Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past[†]

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INTRODUCTION

The organizing theme of this Symposium is whether and how Congress might respond to the recent reign of the "Federalism Five." Over the past eight years, the Supreme Court has been unusually aggressive in its exercise of judicial review over federal statutes challenged on federalism grounds. Eleven times the Court has invalidated provisions in federal statutes after determining that Congress exceeded the scope of its limited regulatory authority. In ten of the eleven cases, the vote was 5-4 with the identical five-Justice conservative majority (Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas) controlling the decision.[1]

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1. The list of 5-4 invalidations includes: Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864 (2002) (invalidating statutory scheme providing for adjudication of private complaints against states through federal administrative agency procedures as violating state sovereign immunity), Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding disability discrimination statute beyond Congress's Scction 5 enforcement power); United States v. Morrison, 529 U.S. 598 (2000) (invalidating portion of Violence Against Women Act as beyond Congress's Commercc Clause or Section 5 enforcement powers); Kimel v. Fla. Bd. of Regents,

This recent burst of decisions invalidating federal statutory provisions, particularly by bare-majority rule, is historically anomalous. During the first 207 years following constitutional ratification, the Supreme Court invalidated provisions of federal statutes in 135 cases; 25 times by a bare majority of Justices. During the past eight years, from 1995 to 2002, the Court has invalidated provisions of federal statutes in 33 cases (or 19.6% of the total in 3.7% of the time), and split 5-4 in sixteen of these cases (39% of the total in 3.7% of the time).[2] Of course, the total quantity of federal statutory enactments has increased over time, and some would suggest that in recent years Congress elicited this judicial response by becoming less respectful of constitutional boundaries.

But at least in the federalism context, surely a large part of the story is the Supreme Court's de facto withdrawal of the supposed "presumption of constitutionality" afforded federal statutes, according to which the Court should "invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."[3] Justice Scalia has recently said as much,[4] and many scholars

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528 U.S. 62 (2000) (holding age discrimination statute beyond Congress's Section 5 enforcement power); Alden v. Maine, 527 U.S. 706 (1999) (invalidating statutory provision purporting to abrogate state sovereign immunity in state courts); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (invalidating statutory provision purporting to abrogate state sovereign immunity); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (holding patent statute beyond Congress's Section 5 enforcement power); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (invalidating statutory provision purporting to abrogate state sovereign immunity); Printz v. United States, 521 U.S. 898 (1997) (invalidating provision in gun purchase statute that commandeered state/local officials to implement federal program); United States v. Lopez, 514 U.S. 549 (1995) (invalidating gun possession statute as beyond Congress's Commerce Clause power); *see also* City of Bocrne v. Flores, 521 U.S. 507 (1997) (holding religious discrimination statute beyond Congress's Section 5 enforcement powers) (6-3 invalidation).

2. These figures are based in large part on the data provided by the Library of Congress, *see Acts of Cong. Held Unconstitutional in Whole or Part by the Supreme Court of the United States*, [The Constitution of the United States of America—Analysis and Interpretation] Cong. Research Serv. (Gov't Printing Office) 1999, 2001-31 (Johnny H. Killian & George A. Costello eds., 1992) and 151-58 (Supp. 2000). I added an additional handful of cases decided prior to the year 2000 that in my judgment should have been included, and I also added the eight cases invalidating provisions in federal statutes (four of them 5-4 decisions) in the 2000 and 2001 Supreme Court Terms. There have also been four cases in which a provision of a congressional enactment was invalidated on a 5-3 vote, with one Justice not participating; I do not count here any of those as bare-majority opinions, though it is reasonably clear in some of these cases that the vote would have bcen 5-4 had the full Court participated.

As a general matter, the increased frequency of 5-4 decisions over time is not limited to cases involving constitutional challenges to federal statutes, *see* Robert E. Riggs, *When Every Vote Counts: 5-4 Decisions in the United States Supreme Court, 1900-90*, 21 HOFSTRA L. REV. 667, 668-74 (1993) (documenting general rise in 5-4 decisions from beginning to near-end of last century), though the increase in 5-4 decisions in this particular category of cases over the past eight years appears to outstrip significantly the general pace.

3. *Morrison*, 529 U.S. at 607.

4. *See A Shot from Justice Scalia*, WASH. POST, May 2, 2000, at A22 (quoting speech by Justice Scalia questioning whether the "presumption [of constitutionality] is unwarranted" given that Congress is "increasingly abdicating its independent responsibility to be sure that it is being

agree that "[t]he Court, or rather five of its members banded together, has systematically been cutting back on the degree of deference due Congress in implementing its powers."[5] If actions speak louder than words, it appears that the Court's continuing recitation of a presumption of constitutionality afforded congressional enactments has become mere sport.

Scholars have recently been focusing on ways in which Congress might either work within the new doctrinal constraints the Court has articulated,[6] or circumvent those constraints entirely.[7] However, the last time a conservative Supreme Court issued a similar spate of largely bare-majority decisions invalidating federal statutes on federalism grounds, which was during the Progressive Era,[8] would-be reformers proposed a far more direct route to blunting the Court's aggression. Led by Senator William E. Borah of Idaho, the progressives championed (among other proposals) the notion that Congress should require supermajority rather than bare-majority agreement among the Justices before the Supreme Court could invalidate a federal statute.[9] Borah believed that the fact that a decision invalidating a federal statute was 5-4 or even 6-3 belied the notion that the presumption of constitutionality had justifiably been overcome by a clear error, and that congressional imposition of a supermajority requirement was the best way of returning teeth to the presumption.

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faithful to the Constitution. . . . " (Speech at the Michigan State University Telecommunications Law and Policy Symposium (Apr. 18, 2000))).

5. *See* Larry D. Kramer, *The Supreme Court 2000 Term: Foreword: We the Court*, 115 HARV. L. REV. 4, 151 (2001); *accord* A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328 (2001); William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001).

6. Such responses include, for example, creating better factual records documenting the need for federal intervention, being clearer about intentions to regulate states or realms of traditional state governance so as to satisfy the Court's "clear statement requirements," and better tailoring legislative means to permissible ends.

7. *See, e.g.*, Lynn A. Baker & Mitchell N. Berman, *Getting Off the* Dole*: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459 (2003) (discussing the promises and pitfalls of congressional resort to conditional spending to circumvent new federalism constraints on other Article I powers).

8. For a rich historical discussion of this period and phenomenon, see generally WILLIAM G. ROSS, A MUTED FURY (1994).

9. While others supported different measures designed to counter the Court's conservative activism, for example, Senator Robert LaFollette's proposal to enable Congress to reenact any statute invalidated by the Supreme Court, *id.* at 193-217, Senator Borah led an effort to impose a supermajority rule on the Court, *id.* at 218-32. Specifically, he introduced and supported a legislative proposal to require the concurrence of seven Justices in order for the Court to invalidate a federal statute. S. 4483, 107th Cong. (1923).

> That in all suits now pending, or which may hereafter be pending, in the Supreme Court of the United States, except cases affecting ambassadors, other public ministers, and consuls and those in which a State shall be a party, where is drawn in question an Act of Congress on the ground of repugnancy to the Constitution of the United States, at least seven members of the court concur before pronouncing said law unconstitutional.

Id. Other supermajority proposals were introduced in early 1923 as well, *see infra* app. at 119.

In keeping with the theme of this Symposium, one could imagine such a congressional response today to the "Federalism Five's" agenda: Congress theoretically might require supermajority consensus for the Court to invalidate a federal statute on federalism grounds. Given the apparent rigidity of the 5-4 split among the Justices regarding basic principles and doctrines of federalism, such a supermajority rule would most likely bring to an immediate halt the recent wave of state-protective decisions.[10]

Of course, the first reaction to this suggestion on the part of many, if not all, readers will likely be: "Today's Congress would never impose such a supermajority rule by statute, both because it would not clearly serve the political interests of many legislators, and because Congress would be wary of appearing to transgress longstanding political norms of judicial independence." I agree with this assessment, defended ably by other contributors to this Symposium.[11] The second reaction of many, if not all, readers will likely be: "Such a congressional statute would itself be an unconstitutional regulation of the Supreme Court's decisionmaking process." This claim may also ultimately be correct, though the arguments are sufficiently complex and interesting that the project of fleshing them out is best left for another time and

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10. Under a straightforward supermajority protocol, the judgment of the four "erstwhile dissenters" that a federal statute is constitutional would control the disposition of the case (the precedential status of this minority-bloc's rationale raises interesting and difficult questions not addressed here).

In this Article, I focus on federalism cases, given both the theme of this Symposium and the powerful arguments for deference to congressional judgments in this particular realm of constitutional law. Barry Friedman helpfully suggested to me that one could cabin the approach to a subset of federalism issues for which one believes that the arguments for deference are especially powerful (perhaps, for example, congressional enforcement measures regulating state behavior pursuant to Section 5 of the Fourteenth Amendment). But one could instead or also advocate a supermajority requirement for other specific realms of constitutional law, if one believes that the presumption of constitutionality deserves greater bite than it currently seems to have. Learned Hand, for example, once rejected a supermajority protocol for federalism decisions but embraced it for *Lochner*-esque substantive due process challenges based on his view that "the questions are in their nature essentially legislative" in this realm. Learned Hand, *The Legal Right to Starve*, 25 NEW REPUBLIC 254, 255 (1923). More broadly, one could advocate a supermajority protocol for invalidations of federal statutes across the board.

11. *See* Charles G. Geyh, *Judicial Independence, Judicial Accountability and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153 (2003); Barry Friedman & Anna Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123 (2003); *see also* Barry Friedman, *"Things Forgotten" in the Debate over Judicial Independence*, 14 GA. ST. U. L. REV. 737, 758-62 (1998) (tracing the rejection of various proposed means (including supermajority rule) of controlling the judiciary during episodes of anti-Court sentiment and concluding that "the American public . . . has settled on preserving the independence of judges"). As Professor Friedman has observed, "[t]he list [of failed proposals to control judges or courts] is long," and it includes (among others): "impeachment, jurisdiction-stripping, court-packing, supermajority requirements, Senate [or congressional] and popular override of Supreme Court decisions, referenda on judges [leading to recall], and eliminating life-tenure." *Id.* at 758. Indeed, I suspect that if the federal courts themselves decided sharply to curtail the practice of judicial review, today's Congress would likely react by encouraging or even purporting to require them to embrace judicial review in a more full-fledged fashion.

place.[12]

However, I'd like to sidestep these two initial reactions for now, because I surmise the third likely reaction will be: "Hey, I haven't considered that before; that's an intriguing idea." I would agree with this as well, and believe that the notion of requiring supermajority agreement for the Supreme Court to invalidate a federal statute on federalism grounds is intriguing enough to warrant some exploration.

This is especially so because, while the supermajority proposition sounds quite radical, it is far from novel. Since the 1820s, reformers periodically have championed supermajority proposals for Supreme Court judicial review, generally alongside proposals for stripping the Court's jurisdiction to entertain constitutional challenges at all. To be sure, none of these federal proposals made it off the drawing board. However, the supermajority concept has elsewhere found an actual home: two state supreme courts currently operate under a supermajority rule governing judicial review, and one more employed a supermajority rule for much of the twentieth century.

My goals in this Article are threefold. Most elementally, I want to bring back into our collective scholarly consciousness a different way of thinking about potential congressional responses to aggressive judicial review. Secondly, drawing upon the Progressive Era debates, I want to compare two distinct methods of ensuring that the Supreme Court accords meaningful deference to congressional determinations: (1) the conventional atomistic approach, whereby individual Justices accord some presumption of constitutionality as they make their own determinations as to whether to vote to invalidate a federal statute or not; and (2) the supermajority protocol approach, whereby the decision rule for aggregating individual votes automatically weights the scales towards upholding federal statutes. Finally, I want to suggest that the major criticisms levied against the supermajority proposal during the Progressive Era can themselves highlight some uncomfortable, if less visible, aspects of our traditional reliance on atomistic enforcement of congressional deference norms.

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12. One could mount several types of challenges to congressional adoption by statute of a supermajority rule for the Supreme Court. First, one could argue that Article III implicitly mandates that the Supreme Court decide cases by bare-majority rule, notwithstanding silence by the text and Framers on this issue. Second, one could argue that Congress lacks delegated authority to prescribe voting protocols for the Supreme Court, though the Necessary and Proper Clause seems on its face to suggest otherwise. Third, one could argue that Article III implicitly grants the Supreme Court exclusive, or at least final, authority to determine for itself how to decide cases, including the choice of voting procedures and protocols. Fourth, one could argue that even if Congress could impose some voting protocols on the Supreme Court, Congress could not impose any protocols that would sometimes dictate the outcome or rule of law imposed in particular cases. Fifth, one could argue that this particular protocol violates separation of powers principles because it purports to aggrandize power to Congress itself. Sixth, one could argue that a supermajority protocol targeting constitutional challenges to federal statutes would require that the Court essentially decide legal issues rather than (or in addition to) deciding cases, and this would contravene the case or controversy requirement or otherwise interfere with the proper function of an Article III court. Perhaps in recognition of these at least plausible constitutional concerns, twelve of the fourteen federal supermajority proposals introduced since 1968 were couched as constitutional amendments rather than statutory dictates. *See infra* app. at 121-22. I consider these constitutional challenges to a congressionally dictated supermajority rule in Evan H. Caminker, *Playing with Voting Protocols on the Supreme Court* (unpublished manuscript, draft on file with author).

I do not mean to endorse congressional imposition of a supermajority rule in this exploratory Article, as I leave unresolved here both the optimal degree of judicial deference and various logistical issues a supermajority rule would raise, and there is reason to doubt that such reform would be constitutional. However, I do think the notion is worth exploring, both to learn some lessons about the road more traveled and to offer opponents of stringent judicial review an alternative avenue to consider.[13]

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13. Barry Friedman notes that because history shows "sustained challenges to judicial independence inevitably arise out of substantive disagreement with the content of judicial decisions. . . . One ought properly to be wary of any explanation for tampering with the judiciary that denies its political motivation, especially when popular disagreement with judicial decisions is palpable." Friedman, *supra* note 11, at 755, 757. Perhaps this is so for legislative reformers, but not for constitutional scholars, who in my experience are often disinterested in technical or procedural constitutional questions until a politically salient event triggers the desire to answer those questions. At that point, while many participants in the debate over process will be driven by a preferred substantive outcome that hangs in the balance, other participants will in fact have no such motive.

While I believe that some (though not all) of the Court's recent 5-4 federalism decisions are unfounded, it is not because they generally support a particularly conservative social agenda. Moreover, anyone addressing procedural issues governing judicial review must be aware that the substantive shoe will often shift to the other foot. *Cf.* Friedman, *supra* note 11, at 753-55 (challenges to independent judicial review historically have come from both the political right and left). This is especially true in the federalism context, as the Court's reinvigorated federalism doctrines can constrain Congress in its pursuit of conservative as well as liberal causes. I am drawn here to exploring supermajority rule not by some passionate commitment to reversing or limiting the impact of the Court's recent federalism decisions, but rather by a transsubstantive interest in enforcement mechanisms for various norms of judicial review.

Indeed, I am tantalized by a much larger set of questions concerning the relationship between alternative judicial voting protocols and the Court's tendency to promote various formal and substantive jurisprudential values. As a formal matter, the Supreme Court often decides cases via a series of fractured opinions, without a majority-backed opinion containing a governing rationale that can provide lower courts, public officials, and future litigants clear guidance. Several rule of law values would be served if only the Court would instead decide cases via clear majority-backed rules. With respect to substantive features, many scholars lament the tendency of the Supreme Court to issue broad rather than narrow rulings that decide no more than that which needs to be decided, or to overrule prior precedents without sufficient hesitation counseled by the doctrine of stare decisis, or as discussed here, to invalidate federal and state action without sufficient respect for the constitutional judgments of others. In theory, alternative voting protocols would predictably influence the extent to which Supreme Court decisions secured these and other formal or substantive values. With respect to formal values, for example, the Court could decide a case only if a majority of the Justices agree to join a single opinion, in addition to a single judgment. With respect to substantive values, the Court could make certain kinds of decisions (for example, overruling precedents or invalidating statutes) only if a specified supermajority of Justices agree.

To what extent might one or more of these alternative voting protocols produce *better* decisionmaking, as measured by various formal and substantive criteria? What practical and logistical difficulties might each protocol confront (for example, impact on precedential status of Court opinions; encouragement of strategic judicial behavior)? As a matter of constitutional authority, which if any of these alternatives could the Court adopt by itself; which if any could Congress impose on the Court by statute; and which could be imposed on the Court only by constitutional amendment? I intend to explore these and related questions more thoroughly in a

I. THE ATOMISTIC NORM OF DEFERENCE TO CONGRESS

When a Supreme Court Justice interprets and applies the law to specific cases through the process of adjudication, her judgment is informed in part by the particular institutional role she plays in our governmental system. Of course, she will draw upon one or more interpretive methods to discern or construct the meaning of constitutional and statutory provisions, such as a focus on text, structure, original meaning, historical experience, and functional purpose.[14] I call these *universal* methods, for they are the same methods that any other legal interpreter might use to interpret the Constitution or statutes, whether he is positioned as a public official, legal scholar, or ordinary citizen.

But a Justice's interpretations will also be influenced by various role-specific norms that dictate how a federal judge, situated on a particular multimember court within a particular republican form of government, should decide cases. These role-specific norms are driven by judgments about institutional competence and relations. Several widely-shared norms involve deference: a Justice should defer somewhat to her colleagues (so as to produce a unified opinion of the Court rather than a splintered decision); should defer somewhat to prior judicial rulings (embracing stare decisis); and, most relevantly for present purposes, should defer somewhat to decisions made by democratically elected and accountable legislative bodies. In a given case, these role-specific norms can constitute additional vectors influencing a judicial decision, perhaps reinforcing and perhaps competing with the vectors provided by universal interpretive methods. And in a given case, each Justice decides for herself which of the universal methods and role-specific norms apply, and how much weight (if any) each should receive.[15] I refer to this practice as atomistic enforcement of the norms.

The role-specific norm of deference to congressional judgments is frequently defended on the ground that there is inevitably some political component to the process of constitutional interpretation, both because giving meaning to vague constitutional language often requires making some value choices, and because the invalidation of a federal statute has peculiar political ramifications. Mediating between the legal and political components of judicial review is a difficult and enduring conundrum; indeed, perhaps as much ink has been spilled by jurists and scholars debating the proper level of deference/aggressiveness of judicial review as on any other question of constitutional law. Debate continues about whether courts ought to engage in judicial review at all, of federal statutes or otherwise; and, if so, whether there are certain categories of constitutional questions that should be considered immune from judicial cognizance.[16] And where it is accepted that federal courts should entertain

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separate article. *See* Caminker, *supra* note 12.

14. *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL FATE 1-119 (1982); JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194-1209 (1987).

15. I do not mean to suggest that judges necessarily conduct this weighing process at a conscious level of decisionmaking; for some judges, the interaction among role-specific norms and universal approaches likely occurs at a subconscious level, or at least that interaction is difficult to identify and articulate.

16. For example, for a recent suggestion that federal courts ought now to refrain from judicial review entirely, see MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 154 (1999) (proposing that the Supreme Court issue a statement that "[w]e will no longer invalidate

constitutional challenges, debate continues about the proper stringency of review for particular types of constitutional claims, for example, tiers of scrutiny in equal protection and substantive due process cases, and whether economic regulations deserve intense or relaxed scrutiny. These doctrinal tests are almost invariably applied no matter which government actor's decisions are being reviewed.[17] But if the Supreme Court decides review is appropriate and brings a particular doctrinal standard to bear, a final question remains: if the challenged act is a federal statute, what if any additional level of judicial deference is appropriate?

The role-specific norm dictating that Justices entertaining constitutional challenges to federal statutes should accord *some* degree of deference to those statutes or their underlying legislative judgments has a rich historical pedigree, extending back to the roots of judicial review within the American constitutional scheme. From the very beginning, it was widely understood that to the extent federal courts had authority to declare void acts of Congress, they could properly do so only when the constitutional violation was quite clear. As Professor Larry Kramer recently described it, "[j]udicial review was . . . a power to be employed cautiously, only where the unconstitutionality of a law was clear beyond doubt."[18] Such an extremely deferential standard was frequently reiterated by eighteenth and early nineteenth century judges. Justice Chase's proclamation in *Hylton v. United States* is exemplary: "I will never exercise [the power of review] *but in a very clear case*."[19]

Both Larry Kramer and Sylvia Snowiss have recently provided an insightful and powerful historical explanation for this extremely deferential original stance. At this early date, judges did not conceive of the Constitution as a species of ordinary law to be consulted, interpreted, and applied during adjudication as if it were a hierarchically

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statutes, state or federal, on the ground that they violate the Constitution"). For a defense of the suggestion that federal courts ought not to engage in judicial review of federal statutes based on asserted violations of principles of federalism or separation of powers, see JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 171-259 (1980).

17. For a rare exception, compare *Mathews v. Diaz*, 426 U.S. 67 (1976) (applying rationality review to federal statute discriminating on grounds of alienage) with *Graham v. Richardson*, 403 U.S. 365 (1971) (applying strict scrutiny to state statute discriminating on grounds of alienage).

18. Kramer, *supra* note 5, at 79; *see also* WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC 222 (1995) ("Throughout the 1790s Justice Iredell and his fellow Justices frequently reiterated the idea that the power of judicial review should be exercised only when the statute in question was 'unconstitutional beyond dispute.' . . ."); SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 36-37 (1990) ("[T]he actual practice of judicial review [in the late eighteenth century] confirms that it was in fact reserved for the concededly unconstitutional act," meaning "legislation regarded as clear violation of fundamental [constitutional] law.").

19. 3 U.S. (3 Dall.) 171, 175 (1796) (emphasis in original); *see also* Calder v. Bull, 3 U.S. (3 Dall.) 386, 395 (1798) (Chase, J.) ("[I]f I ever exercise the jurisdiction [to review legislation,] I will not decide *any law to be void, but in a very clear case*.") (emphasis in original); *id.* at 399 (Iredell, J.) ("The Court will never resort to [its] authority [to invalidate legislation] but in a clear and urgent case."); Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 19 (1800) (Paterson, J.) ("[T]o authorise this Court to pronounce any law void, it must be a clear and unequivocal breach of the constitution, not a doubtful and argumentative implication."); *id.* at 18 (Washington, J.) ("The presumption . . . must always be in favour of the validity of laws, if the contrary is not clearly demonstrated.").

superior form of statutory or common law. Rather, the "clear beyond doubt" standard reflected the understanding that judicial review was but a species of political resistance to unconstitutional or ultra vires governmental action; just as citizens had a duty to keep their legislature in check, so too did judges. Kramer describes the "first approximation of judicial review" as

> an argument that judges, *no less* than anyone else, should resist unconstitutional laws. This obligation did not arise from any special competence the judges possessed as judges, and it certainly was not based on the notion that constitutional law was ordinary law subject to judicial control. It was, rather, simply another instance of the right every citizen had to refuse to recognize the validity of unconstitutional laws—a political duty and responsibility rather than a strictly legal one.[20]

Given this motivation for review, it was quite understandable that the courts, acting in essence as substitute or complementary agents for popular resistance to ultra vires acts, would refuse to enforce a law only when its unconstitutionality was clear beyond doubt.[21]

The view that the Constitution was not "ordinary law" for purposes of judicial interpretation gave way over the course of the nineteenth century, with this conceptual move perhaps being put into motion by Chief Justice John Marshall's famous proclamation that "[i]t is emphatically the province and duty of the judicial department to say what the law is" as part of his justification for exercising judicial review over an act of Congress.[22] Slowly but surely over the course of the nineteenth century, the Constitution morphed from a distinctive form of "fundamental law" operating with political/moral rather than legal force on governmental agents into a superior source of "ordinary law," different in degree but not kind from statutory and common law, and hence enforceable by judges as a normal part of a court's function to bring the law to bear on legal disputes.[23]

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20. Kramer, *supra* note 5, at 37; *see also* SNOWISS, *supra* note 18, at 5-6 ("[Fundamental constitutional law] was to be enforced by electoral or other political action. If these were insufficient, revolution or the threat of revolution was the only recourse. If the judiciary attempted to enforce fundamental law . . . the judiciary functioned necessarily as a substitute for revolution."); *id.* at 50:

> The judicial responsibility over unconstitutional legislation . . . derived furthermore from the judiciary's responsibility to 'the whole people,' and not from any uniquely judicial relationship to fundamental law. . . . Enforcement of [that] fundamental law was a political act, a peaceful substitute for revolution presented as a superior alternative to petition or universal resistance.

21. Kramer, *supra* note 5, at 79; SNOWISS, *supra* note 18, at 6 (judicial invalidation was limited to the "concededly unconstitutional act").

22. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

23. Professor Snowiss suggests that Chief Justice Marshall essentially brought about this transformation deliberately and almost single-handedly, largely by emphasizing the writtenness of the Constitution and applying techniques of statutory construction to the constitutional text. *See* SNOWISS, *supra* note 18, at 3-4, 119-23, 172-75. Professor Kramer disputes this claim and provides a more nuanced historical account of this transformation, drawing upon broader social,

Despite this transformation in the understanding of the legal force of the Constitution and hence function of judicial rule, many courts continued to adhere to a "clear beyond doubt" standard of judicial review,[24] and influential jurists and scholars proclaimed new reasons for their doing so. Writing near the end of the nineteenth century, James Bradley Thayer famously championed such deferential review in his influential essay *The Origin and Scope of the American Doctrine of Constitutional Law*, arguing that courts should employ a "rule of administration" according to which federal legislation should not be invalidated "merely because it is concluded that upon a just and true construction the law is unconstitutional."[25] Even though the Constitution ought to be "regarded as so much law,"[26] a court

> can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one, —so clear that it is not open to rational question.... This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is

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political, and intellectual developments of the first half of the nineteenth century. *See* Kramer, *supra* note 5, at 90-110.

24. *See, e.g.*, Fairbank v. United States, 181 U.S. 283, 285 (1901):

> The constitutionality of an act of Congress is a matter always requiring the most careful consideration. The presumptions are in favor of constitutionality, and before a court is justified in holding that the legislative power has been exercised beyond the limits granted, or in conflict with restrictions imposed by the fundamental law, the excess or conflict should be clear.

See also The Sinking-Fund Cases, 99 U.S. 700, 718 (1878):

> It is our duty, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States; but this declaration should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.

Other governmental officials also recognized the ubiquity of clear-error review. *See, e.g.*, CONG. GLOBE, 40th Cong., 2nd Sess. 479 (1868) (Rep. Williams) ("[I]t is a well-settled principle that no act of the law-making power should ever be declared invalid upon constitutional grounds unless it be a clear case."); *id.* at 488 (Rep. Wilson) (There is a rule of law that we are all perfectly familiar with, that whenever there is a doubt in the mind of the court as to the constitutionality of a law it is to be resolved in favor of the law. . . ."). *See generally* Robert Eugene Cushman, *Constitutional Decisions by a Bare Majority of the Court*, 19 MICH. L. REV. 771, 776 (1921):

> The unanimity with which the doctrine of reasonable doubt has come to be accepted as the only correct and orthodox rule of judicial construction is attested by subsequent judicial utterances numbering into the thousands as well as by the statements of practically every commentator in the field of constitutional law. (citation omitted)

25. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

26. *Id.* at 138.

> often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.[27]

In the end, "*the ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not.*"[28]

Thayer himself provided (somewhat obliquely) several justifications for this deferential standard for reviewing federal statutes.[29] First, many constitutional questions have more than one reasonable answer, and choosing among them may require policy and political determinations as well as the exercise of "practical judgment" better left to Congress,[30] particularly because in many circumstances the validity of such congressional judgments will never be litigated.[31] Second, and in part because of the potentially final nature of congressional decisions, such decisions are deserving of a measure of respect simply for being those of a coordinate governmental agent. As Thayer puts it, "where a power so momentous as this primary authority to interpret [the Constitution] is given [to Congress], the actual determinations of the body to whom it is intrusted are entitled to a corresponding respect . . . ."[32]

Interestingly, Thayer's third reason—the one most famously associated with his essay—is offered in the very last paragraph. His claim is that judicial enforcement of the Constitution has and will continue to cause political institutions and populist impulses to atrophy.[33] Courts cannot ultimately safeguard the people from incursions

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27. *Id.* at 144.

28. *Id.* at 150 (emphasis in original).

29. Thayer specifically disclaimed such a deferential stance toward state legislative action, suggesting that the justifications for the clear-mistake rule were applicable only to judicial review of the acts of a "co-ordinate department." *Id.* at 154-55. This distinction is not self-evident as regards Thayer's third justification, the concern for atrophying of democratic or populist impulses. *See generally infra* note 33 (describing and quoting Thayer's justification).

For a set of rich explorations of the deeper political motivations underlying Thayer's claims in this essay, see Thomas C. Grey, *Thayer's Doctrine: Notes on its Origin, Scope, and Present Implications*, 88 NW. U. L. REV. 28 (1993); Stephen B. Presser, *On Tushnet the Burkean and in Defense of Nostalgia*, 88 NW. U. L. REV. 42 (1993); Mark Tushnet, *Thayer's Target: Judicial Review or Democracy?* 88 NW. U. L. REV. 9 (1993); G. Edward White, *Revisiting James Bradley Thayer*, 88 NW. U. L. REV. 48 (1993).

30. Thayer, *supra* note 25, at 135 ("[Constitutional questions] require an allowance to be made by the judges for the vast and not definable range of legislative power and choice, for that wide margin of considerations which address themselves only to the practical judgment of a legislative body").

31. *Id.* at 135-36.

32. *Id.* at 136.

33. Here is the entire argument:

> No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows. Moreover, even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it. If what I have been saying is true, the safe and permanent road towards reform is that of impressing upon our people a far stronger sense than they have of the great range of possible harm and evil that our system leaves open, and must leave open, to the legislatures, and of the clear limits of judicial power; so

on their liberty, and thus democratic institutions and the people governed by and governing them must take responsibility for defining and enforcing constitutional norms. But this project of democratic/populist self-constraint needs the motivation of necessity, which in turn means a judicial safety net no more secure than that provided by the clear-mistake "rule of administration."[34]

Thayer's celebration of this clear-mistake (or sometimes "clear-error" or "reasonable-doubt") standard of review was quite influential for a time, essentially providing the starting point for discussions of judicial performance and potential structural reforms throughout the Progressive Era.[35] But after the failure of various proposed institutional reforms during that period,[36] the articulation and practice of

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> that responsibility may be brought sharply home where it belongs. The checking and cutting down of legislative power, by numerous detailed prohibitions in the constitution, cannot be accomplished without making the government petty and incompetent. This process has already been carried mueh too far in some of our States. Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere. If this be true, it is of the greatest publie importance to put the matter in its true light.

Id. at 155-56. Whether Thayer was correct in his premise that aggressive review saps the vitality of democratic/populist constitutionalism, of course, is subject to challenge. *See, e.g.*, MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 19 (1982) ("[J]udicial review, rather than deadening, can stir the polity's sense of moral responsibility. . . ."). *But see* Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AMER. J. COMP. LAW 707, 745 (2001) ("[I]t has been widely acknowledged that [judicial review] tends to debilitate both legislative consideration of matters of high principle and popular responsibility for rights protection through the ballot.").

34. At times Thayer seems primarily eoncerned with energizing Congress to assume the responsibility for sound constitutional (and moral) decisionmaking. *See, e.g.*, James B. Thayer, *Constitutionality of Legislation: The Precise Question for a Court*, NATION, Apr. 10, 1884, at 314 ("[O]ur constitutional system, in its actual development, has tended to bereave our legislatures of their feeling of responsibility and their sense of honor . . . ."). But it is clear that Thayer did not hold Congress in particularly high esteem with respect to its predilections and capacity. While in his famous Harvard essay he stated that "virtue, sense, and competent knowledge are always to be attributed to" Congress, he also observed that "we often see, in point of fact, in our legislative bodies, persons untaught it may be, indocile, thoughtless, reckless, [and] incompetent . . . ." Thayer, *supra* note 25, at 149. This observation suggests that his appeal was primarily directed to the people behind the legislature. *See* PAUL W. KAHN, LEGITIMACY AND HISTORY 86-87 (1992) ("Thayer perceives judicial review as weakening the responsible exercise of popular sovereignty.").

35. *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); *see also* former Justice George Sutherland, *Is the Proposal to "Curb" Powers of Supreme Court Sound?*, THE CONG. DIG. 272, 272 (1923) ("This important power of the courts to declare statutes void should be exercised, as it has been almost universally exercised, only where the infringement of the Constitution is so plain as to admit of no reasonable doubt in the mind of the judge."); Adkins v. Children's Hosp., 261 U.S. 525, 544 (1923) (Sutherland, J.) ("This court, by an unbroken line of decisions from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt.").

36. *See infra* note 59.

clear-mistake review as such continued to lose favor. Instead, the impulse to defer tended to become folded into the particular doctrinal tests or standards constructed by courts to give operational meaning to particular constitutional provisions or principles. In particular, courts and individual Justices carved out large realms of constitutional law for which the judicially devised doctrines merely required that governmental acts have a "rational basis" to survive judicial review. Perhaps the famous *Carolene Products* footnote four should be considered equally significant for the size of the constitutional terrain it identified as subject to minimal judicial enforcement as for the terrain it suggested should be subject to closer scrutiny.[37]

At present, much of the work previously done by the clear-mistake rule continues to be done by deferential doctrines implementing various constitutional provisions. In some areas the Supreme Court purports to abstain entirely from scrutinizing the validity of governmental decisions through the political question doctrine, and in other areas the Court employs mere rationality review—which typically amounts to much the same thing as abstention.[38] (In still others, the Court does not defer much at all, such as when addressing racial discrimination or censorship of political speech.) But this built-in doctrinal deference generally does not distinguish between review of federal statutes and review of other federal or state government acts.[39] Thus, it leaves unaddressed the peculiar purpose of the original "clear-beyond-doubt" standard and the Thayerian "clear-mistake" rule, specifically to implement a judicial stance of deference to congressional statutes.

The modern-day remnant of Congress-specific deference lies in the oft-articulated notion that the Supreme Court accords a general "presumption of constitutionality" to federal statutes.[40] On occasion, the Court will embellish this general proclamation,

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37. *See* United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938) (applying rationality review to resolve a claim that the statute violated economic interests, but suggesting that such deference might not be warranted when legislation "appears on its face to be within a specific prohibition of the constitution," or "restricts . . . political processes" or is "directed at particular religious, or national, or racial minorities").

38. *See, e.g.*, FCC v. Beach Communications, Inc., 508 U.S. 307, 313-14 (1993) (articulating rational basis test for regulations "in areas of social and economic policy," and describing this level of review as "a paradigm of judicial restraint"); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 591 (1993) ("Judicial deference is built into the system of judicial review. . . . Courts view the vast majority of such governmental decisions through the prism of low-level, or rational basis, scrutiny. Implicit in low-level scrutiny is deference to the government's chosen course."); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 205-06 (1988) (explaining that "[o]ne of the principal justifications for rational basis review is that the legislature is best able to assess the complex factual issues underlying social and economic legislation; courts, lacking the legislature's fact-finding capacities, are ill-equipped to second-guess its judgments").

For a laundry list of important congressional decisions or activities over which the contemporary Supreme Court exercises no or only extremely deferential review under the rubric of rational basis scrutiny, see Elizabeth Garrett & Adrian Vermeule, *Institutional Dcsign of a Thayerian Congress*, 50 DUKE L.J. 1277, 1284-85 (2001).

39. *See supra* note 17 and accompanying text.

40. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 607 (2000) (noting that according to the presumption of constitutionality, "[d]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing

observing that "[t]his Court acts at the limits of its power when it invalidates a law on constitutional grounds. In recognition of our place in the constitutional scheme, we must act with 'great gravity and delicacy' when telling a coordinate branch that its actions are absolutely prohibited absent constitutional amendment."[41] And on occasion, a Justice harkens back to the early articulations of the clear-error standard and announces something to the effect of: "[B]ut even if this case were doubtful I would heed Justice Iredell's admonition in *Calder v. Bull*. . . that 'the Court will never resort to that authority, but in a clear and urgent case.'"[42] In the main, however, a succinctly phrased "presumption of constitutionality" is all today's Congress gets.

Contemporary scholars continue to justify deferential review on Thayerian as well as additional grounds. A more comprehensive list of justifications (some of which are interrelated) could include the following:

(1) judicial deference to legislative judgments, presumably formed in good faith, shows a proper institutional humility in the project of constitutional interpretation;[43]

(2) at least where constitutional dictates are ambiguous or uncertain, legislative value judgments are more worthy of respect in a constitutional democracy than are judicial value judgments; and the countermajoritarian nature of judicial invalidation of federal legislation entails expressive or symbolic costs;[44]

(3) the cost of "erroneous" judicial invalidation of a federal statute is greater than the cost of "erroneous" judicial validation because the former type of error can be cured only by a constitutional amendment, whereas the latter type of error can be cured by congressional repeal;[45]

and last but not least, the claim most associated with Thayer:

(4) judicial deference can encourage greater legislative and popular responsibility and accountability, whereas judicial scrutiny tends to lead to atrophy of democratic or populist institutions.[46]

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that Congress has exceeded its constitutional bounds"); Rust v. Sullivan, 500 U.S. 173, 191 (1991) ("[A] decision to declare an Act of Congress unconstitutional 'is the gravest and most delicate duty that this Court is called on to perform.'"); INS v. Chadha, 462 U.S. 919, 944 (1983) ("We begin, of course, with the presumption that the challenged statute is valid.").

41. *Rust*, 500 U.S. at 224 (O'Connor, J., dissenting).

42. Plaut v. Spendthrift Farm, 514 U.S. 211, 267 (1995) (Stevens, J., dissenting).

43. *See, e.g.*, James E. Flemming, *The Constitution Outside the Courts*, 86 CORNELL L. REV. 215, 244 (2000).

44. *See, e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962).

45. *See, e.g.*, Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 396-97.

46. For a recent and powerful defense of the continued relevance of this last justification, see TUSHNET, *supra* note 16, at 57-65. *See also* ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 290-318 (1994).

Given the topic of this Symposium, I focus here solely on judicial deference to congressional judgments, rather than those of other federal or state actors. I merely note here that most of the contemporary arguments counseling deference to Congress do not operate with the same force

Under the current voting protocol, each Justice gets to decide individually how much (if any) weight to give to the presumption of constitutionality in any given case—just as she gets to decide how much (if any) weight to accord to any other universal or role-specific interpretive norm.[47] Thus, the norm of Thayerian deference operates by being internalized and implemented by Justices acting atomistically rather than in concert. As such, different Justices are likely to give it different weight in different contexts. And, as some scholars have surmised, perhaps the Justices generally do not give it much weight at all.[48]

It is not surprising, therefore, that at various periods in history, including now, many observers have charged that the Justices give Congress too little deference. And it is equally unsurprising that, in those moments, critics have sometimes turned to an alternative means of giving deference more *oomph*: imposing deference on the Court through external constraints, rather than relying on internal norms.

II. THE HISTORICAL PEDIGREE OF SUPERMAJORITY RULES IN THE FEDERAL AND STATE JUDICIAL SYSTEMS

In the past, whenever the Supreme Court has been perceived as being overly aggressive in reviewing statutes and failing sufficiently to respect the norm of Thayerian deference, politicians and scholars have been quick to propose various direct and indirect ways of combating such aggression. Advocates of direct measures seek to control the Court's decisions. Such measures include stripping the Court of its jurisdiction to hear all or certain types of constitutional challenges to federal statutes, and empowering Congress to override judicial invalidations of statutes by legislative fiat. Advocates of indirect measures purport to influence the composition of the Court. Such measures include stricter Senate oversight of the confirmation process, expanding and hence packing the Court, or providing for recall of individual Justices through impeachment proceedings or otherwise.

A lesser-known direct measure, imposing a supermajority protocol on the Supreme

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with respect to federal executive officials (with the possible exception of the President) or state legislative or executive conduct. *See, e.g.*, Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 844-853 (1997) (challenging suggestion that justifications for Thayerian deference to federal statutes should extend to administrative rules, orders, or actions); Thayer, *supra* note 25, at 154-55 (noting that his argument does not apply to state statutes).

47. One could ask (and maybe I will some other time) why decisions about which interpretive methodologies to use and how to use them in a given case, unlike decisions about what judicial doctrines to craft and apply, are not considered to enjoy the status of presumptively binding precedent for subsequent adjudication. However, the principle of "every person for herself" with respect to choosing interpretive practices is now well entrenched. The arguable exception here is the norm of stare decisis itself, for which there is an oft-articulated set of doctrinal rules. *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 171-75 (1989). Of course, at times Justices appear to treat even this doctrine as merely hortatory rather than binding.

48. *See* Steven G. Calabresi, *Thayer's Clear Mistake*, 88 NW. U. L. REV. 269, 275 (1993) ("[O]nce an American court has presumed a statute to be constitutional.... there is no need to find that the legislature has made a clear mistake before its actions can be invalidated—any old mistake, even an opaque one, is sufficient.").

Court through congressional statute or constitutional amendment, turns out to have as rich a historical pedigree as many of these other, more widely discussed methods. The first such proposal was introduced in Congress in 1823, in response to the Court's decision in *Green v. Biddle*,[49] and would have required unanimity for the Court to invalidate statutes.[50] The most recent proposal appears to have been offered in Congress in 1981.[51] Over sixty proposals were introduced at various times in between.[52]

These proposals differed widely as to both the range of judicial decisions covered and the degree of supermajority agreement required. With respect to range, some proposals applied to all or a subset of invalidations of federal statutes; some applied to all or a subset of invalidations of state laws; and the broadest ones applied to all invalidations of federal and state statutes and state constitutional provisions.

Different proposals sought to require different degrees of supermajority consensus. Some required the concurrence of only one more Justice than necessary for a bare majority; others required unanimity; and still others required various numerical permutations in between. One example of a representative proposal from the last half-century is as follows:

> The Supreme Court may not in any case hold that any provision of an Act of Congress, an Act of the legislature of any State, or a constitution of a State is invalid because it violates a provision of the Constitution of the United States unless at least six Justices of the Supreme Court concur in that holding.[53]

Most of the supermajority proposals were prompted by Supreme Court decisions thought by the reform proponents to be egregiously wrong. A few were more self-consciously intended to forestall potential future Court action. I think the most intriguing example of the latter was Representative Bingham's support in 1868 for a colleague's supermajority proposal on the ground that it would make it more difficult for the conservative Supreme Court to nullify the Fourteenth Amendment because of the arguably coercive nature of its ratification procedure.[54] Only a few seem to have

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49. 21 U.S. (8 Wheat.) 1 (1823) (holding a Kentucky statute governing land rights violated the Impairment of Obligations of Contract Clause).

50. 41 ANNALS OF CONG. 28 (1823) (proposal of Sen. Johnson to require a concurrence of seven Justices in any decision involving the validity of state or federal statutes).

51. H.R. 5182, 97th Cong. (1981) (proposal of Rep. Dornan to require a concurrence of seven Justices to declare a federal or state law unconstitutional).

52. I have attached an Appendix listing sixty-three congressional supermajority proposals of various shapes and sizes, and I do not represent this list as exhaustive. *Infra* app. at 117-22.

53. H.R. 11007, 90th Cong. (1967).

54. Statement of Rep. Bingham:

> This great and victorious people, we are told, cannot amend their own Constitution without the concurrence of some, at least, of the disorganized communities who but yesterday rushed into war with arms in their hands and attempted to batter down the holy temple of our liberties. I desire this [two-thirds supermajority requirement] law to be passed so that the question shall only be touched, if at all, by the consenting voice of two thirds of the judges of that [Supreme] court; and then, if they dare do it, let an appeal again be taken from their atrocious decision to the people.

been pushed by nonpartisan proponents of "good government reform" in the abstract, unhinged to a substantive agenda.[55]

Of all the supermajority proposals floated throughout the past two centuries, the one that galvanized the most extensive public discussion was that proposed by progressive Senator William E. Borah of Idaho in February, 1923. And it was prompted by a string of conservative 5-4 decisions most closely analogous to those "Federalism Five" decisions that are the focal point of this Symposium.

At the time, Senator Borah introduced his proposal requiring the concurrence of seven Justices to invalidate an act of Congress,[56] the Supreme Court had previously invalidated provisions of federal statutes fifty-three times, with eight of those invalidations being decided by a 5-4 bare majority. However, of those eight, four cases (all involving important national issues—child labor, workers' compensation, the income tax, and campaign finance) had been decided between 1918 and 1921, such that an ominous trend was emerging.[57] And a mere two months after Borah introduced his bill, the Supreme Court struck down a statute authorizing a minimum wage in D.C. for women and children on a 5-3 vote, which assuredly would have been 5-4 had Justice Brandeis not recused himself.[58] At the time, one easily could have foreseen a continuing barrage of 5-4 decisions invalidating federal statutes largely on federalism grounds, just as one might foresee today.

Although a variety of political and social reasons prevented Senator Borah's proposal from receiving serious congressional consideration,[59] the political pressure on the Court may have, at times, led the Justices themselves to think twice about their willingness to invalidate federal statutes in bare-majority decisions. Just after his retirement from the Court, Justice Clarke reacted to the Borah proposal by noting:

> It is no new suggestion that if the Court would give real and sympathetic effect to this [clear-mistake] rule by declining to hold a statute unconstitutional whenever several of the Justices conclude that it is valid—by conceding that two or more

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CONG. GLOBE., 40th Cong., 2d Sess. 484 (1868).

55. *See* Friedman, *supra* note 11, at 738 ("no matter how the discussion was framed at any given time, at bottom, challenges to judicial independence have been motivated by disagreement with the substance of judicial decisions"). For an example, see the remarks of Rep. Ramsey in support of his two previously introduced supermajority proposals:

> By a decision of 5 to 4, will [the American people] continue to permit this [Supreme] Court to deny their Legislature the right to correct the evils and abuses of the ownership of property that have for the past 50 years dictated the course of legislation at the expense of human welfare? The courts apparently will not, or cannot, recognize the changing social needs of the United States.

79 CONG. REC. 11097 (1935).

56. The text of his legislative proposal is reproduced *supra* note 9. During the next congressional session, Senator Borah introduced a modified proposal imposing a 7-Justice supermajority requirement for decisions declaring unconstitutional state as well as federal statutes. *See* S. 1197, 68th Cong. (1923).

57. For a list of these cases, see CHARLES WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT 183 (1925).

58. Adkins v. Children's Hosp., 261 U.S. 525 (1923); WARREN, *supra* note 57, at 183.

59. *See* ROSS, *supra* note 8, at 231-32; Steven F. Lawson, *Progressives and the Supreme Court: A Case for Judicial Reform in the 1920s*, 42 THE HISTORIAN 419 (1980).

> being of such opinion in any case must necessarily raise a "rational doubt"—an end would be made of five to four constitutional decisions and great benefit would result to our country and to the Court. To voluntarily impose upon itself such a restraint as this would add greatly to the confidence of the people in the Court and would very certainly increase its power for high service to the country.[60]

And almost a century earlier, supermajority proposals addressing the Court's decision in *Green v. Biddle* invalidating a Kentucky statute on a paltry 3-1 vote[61] elicited the following promise from Chief Justice Marshall: "The practice of this court is, not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in opinion, thus making the decision that of a majority of the whole court."[62]

Although the supermajority concept never gained traction in the federal system, similar measures were debated and ultimately endorsed by several states during the Progressive Era. Indeed, by the time Borah introduced his proposal in the Senate, a handful of states had already embraced the concept.

In 1912, the Ohio Constitutional Convention adopted a constitutional amendment requiring a supermajority of six Justices out of seven to invalidate a state statute on constitutional grounds: "No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void."[63] Justices in the state courts had long enforced a clear-mistake rule through their atomistic judgments, announcing that "[t]he repugnancy which must cause the law to fall, must be necessary and obvious; if by any fair course of reasoning, the law and the constitution can be reconciled, the law must stand."[64] Progressives who were upset by a series of *Lochner*-esque invalidations of worker-protective state statutes perceived the voting protocol as improving the balance between judicial vigilance and deference. As the state court itself observed, the amendment "represents, as is known of all men, a compromise between those of our people who sought to deny to the court the right to exercise the power [of judicial review] at all and those who felt that the Supreme Court should be unhampered by any such restriction."[65] And the provision had already affected one case outcome before the Borah debates ensued: in *Barker v. City of Akron*,[66] the state supreme court upheld a state law requiring counties to pay the costs of municipal special elections, notwithstanding a 4-3 insufficient majority voting to strike it down.[67]

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60. John H. Clarke, *Judicial Power to Declare Legislation Unconstitutional*, 9 A.B.A. J. 689, 692 (1923).

61. 21 U.S. (8 Wheat.) 1 (1823) (holding a Kentucky statute governing land rights violated the Impairment of Obligations of Contract Clause).

62. City of New York v. Miln, 33 U.S. (8 Pet.) 120, 122 (1834).

63. OHIO CONST. art. IV, § 2 (1912).

64. Cass v. Dillon, 2 Ohio St. 607, 608 (1853).

65. State *ex rel.* Turner v. United States Fid. & Guar. Co., 117 N.E. 232, 234 (Ohio 1917). For a history of the amendment's adoption, see Jonathan L. Entin, *Judicial Supermajorities and the Validity of Statutes: How* Mapp *became a Fourth Amendment Landmark instead of a First Amendment Footnote*, 52 CASE W. RES. L. REV. 441, 443-52 (2001).

66. 121 N.E. 646 (Ohio 1918).

67. For a discussion of the cases whose outcomes were dictated by the supermajority rule, see

The Ohio voting protocol's inapplicability to cases in which the court of appeals had already nullified the state statute caused problems over the next several decades that eventually led to the protocol's demise. This exception meant that, whenever the Supreme Court divided 4-3 or 5-2 to invalidate a state statute, the statute would be declared invalid if the court of appeals had done the same, but the statute would be upheld if the court of appeals had done the same. Critics assailed the system for allowing the Supreme Court's judgment to turn on the decision of the lower court, as well as for creating a situation in which the law could be different in different circuits, and causing confusion as to the precedential status of 5-2 or 4-3 insufficient-majority validations.[68] Pressure mounted to fix this perceived problem, and in the end, the entire supermajority protocol was repealed in 1968 when the people approved a Modern Courts Amendment[69] to the state constitution.[70]

Supermajority rules remain alive and well, however, in two other states that embraced the concept in the Progressive Era. In 1919, the North Dakota Constitution was amended to require four out of five Justices to invalidate a state law: "in no case shall any legislative enactment or law of the state of North Dakota be declared unconstitutional unless at least four of the judges shall so decide."[71] At least early on, this protocol operated in addition to the Thayerian deference applied by individual

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Entin, *supra* note 65, at 452-64; Katherine B. Fite & Louis B. Rubinstein, *Curbing the Supreme Court–State Experiences and Federal Proposals*, 35 MICH. L. REV. 762, 774-79 (1937).One such case turned into the landmark *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying the Fourth Amendment exclusionary rule to states). In *State v. Mapp*, 167 N.E.2d 387 (Ohio 1960), Mapp's challenge to the obscenity statute under which she was convicted (based on materials found during a search of her home) was rejected notwithstanding the support of four of the seven Justices.

In another early case in which the state voting protocol made a difference, the Supreme Court of the United States rejected a federal constitutional challenge to the protocol. *See* Ohio *ex rel.* Bryant v. Akron Metro. Park Dist., 281 U.S. 74 (1930), *aff'g* 166 N.E. 407 (Ohio 1929). The Ohio Supreme Court rejected a taxpayer's challenge to state-mandated procedures for creating and maintaining public parks on a 5-2 insufficient-majority vote. The taxpayer argued on appeal to the Supreme Court of the United States that the Ohio voting protocol violated due process because it biased the state supreme court against his claims. The Supreme Court rejected this argument on the ground that resort to state supreme court review was itself a discretionary benefit the state need not extend:

> The opportunity afforded to litigants in Ohio to contest all constitutional and other questions fully in the Common Pleas Court and again in the Court of Appeals plainly satisfied the requirement of the Federal Constitution in this respect and the state was free to establish the limitation in question in relation to appeals to its Supreme Court in accordance with its views of state policy.

Akron Metro. Park Dist., 281 U.S. at 80. The Supreme Court also rejected an equal protection challenge to the protocol on ripeness grounds. *Id.* at 81.

68. *See* Entin, *supra* note 65, at 455-57; Robert L. Hausser, *Limiting the Voting Power of the Supreme Court: Procedure in the States*, 5 OHIO ST. L.J. 54, 67-71 (1938).

69. 11 OHIO CONST. art IV, §2 (amended 1968).

70. *See* Entin, *supra* note 65, at 465-66.

71. N.D. CONST. art. IV, § 89 (*repealed and reenacted* as N.D. CONST. art VI, § 4 (1976)). For a brief discussion of the state supreme court's view of the amendment in the years immediately following its adoption, see Fite & Rubenstein, *supra* note 67, at 779-80.

Justices.[72] This protocol avoids the practical difficulties faced in Ohio; if the North Dakota Supreme Court votes 3-2 to invalidate a state statute, the statute is upheld throughout the state.[73] This protocol has made the difference in a handful of cases.[74]

In 1920, the Nebraska Constitution was amended to require five out of seven Justices to invalidate a state law: "No legislative act shall be held unconstitutional except by the concurrence of five judges."[75] Like North Dakota's, this protocol operates in addition to the Thayerian deference applied by individual Justices.[76] And like North Dakota, if the court votes by a insufficient majority to invalidate a statute, the statute is upheld throughout the state.[77] Unlike both Ohio and North Dakota, though, the Nebraska supermajority rule applies to challenges to state statutes based on the *federal*, as well as the state, constitution.[78] This supermajority protocol still

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72. *See, e.g.*, State *ex rel.* Sathre v. Bd. of Univ. and Sch. Lands of N. Dakota, 262 N.W. 60, 65 (1935) (stating that a state statute "must be presumed constitutional unless its repugnancy to the constitution clearly appears or is made to appear beyond a reasonable doubt"). It is unclear whether this "clear beyond doubt" standard prevails today or has slipped into desuetude, as a Westlaw search failed to discover recent cases articulating this or an equivalent formulation.

73. *See* Edwin O. Stene, *Is There Minority Control of Court Decisions in Ohio?*, 9 U. CIN. L. REV. 23, 32-33 (1935) (In North Dakota, "if the court fails to secure a sufficient majority to declare a statute unconstitutional, an order shall be issued in accordance with the opinion of the minority who hold the act constitutional.").

74. *See, e.g.*, Bismarck Pub. Sch. Dist. 1 v. State, 511 N.W.2d 247, 250 (N.D. 1994) (upholding the state's school finance system despite the finding of three out of five Justices that the system violated the state constitution). For other cases, see Entin, *supra* note 65, at 468 n.193.

75. Neb. Const. art. V, § 2. (amended 1920). For a history of the protocol's adoption, see Paul W. Madgett, Comment, *The "Five-Judge" Rule in Nebraska*, 2 CREIGHTON L. REV. 329, 329-33 (1969); William Jay Riley, Comment, *To Require that a Majority of the Supreme Court Determine the Outcome of Any Case Before It*, 50 NEB. L. REV. 622, 624-27 (1971). The connection between a supermajority protocol and Thayerian deference was made clear in the Convention debates. *See, e.g.*, II JOURNAL OF THE NEB. CONST. CONV. 2845 (1920); PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION 1919-1920, 2845 (1920) ("a legislative act should stand as expressing the people's will unless it is clearly in violation of some provision of the Constitution").

76. *See* Madgett, *supra* note 75, at 340; Riley, *supra* note 75, at 638.

77. Riley, *supra* note 75, at 628.

78. *See* DeBacker v. Brainard, 161 N.W.2d 508 (Neb. 1968) (rejecting a federal constitutional challenge to the state Juvenile Court Act based on a right to jury trial and proof beyond reasonable doubt standard by 4-3 insufficient-majority vote), *appeal dismissed*, 396 U.S. 28 (1969). The application of the state supermajority voting protocol to federal constitutional challenges, essentially raising the hurdle for federal rights claimants, presents interesting Supremacy Clause issues. *See* DeBacker v. Sigler, 185 Neb. 352, 175 N.W.2d 912, 914 (Neb. 1970) (Spencer, J., dissenting) (suggesting that the supermajority protocol is unconstitutional as applied to federal claims because it "hampers the assertion of a federal right and unreasonably discriminates against litigants asserting the constitutional invalidity of legislation"). On the one hand, the protocol applies to state and federal constitutional claims equally, so the protocol neither discriminates against nor appears motivated by hostility to the federal claim. *Compare* Testa v. Katt, 330 U.S. 386 (1947) (at minimum, a state court cannot discriminate against a federal claim or refuse to consider it based on policy objections); Howlett v. Rose, 496 U.S. 356 (1990) (same). On the other hand, the protocol does mean that the state

operates in Nebraska and occasionally dictates the outcome of a case.[79]

While the supermajority protocol never caught on in the federal system, it remains alive and well in two states today (and on paper in a quirky way in a third).[80] Thus one

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courts are not "open to" federal elaims against state statutes on the same terms as their counterpart federal courts are, a concern that the Court sometimes recognizes as a problem of federal preemption to the extent the state procedure seems to frustrate the enforceability of a federal claim. *See* Felder v. Casey, 487 U.S. 131, 141 (1988) (state cannot impose procedural rule that "burdens the exercisc of the federal right" in a manner that is "inconsistent in both design and effect with the compcnsatory aims of federal civil rights laws"). Of course, those who argue that state courts in general are less hospitable to federal claims than are federal courts because of different institutional features (such as electoral accountability versus life tenure) might be hard-pressed to distinguish between such institutional features that purportedly influence atomistic judicial determinations and a voting protocol that influences the corporate outcome those determinations produce.

79. *See, e.g.*, State *ex rel.* Spire v. Beermann, 455 N.W.2d 749, 749-50 (Neb. 1990) (upholding legislation despite the finding of four of seven Justices that the statute violated the state constitution). For other cases, see Entin, *supra* note 65, at 468-69; Riley, *supra* note 75, at 631-33.

80. South Carolina has long had on the books an interesting hybrid protocol that combines a supermajority rule in the first instance with a sophisticated majoritarian default plan in the event of insufficient consensus. Five Justices sit on the South Carolina Supreme Court. If at least three of them believe that a given case presents an issue of state constitutional law or a potential conflict between state and federal law, the supreme court can resolve the conflict by itsclf only if the five Justices unanimously agree as to the proper resolution. If not, then the court is enlarged by adding to these five Justices all of the state's circuit court judges (excluding any that already heard the case below). This new mega-court then decides the case based on simple majority rule. So, a state or federal constitutional challenge to a state statute can succeed in the original supreme court only by unanimous vote, but failing this, it can also succeed in the supplemented court by majority vote.

I describe this protocol as "on the books" because it appears not to be followed in practicc. The hybrid super/simple-majority protocol was introduced into thc South Carolina Constitution in 1895. S.C. CONST. art V, § 12 (1895) (repealed 1973). It was immediately codified in substantially similar language. *See* Act of Jan. 19, 1896, § 19, 1896 S.C. Acts 3, 8-9. That codification has been carried forward, with changes not important here, to the present day. For the current version, sce S.C. CODES ANN. § 14-3-370 (Law. Co-op. 1976). The protocol was deleted from the state constitution, however, in 1973. Act of Apr. 4, 1973, § 2, 1973 S.C. Acts 161, 162. In theory, the statute continues to require resort to the enlarged court whenever "the entire court [of five Justices] is not agreed." §14-3-370(a). In fact, however, the five-Justice court does occasionally resolve constitutional challenges with non-unanimous votes. *See, e.g.*, State v. White, 560 S.E.2d 420 (2002) (rejecting constitutional challcnge by four-to-one vote); Lee v. S.C. Dept. of Natural Res., 530 S.E.2d 112 (2000) (rejecting constitutional challenges by three to two vote). For a potential explanation, see JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 4 (1999):

> In addition to sitting as a five-member court, the Supreme Court may conceivably convene an en banc court composed of the members of the Supreme Court, as well as thosc of circuit courts. *See* S.C. Code Ann. § 14-3-370 to 380 (1976). However, it is an open question whether the statutes allowing the Supreme Court to sit en banc are constitutional. The 1895 South Carolina Constitution made explicit mention of the Supremc Court sitting en banc, but the 1973 rcvision of Article V, § 12, eliminated all refcrcnces in the Constitution to the en banc court. *See* S.C.

cannot quite say that simple majority rule is somehow inherent in or inextricably linked to the very notion of constitutional adjudication. Rather, the voting protocol on a multimember court must be chosen, with the choice turning on the role one wants judicial review to serve.

III. USING A SUPERMAJORITY PROTOCOL TO ENFORCE THAYERIAN DEFERENCE

In the federal and most state court systems, the voting protocol is completely agnostic concerning the weight any universal and role-specific interpretive norms are given in any particular case. As explained earlier, these decisions are made by the individual judges acting in atomistic fashion. To the extent Thayerian deference gets any play, therefore, it is because judges have internalized this norm as part of the role of judging, as one of the "rules of the game" of adjudication.

In contrast, a supermajority protocol operates externally on a multimember court's decision as a corporate body. Specifically, a rule requiring supermajority agreement, before the Supreme Court can invalidate a federal statute on federalism grounds, means that the *corporate* product of the Court will exhibit greater deference to congressional judgments completely independent of the level of Thayerian deference practiced by *individual* members of the Court.

During the Progressive Era debates, Senator Borah and his supporters saw these two mechanisms as conceptually linked, on the ground that close division within the Court should translate into a reasonable doubt for each individual Justice. As one commentator synopsized the argument:

> Five judges believe that a statute is unconstitutional; four judges believe it to be constitutional. Therefore the question of its constitutionality is a doubtful question. That this doubt as to the constitutionality of the statute is a "reasonable doubt" must of course be admitted unless one is to impugn the wisdom of the four dissenting justices. Now the doctrine of reasonable doubt demands that the Supreme Court shall presume every act of Congress to be constitutional and shall continue to act upon that presumption until the unconstitutionality of the statute has been demonstrated beyond a reasonable doubt. And yet in the face of a reasonable doubt upon that question, a doubt evidenced by the fact that four of their colleagues equally learned with themselves disagree with them, a barc majority of the court presumes to pass final judgment that the act is void. It must be quite obvious that such a decision is a virtual repudiation of the reasonable doubt rule of construction.[81]

> Const. art. V, § 12 (1895). The Supreme Court has not sat en banc since the beginning of the twentieth century.

The South Carolina Supreme Court clearly does continue to enforce Thayerian norms atomistically. *See, e.g.*, State v. Gaster, 564 S.E.2d 87, 89-90 (2002) ("When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution.").

81. Cushman, *supra* note 24, at 782-83. *See also* Beulah Amidon Ratliff, *May Congress Limit the Supreme Court?*, 118 NATION 579, 580 (1924):

> The rule that the Supreme Court has always professed to follow in passing upon the constitutionality of laws is that where reasonable doubt exists the statute shall

In other words, the argument went, a corporate decision to invalidate a federal statute based on a 5-4 split simply cannot be squared with the deference norms governing atomistic decisionmaking.[82]

It is sometimes unclear whether those advancing this argument had in mind a subjective or objective understanding of doubt. Either way, the argument runs into difficulties.

From the *subjective* perspective, the notion of reasonable doubt addresses the degree of certitude or confidence with which an individual Justice personally believes a federal statute is unconstitutional. The Thayerian deference norm requires a Justice to ask herself whether, after giving due regard for the opinions of colleagues as well as other sources of argument and insight, she is sufficiently confident that a federal statute is unconstitutional, that *for her* the issue lies beyond a reasonable doubt. The claim here is that, if four (or, for Borah, even three) of her colleagues believe the statute is valid, then she cannot really believe the opposite with sufficient certainty to vote to invalidate.

But thus stated, the argument is belied by reality. When the Court splits 5-4 in favor of invalidation, obviously the contrary views of the four *did not in fact* create a

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> stand. The five-to-four decision is, on its face, an infringement of this rule, for, where four of the learned judges disagree with the other five, everybody except possibly lawyers and judges can see only ground for scoffing at the conflict between the court's profession and practice.

82. Proponents of other supermajority protocols made the same point in defense of their own legislative proposals. *See, e.g.*, 47 CONG. REC. 3878 (1911) (statement of Sen. Bourne, defending unanimity requirement):

> [I]t has been held by the United States Supreme Court that no act of Congress should be held to be in violation of the Constitution unless the conflict appears beyond reasonable doubt. . . . The Supreme Court has, however, in numerous instances held to be unconstitutional acts of Congress which some of the members of the Supreme Court believed to be entircly in harmony with our fundamental law. In cases such as this there certainly existed a very substantial doubt whether the measure in question was in fact in contravention of the Constitution.

62 CONG. REC. 896 (1922) (statement of Rep. McSwain, defending seven-Justice supermajority requirement):

> Courts approach the consideration of the constitutionality of a statute with the declared major premise that the act is presumed to be constitutional and must be found to be unconstitutional beyond a reasonable doubt. . . . And yet in the face of this fundamental proposition we find five members of the court holding that State statutes and acts of Congress are unconstitutional while four members of the same court file vigorous and logical dissenting opinions, arguing that these legislative acts are constitutional. We therefore have a right to ask why it is that the learned and laborious dissenting opinions do not raise a reasonable doubt in the minds of the majority.

72 CONG. REC. 6227 (1930) (statement of Sen. Brookhart, defending unanimity requirement):

> [The Supreme Court] holds that it must appear beyond a reasonable doubt that [a legislative enactment] is unconstitutional before the court will so decide. After laying down that principle, four members of the court may find positively that an act is constitutional and yet it is set aside by the other five as unconstitutional beyond a reasonable doubt. In other words, the opinion of four learned judges cannot even raise a doubt as to the constitutionality of a measure.

reasonable doubt in the minds of the five, from their own subjective perspectives (otherwise, the final vote would have been 9-0 against invalidation). Moreover, this misdescribes to some extent how we reason:

> To advance such a proposition is to advance something which is contrary to fact, which is contrary to human nature, and contrary to the manner in which every man conducts his personal or business life. Can a man never be clearly convinced of anything, if some other man supposedly equal in intelligence differs from him? If this were the case, there are few things of which any one could be convinced beyond a reasonable doubt.[83]

According to the alternative *objective* understanding of doubt, Thayer's argument dictates that a Justice cannot vote to invalidate a federal statute if an "objectively reasonable" Justice would uphold it, notwithstanding her own personal view that the constitutional challenge is persuasive.[84] And if four (or even three) of her colleagues, presumably reasonable jurists acting in good faith, believe a statute to be constitutional, this answers the question whether an objectively reasonable Justice could do so.

Of course, Justices in the real world clearly do not act on this perspective either, since again, if they did, we would never see 5-4 or 6-3 splits to invalidate federal legislation. But at least here the argument has normative bite; Borah could coherently say that the five or six Justices in such majorities *should* be voting to validate under these circumstances, and the supermajority protocol is an appropriate tool to achieve

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83. WARREN, *supra* note 57, at 204. As Robert Cushman put it:

> [a] majority of the Supreme Court judges may firmly believe that a law is invalid beyond all reasonable doubt in spite of the fact that the other four judges believe with equal firmness that the law is valid. While judicially minded men would naturally take due cognizance of opinions contrary to their own it is, of course, ridiculous to assume that five men cannot feel perfectly sure that they are right simply because four men whose opinions they respect disagree with them. Even the most naive observer of human nature realizes that there is hardly anything more futile than arguing with a convinced person.

Cushman, *supra* note 24, at 793. Cushman further noted:

> [i]n an extended search [I have] found no case in which such a division of opinion has been regarded as evidence that a reasonable doubt existed as to the invalidity of the statute, which doubt must compel the court to uphold the law even when a majority of the judges regarded it as invalid. Courts seem to have proceeded upon the simple assumption that all the doctrine requires is that the majority of the court be sure in their own minds that their conclusions are correct.

Id. at 794-95. To my mind (and Mark Tushnet's, who brought this to my attention), Cushman's claim in the first quotation above—that the five Justices can feel "perfectly sure they are right" and their colleagues wrong—is somewhat of an overstatement. I usually find it difficult to be "perfectly sure" when other people I generally respect disagree with me. However, I do sometimes remain confident in my views, notwithstanding such disagreement, after careful consideration.

84. This objective perspective sounds more consistent with Thayer's own phrasing of the clear-mistake standard: In the end, "*the ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not.*" Thayer, *supra* note 25, at 150 (emphasis in original).

the same result.[85]

This objective perspective faces other difficulties, however—the first two of which apply to the subjective perspective as well. First, there is a question of whether the votes of the four or three Justices rejecting the constitutional challenges really provide "objectively reasonable" evidence that a statute is constitutional. Obviously the claim assumes that these Justices reached the merits of the constitutional challenge, rather than refused to strike the statute down on other grounds. But even if they reached the merits, is it clear that their decision to uphold the statute means that they found the constitutional challenge unpersuasive? Or can it be that they themselves applied the clear-mistake rule and determined that, while they also found the constitutional challenge persuasive, it was not sufficiently persuasive to overcome their reasonable doubts? If the Court is actually split between five Justices who believe a statute is clearly unconstitutional and four Justices who believe somewhat uncertainly that the statute is probably unconstitutional, the fact that the minority voted to uphold the statute wouldn't seem to undermine the reasonability of the majority's position.[86] So the argument works, if at all, only if the minority of four or three truly believe that the federal statute is constitutional.

Even then, there is a question as to why *only* the views of the minority of four or three Justices should count in determining whether the majority's position is objectively reasonable. In other words, why say that a 7-2 split in favor of invalidation is the right numerical tipping point? Why are the views of a minority of two insufficient to influence the objective reasonability of the views of the majority of seven? And why should only the views of fellow Justices count for these purposes, as opposed to also the views of lower court judges and even legal scholars?[87]

Finally, it is worth considering whether the fact of disagreement over a statute's constitutionality logically means that either position is objectively reasonable, belying the existence of a clear legislative mistake. The Supreme Court has rejected such a claim in a somewhat analogous context. In *Teague v. Lane*,[88] the Court held that a federal habeas petitioner challenging a state conviction or sentence generally cannot benefit from the application of a favorable but "new rule" of constitutional law. A rule is "new" unless it is dictated by precedent existing when the petitioner's state

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85. *Cf.* Willis S. Siferd, *Proposals to Limit the Power of the Supreme Court in the Seventy-Fourth Congress*, 4 GEO. WASH. L. REV. 381, 385 (1936) (Borah's proposal "attempt[s] to substitute for the common law rule an act of Congress to determine how many dissenting votes shall raise a reasonable doubt").

86. *See* Cushman, *supra* note 24, at 786; WARREN, *supra* note 57, at 206.

87. One might discount somewhat the views of scholars on the ground that their opinions might not be similarly disciplined by the consideration of concrete facts and adversarial presentation of legal positions, and by the knowledge that real world consequences turn on their judgments. But neither of these grounds easily justifies the exclusion of lower court judges' views as well as one's colleagues on the Court. Charles Warren asked a nice hypothetical about a Justice who votes to uphold a statute in Case One and then retires right before the Court decides similar Case Two; why should his view that the statute is constitutional suddenly lose its relevance for the Thayerian inquiry the day he retires? *See* WARREN, *supra* note 57, at 205. One might also ask why the views of the legislators who voted for the statute at issue should not count in assessing objective reasonableness. *See infra* notes 122-124 and accompanying text.

88. 489 U.S. 288 (1989).

conviction and sentence became final.[89] And this inquiry has been characterized as whether "reasonable jurists" could disagree as to whether the sought-after rule is dictated by precedent; if "reasonable jurists" could disagree, then a resolution of the disagreement favoring the petitioner is "new."[90] But the Court has repudiated the claim that the mere *fact* of actual, historical disagreement among (presumably reasonable) lower federal court or state court judges *logically* means that the disagreement is objectively reasonable. While "relevant," the fact that some courts have decided X is not "dispositive" of the question whether X is an objectively reasonable interpretation of existing precedent.[91] Similarly, one can respond to Borah that the fact that four or three Justices believe a statute is constitutional is relevant to, but not dispositive of, the objective reasonableness of holding a contrary position; the majority of five or six can coherently maintain that the position of their remaining colleagues just is not reasonably tenable.

In the end, Borah's suggestion that there is an inherent contradiction between a closely-split decision to invalidate a federal statute and the atomistic standard of reasonable doubt is unpersuasive, under either the subjective or objective understanding. However, this rejoinder to Borah's justification really misses the fundamental point. Whether or not the corporate and atomistic perspectives are logically linked, it remains true that a supermajority protocol governing the Court's corporate decisionmaking can serve as an *independent mechanism* for tempering the aggressiveness of judicial review, one that can either replace or supplement an atomistic norm of Thayerian deference. In other words, as a matter of systems design, one can calibrate judicial review's degree of deference either through internalized norms operating on individual Justices, or through external rules governing the corporate aggregation of individual votes, or through both.

Surely this understanding is familiar from both legal and nonlegal contexts. Consider jury determinations in criminal trials. The constitutional principle of the presumption of innocence has both atomistic and corporate mechanisms of protection. First, no individual juror can vote "guilty" absent atomistically determined confidence that the defendant's guilt has been proven "beyond a reasonable doubt."[92] And second, no jury can return a corporate decision of "guilty" absent a specific level of supermajority concurrence.[93]

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89. *Id.* at 301.

90. *See, e.g.*, Butler v. McKellar, 494 U.S. 407, 415 (1990) ("new" rules include those that are "susceptible to debate among reasonable minds"); Sawyer v. Smith, 497 U.S. 227, 234 (1990) (question is whether "reasonable jurists may disagree").

91. Stringer v. Black, 503 U.S. 222, 237 (1992). *See also* Wright v. West, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring):

> Even though we have characterized the new rule inquiry as whether "reasonable jurists" could disagree as to whether a result is dictated by precedent . . . , the standard for determining when a case establishes a new rule is "objective," *and the mere existence of conflicting authority does not necessarily mean a rule is new.*

(citation omitted and emphasis added) (citing Sawyer, 497 U.S. at 234; Stringer, 503 U.S. at 237).

92. *In re* Winship, 397 U.S. 358, 363 (1970).

93. *See* Johnson v. Louisiana, 406 U.S. 356, 366-80 (1972) (Powell, J., concurring) (requiring unanimity for federal jury trial; upholding state jury trial convictions by nine and ten

For a familiar nonlegal example, consider a faculty's decision whether to promote a colleague to tenure. Given the essentially lifelong commitment at stake, many believe it appropriate for the faculty to place the bar quite high. Some schools effectuate that normative judgment by articulating a high standard for atomistic faculty votes; holding, for example, that a faculty member should vote for tenure only if she is highly certain her colleague is well on his way to becoming a nationally respected leader in his field. Other schools effectuate the same normative judgment by embracing a stringent voting protocol; requiring, for example, that the colleague receive a two-thirds supermajority of support, or that the colleague receive widespread support "without substantial opposition." And some schools do both.

As these examples illustrate, the atomistic and corporate approaches can be viewed as fungible substitutes, each separately calibrated to induce the same level of influence on a decision; or the approaches can be used simultaneously, with the combination calibrated for the optimal effect.[94] As noted above, the North Dakota and Nebraska Supreme Courts employ both approaches together. And one federal proposal for a constitutional amendment introduced in the New Deal Era would have mandated this combination: "No law of the United States or any State shall be held to be unconstitutional . . . by the Supreme Court unless *two-thirds of the members* thereof shall specifically and by separate opinion find it so *beyond a reasonable doubt*."[95]

Thus, putting aside Borah's unpersuasive suggestion that a divided Court ought to induce the majority to have atomistic doubts as to unconstitutionality, corporate disagreement can itself be used as a basis for tempering judicial review through the use of a supermajority protocol. If the Court operated under a rule requiring, say, six Justices to invalidate a federal statute, most likely all of the federal statutes recently invalidated by 5-4 decisions would instead have been upheld against constitutional challenge.

I say "most likely" because some critics of supermajority rules suggest that one or more Justices might react strategically and provide a sixth "courtesy vote" for invalidation so as to allow the corporate decision under the supermajority protocol to mimic the sincere decision under simple majority rule.[96] I find this scenario unlikely.

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out of twelve jurors). The supermajority requirement historically was derived from the Sixth Amendment jury trial right rather than a due process concern for the presumption of innocence. *See* Apodaca v. Oregon, 406 U.S. 404, 411-12 (1972) (White, J., plurality opinion). *But see Johnson*, 406 U.S. at 397 (Stewart, J., dissenting). But in any event, it protects due process just the same.

Charles Warren questioned the analogy between judicial review and criminal juries, noting that when a jury votes by insufficient-majority to convict, the corporate resolution is a "hung jury," rather than adoption of the minority view of "not guilty." *See* WARREN, *supra* note 57, at 207-08. But the fact that there is a different default rule for failure to meet the supermajority requirement does not undermine the important conceptual point that the protocol is still an alternative means of influencing the corporate judgment.

94. Of course, such calibration would havc to take into account the extent, if any, that adoption of a supermajority protocol might lead individual Justices to place less weight on the Thayerian deference norm than they used to do under a bare-majority regime.

95. *See* S.J. Res. 98, 75th Cong. 1st Sess., (Mar. 11, 1937) (Sen. O'Mahoney) (emphasis added). The requirement of a "separate opinion" for each of the supermajority members might be thought to add yet a third procedural protection for statutes under review.

96. *See* Fite & Rubinstein, *supra* note 67, at 781 (asserting, without supportive evidence or

Various strongly held norms favoring sincere voting counsel against such bald strategic behavior,[97] and a Justice would have to be quite passionately committed to the concept of majority rule to be willing to sacrifice what she views as "correct outcomes" in favor of "wrong but bare-majority-backed outcomes."[98] Perhaps she would be willing to do so if she felt confident that her colleagues would similarly sacrifice their views to support her in a future case when she is in the bare-majority camp. But since in each case only one Justice would need to sacrifice herself, it would be difficult for the group to ensure an equitable level of sacrifice for all, and thus to police effectively against defections. In the main, therefore, adoption of a supermajority protocol would likely change the outcome of at least most, if not all, bare-majority decisions.[99]

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explanation, that "[t]here is at least some indication, so deeply embedded in our make-up is the belief in the rule of the majority, that where a majority concurs in the unconstitutionality of an act, judges who would otherwise dissent may somtimes concur for the sake of making up the requisite number to hold legislation invalid").

97. *See* Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2333-79 (1999).

98. To be sure, sometimes within the traditional majority-rule paradigm would-be-dissenting Justices decide to suppress their sincere views and instead join the majority—although the frequency of such dissent-suppression has declined in recent decades. *See, e.g.*, Gregory A. Caldeira & Christopher J.W. Zorn, *Of Time and Consensual Norms in the Supreme Court*, 42 AM. J. POL. SCI. 874 (1998); Lee Epstein et al., *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362 (2001); Thomas G. Walker et al., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361 (1988). And in particular, there is evidence that when the Court is under attack, including during the Progressive Era, Justices are particularly willing to vote strategically in this manner to create a false appearance of solidarity. *E.g.*, Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1314 (2001) ("There is some internal evidence, for example, that during the first half of the 1920s, dissent was suppressed within the Court because of the need to fend off external attacks."); *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 330 (Melvin I. Urofsky ed., 1985) (quoting Justice Brandeis in July, 1924) ("[T]hat is the one positive result of Borah 7 to 2 business [meaning the threat of Borah's legislation], to suppress dissent so as not to make it 7 to 2.") (footnote omitted).

But strategic dissent suppression in these contexts does not change the outcome of the case; it merely changes the publicly revealed numerical division. The antisupermajority claim here is much stronger, that a member of a four-Justice minority coalition would agree to switch her vote even though (nay, *because*) that would have the effect under the supermajority protocol of switching the Court's corporate judgment. It is this claim I find dubious, though it is often difficult to predict in advance how changes in institutional rules can affect social norms which, in turn, influence individual behavior.

99. Of course, it may be that the likelihood of strategic voting would depend on the level of supermajority consensus required for invalidation. For example, suppose a voting protocol required unanimous agreement for invalidation, such that the frequency of invalidation based on sincere voting would decline significantly. If in a given case, the Court sincerely votes 8-1, or maybe 7-2, for invalidation, it is perhaps somewhat easier to imagine the would-be dissenters deciding to suppress their own views for the sake of maintaining the institutional potency of the Court. Under a unanimity rule, it is easy to identify the "holdouts" whose recalcitrance thwarts the majority, for purposes of levying informal sanctions; and no member of the minority has a strong incentive to hold out while hoping another member of the minority switches.

So Senator Borah claimed too much when he suggested, perhaps for strategic or rhetorical reasons, that the notion of "reasonable doubt" at the atomistic level *entailed* a rule of supermajority consensus at the aggregate level. But Borah was nevertheless correct to observe that a supermajority protocol could provide an alternative route to enforcing a regime of judicial deference to congressional decisions. And the fact that three states embraced this route with two still following it today means, at a minimum, that Borah's vision cannot fairly be dismissed out of hand as a potential tool by proponents of strong judicial deference.

IV. LEARNING SOME LESSONS ABOUT ENFORCING THAYERIAN DEFERENCE

In this section, I consider the major criticisms (other than unconstitutionality[100]) launched against Senator Borah's and others' proposed supermajority protocols in the Progressive Era, with two goals in mind. I explore preliminarily some of the advantages and disadvantages of employing the protocol, rather than atomistic norms, to secure the optimal level of Thayerian deference to congressional judgments. More importantly, I draw from this evaluation of supermajority rule some important lessons for the prevailing practice of atomistic deference.

A. Assessing the Optimal Strength of Thayerian Deference

Both in the Progressive Era and in other times, proposed supermajority protocols differed widely in their prescribed degrees of consensus. Since the advent of the nine-Justice Court, proposals have ranged from requiring consensus among a low of six to a high of nine out of nine Justices. This variation obviously raises the question as to what specific degree of required judicial consensus reflects the "ideal" amount of judicial deference. Is a unanimity requirement too strict? Is a two-thirds requirement too lax?

Proponents of particular supermajority protocols were virtually silent (at least in public records and discourse) as to why they championed a particular option. Borah, for example, appears never to have publicly explained why he believed a six-Justice consensus requirement was too weak but a seven-Justice consensus requirement was just right. Perhaps this is not surprising. To provide a fully principled defense of a particular protocol, one would first have to devise a satisfying theoretical explanation as to why the optimal all-things-considered level of Supreme Court deference to congressional determinations is X, and then determine empirically that a requirement of Y-Justice agreement will come closest to securing X amount of deference in operation. Neither step of this two-step justification comes easily.[101]

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100. *See* Caminker, *supra* note 12.

101. For the most part, public justifications for particular protocols drew upon impressionistic judgments and claimed connections between a specified level of consensus and proper implementation of the "reasonable doubt" atomistic standard. *See, e.g.*, 79 CONG. REC. 7730 (1935) (remarks of Rep. Ramsay) ("Such decisions by the Court [declaring federal statutes unconstitutional] should be unanimous or by such a preponderance of the Court, so that no reason for doubt of the correctness and fairness of the decision could be left in the minds of the average citizen."); 72 CONG. REC. 6227 (1930) (remarks of Sen. Brookhart) ("In a jury one vote not only raises a doubt but entirely defeats the verdict; and in a court where all are learned and trained to the law, as the members of the Supreme Court are trained, it seems to me that one vote

Some might view the reformers' failure to offer some grand theory of optimal deference to support their preferred protocols as a devastating lacuna. Of course, opponents equally failed to explain why bare majority rule secures an optimal level of deference, and there is no a priori reason to believe that it does. But at least majority rule provides the comfort of historical familiarity and almost ubiquitous application. So why should we deviate from longstanding tradition to embrace an alternative that reflects an arbitrarily chosen degree of deference?[102]

For others, this critique may not be so telling. Sometimes institutional designers have to make impressionistic judgments when drawing necessarily bright lines.[103] It seems doubtful, for example, that the Framers could have provided a nuanced theoretical justification for why the optimal required supermajority for congressional override of a presidential veto is two-thirds of each House, rather than three-fifths or three-fourths; or why the optimal required supermajority for ratification of constitutional amendments by the several states is three-fourths rather than two-thirds or four-fifths. As the Ohio Supreme Court recognized with respect to its own six-decade supermajority experiment, any such requirement necessarily represents a "compromise" between the polar positions of majority rule and abolishing judicial review entirely.[104] One can imagine an intelligible debate among proponents of

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by a member of the court should raise a doubt."); 62 CONG. REC. 896 (1922) (remarks of Rep. McSwain) ("If the Constitution has been violated by an act of Congress or of a State legislature, that violation ought to be so manifest that at least seven judges out of nine can see it and declare it."); *id.* at 897:

> It is not unreasonable that seven justices of the court should be required to agree before they can set aside the sovereign will either of the Nation or of the State. To allow a dissent of two justices is more than ample to take care of the personal equation and individual idiosyncrasies. It is hard to get all men to agree upon any one proposition, but it ought not to be difficult for seven out of nine men learned in the law [to agree that a statute is constitutional if in fact it is clearly so].

102. *Cf.* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 2 (2002) ("Too much judicial independence may threaten popular sovereignty; too little may undermine individual liberty. It is important to get it right.").

103. *See, e.g.*, Burch v. Lousiana, 441 U.S. 130, 137 (1979) (invalidating conviction by non-unanimous six-person jury, conceding "we do not pretend the ability to discern *a priori* a bright line below which the number of jurors participating in the trial or in the verdict would not permit the jury to function in the manner required by our prior cases. But . . . it is inevitable that lines must be drawn somewhere if the substance of the jury trial right is to be preserved."(citations omitted)). As Justice Holmes put the point in a different context:

> When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.

Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting).

104. *See* State *ex rel.* Turner v. United States Fid. & Guar. Co., 117 N.E. 232, 234 (Ohio

different degrees of supermajority rule, focusing on the relative strength of the various justifications for having courts yield to congressional judgments even without being able to articulate a convincing grand theory of deference.

Surely the apparent arbitrariness of choosing any particular degree of supermajority consensus to secure judicial deference should give at least some, if not substantial, pause. But does that mean it is conceptually preferable instead to leave the decision about deference in the hands of individual Justices?

The problem is that this critique actually extends with equal force to the project of securing Thayerian deference through atomistic decisionmaking. Should deference to Congress merely be a "tiebreaker," such that a Justice should give dispositive weight to the norm only if she is in virtual equipoise over whether a federal statute is unconstitutional? Or should the norm have some real bite, as the doctrines of "clear mistake" or "reasonable doubt" imply? Just as supermajority proponents failed to explain why they preferred a specific degree of consensus, Justices who routinely articulate some commitment to defer atomistically never explain what terms such as "clear error" or "presumption of constitutionality" mean in practice, let alone why they capture an optimal model of judicial review. If one would criticize Borah for having only an impressionistic rather than an analytically rigorous defense of a seven-ninths requirement, one should be equally concerned that adherents of conventional atomistic enforcement of Thayerian deference face the same problem of justification.

And once a particular consensus level *is* chosen for a supermajority requirement, at least the resulting degree of deference achieved should remain stable over time. In contrast, the actual weight given Thayerian deference by Justices acting atomistically will likely vary somewhat from case to case and context to context. Indeed, there are reasons to worry that Justices making atomistic decisions will tend, in general, to give less weight to the deference norm in practice than they themselves might describe as optimal. First, from the subjective perspective, Justices might be somewhat reluctant to admit to themselves—and candidly express to the public—that they are appreciably unsure of a given constitutional judgment. At the same time, Justices will likely be loath to open themselves up to criticism by scholars and pundits by appearing to endorse a congressional judgment that in fact they think is probably (but not certainly) wrong. And we all know how easily we can convince ourselves of a particular answer, even after baving to wrestle with the problem for quite some time. Perhaps for these reasons, Larry Sager has suggested that the subjective approach to the Thayerian norm "is idiosyncratic to a judge's style of reason and discourse and would offer only rare and flickering deference."[105]

1917).

105. Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 413 (1993); *see also The Supreme Court Again*, 34 NEW REPUBLIC 59, 60 (1923):

> Surely the fact that threc of four judges of the court consider the law constitutional should raise enough doubt in the minds of their brethren to bring the [clear-mistake] rule into operation. The fact is, however, that it does not, and the capacity to see any virtue in a view which opposes one's deep-seated convictions is so rare that one may well doubt whether the rule is ever capable of being imposed by the court as a restraint upon its own action.

A prcssure to feel as though one is surc of her answer would not similarly dissuade a Justice

Second, a collective action problem might tend to discourage Justices from atomistically placing great weight on Thayerian deference. Any time a Justice decides to defer to Congress rather than embrace the constitutional interpretation she believes is correct (despite some uncertainty), she in a sense forfeits an opportunity to bring the Constitution-in-operation closer to what she perceives as the Constitution-as-ideal. If each Justice gives the same weight to Thayerian deference, then over time each Justice will forfeit approximately the same amount of interpretive power in this regard.

But suppose a Justice worries that, even though she consistently gives some weight to Thayerian deference, her colleagues will give less or no weight. Over the course of time, the deferring Justice will end up forfeiting her power to bring the operational Constitution in line with her ideal far more than will her colleagues. In a sense, she will bear all of the cost of nonideal judgments associated with producing the public good of deference to Congress. To the extent she cares (and surely all Justices do, to some extent) about implementing the ideal Constitution as she defines it, she will be reluctant to bear this cost alone. Absent some external force that can police uniform compliance with the Thayerian norm—say, a supermajority protocol—she might react to this possibility by deemphasizing deference in her own atomistic decisions. And since each Justice will likely make the same calculation, the norm might end up underenforced across the board.[106]

All of this provides reason to question whether, when push comes to shove, Justices enforcing the Thayerian deference norm through their own atomistic decisions will end up giving it as much weight in practice as they might desire to do in theory.

Of course, one could still extol the virtues of flexibility, claiming that at least under the atomistic approach, Justices can decide at different times and in different contexts that congressional deference *ought* to be given different weight. For example, Justice Scalia recently suggested that today's Congress might deserve less deference than in the past because it is not currently taking seriously its responsibility to think about the constitutionality of its own decisions.[107] Presumably, this comment suggests, Justice

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from giving weight to other role-specific norms that do not similarly trade on any sense of insecurity. For example, Justices frequently take into account judgments about the institutional competence of judicial or other actors to implement properly various doctrinal rules. *See, e.g.*, Strauss, *supra* note 38 (highlighting Fifth Amendment, First Amendment, and equal protection jurisprudence before generalizing to almost all constitutional doctrine). But this role-specific norm helps the Justice identify the optimal doctrinal rule; it does not highlight the presence of uncertainty.

On the other hand, the role-specific norms of stare decisis (deference to prior Court decisions) and collegiality (deference to colleagues in a given case) do similarly require self-conscious reflection on levels of uncertainty; the more unsure a Justice is as to the "right answer" in a given case, the more likely she is to defer to past or present colleagues. Caminker, *supra* note 97, at 2313-22. Perhaps a reluctance to feel and publicly reveal uncertainty helps explain the groundswell of criticism that Justices today give too little weight to stare decisis and collegiality, and perhaps this justifies exploring whether these role-specific norms could productively be secured through externally imposed voting protocols as well. *See* Caminker, *supra* note 12.

106. For a similar analysis applied to the norms of stare decisis and collegiality, see Caminker, *supra* note 12.

107. *See A Shot from Justice Scalia*, WASH. POST, May 2, 2000, at A22 (quoting speech by Justice Scalia stating that "[i]f Congress is going to take the attitude that it will do anything it

Scalia would in the future defer more if and when Congress changed its errant ways. The atomistic approach, unlike a relatively fixed voting protocol, allows for this type of contextual judicial tailoring. One thus could advance here the conventionally claimed advantages of "standards" over "rules."

But flexibility is purchased at a price. Flexibility seems desirable, if one trusts Justices to defer more when they should and less when they should not. But the pressures identified above to underweight deference might lead Justices enjoying discretion to "find" reasons for nondeference more than they perhaps should.[108] If one really wants to secure a meaningful level of Thayerian deference, perhaps the only sure and stable mechanism is an externally imposed supermajority rule.

In the end, the difficulty of identifying an optimal level of Thayerian deference is problematic for the entire project of properly restraining judicial review. But the problem lurks within either the atomistic or corporate means of enforcing such restraint.

B. Bifurcating Legal Reasoning and Legal Outcomes

Two other frequent criticisms of the Borah proposal reflected a common theme: that the supermajority protocol would lead to a regime of "minority rule," and thereby drive a wedge between majoritarian legal reasoning and corporate legal outcomes. The first criticism focused on the discontinuity between the majority's legal view of the constitutional challenge (statute is unconstitutional) and the result of that challenge (statute is nevertheless upheld), and argued that this wedge would diminish public respect for the Court. The second focused on the discontinuity between the majority's legal view of who should win (the constitutional claimant) and the result of the case (constitutional claimant loses), and argued that this wedge would be unfair to litigants. After developing both strands of this theme, I suggest that this concern applies as well, though in less visible fashion, to the conventional atomistic mechanism of securing Thayerian deference.

1. The Complaint about Disrespect for the Court

As a leading Progressive, Senator Borah was surely disturbed by the fact that the Court's closely divided rulings in the early Twentieth century reflected a conservative ideology. But he also seems to have been genuinely worried that the sudden spurt of 5-4 invalidations was bad for the Court as an institution. Borah believed that closely divided decisions "seem[ed] to breed an atmosphere of mistrust,"[109] and others, such as former Justice John Clarke, worried with him that citizens resented the appearance or

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can get away with and let the Supreme Court worry about the Constitution... then perhaps that presumption [of constitutionality] is unwarranted.").

108. Justice Scalia himself frequently defends the desirability of imposing on himself and other judges reasonably clear rules rather than indeterminate balancing tests, in part to protect against the inevitable impulse in certain cases to balance interests differently. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

109. William E. Borah, *Five to Four Decisions as Menace to Respect for Supreme Court*, N.Y. TIMES, Feb. 18, 1923, at 21.

implication of "[o]ne man power."[110] Even the most strident scholarly critic of Borah's proposal, Charles Warren, observed respectfully that "Senator Borah, in spite of his unnecessary and unwise proposal, remains an ardent admirer and upholder of the Court."[111] Borah believed that, in the long run, forestalling a continuing series of 5-4 invalidations of federal statutes would be an important step in restoring public respect for, and ultimately ensuring the moral authority of, the Court.[112]

While Borah certainly had a point, one of the most common and ardent criticisms of his proposal was that a supermajority protocol would, on balance, actually diminish popular respect for the Court. Opponents of the Borah proposal characterized it as leading in constitutional cases to "minority rule," in the sense that a minority of Justices on the Court could dictate the outcome of a constitutional challenge to a federal statute. Many public leaders, scholars, and pundits viewed such "minority rule" as an anathema, and predicted that the public could not respect judicial decisions driven by a minority sentiment. Some questioned the likely stature of a congressional act upheld against challenge by minority vote:

> What degree of authority would such a law possess, when the people of this country knew that six out of nine Judges believed it to be unconstitutional, and that it was the law only because, under the Borah proposal, the vote of the six

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110. Clarke, *supra* note 60, at 691; *see also id.* at 692:

> Treating this much emphasized rule as a reality and not a mere form of words, it is difficult for men not steeped in legalistic thinking and forms of expression to understand how five judges can agree that an Act of Congress is unconstitutional "beyond rational doubt" and that by "clear and indubitable demonstration" they have shown it to be so, when four of their associates, equally able and experienced judges, who have heard the same arguments on the same record declare that to them "upon the basis of reason, experience and authority" the validity of the Act "seems absolutely free from doubt.

15 NEW REPUBLIC 157, 159 (1918) (commenting on the 5-4 invalidation of child labor statute in *Hammer v. Dagenhart*, 247 U.S. 251 (1918), that "[i]n the long run American opinion will not consent to have social legislation invalidated and its social progress retarded by the necessarily accidental and arbitrary preference of one judge in a court of nine."); 79 CONG. REC. 7730 (1935) (remarks of Rep. Ramsay):

> The 5-to-4 decisions of our highest Court in the land sound to the average citizen like the betting odds at a horse race, and, in fact, it leaves the American mind in doubt just what is or should be the law. Such decisions only shake the confidence of the people in the judgment of this great tribune.

111. WARREN, *supra* note 57, at 179 n.1.

112. *See* 64 CONG. REC. 3960 (1923) (article by Sen. Borah):

> One cannot be justly charged with undue national pride when he declares that the Supreme Court of the United States is the most exalted judicial tribunal in the world, not a court beyond the possibility of error, not a court whose opinions are deemed above the reach of fair and honest criticism, but a court which, whether viewed as to the reach and scope and power of its jurisdiction or as to its influence and standing, its ability and learning, its dedication and consecration to the service of mankind, is the greatest tribunal for order and justice yet created among men. If, therefore, the machinery of the court can be geared to a higher plane and greater accuracy, thereby insuring its judgments greater support and approval, that should be our willing task.

> would not prevail, and the vote of the three Judges in the minority would decide the case?[113]

But the predominant concern was disrespect for thc Court, the claim being that the public could never support judicial decisions driven by the minority over the majority. As one commentator put it, "Every time six out of the nine Justices pronounced a law unconstitutional and the law nevertheless went into effect, the country would witness a spectacle far more damaging to the Court's prestige than any that is now presented [by 5-4 invalidations]."[114]

2. The Complaint about Unfairness to Litigants

A second frequent criticism also concerned the bifurcation of reasoning and result, this time from the perspective of litigants. Opponents of supermajority rules repeatedly proclaimed that the Supreme Court does not sit to decide legal issues in the abstract, such as whether or not a statute is constitutional. Rather, the Court sits to adjudicate actual controversies involving people or institutions as adversarial parties. The Borah proposal, it was said, would divert the Court away from an impartial inquiry into which litigant should win, instead allowing the protocol to tip the scales of Justice against the federal claimant.

Charles Warren framed this concern with the following hypothetical:

> That the proposed bill contemplates actual control by the minority is to be seen clearly, when one reflects that a decision of a Court is not a decision upon an abstract question or upon the general proposition of the validity or invalidity of a statute. Every decision of a Court is a positive Act, deciding and establishing which of two persons or parties, litigating before it, is right. It is a decision that X, an actual person, has certain rights as a plaintiff or defendant, and that correlatively Y, another actual person, as defendant or plaintiff, has not certain rights. John Citizen claims that he has a right against James Voter based on a Federal statute; James Voter denies this and says that he has a right based on some provision or guaranty of the United States Constitution; the Supreme Court [is] then called upon to decide which right shall prevail.... Senator Borah's proposal is that a minority of the Court, and not a majority, shall decide these rights, in cases where one party relies on a Federal statute and the other party relies on the Constitution. His proposal [is] that Congress shall step in and say to the Court: "If a case is before you in which John Citizen, a plaintiff, relies on an Act of Congress, and James Voter, a defendant, relies on the Constitution, and claims the statute to be invalid, then if only six Judges think James Voter is right, the view of the minority of three Judges must prevail, and the Court must render its decision

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113. WARREN, *supra* note 57, at 193.

114. Fabian Franklin, *Five to Four in the Supreme Court*, 110 INDEP. 246, 247 (1923). *See also, e.g.*, Cushman, *supra* note 24, at 801:

> And so far as the influence on the popular mind is concerned, it may seriously be questioned which is most calculated to inspire distrust of the Supreme Court, —a decision invalidating a statute by a vote of five to four or a decision upholding a statute rendered by a court of nine, eight of whom believe the statute to be null and void.

in favor of John Citizen.[115]

In the view of Warren and many others,

> the fundamental objection to th[is] proposition was that it completely ignored the true funetion of a judicial tribunal, which was, to hold the scales of justice even and to decide impartially between the parties, the appellant and appellee both meeting before it on even terms. . . . The parties no longer came into the Court on an equal basis, but with the chances heavily weighted against [one party]—and this was not in consonance with any Anglo-Saxon system of justice.[116]

This operation of the protocol seems particularly unfair in the event that the lower federal or state court from which the appeal was taken had already (perhaps unanimously) held for the federal constitutional claimant after finding the statute unconstitutional, a conclusion then shared by six but not seven members of the Supreme Court. If six Justices believed that the party relying on the Constitution as against the statute should win, the argument concluded, then that party "deserved" to win and would be unfairly treated by a voting protocol that dictated otherwise.[117]

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115. WARREN, *supra* note 57, at 179-81.

116. 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 125-26 (1922) (speaking of the objection in reference to supermajority proposals introduced in Congress in 1824).

117. Of course, this argument again fails to count the *congressional* majority that voted to enact the statute in determining what constitutes the "majority" and "minority" positions for purposes of dictating which litigant "deserves" to win. One could dress this concern in constitutional clothing as well, focusing on the reformed structure of adjudication, rather than fairness to litigants. If a supermajority rule is tied to a single issue raised by a case, such as a constitutional challenge to a statute, then the Justices must adjudicate the case by first deciding that issue under the supermajority protocol, and then considering any remaining issues under simple majority rule. In other words, the Justices must first and separately vote on the constitutional issue in order to see whether the Court as a corporate entity will uphold or invalidate the statute, and then the Justices must take that collective decision as a given to direct the rest of their decisionmaking process. If five—but only five—Justices think the statute is unconstitutional, they must defer to the minority faction and then continue to decide the case as if they believed the statute was constitutional. This ordered decisionmaking seems ineonsistent with the notion that courts decide cases rather than issues of law, and arguably therefore is inconsistcnt with the notion that Article III courts issue judgments, not opinions. *See generally* Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123 (1999).

But while the protocol does require us to think differently about the process of adjudication, I do not find this challenge fully persuasive. The Constitution clearly precludes federal courts from issuing declarations of law when unnecessary to decide an Article III case or controversy. But the supermajority protocol is merely a means of determining the law that will be applied to an actual controversy, not a mechanism for lawmaking outside such a context. The fact that the process of adjudication focuses, in part, on law declaration does not turn the pronouncement into an advisory opinion, so long as the declaration of law in fact plays a role in determining which litigant wins the judgment.

Moreover, there are (admittedly infrequent) cases in which an individual Justice has deferred to her colleagues' views on one issue in a case, and uses their views as a basis for reaching and

3. The Common Theme: Bifurcation of Legal Reasoning and Relevant Outcome

At the root of these complaints about minority control over the fate of statutes and litigants is a common underlying concern: that salient legal outcomes should be justified by the best statement of what the law is. The complaint about loss of public respect is driven by the disjunction between the majority's statement of the law and the legal outcome of judicial review (i.e., whether the statute is upheld or invalidated). And the complaint about litigant unfairness is driven by the disjunction between the majority's statement of the law and the legal disposition of the case (i.e., whether the constitutional claimant wins or loses).

Digging deeper, it is clear that both complaints rest on the unsurprising notion that the majority's legal reasoning, not the minority's reasoning, will be accepted by the public as the better and more authoritative statement of what the law is. Obviously, if the public perceived the minority-backed declaration of law as being authoritative, then there would be no cognitive dissonance created by having that declaration govern either the statutes' or the litigants' fortunes.

But by the Progressive Era, we had moved well past the earlier view that the Constitution was some sort of fundamental law enforceable by courts only as a matter of political morality, and had long embraced the view that the Constitution is "ordinary" (albeit "supreme") law, and therefore is subject to conventional forms of judicial interpretation.[118] As such, Justices engaged in constitutional analysis were viewed as striving for an "accurate" interpretation and, as with interpretation of statutes and the common law, it was assumed that when Justices disagreed, the majority view had greater claim to accuracy than the minority position.[119] Of course this did not stop commentators from criticizing majoritarian positions in specific cases, but in an abstract sense it was still assumed that judicial majorities were more often

deciding other issues in the case, even if that means she ends up voting inconsistently with the way she would have decided the case on her own. One infamous example is Justice White's opinion in *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989) (White, J., concurring) (voting to uphold statutory abrogation of state sovereign immunity despite own view that statute did not purport to do so). *See also* Susanna Sherry, *Justice O'Connor's Dilemma: The Baseline Question*, 39 WM. & MARY L. REV. 865, 882-92 (1998); *but see* Hartnett, *supra*, at 138-41 (noting that most instances of intracase deference were necessary to fashion majority agreement on a judgment). I do not believe this intracase deference has ever been criticized as a violation of Article III, although it has been criticized as a matter of policy. *See* Hartnett, *supra*, at 142-46. In addition, in one sense, the Supreme Court routinely decides only issues within a case, instead of the entire case itself, when it grants a petition of certiorari limited to certain specified legal issues. The Court does itself pronounce a judgment, but in a temporal sense it is simply deciding some of the issues embedded in a larger adjudication. It does not seem that different for the Justices to decide two or more issues in a single case, treating them serially as independent issues governed by a protocol rule. It would simply be more efficient than, say, granting certiorari on the constitutional question, upholding the statute and remanding for further proceedings, and then granting certiorari again on the statutory application question.

118. *See* SNOWISS, *supra* note 18, at 3-4, 119, 172-75.

119. For a representative Progressive Era claim to this effect, see Joseph D. Sullivan, *Curbing the Supreme Court*, 11 GEO. L.J. 10, 14 (1923) ("The minority opinion represents not what the law is but what some learned men think it should be. The majority decision is the law."). *See* Caminker, *supra* note 97, at 2362-63 (supporting this proposition analytically).

right than minorities. And thus, it would seem to follow, the resolution of an issue and the overall outcome of a case should be dictated by majority rather than minority reasoning. If six Justices explained why they believed a statute was unconstitutional and therefore the petitioner should win, and only three Justices expressed a contrary view, Borah's protocol would drive a wedge between the more likely accurate reasoning of the six, and the outcomes of upholding the statute and entering judgment against the petitioner.[120]

This bifurcation of (majority-backed) reasoning and results seemed to challenge the rule of law. As one contemporary put it:

> The justices of the Supreme Court of the United States are experts in the art of construing and applying the basic law adopted by our forefathers a century and a half ago. If five of the nine justices unite in finding that the justice of the Constitution shelters and protects a citizen, . . . what respect would that instrument inspire if its precepts are to be enforced only in case seven out of nine judges are in favor thereof?[121]

Of course, this rhetorical question would lose some of its bite if a supermajority protocol were premised on the propositions that (1) Congress's enactment of a statute reflects its judgment that the statute is constitutional, and (2) Congress's judgment counts as meaningful evidence supporting the accuracy of its constitutional

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120. To the extent the Justices would still be applying a clear-mistake standard in their own atomistic determinations, then the six-person majority would really be saying that the statute was unconstitutional beyond reasonable doubt, creating an even larger rift between the majority's reasoning and the corporate decision.

121. Ira Jewell Williams, *The Attack upon the Supreme Court*, 7 CONST. REV. 143, 146-47 (1923); *see also* WARREN, *supra* note 57, at 203 ("No class or section of the people of the United States would ever accept or have confidence in a judicial decision which fixed their rights and duties, by the views of a minority of the Court–of three Judges out of nine.").

The same concern, I believe, explains the discomfort many feel about the rare "paradoxical" case in which the Court resolves two legal questions, and yet, because of the particular lineup of Justices on each question, the Court issues a judgment seemingly at odds with its own collective reasoning. The most well-known paradoxical case is *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949), in which the Court upheld on a 5-4 vote the constitutionality of the federal diversity jurisdiction statute as applied to a suit between a Maryland and a District of Columbia citizen. Two Justices ruled that the District counted as a state, and seven rejected this argument; three Justices ruled that Congress could expand Article III jurisdiction in this manner, and six rejected this argument. But the two and the three were different groups, and thus there were five votes to uphold the statute, despite the fact that supermajorities rejected both supportive theories. Many able scholars have addressed this type of voting "paradox," some supporting the outcome-voting approach in *Tidewater* and others advocating an issue-by-issue approach. *See, e.g.*, MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS 111-24, 340 n.2 (2000) (citing other scholarship on point).

But whatever view one takes, it is clear that the controversy is driven by the discomfort that arises when, as in *Tidewater*, the Court issues a judgment that appears to conflict with the majority-backed legal reasoning offered in its support. *See, e.g.*, Bruce Chapman, *Rational Aggregation*, 1 POL., PHIL. & ECON. 337, 341-45 (2002) (discussing the obligation of "public reasons" supporting a judicial decision); Hartnett, *supra* note 117, at 134-42 (noting other "paradoxical" cases).

interpretation.[122] Suppose one considers Congress's implicit judgment to deserve the same weight in assessing the accuracy of a proffered interpretation as the vote of a single Justice. Then the statute comes to the Court with one "vote" already cast in its favor, and it would take a vote of six, rather than five, Justices against the statute-supporting constitutional interpretation to form a majority of the Court-plus-Congress (six out of ten) sharing a presumptively accurate interpretation rendering the statute unconstitutional.[123] The point is that one could view a supermajority protocol as designed to increase the likelihood of identifying an "accurate" constitutional interpretation, by viewing Congress's input as valuable to making such a determination.[124]

Suffice it for now to say that neither Borah and his supporters, nor his critics, viewed the supermajority proposal as reflecting this vision. Rather, both sides viewed the supermajority protocol as being designed to introduce and give some weight in the judicial review process to a factor *other* than pure "accuracy" of legal interpretation. Borah was primarily concerned that the people's instinctive valuation of democratic

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122. *See supra* text accompanying notes 43-44 (justifications (1) and (2) for Thayerian deference). There is a substantial literature debating the validity of each of these propositions. *See generally* Garrett & Vermeule, *supra* note 38 (discussing institutional reforms that might make these propositions more true for Congress).

123. Of course, to justify Senator Borah's proposed consensus requirement of *seven* Justices to invalidate a statute, one would have to view Congress's judgment as deserving the equivalent weight of *three* Justices' votes—such that a 7-2 judicial vote would really represent a 7-5 majority Court-plus-Congress vote, whereas a 6-3 judicial vote would really represent a 6-6 Court-plus-Congress vote.

124. Mitch Berman suggested to me that one could similarly view the President as exercising a "vote" through his sign-or-veto decision. One might say that a presidential signing should count as a vote in favor of the accuracy of a constitutional interpretation supporting the statute, and a veto should count in favor of the accuracy of a constitutional interpretation challenging the statute. This view could justify the following protocol: when the President signs a statute into law, the Court may declare it unconstitutional only with at least six Justices' votes (representing a 6-5 majority Court-plus-Congress-plus-President vote); but when the statute is enacted over the President's veto, the Court may declare it unconstitutional with five Justices' votes (still representing a 6-5 majority Court-plus-Congress-plus-President vote). Of course, one would have to ignore or somehow deal with the obvious complication that signing and vetoing statements reveal that presidents occasionally sign bills they believe contain unconstitutional provisions and they occasionally veto bills with which they have no constitutional complaint.

For an intriguing combination judicial-review-preclusion and legislative override proposal (rather than a straightforward supermajority proposal) that viewed presidential signature as a salient act along these lines, see the proposal of Representative Morin, providing in relevant part:

> The Supreme Court of the United States shall have no power to set aside as unconstitutional any Act of Congress adopted in pursuance of this article, or any other Act of Congress which shall have received the signature of the President; and, in case any Act which shall have been passed over the President's veto by a two-thirds majority of each House of Congress shall be declared unconstitutional by the said court, it shall again be voted upon, and if it shall again receive two-thirds of the votes of each of said Houses it shall be the law, notwithstanding the decision of the said court.

H.R.J. RES. 361, 64th Cong. (1917).

decisionmaking would lead them to disrespect judicial rulings that were "countermajoritarian" in the Bickelian sense but were supported by only a bare-majority judicial vote. Other supermajority supporters emphasized Thayer's concern about the debilitation of democratic/populist constitutional reasoning and worried that aggressive judicial review would lead to the atrophy of these alternative, and in the long run, necessary, venues for dialogue about constitutional values.

In the arguments sketched above,[125] Borah's critics recognized that a supermajority protocol premised on either of these arguments—and the same would apply to any other argument for deference derived from the political consequences of judicial invalidation of federal statutes—would lay bare the Court's effort to serve two masters at once: (1) to provide a principled interpretation of the Constitution, with the majority view being accepted as "accurate," and (2) to take account of the political consequences of judicial review. At a minimum, the blatant divergence of legal outcomes from legal reasoning would diminish the Court's claim to be a forum of principle, as opposed to being (in part) a politically sensitive actor mindful of the institutional consequences of its actions.[126] And this was thought by the Borah opponents to be sufficient reason to oppose the adoption of supermajority rules.

4. Application of Theme to Atomistic Enforcement of Thayerian Deference

By repeating the complaints that "minority rule" would drive a wedge between accurate legal reasoning and legal results (for statutes or litigants), I do not mean to endorse them uncritically. Borah's explanation of the dichotomy—that the protocol was designed to enforce deference to Congress, as a separable objective of judicial review—would have been graspable by the public. And people can always learn to expect different things from adjudication. In today's Nebraska and North Dakota, for example, one does not find a groundswell of fervent opposition to their supermajority rules; apparently the inhabitants of these states have grown comfortable with the notion that their supreme courts occasionally issue rulings dictating the fates of statutes and litigants that are inconsistent with the legal reasoning contained in the presumptively "accurate" majority-backed opinions.

But even taking these concerns about corrupting the "purity" of judicial interpretation seriously, it is important to acknowledge—as Borah's opponents did not—that the very same tension between reasoning and results also inheres in the traditional clear-mistake rule as well, and any modern-day remnant thereof couched in terms of a presumption of constitutionality. The only difference is that the tension is mediated silently in the minds of individual Justices, not advertised publicly by the externally visible voting protocol.

A Justice adhering to the Thayerian clear-error rule must, on the one hand,

125. *See supra* notes 109-126 and accompanying text.

126. Out of an abundance of caution, let me be absolutely clear that by "politically sensitive," I do not mean to describe Justices as being sensitive to *partisan* or *ideological* influences within themselves, or responsive to such influences within Congress. I merely mean to describe (presumably nonpartisan) Justices as being sensitive to the fact that the judicial invalidation of federal statutes entails both expressive and tangible consequences for the workings of our governmental system in relation to underlying norms, such as democratic accountability and self-governance. In other words, judicial deference is driven by statescraft.

determine what she views as the best interpretation of the relevant constitutional provision or principle (taking into account whatever universal and other role-specific norms she finds appropriate), and, on the other hand, recognize the "statescraft" or interdepartmental comity-related justifications for deference. On the subjective account of the Thayerian standard, she contemplates how certain she is of her best judgment that a federal statute is constitutional, and at some threshold level of uncertainty, she uses the deference norm as a reason to uphold the statute. On the objective account of the standard, the Justice asks not whether she believes the statute is unconstitutional, but whether a reasonable Justice could find it constitutional, and if the latter is true, she then invokes the Thayerian standard as a reason to do so herself. Either way, the statescraft or political comity component of judicial review does a fair amount of the work, competing with and, at times, trumping the "pure" interpretive project.

Atomistic enforcement of the deference norm thus also drives a wedge between legal reasoning and outcome, both for the statute and the litigants. With respect to the statute, it would be upheld notwithstanding a majority or even unanimous view that it was unconstitutional, so long as enough members of the coalition had some (subjective or objective) doubt about the matter. And with respect to the litigants, a party challenging the constitutionality of the statute could still lose, even after persuading a majority or even every member of the Court of his position, so long as enough Justices still harbored some doubt.

Moreover, those who criticized supermajority protocols for laying bare the political aspect of judicial review knew full well that the atomistic enforcement they defended raised the very same concern. Thayer himself did not hide the fact that Justices following his prescription were not engaged in a project of providing the best interpretation of the Constitution; in his own words, "*the ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not.*"[127] As he put it differently, a judge applying the clear-mistake standard needed "that combination of a lawyer's rigor with a statesman's breadth of view."[128] And as another commentator noted during the Progressive Era:

> If [judges] do not decide for themselves as a judicial question whether the two documents [statute and Constitution] conflict but try instead to determine whether reasonable men could have harmonized them, then it would seem that they have failed to exercise the essential duty of declaring what the court finds the law to be, and have instead declared what some one else might reasonably have found it to be. . . . Thus it would appear that it is only on the theory that in passing upon the validity of statutes the courts are exercising a power essentially political in origin and nature that Thayer's doctrine can be logically supported.[129]

More recently, some scholars have phrased the critique in even more radical terms. Professor Sylvia Snowiss claims that applying Thayer's clear-mistake standard in a modern world, where the Constitution is viewed as a supreme form of ordinary law, is actually "incoherent," apparently because it undermines the view that constitutional

127. Thayer, *supra* note 25, at 150 (emphasis in original).
128. *Id.* at 138.
129. Cushman, *supra* note 24, at 788-89.

adjudication is an act of interpretation.[130] Professor Gary Lawson claims that Thayerian deference cannot be squared with *Marbury*'s notion that the judicial function is to "say what the law is,"[131] with the result that such judicial deference to congressional determinations is not just improper or incoherent, but downright unconstitutional.[132]

In my view, Snowiss and Lawson push the claim of tension between interpretation and deference too far; they both have a rather rigid view of what the project of constitutional interpretation must be once the Constitution is recognized to be a form of ordinary (if supreme) law. And let us not forget that many state courts still purport to operate under the turn-of-the-(prior)-century clear-mistake standard even in the modern era.[133] But it is sufficient for present purposes to recognize the central point: that Thayer's clear-mistake standard of review, and its modern-day shadow "presumption of constitutionality," both share the central defect trumpeted by Borah's opponents—they require Justices to operationalize a sensitivity to the political aspect of judicial review that drives a wedge between "pure" legal reasoning and adjudicatory outcomes. And Borah's detractors knew it.

Now, there still are reasons someone might prefer one or the other way of importing deference into judicial review. Borah's opponents were surely right to worry that the supermajority protocol throws the potential conflict between accuracy and political

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130. *See* SNOWISS, *supra* note 18, at 172:

> Both the doubtful case rule for determinations of unconstitutionality and the 'not unconstitutional' standard for sustaining legislation tapped ineradicable differences in kind that originally and clearly separated fundamental law from ordinary law. . . . Thus, neither the doubtful case rule nor the 'not unconstitutional' standard is coherent or internally consistent for modern judicial review.

131. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

132. *See, e.g.*, Gary Lawson, *Thayer Versus Marshall*, 88 NW. U. L. REV. 221 (1993); *see also* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1274-79 (1996) (rejecting Thayerian deference toward federal statutes on the ground that "on balance we regard the arguments for formal judicial interpretative independence to be stronger than the arguments for a Thayerian interpretative posture").

For the same reason, Lawson has argued, judicial deference to prior judicial decisions through the role-specific norm of stare decisis is affirmatively unconstitutional. Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 194 (2001) ("It is affirmatively unconstitutional for federal courts to rely on precedent in constitutional cases."). *See also* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994) (developing argument). His reasoning would lead him, I believe, to conclude the same about intracase deference to a colleague's judgment. I think these role-specific norms can be distinguished from Thayerian deference, however, because at least the norms of stare decisis and collegiality involve deference from one Article III actor to another, and can both be defended as means of constructing a single best interpretation of a constitutional provision or principle from the perspective of the Article III judiciary writ large. *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 857-58 (1994) (explaining judiciary-centric rather than court-centric perspective on legal interpretation).

133. *See* Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 690-91 (2000).

deference in the public's face. It is one thing to lose a case after being told by the majority that your argument was not quite convincing enough; it feels like a very different thing to lose despite being told by the majority that they agree with your legal claim.

On the other hand, I can imagine an argument in favor of candor here. If a supermajority protocol replaced (rather than supplemented) an atomistic enforcement regime, then at least individual Justices could focus exclusively on determining the best interpretation of the Constitution, without trying to be statespersons at the same time. As Lawson might say, the judicial role could be purified, with Justices simply being the best law-declarers they can be, while letting the chips fall where the supermajority protocol places them. Put differently, the work being done by the two objectives of accuracy and deference are rendered more transparent when the latter is secured by a supermajority protocol rather than atomistic Thayerian deference.

The state systems show that neither approach is crazy: many choose the atomistic approach, a couple choose the protocol approach, and at least Nebraska chooses both at once. For someone committed to the norm of Thayerian deference, the question is how, not whether, to manage the inevitable tension between the legal and political impulses underlying judicial review.

V. BACK TO THE MODERN COURT

This last discussion might explain why the modern Court seems no longer committed to the Thayerian norm or anything approaching it—why the boilerplate "presumption of constitutionality" has apparently become a meaningless mantra. The best way to assuage the tension, at least on the visible surface, is simply to forgo the concerns about political consequences and apply judicial doctrines without flinching when they point to statutory invalidity.

I say "on the visible surface" because the modern Court uses yet a third device for mediating the tension: building deference into the very structure of constitutional doctrine. As explained earlier, some constitutional doctrines call for outright judicial abstention, and many others call for highly deferential "rationality review."[134] These doctrines generally do not treat federal statutes in any specially deferential way, and thus are not true to the Thayerian vision. But they do encompass deference to federal statutes, and in that sense they get the job done.

To be sure, Justices must think about the political consequences of judicial review when fashioning the doctrines in the first place, for example, when deciding whether or not to limit Congress to regulating "commercial activities" using its Commerce Clause authority. But at least once the doctrine is set, the Justices can apply it on a case-by-case basis without appearing to appeal to any guides other than the doctrine itself. Of the three mechanisms for incorporating Thayerian deference considered here, perhaps the Court's current approach, mouthing but not meaning the words of deference and just straightforwardly applying rules with the deference already built in, best masks the political component of judicial review. Given a Court seemingly bent on maintaining an aura of judicial supremacy, presupposing that it is uniquely competent to pronounce authoritative interpretations of the Constitution, this is an unsurprising choice.

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134. *Id.* at 683-86, 689-90.

But for those who would prefer turning back to a more "minimal model of judicial review,"[135] either for certain constitutional claims or perhaps even across the board, the choice is not an inevitable one.

135. Kramer, *supra* note 5, at 166.

APPENDIX

This Appendix reports the form, coverage, and minimum required consensus for the listed supermajority proposals. Despite intensive research efforts, due to both recording and indexing limitations this list may not include every original supermajority proposal ever introduced in Congress; and this list does not include every amendment offered to original proposals).

Proposal[136] and Sponsor	Form of Proposal[137]	Coverage[138]	Minimum Required Consensus[139]
41 ANNALS OF CONG. 28, 18th Cong., 1st Sess. 1823 (Sen. Johnson)	resolution asking Committee on Judiciary to devise legislation	federal or state laws	7 (of 7)
42 ANNALS OF CONG. 336, 18th Cong., 1st Sess. 1824 (Sen. Van Buren)	legislation	state law	5 (of 7); seriatim opinions required
42 ANNALS OF CONG. 2514, 18th Cong., 1st Sess. 1824 (Rep. Lechter)	legislation	state constitution or statute	5 (of 7); seriatim opinions required
42 ANNALS OF CONG. 2635, 18th Cong., 1st Sess. 1824 (Rep. Metcalfe)	legislation	state constitution or statute	2/3, of entire Court; equals 5 (of 7)
42 ANNALS OF CONG. 365, 18th Cong., 2d Sess. 1825 (Rep. Lechter)	legislation	state constitution or statute	5 (of 7); seriatim opinions required
2 REG. DEB. 1124, 19th Cong., 1st Sess. 1825 (Rep. Wickliffe)	legislation	federal statute or treaty, state constitution or statute	6 (of 10); presupposing Court expansion

136. Most of these proposals are original bills or resolutions, but a couple are amendments to bills previously introduced.

137. The three forms represented are legislation, constitutional amendments, and referrals to the Committee on the Judiciary to produce legislation.

138. Unless otherwise specified, the supermajority requirement applies only to federal constitutional challenges to the types of law listed here.

139. Where the required consensus is expressed as a fraction rather than a specific number of Justices, the denominator sometimes refers to the total number of Justices actually participating in the decision, and other times refers to the total number of Justices on the Court even if one or more is not participating. I use the notation "ambiguous denominator" where it is unclear if the prescribed percentage must be of the entire Court's members or only those participating in a given decision.

Proposal[136] and Sponsor	Form of Proposal[137]	Coverage[138]	Minimum Required Consensus[139]
3 REG. DEB. 423, 19th Cong., 1st Sess. 1826 (Sen. Rowan)	legislation	state constitution or statute	7 (of 10); presupposing Court expansion
3 REG. DEB. 775, 19th Cong., 2d Sess. 1827 (Rep. Wickliffe)	legislation	state law	5 (of 7); seriatim opinions required
H.R. 353, 20th Cong., 2d Sess. 1828 (Rep. Barbour)	legislation	state constitution or statute	greater than majority; equals 5 (of 7)
H.R. 1015, 39th Cong., 2d Sess. 1867 (Rep. Benjamin)	legislation	federal statute or authority	unanimous, of entire Court[140]
H.R. 30, 40th Cong., 1st Sess. 1867 (Rep. Williams)	legislation	federal statute or authority	unanimous, of entire Court[141]
Amendment to S. 163, 40th Cong., 2d Sess. 1868 (Sen. Wilson)	legislation	federal law	2/3, of entire Court[142]
Amendment to S. 163, 40th Cong., 2d Sess. 1868 (Sen. Williams)	legislation	federal statute or authority	unanimous, of entire Court[143]
H.R. 379, 40th Cong., 2d Sess. 1868 (Rep. Miller)	legislation	federal statute	2/3, of ambiguous denominator
S. 3179, 54th Cong., 1st Sess. 1896 (Sen. Allen)	legislation	federal statute	unanimous, of ambiguous denominator
S. 3222, 62nd Cong., 1st Sess. 1911 (Sen. Bourne)	legislation	federal law, state law, or state constitution	unanimous, of entire Court; equals 9 (of 9)
S.J. Res. 6, 63rd Cong., 1st Sess. 1913 (Sen. Reed)	constitutional amendment	federal or state statute	2/3, of entire Court; equals 6 (of 9)

140. At this time, Congress had recently reduced the number of Supreme Court Justice positions from ten to seven. *See* Act of July 23, 1866, ch. 210, 14 Stat. 209. But Article III's life tenure guarantee meant that the Court would actually shrink from ten to seven Justices only with the passage of time due to death or resignation. So when this unanimity proposal was introduced, the absolute size of the required consensus was contingent. The number of Justices did in fact fall to eight by April 1869, when Congress increased the size of the Court back up to nine Justices. *See* Act of April 10, 1869, ch. 22, 16 Stat. 44.

141. *See supra* note 140.

142. *See supra* note 140.

143. *See supra* note 140.

Proposal[136] **and Sponsor**	**Form of Proposal**[137]	**Coverage**[138]	**Minimum Required Consensus**[139]
H.R.J. Res. 39, 65th Cong., 1st Sess. 1917 (Rep. Hayden)	constitutional amendment	coverage ambiguous: "no law shall be held unconstitutional"	all but two Justices, of ambiguous denominator
H.R. 12415, 65th Cong., 2d Sess. 1918 (Rep. Dillon)	lcgislation	coverage ambiguous: "no law or congressional act"	3/4, of participating Justices
H.R.J. Res. 16, 66th Cong., 1st Sess. 1919 (Rep. Hayden)	constitutional amendment	coverage ambiguous: "no law shall be held unconstitutional"	all but two Justices, of ambiguous denominator
H.R.J. Res. 15, 67th Cong., 1st Sess. 1921 (Rep. Hayden)	constitutional amendment	coverage ambiguous: "no law shall be held unconstitutional"	all but two Justices, of ambiguous denominator
H.R. 9755, 67th Cong., 2d Sess. 1922 (Rep. McSwain)	legislation	federal or state statute	7 (of 9)
S. 4483, 67th Cong., 4th Sess. 1923 (Sen. Borah)	legislation	federal statute	7 (of 9)
H.R. 14209, 67th Cong., 4th Sess. 1923 (Rep. Woodruff)	legislation	federal statute	7 (of 9)
H.R.J. Res. 436, 67th Cong., 4th Sess. 1923 (Rep. Frear)	legislation	federal statute	grants Congrcss power to determine number of Justices required
S. 1197, 68th Cong., 1st Scss. 1923 (Sen. Borah)	legislation	federal or state statute	7 (of 9)
H.R. 697, 68th Cong., 1st Sess. 1923 (Rep. Woodruff)	legislation	federal statute	7 (of 9)
H.R. 721, 68th Cong., 1st Sess. 1923 (Rep. LaGuardia)	legislation	federal or state statute	7 (of 9)
H.R. 6762, 69th Cong., 1st Sess. 1926 (Rep. Woodruff)	legislation	federal statute	7 (of 9)
S.J. Res. 162, 71st Cong., 2d Sess. 1930 (Sen. Brookhart)	legislation	federal statute	unanimous, of ambiguous denominator
H.R.J. Res. 277, 74th Cong., 1st Sess. 1935 (Rep. Ramsay)	constitutional amendment (specifying ratification by state convention)	federal statute	3/4, of entire Court; equals 7 (of 9)

Proposal[136] and Sponsor	**Form of Proposal[137]**	**Coverage[138]**	**Minimnm Reqnired Consensns[139]**
H.R. 7997, 74th Cong., 1st Sess. 1935 (Rep. Ramsay)	legislation	federal or state statute	7 (of 9)
H.R. 8054, 74th Cong., 1st Sess. 1935 (Rep. Ramsay)	legislation	federal or state statute	7 (of 9)
H.R. 8100, 74th Cong., 1st Sess. 1935 (Rep. Crosser)	legislation	federal or state statute	3/4, of ambiguous denominator
H.R. 8123, 74th Cong., 1st Sess. 1935 (Rep. Young)	legislation	federal or state statute	3/4, of ambiguous denominator
H.R. 8168, 74th Cong., 1st Sess. 1935 (Rep. Monaghan)	legislation	federal or state statute	unanimous, of ambiguous denominator
H.R.J. Res., 287, 74th Cong., 1st Sess. 1935 (Rep. Dobbins)	constitutional amendment	exercise of congressional power	2/3, of ambiguous denominator
S.J. Res. 149, 74th Cong., 1st Sess. 1936 (Sen. Norris)	constitutional amendment	federal statute	2/3, of ambiguous denominator
S. 3739, 74th Cong., 2d Sess. 1936 (Sen. Norbeck)	legislation	federal statute	7 (of 9)
S. 3912, 74th Cong., 2d Sess. 1936 (Sen. Pope)	legislation	federal statute	greater than 2/3, of participating Justices
H.R. 10196, 74th Cong., 2d Sess. 1936 (Rep. Gillette)	legislation	federal statute	7 (of 9)
S. 437, 75th Cong., 1st Sess. 1937 (Sen. Pope)	legislation	federal statute	Greater than 2/3, of participating Justices
S. 1098, 75th Cong., 1st Sess. 1937 (Sen. Gillette)	legislation	federal statute	7 (of 9); no consideration of precedent
S.J. Res. 98, 75th Cong., 1st Sess. 1937 (Sen. O'Mahoney)	constitutional amendment	federal or state law	2/3, of ambiguous denominator; seriatim opinions required; each Justice must find law unconstitutional "beyond a reasonable doubt"
S.J. Res. 100, 75th Cong., 1st Sess. 1937 (Sen. Andrews)	constitutional amendment	federal statute	2/3, of entire Court; equals 7 (of 11, based on proposed Court expansion)

Proposal[136] and Sponsor	**Form of Proposal[137]**	**Coverage[138]**	**Minimum Required Consensus[139]**
H.R. 13857, 85th Cong., 2d Sess. 1958 (Rep. Abbitt)	legislation	state statute; claimed repugnancy to Federal Constitution, treaty, or law	unanimous, of participating Justices
H.R. 4565, 86th Cong., 1st Sess. 1959 (Rep. Abbitt)	legislation	state constitution or statute; claimed repugnancy to Federal Constitution, treaty, or law	unanimous, of participating Justices
H.R. 4659, 86th Cong., 1st Sess. 1959 (Rep. Tuck)	legislation	state constitution or statute; claimed repugnancy to Federal Constitution, treaty, or law	unanimous, of participating Justices
H.R. 11007, 90th Cong., 1st Sess. 1967 (Rep. Erlenborn)	legislation	federal statute, or state constitution or statute	6 (of 9)
H.R.J. Res. 1149, 90th Cong., 2d Sess. 1968 (Rep. Rogers)	constitutional amendment	federal or state statute	2/3, of ambiguous denominator
H.R.J. Res. 1172, 90th Cong., 2d Sess. 1968 (Rep. Pool)	constitutional amendment	federal or state statute	2/3, of ambiguous denominator
H.R.J. Res. 1369, 90th Cong., 2d Sess. 1968 (Rep. Teague)	constitutional amendment	federal or state statute	2/3, of ambiguous denominator
H.R.J. Res. 1469, 90th Cong., 2d Sess. 1968 (Rep. Betts)	constitutional amendment	any decision involving interpretation of federal or state constitution	2/3, of ambiguous denominator
H.R.J. Res. 94, 91st Cong., 1st Sess. 1969 (Rep. Teague)	constitutional amendment	federal or state statute	2/3, of ambiguous denominator
H.R.J. Res. 193, 91st Cong., 1st Sess. 1969 (Rep. Cabell)	constitutional amendment	fcderal statute, or state constitution or statute	2/3, of entire Court; equals 6 (of 9)
H.R.J. Res. 557, 91st Cong., 1st Sess. 1969 (Rep. Nichols)	constitutional amendment	federal or state statute	2/3, of ambiguous denominator
H.R.J. Res. 700, 91st Cong., 1st Sess. 1969 (Rep. Devine)	constitutional amendment	federal statute, or state constitution or statute	2/3, of entire Court; equals 6 (of 9)

Proposal[136] and Sponsor	**Form of Proposal[137]**	**Coverage[138]**	**Minimum Required Consensus[139]**
H.R.J. Res. 758, 91st Cong., 1st Sess. 1969 (Rep. King)	constitutional amendment	federal statute, or state constitution or statute	2/3, of entire Court; equals 6 (of 9)
H.R.J. Res. 293, 92d Cong., 1st Sess. 1971 (Rep. Teague)	constitutional amendment	federal or state statute	2/3, of ambiguous denominator
H.R.J. Res. 323, 93d Cong., 1st Sess. 1973 (Rep. Teague)	constitutional amendment	federal or state statute	2/3, of ambiguous denominator
H.R.J. Res. 84, 94th Cong., 1st Sess. 1975 (Rep. Teague)	constitutional amendment	federal or state statute	2/3, of ambiguous denominator
H.R. 4109, 96th Cong., 1st Sess. 1979 (Rep. Dornan)	legislation	federal or state law; applies only to Supreme Court's appellate jurisdiction	7 (of 9)[144]
H.R. 5182, 97th Cong., 1st Sess. 1981 (Rep. Dornan)	legislation	federal or state law; applies only to Supreme Court's appellate jurisdiction	7 (of 9)[145]

144. Interestingly, these proposals did not specify that the Court could not *invalidate* a federal or state law absent consensus by the prescribed seven-Justice supermajority. Rather, the proposal specified that any federal or state law "which *is declared* invalid under the Constitution . . . *shall not be* invalid" absent the prescribed consensus. H.R. 4109, 96th Cong. (1979); H.R. 5182, 97th Cong. (1981) (emphasis added). Whatever that means . . . .

145. *See supra* note 144.