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"UNCONSTITUTIONAL BEYOND A REASONABLE DOUBT" – A MISLEADING MANTRA THAT SHOULD BE GONE FOR GOOD

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Abstract: For a century, Washington State Supreme Court opinions periodically have intoned that the body will not invalidate a statute on constitutional grounds unless it is "unconstitutional beyond a reasonable doubt." This odd declaration invokes an evidentiary standard of proof as a rule of decision for a legal question of constitutionality, and it confuses practitioners and the public alike. "Unconstitutional beyond a reasonable doubt" is not peculiar to Washington State. Indeed, it began appearing in state court decisions in the early nineteenth century and, rarely, in opinions of the United States Supreme Court. But the use of the phrase rapidly increased after an 1893 *Harvard Law Review* article by Professor James Bradley Thayer, who promoted it as a constitutional rule or standard because he wanted to reduce judicial rejection of progressive legislation. In Washington State, "unconstitutional beyond a reasonable doubt" increased steadily during and after the 1930s but remains controversial. In two opinions, *Island County v. State* in 1998, and *School Districts' Alliance v. State* in 2010, members of the Washington State Supreme Court wrestled with whether it makes sense to invoke an evidentiary standard in constitutional dialogue. In *Island County*, some asserted that the declaration only meant the Court would not overrule the legislature unless the judges were fully convinced of unconstitutionality after a searching analysis. One called it "simply a hortatory expression" meant as a nod to elected lawmakers. In split *School Districts' Alliance* opinions, a majority of the justices criticized the practice. This short Essay argues that "unconstitutional beyond a reasonable doubt" should be permanently erased from the Washington State Supreme Court's vocabulary because it confuses people, is perhaps a bit disingenuous, and judges should say what they mean. Finally, the Court regularly uses other more workable standards, and those should replace "unconstitutional beyond a reasonable doubt" forever.

INTRODUCTION

Every lawyer has a professional pet peeve. Mine is a purported standard of constitutional application that I find senseless, misleading, and even a bit disingenuous.

Washington State Supreme Court opinions periodically assert that the justices will not declare a statute unconstitutional unless they have determined the measure is "unconstitutional beyond a reasonable doubt." For years, I found this puzzling. Everyone is familiar with "beyond a reasonable doubt" as the standard required to convict a criminal defendant. But why would an appellate court apply the factual standard

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for guilt to a pure question of law? Is a contentious constitutional question ever resolved "beyond a reasonable doubt"? How can a five-vote majority opinion declare a legislative action unconstitutional "beyond a reasonable doubt" in the face of a thoughtful, well-reasoned dissent that merely failed to garner that fifth vote? Is the majority suggesting that their minority colleagues are unreasonable numbskulls?

Washington State jurists have not invoked this standard without thought—they debated it robustly in 1998 in *Island County v. State*[1] and twelve years later in S*chool Districts' Alliance v. State*.[2] In *Island County*, Justice Richard Guy declared that unconstitutionality "beyond a reasonable doubt" was *not* an evidentiary standard but instead voiced the principle that the Washington State Supreme Court was "hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution."[3]

So . . . why doesn't the Court say what it means, drop "unconstitutional beyond a reasonable doubt," and just stick with "fully convinced after a searching legal analysis"?

I used to think the unconstitutional-beyond-a-reasonable-doubt concept was an odd fluke of Washington courts, some mantra that had been thoughtlessly dropped into a decision and then invoked from time to time when the Washington State Supreme Court wanted to remind legislators and the public that judges do not void statutes without a really good reason.

But I was wrong. The unconstitutional-beyond-a-reasonable-doubt jingle turns out to have a long history, back to 1893 and beyond. While it never took much hold at the federal level, many state courts continue to recite the "doctrine."

In this short Essay, I recount the origin of unconstitutional-beyond-a-reasonable-doubt in an 1893 law review article by James Bradley Thayer, a progressive Harvard law professor who wanted to trim the sails of activist conservative justices on the United States Supreme Court. We will see how Professor Thayer's theory influenced the judicial discretion thinking of a handful of colleagues, students, and acolytes including Oliver Wendall Holmes, Jr., Louis Brandeis, and Felix Frankfurter. Later commentators have shown that the "standard" did not stand the test of time. It has been shredded by legal heavyweights like Yale Law School's Charles L. Black, Jr. in 1960,[4] and federal appeals court Judge Richard A.

1. 135 Wash. 2d 141, 955 P.2d 377 (1998).
2. 170 Wash. 2d 599, 244 P.3d 1 (2010).
3. *Island Cnty.*, 135 Wash. 2d at 147, 955 P.2d at 380.
4. CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY

Posner in 2012.[5] While "unconstitutional beyond a reasonable doubt" continues to pop up like a zombie at the state court level, I hope to convince you that it deserves a permanent burial and replacement with the standard the Supreme Court of Washington really uses: a statute is invalidated when the court is "fully convinced, after a searching legal analysis" that the law is unconstitutional.

I. JAMES BRADLEY THAYER: GOOD MAN, BAD IDEA

James Bradley Thayer (1831–1902) was an enlightened New Englander through and through. His father was a newspaper publisher and friend of the abolitionist William Lloyd Garrison.[6] As a child, the poet John Greenleaf Whittier lodged with Thayer's family.[7] Thayer went to Harvard and then Harvard Law School, graduating at the head of his class.[8] As a young Boston lawyer, he married Ralph Waldo Emerson's niece and in 1871 took Emerson on a pleasure and lecture tour of the far west, visiting San Francisco and Yosemite Valley.[9] That jaunt resulted in a delightful little book, *A Western Journey with Mr. Emerson*.[10] Thayer belonged to Boston's famous Metaphysical Club, the philosophical debating society frequented by William James, Charles Sanders Peirce, and Thayer's young law firm associate Oliver Wendall Holmes, Jr.[11] He contributed to leading progressive literary and political magazines,[12] advocated for Native American rights,[13] and was active with other Boston intellectuals in the "Mugwump" movement of progressive Republicans who switched to the Democratic Party.[14]

193–209 (1960). For a variety of views on the validity and impact of Thayer's work, see *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. 1 (1993). Other thoughtful articles on the topic that are not otherwise discussed in this Essay include Vicki C. Jackson, *Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality*, 130 HARV. L. REV. 2348 (2017); Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656 (2000); Maimon Schwarzschild, *Pluralism, Conversation, and Judicial Restraint*, 95 NW. U. L. REV. 961 (2001).

5. Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 533–50 (2012).

6. Jay Hook, *A Brief Life of James Bradley Thayer*, 88 NW. U. L. REV. 1, 1 (1993).

7. *Id.*

8. *Id.* at 2.

9. *Id.* at 4; JAMES BRADLEY THAYER, A WESTERN JOURNEY WITH MR. EMERSON 46, 53 (1884).

10. *See* Hook, *supra* note 6, at 4 n.20 (citing THAYER, *supra* note 9).

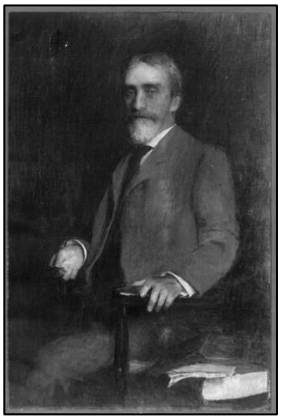
11. *Id.* at 4.

12. *Id.* at 5.

13. Wallace Mendelson, *The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71, 71 (1978); Hook, *supra* note 6, at 7.

14. Hook, *supra* note 6, at 6.

Figure 1:
James Bradley Thayer 1831–1902[15]



As a lawyer, Thayer successfully argued for government eminent domain rights in the public interest, environmental and work safety standards, and public control of limitations on privately-owned utilities.[16] As a scholar, he collaborated with Holmes on the twelfth edition of Kent's famous *Commentaries on American Law*.[17] In 1872, Dean Christopher Columbus Langdell recruited him onto the Harvard Law School faculty.[18] There, Thayer became a beloved teacher and a scholar on a variety of subjects, writing the first casebook on American constitutional law and the preliminary version of an evidence treatise later completed by his student John Henry Wigmore.[19] Another of his star pupils was Louis Brandeis, who taught Thayer's evidence class when the latter was in England studying the British Constitution and parliamentary democracy.[20] Brandeis, a crusading progressive lawyer and future United States Supreme Court justice, became a close friend of Thayer's.[21]

James Bradley Thayer was not a detached ivory-tower intellectual. He was not conservative—indeed, he was an engaged, politically active

15. *James Bradley Thayer, 1831–1902*, LIBR. OF CONG., https://www.loc.gov/pictures/item/2004674990/ [https://perma.cc/3GKR-C7HU].

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* (citing JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW (1904)); *see also* Mendelson, *supra* note 13, at 71.

20. *See* Hook, *supra* note 6, at 5.

21. Mendelson, *supra* note 13, at 73–74, 76.

progressive. But in 1893 he authored a piece in the *Harvard Law Review* that Felix Frankfurter labeled the "most important single essay" on American constitutional law.[22] Thayer's piece, *The Origin and Scope of the American Doctrine of Constitutional Law*,[23] was written as a counter-attack against the activist, pro-business, anti-labor, and anti-regulatory majority on the United States Supreme Court.[24] This discourse by a progressive, public-minded law professor—just the sort of fellow I like—forcefully promoted my unconstitutional-beyond-a-reasonable-doubt pet peeve. What's going on here?

In his 1893 article, Thayer attempted to reconstruct American legal history to demonstrate the existence of a federal doctrine that in fact had never been consistently established or applied. In short, he argued that the Supreme Court would not strike down a federal statute unless the jurists were convinced that the measure was "unconstitutional beyond a reasonable doubt."[25] His argument relied on the Supreme Court's respect for Congress, and was based on the presumption that the lawmakers would thoughtfully consider the constitutionality of proposed legislation.[26] Thayer urged that when considering the constitutionality of a statute, the Supreme Court's ultimate job "is not [to determine] what is the true meaning of the constitution, but whether legislation is sustainable or not."[27] He observed that a legislative body often has "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."[28] Thayer concluded that judges can overturn a legislative act as unconstitutional "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."[29]

Thayer appears to have proposed this beyond-a-reasonable-doubt doctrine because he hoped that if it gained acceptance, the United States Supreme Court would refrain from interfering with Congressional acts in

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22. SANFORD BYRON GABIN, JUDICIAL REVIEW AND THE REASONABLE DOUBT TEST 5 (1980) (citation omitted).

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

24. *See* Hook, *supra* note 6, at 7.

25. Thayer, *supra* note 23, at 151.

26. *See id.* at 136, 142.

27. *Id.* at 150 (emphasis omitted).

28. *Id.* at 144.

29. *Id.*

aid of disadvantaged groups,[30] such as the Court's 1883 invalidation of federal civil rights laws in *The Civil Rights Cases*.[31] If that was Thayer's goal, he must have been disappointed when, for example, the anti-regulatory majority on the Supreme Court in 1895 demolished the Sherman Antitrust Act's application to the manufacturing sector.[32] But he vigorously contended in his *Harvard Law Review* article that American courts historically had taken an extremely deferential approach to the constitutionality of legislative enactments—notwithstanding the much better known *Marbury v. Madison*[33] doctrine.[34]

Remember that in *Marbury*, Chief Justice Marshall held for a unanimous Court that it was "emphatically the province and duty of the judicial department to say what the law is,"[35] that a written constitution is "superior, paramount law" that supersedes an ordinary statute,[36] and therefore,

> if both the [statute] and the constitution apply to a particular case . . . the court must either decide that case conformably to the [statute], disregarding the constitution; or conformably to the constitution, disregarding the [statute]; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.[37]

In other words, Marshall reasoned that the Court should analyze a statute in light of the superior Constitution and make a reasoned judgment as to whether the statute is consistent with that Constitution. And that is what American judges regularly do.

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30. *See* Hook, *supra* note 6, at 6.

31. 109 U.S. 3 (1883). The *Civil Rights Cases* were five individual cases challenging the 1875 Civil Rights Act. That statute had outlawed discrimination on the basis of race, color, or previous condition of servitude in the use of transportation, lodging, and amusement facilities. *Id.* at 9. In its decision, Supreme Court ruled that the Thirteenth and Fourteenth Amendments applied only to "state action" and not to activities of private individuals or entities. *Id.* at 11. This substantially reduced the effectiveness of Congress to enforce that amendment through statutory protections for former slaves and others.

32. United States v. E. C. Knight Co., 156 U.S. 1, 12–18 (1895).

33. 5 U.S. (1 Cranch) 137 (1803).

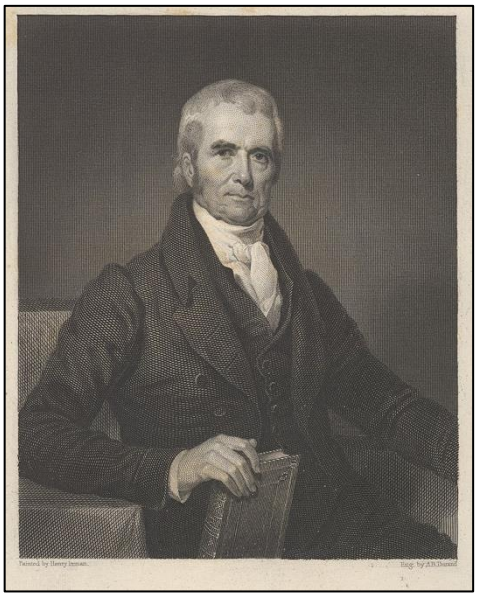
34. *Id.* at 177.

35. *Id.*

36. *Id.*

37. *Id.* at 178.

Figure 2:
Chief Justice John Marshall 1755–1835[38]



But Thayer relegated *Marbury v. Madison* to a footnote and dismissed it as "overpraised," undercutting Marshall's rationale for judicial review.[39] He then tried to show that later jurists had supplemented and corrected *Marbury* by imposing a "rule of administration" that limited judicial annulment of Congressional statutes to situations where the unconstitutionality was so clear that it was not open to rational question.[40] He cited a Pennsylvania decision from 1811 to the effect that "an Act of the legislature is not to be declared void unless the violation of the

38. *File: Chief Justice John Marshall*, WIKIMEDIA COMMONS, https://commons.wikimedia.org/w/index.php?curid=60889951 [https://perma.cc/YF4J-CKHN].

39. Thayer, *supra* note 23, at 130 n.1. For a lively critique of Thayer's approach to *Marbury v. Madison*, see Gary Lawson, *Thayer Versus Marshall*, 88 NW. U. L. REV. 221, 222 (1993) (asserting that Thayer "affirmatively ridiculed *Marbury*'s argument for judicial review" without good reason).

40. *See* Thayer, *supra* note 23, at 144. Interestingly, Thayer did not contend that his restrictive "rule of administration" applied to United States Supreme Court review of state laws because the federal high court was not a coordinate department at the same level as a state legislature. *See id.* at 152–55. Thus, the Supreme Court could balance a state statute against the language of the Constitution and freely overturn the judgment of state legislators. *Id.* He did suggest it was plausible that state supreme courts could appropriately use his deferential "rule of administration" when examining their own state legislatures' enactments. *Id.* at 155.

constitution is so manifest as to leave no room for reasonable doubt."[41] He quoted from an 1808 opinion of the Supreme Court of Georgia suggesting that if it were "doubtful whether the legislature [has or has not] trespassed on the constitution, a conflict ought to be avoided" because the legislature might have been correct.[42] Thayer listed an 1812 South Carolina case opining that the validity of a law should not be questioned unless it is "so obviously repugnant to the constitution" that "all men of sense and reflection" can perceive that repugnancy.[43] Finally, he relied on the respected Massachusetts jurist Lemuel Shaw, who in 1834 declared that "courts will . . . never declare a statute void unless the nullity and invalidity are placed beyond reasonable doubt."[44]

Thayer offered these and a handful of other state cases that used the unconstitutional-beyond-a-reasonable-doubt jingle or something close to it.[45] He also mentioned a United States Supreme Court decision in which Chief Justice Waite remarked in 1878 that:

> 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.[46]

Although Waite's language was referred to in several state court cases, Thayer did not cite any United States Supreme Court cases in which the expression "unconstitutional beyond a reasonable doubt" had been adhered to by a majority of justices.[47] As Professor Charles Black documented in a 1960 book,[48] Thayer misrepresented the few Supreme Court cases he discussed, and there was a

> striking *absence* of precedents in which Thayer's rule actually was *applied* . . . . If Thayer's "rule" really had been a "rule," you would expect to find a torrent of such cases. You will not find

41. *Id.* at 140 (citing Commonwealth *ex rel.* O'Hara v. Smith, 4 Binn. 117, 123 (Pa. 1811)).

42. *Id.* at 141 (alteration in original) (citing Grimball v. Ross, T.U.P. Charlton R. 175, 178 (Liberty Cnty. Super. Ct. 1808)).

43. *Id.* at 142 (citing Byrne's Adm'rs v. Stewart's Adm'rs, 3 S.C. Eq. (3 Des. Eq.) 466, 477 (1812)).

44. *Id.* at 146 (alteration in original) (citing *In re* Wellington, 33 Mass. (16 Pick.) 87, 95 (1834)).

45. *See id.* at 142 n.1.

46. *Id.* (quoting The Sinking-Fund Cases, 99 U.S. 700, 718 (1878)).

47. *Id.* Thayer quoted Justice Washington's opinion in *Ogden v. Saunders*, 25 U.S. 213, 270 (1827), a split decision from which Chief Justice Marshall dissented—his only dissent in Supreme Court history because of his strong belief in the United States Supreme Court presenting a united front. *See* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 25 (5th ed. 2010); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888, at 150–51 (1985).

48. BLACK, *supra* note 4, at 196–99.

> them cited by Thayer. I venture to say you will find very few if any of them anywhere else.[49]

Most of the United States Supreme Court majority or lead opinions that Thayer did cite used a different sort of language. Thayer recounted that in 1796, Justice Samuel Chase stated that if the Court possessed the power to declare a statute unconstitutional, he would not exercise that power "but in a very clear case,"[50] i.e., a clearly unconstitutional or "clarity" approach. Thayer also noted that Justice William Paterson in 1800 had suggested that for "this Court to pronounce any law void, it must be a clear and unequivocal breach of the constitution, not a doubtful and argumentative implication."[51] Thayer further invoked Thomas Cooley's prominent nineteenth century treatise on constitutional limitations.[52] But when one examines what Cooley actually proposed as a guideline, it was simply that legislators should carefully resolve their own doubts about the constitutionality of proposed legislation and that "the courts should sustain legislative action when not clearly satisfied of its invalidity."[53] Cooley also wrote that it was "the duty of the court to uphold a statute when the conflict between it and the constitution is not clear," and that a court "if possible, must give the statute such a construction as will enable it to have effect."[54]

But Chase, Paterson, and Cooley's arguments—essentially that statutes should only be found unconstitutional in crystal-clear cases—are not the same as stating that laws should be overturned only if judges find them "unconstitutional beyond a reasonable doubt" or only if the unconstitutionality is "so clear that it is not open to rational question." It is difficult to find a federal or state supreme court split decision where the dissenters' views are so frivolous that they are without any rational arguments whatsoever.

Professor (and retired federal appeals court judge) Richard A. Posner has written a forceful take-down of Thayer's unconstitutional-beyond-a-reasonable-doubt.[55] He suggests that Thayer's idea initially gained some

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49. *Id.* at 196 (emphasis in original).

50. Thayer, *supra* note 23, at 141 (quoting Hylton v. United States, 3 U.S. 171, 175 (1796) (emphasis omitted)).

51. Cooper v. Telfair, 4 U.S. 14, 19 (1800); Thayer, *supra* note 23, at 141.

52. Thayer, *supra* note 23, at 142 n.1 (citing THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 216 (6th ed. 1890)).

53. COOLEY, *supra* note 52, at 217.

54. *Id.* at 218.

55. Posner, *supra* note 5. Thayer receives more sympathetic treatment from Sanford Byron Gabin. *See* GABIN, *supra* note 22.

credence because "there were no cogent theories of how to decide a difficult case."[56] But Posner pointed out that "once you embraced [Thayer's approach], you could not explain why a law would ever be declared unconstitutional."[57] While Thayer had admirers such as Holmes, Brandeis, and Frankfurter, Posner demonstrated how each of them, when serving on the Supreme Court, were altogether inconsistent in their "Thayerism" and in practice applied other deference standards, tending to defer to Congress on regulatory actions while overturning national and state laws that interfered with civil rights and liberties.[58] Posner observed that judicial deference diminished during the Warren Court years,[59] but acquiescence to lawmakers was not revived by subsequent conservative justices who wanted to roll back Warren Court decisions and sustain a rightward agenda.[60] Posner pointed out that despite their claims of judicial restraint and deference to elected legislators, none of the conservatives on the United States Supreme Court would say, "I think the original meaning of the Second Amendment is that people have a right to own guns for self-defense, and the challenged statute . . . doesn't permit that, but reasonable persons might disagree with my reading of history, so I'll vote to uphold the enactment."[61]

In other words, no one on America's contemporary high court applies Thayer's unconstitutional-beyond-a-reasonable-doubt theory. And it turns out that, despite the lip service given to the concept when a statute is overturned, no one on the Washington State Supreme Court really applies Thayer's theory either.

II. THAYERISM IN WASHINGTON STATE (AND WHY IT SHOULD VANISH)

The last United States Supreme Court opinion that voiced the "unconstitutional beyond a reasonable doubt" standard (or something close to it) was in 1958, when Justice William O. Douglas alluded to Chief Justice Waite's 1878 remark that "[e]very possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt."[62] While two earlier United States Supreme

56. Posner, *supra* note 5, at 522.

57. *Id.*

58. *Id.* at 525–31.

59. *Id.* at 546.

60. *Id.* at 547.

61. *Id.* at 537.

62. Fed. Hous. Admin. v. Darlington, Inc., 358 U.S. 84, 90–91 (1958) (quoting The Sinking-Fund Cases, 99 U.S. 700, 718 (1878)).

Court opinions used similar language,[63] none used the exact terms "beyond a reasonable doubt." The language appeared in two Supreme Court opinions before Thayer's article (both by Justice John Harlan),[64] and just nine times after 1893—all save one in dissents.[65]

But Thayerism definitely survives at the state level—at least in words. University of Mississippi Professor Christopher R. Green has documented the use of unconstitutional-beyond-a-reasonable-doubt at least once in almost every state since 1811.[66] I have reviewed the recent use of the formulation in each state since 2000, and in this century, high court opinions in thirty-six states included a statement that the relevant court has applied (or said it applied) a version of unconstitutional-beyond-a-reasonable-doubt.[67]

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63. The United States Supreme Court opinions voiced the concept of unconstitutional beyond a reasonable (or rational) doubt in just two opinions before Waite's use of the formulation: *Ogden v. Saunders*, 25 U.S. 213, 270 (1827) (Washington, J., majority opinion), and *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 531 (1870).

64. The Civil Rights Cases, 109 U.S. 3, 27 (1883) (Harlan, J., dissenting) (citing *The Sinking-Fund Cases*, 99 U.S. at 718); Powell v. Pennsylvania, 127 U.S. 678, 684 (1888) (Harlan, J., majority opinion) (citing *The Sinking-Fund Cases*, 99 U.S. at 718).

65. Cases mentioning the formulation after Thayer's article included: *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 699 (1895) (Jackson, J., dissenting); *Scott v. Donald*, 165 U.S. 58, 106 (1897) (Brown, J., dissenting) (citing *The Sinking-Fund Cases*, 99 U.S. at 718); *Howard v. Illinois Central Railroad Co.*, 207 U.S. 463, 510–11 (1908) (Moody, J., dissenting); *Detroit United Railway Co. v. Detroit*, 248 U.S. 429, 442 (1919) (Clarke, J., dissenting); *United States v. Constantine*, 296 U.S. 287, 299 (1935) (Cardozo, J., dissenting); *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266, 278 (1936) (Cardozo, J., dissenting); *Ashton v. Cameron County Water Improvement District*, 298 U.S. 513, 540 (1936) (Cardozo, J., dissenting); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 354–55 (1936) (Brandeis, J., concurring); and *Federal Housing Administration v. Darlington*, 358 U.S. 84, 90–91 (1958). The last and most recent decision, *Federal Housing Administration v. Darlington*, was based almost entirely on statutory construction, upholding a statute and regulations banning FHA-financed apartments from being rented to transients. 358 U.S. 84, 85–91 (1958). The "beyond a rational doubt" language appears in Justice Douglas' opinion as a throw-away line. *Id.* at 91.

66. *See* Christopher R. Green, *Clarity and Reasonable Doubt in Early State-Constitutional Judicial Review*, 57 S. TEX. L. REV. 169, 179–82 (2015). The earliest use of the formulation in state court was in *Commonwealth ex rel. O'Hara v. Smith*, 4 Binn. 117 (Pa. 1811). *See* Green, *supra*, at 179.

67. *See* City of Daphne v. City of Spanish Fort, 853 So. 2d 933, 943 (Ala. 2003); *In re* Leon G., 59 P.3d 779, 783 (Ariz. 2002); TABOR Found. v. Reg'l Transp. Dist., 2018 CO 29, ¶¶ 12–13, 416 P.3d 101, 104; State v. McCleese, 215 A.3d 1154, 1178 (Conn. 2019); Fla. Dep't of Revenue v. Am. Bus. USA Corp., 191 So. 3d 906, 911 (Fla. 2016); State v. Pacquing, 389 P.3d 897, 902 (Haw. 2016); State v. Hernandez-Lopez, 639 N.W.2d 226, 233 (Iowa 2002); State v. Bennett, 125 P.3d 522, 525 (Idaho 2005); State v. Timbs, 134 N.E.3d 12, 23 (Ind. 2019); Hall v. Dillon Cos., 189 P.3d 508, 517 (Kan. 2008); Shepherd v. Shidler, 2015-1750 (La. 1/27/16), 209 So. 3d 752, 766, *aff'd on reh'g* (May 2, 2016); Goggin v. State Tax Assessor, 2018 ME 111 ¶ 20, 191 A.3d 341, 346–47; Atwater v. Comm'r of Educ., 957 N.E.2d 1060, 1067 (Mass. 2011); People v. Carp, 852 N.W.2d 801, 813 (Mich. 2014); Soohoo v. Johnson, 731 N.W.2d 815, 821 (Minn. 2007); Mauldin v. Branch, 2002-CA-00146-SCT (¶ 21) (Miss. 2003), 866 So. 2d 429, 435; Hernandez v. Bd. of Cnty. Comm'rs, 2008 MT 251, ¶ 15, 345 Mont. 1, 6, 189 P.3d 638, 642–43; State v. Hynek, 640 N.W.2d 1, 5 (Neb. 2002); Miller v. Burk, 188 P.3d 1112, 1123 (Nev. 2008); Hynes v. Hale, 776 A.2d 722, 726 (N.H. 2001); Commc'ns

There are other standards for overturning statutes, and some bear a resemblance to what appeals courts actually *do* when faced with an assertion that an enactment is unconstitutional. Professor Green has shown how the states intertwine unconstitutional-beyond-a-reasonable-doubt with other formulations for presuming the constitutionality of statutes.[68] The oldest and most popular approach has been the clarity approach (requiring a clear, plain, manifest or evident instance of unconstitutionality).[69] But let's zero in on Washington State, where the Washington State Supreme Court voices a variety of standards, often within the same opinion.

The earliest Washington State cases referencing Cooley's admonition about caution and resolving all doubts before overturning statutes were decided early in the state's history in *Board of Directors of Middle Kittitas Irrigation District v. Peterson*[70] and *State ex rel. School District No. 24 of Snohomish County v. Grimes*.[71] In 1894 a year after *Grimes*, the Washington State Supreme Court in *State ex rel. McReavy v. Burke*[72] voiced the more common "clarity" formulation.[73] That opinion stated that "it is well settled that the courts will approach [questions of constitutional invalidity] with the greatest caution, and . . . acts of the legislature will not be held void or unconstitutional unless the question is directly involved, and the conflict clearly apparent."[74]

There was an uptick in the explicit use of "beyond a rational doubt" and "beyond a reasonable doubt" as Washington moved into the Progressive Era of the early twentieth century and the Washington State

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Workers of Am. v. N.J. Civ. Serv. Comm'n, 191 A.3d 643, 661 (N.J. 2018); Rodriguez v. Brand W. Dairy, 2016-NMSC-029 ¶ 10, 378 P.3d 13, 19; Cnty. of Chemung v. Shah, 66 N.E.3d 1044, 1051 (N.Y. 2016); State v. Grady, 831 S.E.2d 542, 553 (N.C. 2019); State v. Blue, 2018 ND 171 ¶ 19, 915 N.W.2d 122, 128; State v. Lowe, 112 Ohio St. 3d 507, 2007-Ohio-606, 861 N.E.2d 512, at ¶ 17; Shah v. City of Okla. City, 2019 OK 65, ¶ 7, 451 P.3d 161, 166; Mosby v. Devine, 851 A.2d 1031, 1045 (R.I. 2004); *In re* Treatment & Care of Luckabaugh, 568 S.E.2d 338, 334 (S.C. 2002); Meinders v. Weber, 2000 SD 2, ¶ 10, 604 N.W.2d 248, 254; McCarver v. Ins. Co. of Pa., 208 S.W.3d 380, 384 (Tenn. 2006); Anderson v. U.P.S., 2004 UT 57, ¶ 7, 96 P.3d 903, 906; Volkswagen of Am., Inc. v. Smit, 689 S.E.2d 679, 684 (Va. 2010); State *ex rel.* Gallagher Bassett Servs., Inc. v. Webster, 829 S.E.2d 290, 297 (W. Va. 2019); *In re* Commitment of Dennis H., 2002 WI 104, ¶ 12, 647 N.W.2d 851, 856; Sheesley v. State, 2019 WY 32, ¶ 3, 437 P.3d 830, 833 (Wyo. 2019). *But see* Gallardo v. State, 336 P.3d 717, 720 (Ariz. 2014) (ending use of "unconstitutional beyond a reasonable doubt" in Arizona).

68. Green, *supra* note 66, at 175–76.

69. *Id.* at 181.

70. 4 Wash. 147, 149–50, 29 P. 995, 995–96 (1892).

71. 7 Wash. 270, 274, 34 P. 836, 837–38 (1893).

72. 8 Wash. 412, 36 P. 281 (1894).

73. *Id.* at 419, 36 P. at 283.

74. *Id.*

Supreme Court shifted from blocking government regulations to consistently upholding state laws protecting consumers, female employees, and workers in hazardous industries.[75] This was precisely the use of Thayer's doctrine of deference to legislatures that the progressive Bostonian had desired. For example, in *Holzman v. City of Spokane*,[76] sustaining a local improvement district lien statute against a subject-in-title challenge, the progressive Justice Emmett Parker[77] in 1916 wrote:

> This court has always liberally construed the constitutional requirement that the subject-matter of an act of the Legislature shall be expressed in its title, and has deferred to legislative discretion touching that requirement, except in cases of its plainest violation. The doctrine that all reasonable doubts as to the constitutionality of an act of the Legislature should be resolved in favor of upholding the act has peculiar force in the solution of the question of whether or not the act has been in form constitutionally passed, because such a constitutional question has to do with legislative procedure. In other words, it has to do with the methods of transacting public business by a co-ordained branch of the state government, and not with those constitutional guaranties of personal rights which it is the peculiar province of the courts to protect.[78]

Waite's "beyond a rational doubt" language appeared again in *Fisher Flouring Mills Co. v. Brown*,[79] a 1920 decision upholding a law restricting the amount of crude fiber added to livestock feed.[80] The following year, in *Parrott & Co. v. Benson*,[81] the Washington State Supreme Court upheld a consumer-protection law on egg labeling, stating, "it is well settled that the courts will not declare a statute to be unconstitutional unless its conflict with the Constitution is plain beyond a reasonable doubt."[82] These cases reflected the Washington State Supreme Court's early twentieth century Progressive shift in favor of consumer and worker protections.

After *Parrott* there was a twelve-year gap in use of the

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75. *See* Hugh Spitzer, *Pivoting to Progressivism: Justice Stephen J. Chadwick, the Washington Supreme Court, and Change in Early 20th-Century Judicial Reasoning and Rhetoric*, 104 PAC. NW. Q. 107, 115–17 (2013).

76. 91 Wash. 418, 157 P. 1086 (1916).

77. For a short biography of Justice Emmett Parker and his tendency towards "moderate-to-liberal stances," see CHARLES H. SHELDON, THE WASHINGTON HIGH BENCH: A BIOGRAPHICAL HISTORY OF THE STATE SUPREME COURT, 1889–1991, at 271–72 (1992).

78. *Holzman*, 91 Wash. at 420, 157 P. at 1087.

79. 109 Wash. 680, 694–95, 187 P. 399, 403–04 (1920).

80. *See id.* at 698, 187 P. at 405.

81. 114 Wash. 117, 194 P. 986 (1921).

82. *Id.* at 122, 194 P. at 988.

unconstitutional-beyond-a-reasonable-doubt concept. From 1933 forward the use of the phrase steadily increased,[83] accelerating since the 1990s—often in politically controversial cases.[84] Since 1933, the Washington high court has invoked the constitutional (or unconstitutional) beyond a reasonable doubt mantra seventy-one times in civil cases, reciting it in fifty-seven cases upholding laws or government actions, and just fourteen cases overturning statutes or initiatives.[85] I have reviewed the use of unconstitutional-beyond-a-reasonable-doubt by state supreme courts since 2000, and Washington, with forty-two references, is fifth highest nationally during that period.[86]

But the underlying purpose of using the standard seems to have changed since the Progressive Era—shifting from a conscious deference to the legislative branch and voters, to an incantation for cosmetic purposes in constitutional cases involving high-profile issues. The more frequent reference to the standard in *upholding* government actions suggests that justices are applying it when they want to give a nod to public concerns, announcing, in essence, that "the Devil made me do it" in acting to sustain a law that is unpopular with one interest group or another. At the same time, justices on the Washington State Supreme Court have not hesitated to *invalidate* legislation and initiatives on state constitutional grounds without stating that they have determined it is "unconstitutional beyond a reasonable doubt."[87] Among the state supreme

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83. *See* Robb v. City of Tacoma, 175 Wash. 580, 599, 28 P.2d 327, 334 (1933) (upholding the validity of a voted general obligation bond issue).

84. *See, e.g.*, Leonard v. Spokane, 127 Wash. 2d 194, 197–98, 897 P.2d 358, 360 (1995) (overturning a tax increment financing law); Gerberding v. Munro, 134 Wash. 2d 188, 196, 949 P.2d 1366, 1370 (1998) (invalidating an initiative setting term limits for elected officials); Island Cnty. v. State, 135 Wash. 2d 141, 146–47, 955 P.2d 377, 380 (1998) (rejecting a community council system in counties); Belas v. Kiga, 135 Wash. 2d 913, 920, 959 P.2d 1037, 1041 (1998) (holding a value-averaging system of real property assessment in violation of constitutional tax uniformity requirements); Amalgamated Transit Union v. State, 142 Wash. 2d 183, 205, 11 P.3d 762, 780 (2000) (rejecting Initiative 695 limits on tax increases); Auto. United Trades Org. v. State, 175 Wash. 2d 537, 545, 286 P.3d 377, 381 (2012) (upholding a tax on first possession of petroleum in the state); League of Educ. Voters v. State, 176 Wash. 2d 808, 820–21, 295 P.3d 743, 749 (2013) (invalidating an initiative's requirement for supermajority legislative passage of tax increases).

85. A spreadsheet listing each Washington State Supreme Court case in which the unconstitutional-beyond-a-reasonable-doubt formulation appeared, is available at: *Washington Unconstitutional BARD–WA*, UNIV. OF WASH. L. SCH., https://www.law.uw.edu/media/142145/washington-unconstitutional-bard-waxlsx-unconstitutional-bard-wa.pdf [https://perma.cc/M2L9-U9JF]. In addition, at least 150 Washington Court of Appeals cases have used the beyond-a-reasonable-doubt language.

86. The five most frequent state users of the formulation are: Montana (74 occurrences); Wisconsin (53); Ohio (46); Nebraska (43); and Washington (42).

87. *See* Seattle Sch. Dist. v. State, 90 Wash. 2d 476, 496–97, 585 P.2d 71, 83–84 (1978) (finding Washington school funding system at odds with state constitutional requirements); McCleary v. State,

courts that have actively used the formulation since 2000, at least four besides Washington have invalidated statutes without reference to the formulation.[88] As noted above, it is difficult for a court to be collectively "without doubt" when there are thoughtful and cogent arguments in dissents.

In any event, none of Washington's unconstitutional-beyond-a-reasonable-doubt cases thoughtfully evaluated whether the legal concept really made sense until 1998. In that year, in *Island County*, Justices Richard Guy, Richard Sanders, and Philip Talmadge engaged in a free-for-all over the meaning and merits of unconstitutional-beyond-a-reasonable-doubt.[89] Justice Guy wrote the majority opinion nullifying a statute providing for community councils in counties consisting entirely of islands with a population exceeding 30,000.[90] The Washington State Supreme Court unanimously determined that the law violated the state constitution's ban on special legislation because it applied to only one county.[91] But the justices disagreed about whether the standard made sense. Justice Guy conceded that "whether the community council act is special legislation is a close question."[92] Yet at the same time he contended that the Court's "traditional articulation" was that "the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt."[93] How on earth could a "close question" of constitutionality be an instance where unconstitutionality was proven

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173 Wash. 2d 477, 514–15, 269 P.3d 227, 245–46 (2012) (finding Washington school funding system at odds with state constitutional requirements); Spokane Cnty. Sch. Dist. v. Bryan, 51 Wash. 498, 500–07, 99 P. 28, 28–31 (1909) (rejecting special or charter school legislation); League of Women Voters of Wash. v. State, 184 Wash. 2d 393, 401, 355 P.3d 1131, 1137 (2015) (rejecting special or charter school legislation); Petroleum Lease Props. Co. v. Huse, 195 Wash. 254, 260–61, 80 P.2d 774, 777 (1938) (holding oil and gas lease regulation provisions in securities legislation to exceed the scope of the bill's title); State *ex rel.* Wash. Toll Bridge Auth. v. Yelle, 32 Wash. 2d 13, 23–26, 200 P.2d 467, 473 (1948) (rejecting ferry purchase provisions of legislation as outside the bill title); Flanders v. Morris, 88 Wash. 2d 183, 191–92, 558 P.2d 769, 774–75 (1977) (invalidating substantive welfare reform provisions in budget legislation under state constitution's single-subject requirement); Bennion, Van Camp, Hagan & Ruhl v. Kassler Escrow, Inc., 96 Wash. 2d 443, 447–54, 635 P.2d 730, 733–36 (1981) (finding statute regulating escrow officers to conflict with the judiciary's sole power to oversee the practice of law).

88. These include Alabama, Iowa, Ohio, and West Virginia. *See* Jefferson Cnty. v. Weissman, 69 So. 3d 827, 830–45 (Ala. 2011); Planned Parenthood of the Heartland v. Reynolds *ex rel.* State, 915 N.W.2d 206 (Iowa 2018); State *ex rel.* Espen v. Wood Cnty. Bd. of Elections, 154 Ohio St. 3d 1, 2017-Ohio-8223, 110 N.E.3d 1222, at ¶ 13–16; State v. Hoyle, 836 S.E.2d 817, 824–26, 829–34 (W. Va. 2019).

89. Island Cnty. v. State, 135 Wash. 2d 141, 955 P.2d 377 (1998).

90. *Id.* at 155, 955 P.2d at 384.

91. *Id.*

92. *Id.*

93. *Id.* at 146, 955 P.2d at 380.

"beyond a reasonable doubt"? But Justice Guy stated, after reciting the beyond-a-reasonable-doubt standard, that the legislature had likely considered the constitutionality of its enactment, and out of respect for lawmakers "we are hesitant to strike a duly enacted statute *unless fully convinced, after a searching legal analysis, that the statute violates the constitution*."[94]

Figure 3:
Former Washington State Supreme Court Justice Richard Guy[95]

"Fully convinced after a searching legal analysis" is a far cry from "beyond a reasonable doubt." Those two concepts simply are not the same standard. It is likely that the *real* standard Guy applied was the "fully convinced" approach, and that is confirmed by his addition of a citation to *Marbury v. Madison* and a statement that "[u]ltimately . . . the judiciary must make the decision, as a matter of law, whether a given statute is within the legislature's power . . . or whether it violates a constitutional mandate."[96]

Guy could have easily omitted the beyond-a-reasonable-doubt mantra, but perhaps he left it in because he enjoyed the occasional intellectual squabble between Justices Sanders and Talmadge. Sanders, with his libertarian bent,[97] argued that Thayer's prescription favored the legislative

94. *Id.* at 147, 955 P.3d at 380 (emphasis added).

95. Washington State Supreme Court Photograph of Justice Guy (on file with author).

96. *Id.*

97. *See* Eric Scigliano, *The Devil's Advocate*, SEATTLEMET (June 13, 2010), https://www.seattlemet.com/news-and-city-life/2010/06/supreme-court-justice-richard-sanders-charlie-wiggins-0710 [https://perma.cc/4323-UUQN].

branch in a manner dangerous to individual liberties,[98] contradicted the Hamilton-Marshall concept of independent judicial review,[99] and established a presumption on a legal issue when presumptions are appropriately suited only to factual questions.[100] Justice Talmadge, a former long-time state senator and advocate for judicial deference to the legislature in policy matters,[101] opined:

> It should go without saying that when we consider a constitutional question, we decide the question as a matter of law, not of fact. In the constitutional context, therefore, the beyond-a-reasonable-doubt standard is obviously not an evidentiary standard; nor was it intended to be. *It is simply a hortatory expression*, a guide for our consideration, a reminder that the Legislature—not the Court—is the body the people of our state have chosen to make their laws.[102]

Simply a hortatory expression. Probably true. So why bother?

The *Island County* dust-up could have been the end of it, but the Washington State Supreme Court's internal argument about unconstitutional-beyond-a-reasonable-doubt resurfaced twelve years later in *School Districts' Alliance*, which upheld the constitutionality of the state's special education funding process.[103] This time there was a majority opinion, two concurrences, and a dissent. The three extra opinions all debated the usefulness of unconstitutional-beyond-a-reasonable-doubt, which was critiqued one way or another by a *majority* of the justices.

In *School Districts' Alliance*, Justice Susan Owens stated that the mantra "refers to the fact that one challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution" and reiterated that "this high standard is based on our respect for the legislative branch."[104] She also repeated the *Island County* not-so-high standard that beyond-a-reasonable-doubt "merely means that . . . we will not strike a duly enacted statute unless we

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98. *Island Cnty.*, 135 Wash. 2d at 155–56, 955 P.2d at 384.

99. *Id.* at 156–57, 955 P.2d at 384–85.

100. *Id.* at 159–61, 955 P.2d at 386–87.

101. *See* Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 SEATTLE U. L. REV. 695, 697 (1999). A short biography of former Justice Talmadge appears at: David Postman, *Talmadge to Leave Supreme Court*, SEATTLE TIMES (May 4, 2000), https://archive.seattletimes.com/archive/?date=20000504&slug=4019060 [https://perma.cc/E2P4-3ZMF].

102. *Island Cnty.*, 135 Wash. 2d at 172, 955 P.2d at 393 (emphasis added).

103. Sch. Dists.' All. for Adequate Funding of Special Educ. v. State, 170 Wash. 2d 599, 614, 244 P.3d 1, 8–9 (2010).

104. *Id.* at 605–06, 244 P.3d at 4 (quoting *Island Cnty.*, 135 Wash. 2d at 147, 955 P.2d at 380).

are 'fully convinced, after a searching legal analysis, that the statute violates the constitution.'"[105] Five justices signed Owens' opinion. But a majority simultaneously signed either one of the concurrences or the dissent—all attacking the "unconstitutional beyond a reasonable doubt" concept.

Justice Debra Stephens, joined by Justice Mary Fairhurst, asserted that the "'beyond a reasonable doubt' standard is unnecessary and distracting."[106] She noted an "inherent tension" between the Court's duty to construe the state constitution and its commitment to avoid impinging on the legislature's policy-making role.[107] She then engaged in a thoughtful discussion of whether the beyond-a-reasonable-doubt standard was "the proper constitutional lens through which to examine positive rights" such as Washington State Constitution article IX, section 1's "paramount duty" education clause.[108]

Justice Tom Chambers, joined by Justice James Johnson, argued that "beyond a reasonable doubt" should be left solely as an evidentiary burden on a party.[109] He suggested that on legal questions the burden should be on the court and not on the individual bringing a challenge.[110] He added that while the court should assume a statute is valid, it should "entertain no presumptions against its validity."[111] Justice Richard Sanders dissented, repeating his contention in *Island County* that a "presumption of statutory constitutionality favors the legislature at the expense of the individual."[112] He referred for support to a 1984 law review article by the late Justice Robert Utter in which Justice Utter critiqued unconstitutional-beyond-a-reasonable-doubt as an improper application of a factual standard to a legal question, and as a standard excessively deferential to the legislative and executive branches that might "undercut the fundamental rights of Washington citizens."[113]

Is this a tempest in a teapot, rendering excitement over a trivial matter? The answer: both yes and no.

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105. *Id.* at 606, 244 P.3d at 5 (quoting *Island Cnty.*, 135 Wash. 2d at 147, 955 P.2d at 380).

106. *Id.* at 614, 244 P.3d at 9 (Stephens, J., concurring).

107. *Id.* at 615, 244 P.3d at 9.

108. *Id.* at 615–16, 244 P.3d at 9–10.

109. *Id.* at 617, 244 P.3d at 10 (Chambers, J., concurring in part).

110. *Id.*

111. *Id.* at 617–18, 244 P.3d at 10 (quoting State v. Ide, 35 Wash. 576, 581–82, 77 P. 961, 962 (1904)).

112. *Id.* at 622, 244 P.3d at 13 (Sanders, J., dissenting).

113. *Id.* at 622–23, 244 P.3d at 13 (quoting Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 507–08 (1984)).

Figure 4:
Tempest in a Teapot[114]

Yes, the unconstitutional-beyond-a-reasonable-doubt controversy is unimportant because the "standard" (and the debate) rarely occurs. Most important, the Washington State Supreme Court has clearly stated that the formulation does not mean what it says. In *Island County* and in *School Districts' Alliance*, the majority opinions stressed that it is not an evidentiary standard, and that in deference to legislative judgment the Court simply is "hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution."[115] So *that's* the standard, not James Bradley Thayer's proposal that courts should refrain from nullifying actions of elected lawmakers unless the constitutional mistake is so clear that "it is not open to rational question."[116]

Arizona recently tackled this issue in *Gallardo v. State*,[117] and came down firmly on the side of jettisoning the jingle.[118] *Gallardo* was a "special legislation" case upholding a statute that provided for larger

114. *File: Tea Tax Tempest*, WIKIMEDIA COMMONS, https://commons.wikimedia.org/w/index.php?curid=17947717 [https://perma.cc/2AHT-NBYH].

115. Island Cnty. v. State, 135 Wash. 2d 141, 147, 955 P.2d 377, 380 (1998) (citing State v. Smith, 111 Wash. 2d 1, 17, 759 P.2d 372, 380 (1988) (Utter, J., dissenting)); *Sch. Dists.' All.*, 170 Wash. 2d at 606, 244 P.3d at 4 (quoting *Island Cnty.*, 135 Wash. 2d at 147, 955 P.2d at 380).

116. Thayer, *supra* note 23, at 144; *see supra* notes 27–29 and accompanying text.

117. 336 P.3d 717 (Ariz. 2014).

118. *Id.* at 720.

community college district boards in counties with at least three million residents (of which there was only one).[119] The Arizona State Supreme Court majority forthrightly ruled that

> Defendants argue that in determining whether a statute is a special law, we must apply a strong presumption in favor of its constitutionality, and Plaintiffs must prove its unconstitutionality beyond a reasonable doubt. Although prior cases have used similar language, it incorrectly states the standard. Determining constitutionality is a question of law, which we review de novo. Assessing the constitutionality of a law fundamentally differs from determining the existence of historical facts, the determination of which is subject to deference. We therefore disapprove the use of the "beyond a reasonable doubt" standard for making constitutionality determinations.[120]

Washington State's high court ought to do the same and eliminate unconstitutional-beyond-a-reasonable-doubt. This is really not so trivial, and for several reasons:

> *Courts ought to say what they mean.* In the United States (and certainly in Washington State) our appellate judges pride themselves on straightforward explanations for their decisions. It is misleading to voice a standard for "hortatory" purposes, followed immediately with a statement that, never mind, the court is actually applying a different standard.
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> *"Unconstitutional-beyond-a-reasonable-doubt" might be a bit disingenuous.* Our Supreme Court justices are a thoughtful and honest group of people. But perhaps they toss in "beyond a reasonable doubt" as a sop to legislators or voters who might be angered by judicial nullification of all the hard work that went into passing a new law. As Justice Talmadge wrote, the phrase "is simply a hortatory expression" used when the justices are really saying that they respect the legislature's role.[121] So—they could say just that.
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> *"Unconstitutional-beyond-a-reasonable-doubt" confuses people.* Reciting this standard might not confuse members of the Washington State Supreme Court, but it can certainly confuse lawyers and members of the public who take Supreme Court pronouncements at face value. Witness the 2014 law review case note criticizing the Court's constitutional rejection of an initiative measure requiring an automatic voter referendum on tax

119. *Id.* at 726.

120. *Id.* at 720 (citations omitted).

121. *See supra* note 104 and accompanying text.

increases.[122] The author seemed genuinely shocked that the Court declined to follow Thayer's approach, arguing that based on their declaration of the beyond-a-reasonable-doubt standard, Washington judges had a duty to harmonize the statute with the constitution if a reasonable interpretation existed, and the "judicial branch must uphold the statute in light of this reasonable interpretation."[123]

The Washington State Supreme Court possesses several workable standards it can and does apply. The best approach is Justice Guy's *real* standard from *Island County* that the statute is unconstitutional.[124] This can be supplemented by Justice Utter's 1989 language from *Sofie v. Fibreboard Corp.*[125] that "we follow the rule giving every reasonable presumption in favor of the constitutionality of the law . . . to avoid substituting our judgment for the judgement of the Legislature."[126] There is also Justice Robert Finley's 1974 declaration in *Fritz v. Gorton*[127] that "it is not the prerogative nor the function of the judiciary to substitute . . . their better judgement" for that of the electorate or the legislators unless the relevant statutes "clearly contravene state or federal constitutional provisions."[128] Any and all of these standards accurately reflect what our high court does when faced with constitutional challenges to statutes. So why bother including a misleading standard?

CONCLUSION

James Bradley Thayer meant well when he promoted the "American doctrine" that appellate courts will not overturn a statute unless it is unconstitutional beyond a reasonable doubt. Professor Thayer thought he was making a case for judicial respect of democratic institutions. But his "doctrine" never really caught on at the federal level, and at the state court level it is often ignored—even by the courts that regularly voice the formulation. Courts have a duty of transparency to the public, so it would

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122. Nicholas Carlson, Note, *Taxing Judicial Restraint: How Washington's Supreme Court Misinterpreted Its Role and the Washington State Constitution*, 37 SEATTLE U. L. REV. 865, 866 (2014).

123. *Id.* at 888.

124. Island Cnty. v. State, 135 Wash. 2d 141, 147, 955 P.2d 377, 380 (1998).

125. 112 Wash. 2d 636, 771 P.2d 711 (1989).

126. *Id.* at 643, 771 P.2d at 715 (citing Shea v. Olson, 185 Wash. 143, 152, 53 P.2d 615, 619 (1936)).

127. 83 Wash. 2d 275, 517 P.2d 911 (1974).

128. *Id.* at 287, 517 P.2d at 919.

be a useful (though small) improvement if the Washington State Supreme Court would decide once and for all to permanently drop the jingle of "unconstitutional beyond a reasonable doubt."