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REASONING V. RHETORIC: THE STRANGE CASE OF "UNCONSTITUTIONAL BEYOND A REASONABLE DOUBT"

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ABSTRACT

An odd formulation has frequented American constitutional discourse for 125 years: a declaration that courts should not overturn a statute on constitutional grounds unless it is "unconstitutional beyond a reasonable doubt." This concept has been thought of as a presumption, a standard, a doctrine, or a philosophy of coordinate branch respect and judicial restraint. Yet it has been criticized because "beyond a reasonable doubt" is at root an evidentiary standard of proof in criminal cases rather than a workable theory or standard for deciding constitutional law cases. This article discusses the history and use of "unconstitutional beyond a reasonable doubt," which was famously promoted by Harvard professor James Bradley Thayer in 1893. The formulation never gained much traction at the United States Supreme Court, but its use spread widely at the state level. This analysis focuses on that state court usage, concentrating on the past twenty years. The article presents empirical data on the application of "unconstitutional beyond a reasonable doubt" in state supreme court decisions starting in 2000, observing that while its use is geographically random, it is applied mostly in civil cases and overwhelmingly in opinions upholding statutes. It shows how some state courts have picked up the formulation and then abandoned it, while in other jurisdictions it was absent and then suddenly appeared. Few state court decisions have consciously analyzed whether Thayer's concept makes sense. But the concept continues to be used as a rhetorical device to communicate with coordinate branches of government and to provide institutional cover when an appellate

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court resolves a controversial case. What "unconstitutional beyond a reasonable doubt" does not do is serve as a working doctrine or presumption. This article concludes—as others have concluded—that the idea should be eliminated from judicial discourse because it does not help judges decide cases. It can mislead both lawyers and the public or appear disingenuous and reduce respect for the judiciary. Consequently, courts would do well to say what they mean and drop any pretense that "unconstitutional beyond a reasonable doubt" is a real standard.

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I. INTRODUCTION

A strange rhetorical formulation has persisted in American constitutional discourse for the past 125 years: a declaration that courts should not overturn a statute unless it is "unconstitutional beyond a reasonable doubt." This concept has been thought of as a presumption, a standard, a doctrine, or a philosophy of coordinate branch respect and

judicial restraint. But at the same time it has been critiqued by both judges and academics because "beyond a reasonable doubt" is fundamentally an evidentiary standard of proof in criminal cases.[1] When laws are overturned on constitutional grounds, there are often dissents, and those dissents typically contain rational arguments; so it is odd for a court to assert that it invalidates laws only when they are "unconstitutional beyond a reasonable doubt" in cases where dissenting judges present reasoned contentions. Indeed, if courts applied "unconstitutional beyond a reasonable doubt" as an operative standard, laws would be invalidated only once in a very blue moon.

Statutes are regularly declared unconstitutional by federal and state appellate courts, but the "unconstitutional beyond a reasonable doubt" language nevertheless continues to appear in opinions, at least at the state level. Some courts that have applied the formulation have since dropped it, and several of the courts that actively voice the concept nonetheless ignore it when it suits them. Despite its uneven application, "unconstitutional beyond a reasonable doubt" has remarkable staying power.

The concept goes back at least to an 1811 Pennsylvania case[2] and appeared occasionally during the nineteenth century, with a marked increase in the late nineteenth and early twentieth centuries[3] following an influential 1893 *Harvard Law Review* article[4] by James Bradley Thayer. Thayer was a Harvard law professor with an interest in restraining the anti-regulatory activism of the late nineteenth century Supreme Court.[5] While his teaching deeply influenced several later Supreme Court justices,[6] the Court's opinions voiced his "beyond a

1. Strong critiques of "unconstitutional beyond a reasonable doubt" include, CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY 193–209 (1960), and, Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 533–38 (2012). 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) [hereinafter *Thayer Centennial Symposium*].

2. *See* Commonwealth *ex rel.* O'Hara v. Smith, 4 Binn. 117, 123 (Pa. 1811). In this case, Chief Justice William Tilghman mentioned in dicta that "an act of the legislature is not to be declared void, unless the violation of the constitution is so manifest as to leave no room for reasonable doubt." *Id.*

3. The first instances of state court use of "unconstitutional beyond a reasonable doubt" are carefully documented in, Christopher R. Green, *Clarity and Reasonable Doubt in Early State-Constitutional Judicial Review*, 57 S. TEX. L. REV. 169, 179–82 (2015).

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

5. *See* Jay Hook, *A Brief Life of James Bradley Thayer*, 88 NW. U. L. REV. 1, 7 (1993).

6. *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); Hook, *supra* note 5, at 7–8; Posner, *supra* note 1, at 525–31; Vicki C. Jackson, *Thayer, Holmes, Brandeis: Conceptions*

reasonable doubt" concept only eleven times after his article was published, almost always in dissents from decisions invalidating regulatory statutes.[7] The single post-Thayer Supreme Court majority opinion expressing the "unconstitutional beyond a reasonable doubt" statement was issued more than six decades ago.[8]

However, the declaration continues to regularly appear in some state supreme court opinions. Christopher R. Green has documented how "unconstitutional beyond a reasonable doubt" has always been intertwined and in competition with other formulations of the basic presumption of the constitutionality of statutes.[9] While there has been lively normative debate about Thayer's proposition,[10] no one besides Professor Green has described in detail what state courts actually *do* with the rhetorical declaration that they invalidate statutes only when laws are unconstitutional "beyond a reasonable doubt." There is much more to know about how this formulation is used today in state court cases. How often does this statement appear? In civil or criminal cases? In cases upholding or overturning statutes? And to what extent do state courts think about or discuss the appropriateness of "unconstitutional

of Judicial Review, Factfinding, and Proportionality, 130 HARV. L. REV. 2348, 2358–59 (2017).

7. The five pre-Thayer cases in which Supreme Court opinions voiced the concept of "unconstitutional beyond a reasonable (or rational) doubt" were: *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 270 (1827) (Washington, J., dissenting); the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 531 (1870); the *Sinking-Fund Cases*, 99 U.S. 700, 718 (1878); the *Civil Rights Cases*, 109 U.S. 3, 27 (1883) (Harlan, J., dissenting); *Powell v. Pennsylvania*, 127 U.S. 678, 684 (1888). The cases 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); *Howard v. Illinois Central Railroad Co.*, 207 U.S. 463, 510–11 (1908) (Moody, J., dissenting); *Detroit United Railway Co. v. City of 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 No. 1*, 298 U.S. 513, 540 (1936) (Cardozo, J., dissenting); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 355 (1936) (Brandeis, J., concurring); *Federal Housing Administration v. Darlington, Inc.*, 358 U.S. 84, 90–91 (1958).

8. *See Darlington, Inc.*, 358 U.S. at 90–91.

9. *See* Green, *supra* note 3, at 171.

10. *See, e.g.*, *Thayer Centennial Symposium*, *supra* note 1. In an essay, Thomas W. Merrill observed: "Discussions of Thayer's conception of judicial review . . . tend to be normative." Thomas W. Merrill, *Pluralism, the Prisoner's Dilemma, and the Behavior of the Independent Judiciary*, 88 NW. U. L. REV. 396, 396 (1993). A concise and thoughtful discussion of Thayer's concept, competing understandings of that concept, and normative debates, is found in Matthew J. Franck, *James Bradley Thayer and the Presumption of Constitutionality: A Strange Posthumous Career*, 8 AM. POL. THOUGHT 393 (2019). *See also* JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 58–68 (2022).

beyond a reasonable doubt"? And does this proposition make a difference in deciding cases?

When one carefully reviews the recent use of the concept at the state level, several things become apparent. First, whether any particular state's high court voices "unconstitutional beyond a reasonable doubt" seems random. There are no regional or ideological patterns among the jurisdictions that use it compared to those that do not. As Green observed, most states have applied the formulation together with other standards, particularly the clarity approach—i.e., a clear, plain, manifest or evident instance of unconstitutionality.[11] Next, remarkably few state supreme courts have ever *engaged* with the concept in their opinions, discussing and debating whether and why "unconstitutional beyond a reasonable doubt" makes sense in comparison with other formulations or standards of constitutional review. Instead, most courts that apply the idea appear to have picked it up without reflection, while others seem to have dropped it without any discussion. Finally, when one reviews recent judicial opinions where "unconstitutional beyond a reasonable doubt" has been recited, the vast majority of them—83% in the 2000–2020 period—have been in decisions *upholding* statutes, and more than three-fifths of those have been civil rather than criminal cases.[12] All of this suggests that "unconstitutional beyond a reasonable doubt" truly is what Harvard law professor Vicki C. Jackson labels a "rhetorical commitment[] to judicial deference"[13] and not a presumption or doctrine that drives the outcome of cases.

This article recounts the history and use of "unconstitutional beyond a reasonable doubt" by state courts over the past two centuries, concentrating on the recent period since 2000. The use of the statement illustrates how common law courts acquire phrases from each other and apply them when it is rhetorically useful—regardless of whether the concept is thought through or makes jurisprudential sense. In most states, "unconstitutional beyond a reasonable doubt" has become a jingle that is dropped into cases when convenient (usually when upholding statutes) and then ignored when it is not convenient. This article concludes—as others have concluded[14]—that the idea should be eliminated from judicial discourse because it does not help judges decide cases. Quoting an evidentiary standard of proof and posturing it as a rule of decision can mislead both lawyers and the public, or, still worse, appear disingenuous and reduce respect for the judiciary.

11. Green, *supra* note 3, at 176–78.
12. *See infra* notes 76–77 and accompanying text.
13. Jackson, *supra* note 6, at 2348.
14. *See, e.g.*, BLACK, *supra* note 1, at 195; Posner, *supra* note 1, at 536–38.

Part II of this article briefly reviews the history of Thayer's concept and later normative critiques. Part III presents empirical data on the use of "unconstitutional beyond a reasonable doubt" in state court decisions from January 2000 to January 2020. It observes that while the formulation's use is geographically random, there is a clear pattern of application, i.e., mostly in civil cases and overwhelmingly in opinions upholding statutes. It then describes the development and inconsistent use of Thayer's formulation in state courts, showing how it has sometimes been picked up and then abandoned, while in other jurisdictions it was altogether absent and then suddenly appeared. Part III also discusses the paucity of state court decisions consciously analyzing whether Thayer's concept makes sense. Indeed, thoughtful debate over the formulation has appeared in only a half dozen states. Part IV returns to what the concept "really" means to judges, i.e., how it continues to be used as a rhetorical device to communicate with coordinate branches of government and to provide institutional cover when an appellate court resolves a controversial case by upholding a statute. But what "unconstitutional beyond a reasonable doubt" does *not* do, is serve as an honest working doctrine or presumption. This article concludes that state courts would do well to say what they mean and drop any pretense that "unconstitutional beyond a reasonable doubt" is a real standard.

II. JAMES BRADLEY THAYER'S "HISTORICO-POLITICS"

James Bradley Thayer (1831–1902) was the model of an enlightened New Englander: head of his class at Harvard Law School,[15] married to Ralph Waldo Emerson's niece,[16] president of the American Unitarian Association,[17] and a member of Boston's Metaphysical Club, the philosophical debating society frequented by William James, Charles Sanders Peirce, and Thayer's law firm colleague, Oliver Wendall Holmes, Jr.[18] Thayer contributed to progressive literary and political magazines,[19] took an interest in Native Americans,[20] and was active with other Boston

15. *See* Hook, *supra* note 5, at 1–2.

16. *Id.* at 4.

17. EVAN TSEN LEE, JUDICIAL RESTRAINT IN AMERICA: HOW THE AGELESS WISDOM OF THE FEDERAL COURTS WAS INVENTED 56 (2011).

18. *See* Hook, *supra* note 5, at 4.

19. *See id.* at 4–5.

20. *See* Mendelson, *supra* note 6, at 71; *see also* Hook, *supra* note 5, at 7. It should be noted that Thayer's concern for Native American welfare led him to support policies that today would not be seen as particularly helpful. He supported federal legislation that was aimed, in part, at settling indigenous Americans on farms and making them more like

intellectuals in the "Mugwump" movement of progressive Republicans who switched to the Democratic Party.[21] He was recruited onto the Harvard law faculty by Dean Christopher Columbus Langdell and became a distinguished teacher and a scholar on a variety of subjects.[22] Thayer collaborated with Holmes on the twelfth edition of Kent's *Commentaries*,[23] wrote the first casebook on American constitutional law, and authored the first version of an important evidence treatise later completed by his student John Henry Wigmore.[24] Yet, Thayer was no ivory-tower intellectual—he was an engaged, politically active progressive. His article, *The Origin and Scope of the American Doctrine of Constitutional Law*[25] was written as a counterattack against the activist, pro-business, and anti-regulatory majority on the United States Supreme Court.[26] In that article, Thayer attempted to demonstrate the existence of a constitutional doctrine of judicial deference to the legislative branch that in fact had never been consistently established or applied. He argued that the Supreme Court would not (or at least should not) strike down a federal statute unless it was convinced that the legislation was "unconstitutional beyond a reasonable doubt."[27] His position relied on judicial respect for Congress as a coordinate branch, and the presumption that lawmakers could themselves thoughtfully consider the constitutionality of proposed bills.[28]

Until Thayer's 1893 article, the concept of "unconstitutional beyond a reasonable doubt" had appeared spottily in American appellate court opinions.[29] In *Fletcher v. Peck*,[30] the first Supreme Court decision overturning a state law for incompatibility with the national Constitution, Chief Justice John Marshall wrote in 1810 that "whether a law be void for its repugnancy to the constitution, is . . . a question of much delicacy, which ought seldom, if ever, to be decided in the

European Americans. *See* WILLIAM DRAPER LEWIS, GREAT AMERICAN LAWYERS 379 (William Draper Lewis ed., 1909).

21. Hook, *supra* note 5, at 6.

22. *See* G. Edward White, *Revisiting James Bradley Thayer*, 88 NW U. L. REV. 48, 60–61 (1933); Hook, *supra* note 5, at 5–7.

23. Hook, *supra* note 5, at 4 (citing JAMES KENT, COMMENTARIES ON AMERICAN LAW (Oliver Wendell Holmes, Jr. ed., 12th ed. 1873)).

24. Hook, *supra* note 5, at 5 (citing JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW (1st ed. 1904)); Mendelson, *supra* note 6, at 71.

25. Thayer, *supra* note 4.

26. *See* Hook, *supra* note 5, at 7.

27. Thayer, *supra* note 4, at 151.

28. *See id.* at 151–155.

29. *See* Green, *supra* note 3, at 179–80.

30. 10 U.S. (6 Cranch) 87 (1810).

affirmative, in a doubtful case."[31] Not exactly "unconstitutional beyond a reasonable doubt," but the word "doubtful" is in there and it gained a fleeting reference in Thayer's article.[32] Thayer also cited an 1811 opinion by Pennsylvania Chief Justice William Tilghman, who had mentioned in dicta, "that an Act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt."[33] In 1825, Chief Justice Tilghman again stated in dicta, "that when a judge is convinced, beyond doubt, that an act . . . [is] in violation of the constitution, he is bound to declare it void."[34] Then in 1827, Supreme Court Justice Bushrod Washington wrote in *Ogden v. Saunders*, that a court should "presume in favour of [a statute's] validity, until its violation of the constitution is proved beyond all reasonable doubt."[35] Seven years later, upholding a statute permitting the enclosure of the Cambridge Common, Massachusetts' Chief Justice Lemuel Shaw voiced the concept that courts ought "never declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt."[36] In the *Sinking-Fund Cases*, Chief Justice Waite, in 1878, said that the Supreme Court should not invalidate a statute "except in a clear case," when unconstitutionality is "shown beyond a rational doubt."[37]

Thayer cited these examples and a handful of other court rulings that contained "beyond a rational doubt" or "beyond a reasonable doubt" language.[38] Thayer also mentioned several other opinions in which courts by different language exhibited judicial deference and a hesitancy to invalidate a law, absent a strong conviction that unconstitutionality had been thoroughly established.[39] He suggested that Chief Justice John

31. *See id.* at 128.

32. *See* Thayer, *supra* note 4, at 149.

33. *See* Thayer, *supra* note 4, at 140 (quoting Commonwealth *ex rel.* O'Hara v. Smith, 4 Binn. 117, 123 (Pa. 1811)).

34. Eakin v. Raub, 12 Serg. & Rawle 330, 339 (Pa. 1825).

35. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270 (1827) (Washington, J., dissenting).

36. *In re* Wellington, 33 Mass. (16 Pick.) 87, 95 (1834).

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

38. *See Ex parte* M'Collum, 1 Cow. 550, 564 (N.Y. 1823); Cotten v. Leon Cnty. Comm'rs, 6 Fla. 610, 613 (1856); Commonwealth v. People's Five Cents Sav. Bank, 87 Mass. (5 Allen) 428, 432 (1862); Perry v. Keene, 56 N.H. 514, 519–20 (1876). All cited by Thayer. *See* Thayer, *supra* note 4, at 142 n.1.

39. *See* Thayer, *supra* note 4, at 141 ("[W]hen it remains doubtful whether the legislature have or have not trespassed on the constitution, a conflict ought to be avoided." (quoting John E. Hall, *Georgia: Liberty County Superior Court*, 2 AM. L.J. 93, 96–97 (1809) (reporting opinion in Grimball v. Ross))). Thayer also quotes from a lawyer's argument in an earlier phase of *Trustees of Dartmouth College v. Woodward*, a case in which that advocate called for "absolute certainty" that "none can doubt" before a court were to

Marshall's theory of judicial review, as outlined in *Marbury v. Madison*, was "overpraised"[40] and asserted that any rational constitutional understanding by legislators should be treated as constitutionally valid.[41] Thayer also looked for support[42] from Judge Cooley's respected treatise on the Constitution.[43] But on examination, Cooley cannot be said to have been a true advocate for "unconstitutional beyond a reasonable doubt" as a working standard. Instead, he promoted judicial avoidance of unnecessary constitutional decisions,[44] and a cautious policy of overturning statutes based on "a clear and strong conviction" of incompatibility with the Constitution.[45] Importantly, Green has documented that notwithstanding Thayer's critique of *Marbury v. Madison*, and the recitation of "unconstitutional beyond a reasonable doubt" at least once in every state, all state supreme courts have voiced approval of the *Marbury* approach to judicial review.[46]

Judicial restraint and deference to a coordinate branch are a far cry from "unconstitutional beyond a reasonable doubt," which Thayer labeled a "thoroughly established" doctrine.[47] But a sprinkling of cases over a century do not make a thoroughly established constitutional standard—particularly where, as Professor Charles L. Black observed, the reasonable doubt and rational doubt language in those cases was never a *rule* that the relevant courts actually applied, i.e., "precedents deferring to the legislative judgment where the court's convictions were that the statute was unconstitutional."[48] Black pointed out that if "unconstitutional beyond a reasonable doubt" were a rule of decision, we "would expect to find a torrent of such cases."[49] But there were very few, and in the instances cited by Thayer, "the court in each of these cases felt and expressed a positive conviction of the constitutionality of the

invalidate a statute. *See* Thayer, *supra* note 4, at 145; Trs. Dartmouth Coll. v. Woodward, 17 U.S. 518, 606–07 (1819). But Thayer did not cite the "clear and strong conviction" language actually used in the Supreme Court's opinion, Thayer, *supra* note 4, at 145, presumably because it was a weaker standard that did not fit neatly into his argument.

40. Thayer, *supra* note 4, at 130 n.1.

41. *Id.* at 144.

42. *Id.* at 142 n.1, 144.

43. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (6th ed. 1890).

44. *See id.* at 216–19.

45. *See id.* at 217.

46. *See* Green, *supra* note 3, at 179–82.

47. *See* Thayer, *supra* note 4, at 140.

48. BLACK, *supra* note 1, at 196.

49. *Id.*

statute," and each time the language was "a mere passing remark on a problem not before the court."[50]

Black's book was just one of several hard-hitting critiques of Thayer's assertion.[51] G. Edward White has effectively demonstrated how Thayer was attempting to be a proper late nineteenth century "legal scientist doing 'historico-politics': employing history to prove the truth of his normative propositions."[52] In a 2012 law review article,[53] professor and former federal appeals court judge, Richard A. Posner, authored a forceful take-down of Thayer's "unconstitutional beyond a reasonable doubt" concept. Posner describes how Thayer's interest in restraining conservative judicial activism influenced, and was used by, his colleagues and successors like Holmes, Brandeis, Frankfurter, and Bickel.[54] But, he effectively argues that Thayer's proposition was "rhetoric [rather] than a theory"[55] and that it never caught on at the Supreme Court because it failed to provide a constitutional standard that could help justices decide cases.[56]

While there have been some academic attempts to defend or reinterpret Thayer,[57] and lively intellectual sparring about his underlying motivations and meaning,[58] the basic fact remains that in practice, the Supreme Court never seriously entertained "unconstitutional beyond a reasonable doubt" as a working standard. As noted above,[59] after Thayer's article, his proposition appeared in only nine Supreme Court opinions, of which eight were dissents by justices pleading for greater judicial respect for lawmakers.[60] Regardless of their background philosophies, the Court's members have remained solidly in John Marshall's orbit—willing to invalidate a statute when a majority is clearly convinced it is unconstitutional (and notwithstanding the dissenters' "reasonable doubts"). As Posner observed, none of the

50. *See id.*

51. *See, e.g.*, White, *supra* note 22; Gary Lawson, *Thayer Versus Marshall*, 88 NW. U. L. REV. 221 (1993); Steven G. Calabresi, *Thayer's Clear Mistake*, 88 NW. U. L. REV. 269 (1993); Posner, *supra* note 1.

52. *See* White, *supra* note 22, at 76.

53. Posner, *supra* note 1, at 544.

54. *See id.* at 525–33; *see also* Mendelson, *supra* note 6.

55. Posner, *supra* note 1, at 546.

56. *See id.* at 535.

57. The most thorough defense of Thayer is provided by, SANFORD BYRON GABIN, JUDICIAL REVIEW AND THE REASONABLE DOUBT TEST 27–46 (1980). *See also* Mark Tushnet, *Thayer's Target: Judicial Review or Democracy?*, 88 NW. U. L. REV. 9, 11 (1993); Franck, *supra* note 10, at 394.

58. *See generally Thayer Centennial Symposium*, *supra* note 1.

59. *See supra* note 7 and accompanying text.

60. *Id.*

conservatives on the U.S. Supreme Court today 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]

III. THAYER IN THE STATES: THE FORMULATION LIVES ON

Although "unconstitutional beyond a reasonable doubt" has not been seen in the Supreme Court's vocabulary for sixty years, the formulation has persisted in the state courts. Christopher R. Green's study illustrates how it first appeared in a state court—Pennsylvania in 1811—and then made at least one appearance in nearly every other state by 1975.[62] Green also documented how every state has also used a clarity standard (clearly, plainly, or manifestly unconstitutional),[63] and how the clarity approach was earlier adopted and has been consistently dominant.[64] He concludes that the two formulations ultimately mean the same thing for most state courts,[65] i.e., "[t]o be 'clearly and truly convinced' is to lack any 'reasonable doubt.'"[66] Hawai'i, the last state to echo the "unconstitutional beyond a reasonable doubt" language, did so in a case that simultaneously included *three* different formulations: "all reasonable doubt," "clear and convincing," and "beyond question."[67]

Green's study focused mainly on the initial appearance and early history of the clarity standard and "unconstitutional beyond a reasonable doubt."[68] This article builds on Green's work and focuses on when and how various states have used the formulation, particularly during the past two decades. It describes patterns of usage among the states and looks at how little thought seems to have been put into state supreme court choices about whether to intone the expression about unconstitutionality "beyond a reasonable doubt."

61. Posner, *supra* note 1, at 537.

62. *See* Green, *supra* note 3, at 179–82. Alaska appears to be the only state in which the supreme court never used the "unconstitutional beyond a reasonable doubt" formulation. *Id.* at 179.

63. *See id.* at 176–78.

64. *See id.* at 182–83.

65. *See id.* at 183–88.

66. *Id.* at 188.

67. *See id.* at 182, 182 n.150 (quoting State v. Kahalewai, 541 P.2d 1020, 1024 (Haw. 1975)).

68. *See id.* at 170–73.

A. "Unconstitutional Beyond a Reasonable Doubt" in the Twenty-First Century

A curious aspect of state court use of "unconstitutional beyond a reasonable doubt" is that its modern occurrence among the various states appears random—the result of rhetorical history and unconnected to any regional or ideological pattern.

The empirical work for this article involved searching opinions of the highest court in every state and the District of Columbia[69] for the period of January 1, 2000, through January 31, 2020. We looked for constitutional cases using the "beyond a reasonable doubt" formulation, and also searched for "rational doubt" in that context. The study found 677 cases nationwide during the twenty-year period. The results were divided between civil cases and criminal cases, and between cases overturning versus upholding statutes on constitutional grounds.

The results are illuminating. First, there is no geographical or regional consistency in the contemporary use of "unconstitutional beyond a reasonable doubt." There is no grouping by size of population. Thirteen state courts and the District of Columbia, scattered from Vermont down to Texas and up to Alaska, never used the formulation during the first twenty years of this century.[70] Only fourteen jurisdictions used the concept with relative frequency—more than twenty times in the same period.[71] Montana, with seventy-four instances, was the most frequent user. The supreme courts of eighteen states mentioned "unconstitutional beyond a reasonable doubt" between one and ten times in the study period,[72] and in five states, the wording appeared between eleven and

69. The study used Westlaw for searching for court use of the target terms.

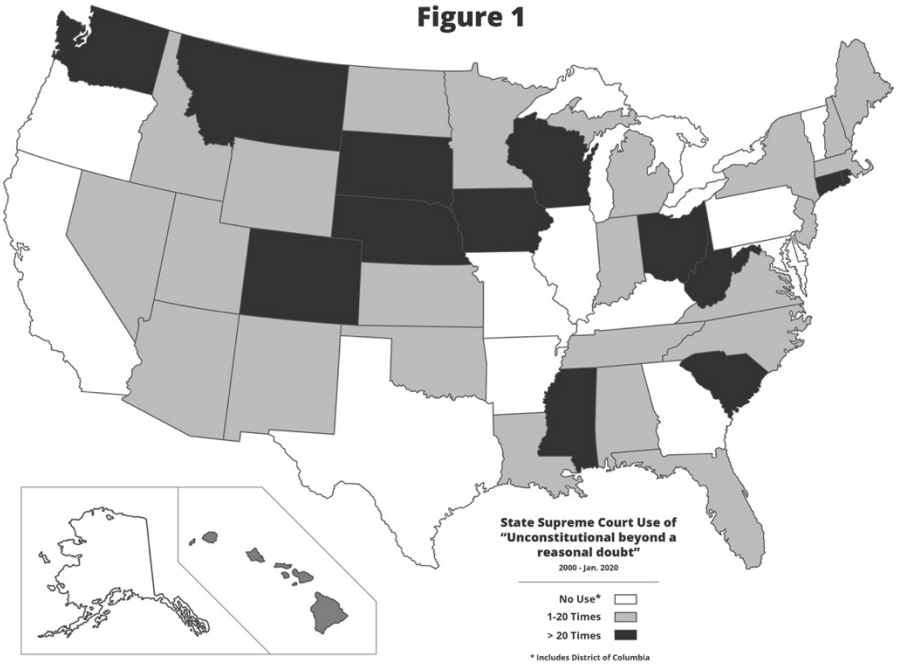
70. States not using "unconstitutional beyond a reasonable doubt" in this century include: Alaska, Arkansas, California, Delaware, Georgia, Illinois, Kentucky, Maryland, Missouri, Oregon, Pennsylvania, Texas and Vermont. The District of Columbia has also avoided the formulation during the past twenty years.

71. States that used "unconstitutional beyond a reasonable doubt" on more than twenty occasions during the period of January 1, 2000, through January 31, 2020, included: Colorado (22), Connecticut (30), Iowa (29), Minnesota (44), Mississippi (34), Montana (74), Nebraska (43), Ohio (46), Rhode Island (25), South Carolina (22), South Dakota (21), Washington (42), West Virginia (25), and Wisconsin (53).

72. State supreme courts that mentioned "unconstitutional beyond a reasonable doubt" between one and ten times included: Alabama (4), Arizona (2), Hawai'i (9), Idaho (3), Indiana (7), Kansas (10), Louisiana (1), Maine (6), Massachusetts (4), Michigan (7), Nevada (1), New Hampshire (1), New Jersey (4), New Mexico (7), New York (10), North Carolina (7), North Dakota (7), and Tennessee (2).

twenty times.[73] Overall, a solid majority of states use the formulation infrequently.

Figure 1



There appears to be no correlation between the use of "unconstitutional beyond a reasonable doubt" and the dominant political ideology of the states—both "red" and "blue" states are represented among both the users and non-users. The courts that frequently avail themselves of the formulation appear to be a bit more northern as a group, scattered mainly in a band across the top of the nation.[74] The states using the concept between one and twenty times are distributed throughout the country, and the states altogether avoiding the concept in the past two decades are scattered along an arc starting in Vermont, then going southwest towards Texas and back up the west coast to Alaska.[75] Fundamentally, geographical location or region does not appear

73. State supreme courts that mentioned "unconstitutional beyond a reasonable doubt" between eleven to nineteen times included: Florida (12), Oklahoma (12), Utah (19), Virginia (11) and Wyoming (17).

74. *See supra* Figure 1. Mississippi and South Carolina are the only fully southern states that have frequently used "unconstitutional beyond a reasonable doubt." *Id.*

75. *See id.*

to be a material indicator of a court's preference for the "unconstitutional beyond a reasonable doubt" refrain.

There are, however, distinct patterns in the types and outcomes of cases in which the formulation appears. During our twenty-year study period, 420 were civil cases (63%), while 248 involved criminal statutes (37%).[76] This is not surprising because there are many more statutes involving non-criminal matters of both public and private law, than there are statutes defining crimes. Further, while 37% of the cases were in the area of criminal law, only 28% of the decisions overturning laws involved crimes. It is unsurprising that judges give more deference to criminal statutes than laws involving private law or government structure and processes.

Importantly, 564 opinions of the "unconstitutional beyond a reasonable doubt" cases (83%) involved instances in which the court upheld a statute, while only 108 were cases in which a statute was overturned (16%). Plausible explanations for this are discussed below.[77] But it seems obvious that most judges will be more comfortable reciting, what is on its face, a very strict "standard" when they decline to invalidate an existing law than when they overturn a statute. As we will see below, even courts that frequently recite "unconstitutional beyond a reasonable doubt" are fully capable of nullifying statutes when they see fit (and typically without mention of the formulation).[78] The following table summarizes the findings regarding use of "unconstitutional beyond a reasonable doubt" language by state high courts from January 1, 2000, to January 31, 2020:

76. Five cases were treated as anomalous and did not fit neatly into either a civil or criminal category.

77. *See infra* notes 157–58 and accompanying text.

78. *See infra* notes 160–65 and accompanying text.

TABLE 1
State Supreme Court Cases Jan. 2000–Jan. 2020
Reciting "Unconstitutional Beyond a Reasonable Doubt" Formulation

Case Category	Number of Cases	% of Cases
Civil Cases, Upholding Statute	342	51% (61% of all cases upholding)
Civil Cases, Overturning Statute	78	12% (72% of all cases overturning)
Total Civil Cases	420	62%
Criminal Cases, Upholding Statute	222	33% (39% of all cases upholding)
Criminal Cases, Overturning Statute	30	4% (28% of all cases overturning)
Total Criminal Cases	252	37%
All Cases Upholding Statute	564	83%
All Cases Overturning Statute	108	16%
Anomalous Cases	5	1%
Total Cases	677	100%

No. of states not using formulation: 14 (incl. D.C.)
No. of states using formulation < 20 times: 14
No. of states using formulation 1–10 times: 18
No. of states using formulation 11–20 times: 5
(Totals include District of Columbia)

B. The On-Again, Off-Again Peregrinations of an Odd Formulation

Christopher R. Green has shown how "unconstitutional beyond a reasonable doubt" language has appeared at least once in almost every state at some point in the past two centuries.[79] But that formulation has an odd history: popping up in some states and then disappearing forever; coming into use by courts through misstatements about earlier cases or via headnote errors; and gaining currency in the early 20th century as a signal of a progressive, pro-regulatory stance in state courts. The most striking thing is how few state courts have ever engaged conceptually with "unconstitutional beyond a reasonable doubt," i.e., consciously debating the idea and providing a thoughtful rationale for using it or not.

79. *See supra* note 62 and accompanying text.

This section discusses some principal aspects of the formulation's usage, focusing on the casual and frequently unreflective character of its appearance (and disappearance) among the states.

1. Appearing and Disappearing

Green counted twenty-four state supreme courts using "unconstitutional beyond a reasonable doubt" language between 1811 and 1893,[80] giving the lie to the suggestion by modern critics of Thayer, that he concocted his proposed standard out of almost thin air. Charles L. Black, for example, argued that Thayer misled readers when he promoted "unconstitutional beyond a reasonable doubt" as an established standard.[81] Black asserted that if the formulation were an accepted doctrine, one "would expect . . . a torrent of such cases."[82] But Black fixed his attention on pre-1893 usage by the U.S. Supreme Court,[83] not the opinions of the two dozen state courts that had used the formulation by the time Thayer published his article. Thayer was not as disingenuous as Black asserted. Thayer simply argued that "unconstitutional beyond a reasonable doubt" was commonly used and that the nation's high court should treat it as a working standard, thus reducing the number of cases in which it invalidated (often progressive) legislation.

But a fascinating thing about "unconstitutional beyond a reasonable doubt's" evolution, is that of the twenty-four early state users of the jingle, one-third had dropped it entirely by the current century[84]—including Pennsylvania, the state in which it first appeared.[85] In fact, nearly half of the pre-1894 state users have either discontinued it, or

80. Green, *supra* note 3, at 179–81. The states that used the formulation at least once through 1893 include: Pennsylvania (1811), Massachusetts (1834), Maryland (1838), New York (1846), Arkansas (1851), Florida (1856), Michigan (1858), New Hampshire (1859), Connecticut (1860), California (1863), Wisconsin (1863), Missouri (1868), Iowa (1870), Vermont (1877), South Carolina (1881), Illinoi (1882), West Virginia (1882), Colorado (1884), Kentucky (1885), Rhode Island (1889), South Dakota (1891), Tennessee (1891), Idaho (1891), and Nevada (1893). *Id.*

81. *See supra* notes 48–50 and accompanying text.

82. BLACK, *supra* note 1, at 196.

83. *Id.* at 197-202.

84. Those states were: Arkansas, California, Illinois, Kentucky, Maryland, Missouri, Pennsylvania, and Vermont.

85. *See* Green, *supra* note 3, at 179. "Unconstitutional beyond a reasonable doubt" has appeared in dissents in two recent Pennsylvania decisions holding mandatory sentencing statutes unconstitutional: *Commonwealth v. Omar*, 981 A.2d 179, 191–92 (Pa. 2009) (Greenspan, J., dissenting), and *Commonwealth v. Hopkins*, 117 A.3d 247, 267 (Pa. 2015) (Stevens, J., dissenting).

have mentioned it just a handful of times in the past twenty years.[86] Eight of the remaining states in which it had appeared by 1893 continued as active users in our recent period.[87] Like other states that avoid or infrequently use "unconstitutional beyond a reasonable doubt" language, the early user states that later dropped the formulation, adhere to approaches that focus on a challenger's burden to demonstrate "clear" unconstitutionality. For example, Pennsylvania, whose appellate courts have not articulated "unconstitutional beyond a reasonable doubt" in majority opinions since 1958,[88] in 2008, described its current approach as follows:

> A legislative enactment enjoys the presumption of constitutionality under both the rules of statutory construction and the decisions of the Pennsylvania Supreme Court. The party challenging the legislative enactment bears a heavy burden to prove that it is unconstitutional. The statute will only be declared unconstitutional if it *clearly, palpably and plainly violates the constitution*. Any doubts are to be resolved in favor of finding the enactment constitutional.[89]

Similarly, many other early users of "beyond a reasonable doubt," today emphasize the burden on the statute's challenger, or the need to show "clear" unconstitutionality, or both. For example, Arkansas' court has declared: "All statutes are presumed constitutional and we resolve all doubts in favor of constitutionality."[90] Maryland similarly emphasizes a "strong presumption of constitutionality."[91] Kentucky's court recently held: "The statute is presumed to be constitutional, and the challenger of the statute has the burden to prove it is unconstitutional."[92] Vermont holds that laws "are presumed to be constitutional, . . . are presumed to be reasonable, . . . [and] the proponent of a constitutional challenge has

86. *See* states listed *supra* note 84, together with Michigan (1 use), Nevada (1), New Hampshire (1), Tennessee (2), Idaho (3), and Massachusetts (4).

87. The active users included: Wisconsin (53), Connecticut (30), Iowa (29), West Virginia (25), Rhode Island (25), Colorado (22), South Carolina (22), and South Dakota (21).

88. The most recent Pennsylvania appellate opinion using the formulation was *Commonwealth v. Bristow*, in which an intermediate appeals court declared that a statute that "promotes the health, safety, and general welfare of the public, will not be declared unconstitutional unless its nullity and invalidity are beyond a reasonable doubt." Commonwealth v. Bristow, 138 A.2d 156, 161 (Pa. Super. Ct. 1958).

89. Jae v. Good, 946 A.2d 802, 807 n.11 (Pa. Commw. Ct. 2008) (emphasis added) (citations omitted).

90. Ester v. Nat'l. Home Ctrs., Inc., 981 S.W.2d 91, 96 (Ark. 1998).

91. Edgewood Nursing Home v. Maxwell, 384 A.2d 748, 751 (Md. 1978).

92. Hunter v. Commonwealth, 587 S.W.3d 298, 304 (Ky. 2019).

a very weighty burden to overcome."[93] Missouri, another nineteenth century user of "unconstitutional beyond a reasonable doubt" language, today uses a clarity approach with a slight hint of a doubt standard: "A statute is presumed to be constitutional and will not be declared unconstitutional unless it clearly and undoubtedly violates some constitutional provision."[94] Oregon applies a mixed approach, noting that "[e]very statute is presumed to be constitutional, and all doubt must be resolved in favor of its validity."[95] But in the same case, the Oregon court adds the Marshallian postscript: "Although that is true, a statute in conflict with the constitution cannot stand."[96]

2. Evolution Through Misreading, Misrepresentation or Neglect

Another phenomenon is that some states adopted the "beyond a reasonable doubt" formulation by apparent mistake, by misrepresentation of earlier caselaw, or by using the phrase while ignoring existing cases in those states that had applied the clarity approach. For example, several twentieth century opinions issued by Michigan's Supreme Court mentioned "unconstitutional beyond a reasonable doubt," citing earlier Michigan cases as precedent. But when one tracks back through these earlier citations, the formulation disappears into a netherworld of mis-citations. For example, *Cady v. Detroit*, in 1939, stated the concept and cited to several earlier cases.[97] But upon examination, none of those cited cases had used "unconstitutional beyond a reasonable doubt" or anything like it. Some Michigan cases cite to a 1914 decision, *Attorney General* ex rel. *Barbour v. Lindsay*, for the concept; but while that case's *headnote* mentions "unconstitutional beyond a reasonable doubt," the formulation appears nowhere in the opinion.[98] In fact, quoting Cooley, *Lindsay* incorporates a resounding affirmation of Marshall's concept that courts "finally determine [a] question of constitutional law."[99] It appears that judges or their clerks were aware of "unconstitutional beyond a reasonable doubt" in the doctrinal atmosphere and chose to use it, and then found the

93. Badgley v. Walton, 10 A.3d 469, 476 (Vt. 2010).

94. State v. Crawford, 478 S.W.2d 314, 316 (Mo. 1972).

95. State v. N.R.L., 311 P.3d 510, 513 n.3 (Or. 2013) (en banc) (quoting Milwaukie Co. of Jehovah's Witnesses v. Mullen, 330 P.2d 5, 11 (Or. 1958)).

96. *Id*.

97. *See* 286 N.W. 805, 807 (Mich. 1939).

98. *See* Att'y Gen. *ex rel.* Barbour v. Lindsay, 145 N.W. 98 (Mich. 1914).

99. *See id*. at 100 (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (7th ed. 1903)).

Lindsay case's headnote in a digest without bothering to read the original cited opinion.[100]

In Nevada, a recent case voices the formulation[101] but neglects a robust history of Nevada opinions that focused on presumption of constitutionality and the clarity standard.[102] A nineteenth century Nevada case using the "reasonable doubt" approach to constitutionality[103] seems to have been an outlier and was never cited in later decisions for the formulation.

The doctrinal genealogy of "unconstitutional beyond a reasonable doubt" is also peculiar in Montana, the state that has most frequently used it in the past twenty years (seventy-four times).[104] The earliest use in that state was in 1896, in *State v. Camp Sing*.[105] That case was mentioned on just a few occasions in subsequent decades,[106] but then petered out as a reference citation for the concept. The contemporary Montana cases using the "unconstitutional beyond a reasonable doubt" concept cite to strings of later Montana cases, but when one tracks back through those cases, they eventually lead to *Western Ranches v. Custer County*,[107] a 1903 case that doesn't mention *Camp Sing* at all. Instead, the opinion in that case uses the alternative clarity approach to

100. See *Phillips v. Mirac., Inc.*, 685 N.W.2d 174, 179 (Mich. 2004), for a Michigan case that uses "unconstitutional beyond a reasonable doubt" but then cites to, *Taylor v. Gate Pharmaceuticals*, 639 N.W.2d 45 (Mich. Ct. App. 2003), *rev'd sub nom. Taylor v. Smithkline Beecham Corp.*, 658 N.W.2d 127 (Mich. 2003). However, the *Taylor* case does not use the formulation at all, instead adopting a clarity approach: "Statutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *See* 658 N.W.2d at 130.

101. *See* Miller v. Burk, 188 P.3d 1112, 1123 (Nev. 2008).

102. *See, e.g.*, Halverson v. Miller, 186 P.3d 893, 896 (Nev. 2008) ("'Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional.' The presumption, however, is rebutted when the challenger clearly shows the statute's invalidity." (quoting Nevadans for Nev. v. Beers, 142 P.3d 339, 345 (Nev. 2006))); Koscot Interplanetary, Inc. v. Draney, 530 P.2d 108, 112 (Nev. 1974) ("Every reasonable presumption must be indulged in support of the controverted statute with any doubts being resolved against the challenging party, who has the substantial burden of showing that the act is constitutionally unsound."); *Ex parte* Iratacable, 30 P.2d 284, 287, 290–91 (Nev. 1934) ("It is not only our duty to indulge every presumption in favor of the constitutionality of the act in question, but to be loath to override an act so wholesome and beneficent as the present one.").

103. State *ex rel.* Mack v. Torreyson, 34 P. 870, 871 (Nev. 1893). *Torreyson* is cited in a 1948 case that mentions resolving doubts in favor of constitutionality, but not for that proposition. *See* King v. Bd. of Regents, 200 P.2d 221, 225–26 (Nev. 1948).

104. *See supra* note 71 and accompanying text.

105. *See* 44 P. 516, 517 (Mont. 1896)*; see also* Green, *supra* note 3, at 180–81 n.128.

106. *See, e.g.*, State v. Clancy, 52 P. 267, 267 (Mont. 1898); State v. Stewart, 190 P. 129, 132 (Mont. 1920); State *ex rel.* Pierce v. Gowdy, 203 P. 1115, 1117 (Mont. 1922).

107. *See* 72 P. 659 (Mont. 1903).

constitutional review of statutes, i.e., that "courts will not pronounce a statute unconstitutional unless it is clearly so, and both the statutes and the constitutional provisions with which they are claimed to be in conflict will be liberally construed with a view to sustaining legislative action."[108] This suggests sloppy research and opinion drafting. It also indicates that Montana justices have acted in a loose fashion, inserting "unconstitutional beyond a reasonable doubt" when they wish to signal deference to legislators, without thoughtfully considering the doctrinal history or justification for the "standard" they apply. Indeed, the only contemporary reference to Montana's *Camp Sing* case in this context appears in a 2007 concurring opinion in which a justice writes:

> I . . . find this to be an incongruous standard to apply to the proving of a legal proposition as opposed to an issue of fact. I agree with the New York Federal District Court's observation that the 'beyond a reasonable doubt' standard is an 'absurd standard of decision' for a question of law.[109]

3. Progressive Era Expansion

Twenty-five state supreme courts mentioned "unconstitutional beyond a reasonable doubt" for the first time after 1893, the publication year of Thayer's article.[110] All but two of those—Oregon (1933) and Hawai'i (1975)[111]—appeared between the late 1890s and the early 1920s, a period of progressive activism and growth in government regulation of the private sector.[112] When one examines these Progressive Era decisions, twenty-one of twenty-three states upheld statutes and most

108. *Id.* at 661.

109. *See* Oberson v. U.S. Dep't of Agric., 2007 MT 293, ¶ 34, 339 Mont. 519, 171 P.3d 715 (Leaphart, J., concurring). Another case, *Powder River City v. State*, 2002 MT 259, 312 Mont. 198, 60 P.3d 357, cites to *Camp Sing* in regard to taxation on coal and mining.

110. Green, *supra* note 3, at 179–82.

111. *See id.* at 182. The twenty-three states to first mention "unconstitutional beyond a reasonable doubt" during the Progressive Era were: North Carolina (1885), Indiana (1886), Montana (1886), Minnesota (1886), Delaware (1899), Maine (1899), Nebraska (1900), Georgia (1902), Texas (1903), Washington (1904), Mississippi (1906), Alabama (1908), Utah (1908), Louisiana (1908), Oklahoma (1909), New Jersey (1910), Kansas (1912), North Dakota (1914), Ohio (1915), Virginia (1918), Arizona (1921), Wyoming (1923), and New Mexico (1925). *See id.* at 180–182.

112. *See generally* RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. (1955) (examining the Populist-Progressive thinking that occurred from 1890 to 1917); GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900–1916 (1963) (arguing that the Progressive Era reform was brought about by business control over politics); LEWIS L. GOULD, THE PROGRESSIVE ERA (Lewis L. Gould ed., 1974) (scrutinizing the Populist-Progressive era from the 1890s to the end of World War I).

involved regulatory measures that Thayer would have liked judges to respect rather than reject.[113] This suggests that Thayer's arguments about judicial deference to elected legislative bodies had gained some traction—or at least that Thayer's progressive ideas correlated with a broader judicial consensus that was already developing in that era.[114] It is important to observe that in these post-1893 instances of the first uses of "unconstitutional beyond a reasonable doubt," the courts in more than 90% of those cases *upheld* statutes, a proportion that is similar to the 84% of the twenty-first century cases that mention the formulation.[115] Courts appear much less likely to bring up the concept when overturning a law, so that they are not treating "unconstitutional beyond a reasonable

113. *See* Sutton v. Phillips, 21 S.E. 968, 968 (N.C. 1895) (upholding weights and measures regulation); State v. Gerhardt, 44 N.E. 469, 475–77 (Ind. 1896) (upholding liquor regulation); State v. Camp Sing, 44 P. 516, 522 (Mont. 1896) (upholding a business license tax); Lommen v. Minneapolis Gaslight Co., 68 N.W. 53, 57 (Minn. 1896) (upholding jury selection process); Wilmington v. Ewing, 43 A. 305, 309 (Del. 1899) (upholding limits on city tort liability); State v. Lubee, 45 A. 520, 522 (Me. 1899) (upholding fisheries regulations); State v. Standard Oil Co., 84 N.W. 413, 413–14 (Neb. 1900) (upholding anti-trust legislation); Park v. Candler, 40 S.E. 523, 526 (Ga. 1902) (upholding law allocating proceeds of state property sales to debt); Brown v. City of Galveston, 75 S.W. 488, 497 (Tex. 1903) (upholding local license taxes); State v. Ide, 77 P. 961, 965 (Wash. 1904) (overturning non-uniform taxes); State *ex rel*. Greaves v. Henry, 40 So. 152, 159 (Miss. 1906) (upholding state prison labor statute); State *ex rel*. Woodward v. Skeggs, 46 So. 268, 273 (Ala. 1908) (upholding county liquor regulations); Blackrock Copper Mining & Milling Co. v. Tingey, 98 P. 180, 186 (Utah 1908) (upholding license taxes); State *ex rel*. Lebauve v. Michel, 46 So. 430, 436 (La. 1908) (upholding election law); Rakowski v. Wagoner, 103 P. 632, 634 (Okla. 1909) (upholding statute on court locations); Booth v. McGuiness, 75 A. 455, 467 (N.J. 1910) (overturning civil service law); State v. Sherow, 123 P. 866, 867 (Kan. 1912) (upholding statute on local pool hall regulations); State *ex rel.* McCue v. N. Pac. Ry. Co., 145 N.W. 135, 160 (N.D. 1914) (upholding railroad rate regulation); Miami County v. City of Dayton, 110 N.E. 726, 732 (Ohio 1915) (upholding land conservation law); City of Roanoke v. Elliott, 96 S.E. 819, 824–26 (Va. 1918) (upholding emergency clause in legislation); Smith v. Mahoney, 197 P. 704, 708 (Ariz. 1921) (overturning non-uniform tax); *In re* Proposed Middle Rio Grande Conservancy Dist., 242 P. 683, 696 (N.M. 1925) (upholding land conservation law). It should be observed that the last two state courts to use "unconstitutional beyond a reasonable doubt," also did so in cases upholding regulatory statutes. *See* Anderson v. Thomas, 26 P.2d 60, 76 (Or. 1933) (upholding regulation and taxation of motor carriers); State v. Kahalewai, 541 P.2d 1020, 1021 (Haw. 1975) (upholding statute regulating intoxicants).

114. For a discussion of the impact of upper-middle-class progressive attitudes on state court decisions in the early 20th century, 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 (2013).

115. *See supra* Table 1.

doubt" as a real standard or constitutional theory that actually guides justices in deciding cases.[116]

4. A Remarkable Lack of Discussion in Most States

Despite the spurt in the use of Thayer's formulation in the thirty years following his article's publication, a state supreme court's introduction of the concept in those years has no correlation to the frequency with which it later applied the formulation. In other words, it is not a predicter of whether a state is more, or less, likely to mention "unconstitutional beyond a reasonable doubt" over the long term. For example, of the twenty-three states in which the idea was first voiced during the Progressive Era,[117] four were active users post-2000,[118] three seem to have discontinued the formulation altogether,[119] and in the remaining sixteen states the usage was sporadic.[120] This is consistent with the random, geographically scattered character of state courts voicing Thayer's idea.

A striking phenomenon is the noticeable lack of judicial thought and discussion about whether or how "unconstitutional beyond a reasonable doubt" meshes with the more common clarity standard, or whether Thayer's approach makes any sense at all. State courts either cite the few early U.S. Supreme Court uses in *Ogden* and the *Sinking Fund Cases*, to Massachusetts Justice Shaw in *Wellington*,[121] to Cooley's treatise,[122] or they pick it up from other states or seemingly out of thin air.[123] As Green

116. This is Richard A. Posner's major observation, i.e., that Thayer's "standard" is not a constitutional theory that helps judges "decide whether a statute or an executive action violates the Constitution." Posner, *supra* note 1, at 538.

117. *See supra* notes 110–12 and accompanying text.

118. Montana (74); Ohio (46); Washington (42); Mississippi (34).

119. Delaware, Georgia, and Texas. *See supra* notes 84, 86 and accompanying text.

120. North Carolina, Indiana, Minnesota, Maine, Nebraska, Alabama, Utah, Louisiana, Oklahoma, New Jersey, Kansas, North Dakota, Virginia, Arizona, Wyoming, New Mexico. *See supra* notes 72–73 and accompanying text.

121. *See supra* notes 35–37 and accompanying text; *see, e.g.*, State v. District of Narragansett, 16 A. 901, 906 (R.I. 1889); Noble v. Bragaw, 85 P. 903, 904 (Idaho 1906); State v. Phillips, 78 A. 283, 285 (Me. 1910); Clement v. State Nat'l Bank, 78 A. 944, 958 (Vt. 1911); City of Xenia v. Schmidt, 130 N.E. 24, 26 (Ohio 1920).

122. *See supra* note 43 and accompanying text; *see*, *e.g.*, Pelzer, Rodgers & Co. v. Campbell & Co., 15 S.C. 581, 593 (1881); Cole Mfg. Co. v. Falls, 16 S.W. 1045, 1046 (Tenn. 1891); Bonhomme County v. Berndt, 83 N.W. 333, 334–35 (S.D. 1900); State *ex rel.* Lucero v. Marron, 128 P. 485, 488 (N.M. 1912).

123. *See, e.g.*, Miami County v. City of Dayton, 110 N.E. 726, 728 (Ohio 1915) ("Of late many of the courts, and especially the federal courts, have held that the conflict [between a statute and the constitution] must be 'beyond a reasonable doubt' . . . ."); Hartford Bridge

observed, courts often have used it interchangeably with the clarity approach.[124] But few states have thoughtfully engaged with questions such as the difference between "doubt" and "reasonable doubt,"[125] the difference between "reasonable doubt" and the clarity standard, or whether it makes any sense to use a phrase rooted in a criminal evidentiary standard to determine whether a statute is constitutional.

A handful of state supreme courts have engaged in serious discussion of the issue, and the reasoning in their opinions is thoughtful and elucidating. We will next review opinions in a half dozen states where justices have taken the time to grapple with the question of whether "unconstitutional beyond a reasonable doubt" makes doctrinal sense. The state court opinions that have addressed the formulation fall into two groups: one reconfiguring "unconstitutional beyond a reasonable doubt" into something else; and the other consisting of opinions (including concurrences or dissents) that debate the topic and sometimes reject the concept altogether.

5. Reformulating the Formulation's "Real" Meaning

Two opinions, from Utah and Wisconsin, handle the formulation by explaining that it means something different from the evidentiary standard. In *Society of Separationists, Inc. v. Whitehead*,[126] Utah's Supreme Court addressed the distinction between "beyond a reasonable doubt" as a criminal law standard and as a standard of constitutional decision-making:

> The City Council argues that we should uphold its practice unless the Separationists show that the practice is unconstitutional "beyond a reasonable doubt." We agree with the Council that the burden of showing the unconstitutionality of the practice is on the Separationists. However, we do not agree that the showing must be made "beyond a reasonable doubt" as that phrase has

Co. v. Union Ferry Co., 29 Conn. 210, 211 (1860); State v. Sherow, 123 P. 866, 867 (Kan. 1912).

124. Green, *supra* note 3, at 183–88. A good example is provided in West Virginia. Tracking back through that state's "unconstitutional beyond a reasonable doubt" citations, one eventually comes to, *Varner v. Martin*, 21 W. Va. 534 (1883), where the opinion says: "Perhaps this really means no more than we have said, that before declaring an act of the Legislature void its unconstitutionality should be *clear* to our minds." *Varner*, 21 W. Va. at 542.

125. Green, *supra* note 3, at 174 (listing nine states that simply referred to doubt in early decisions without adding the adjective "reasonable").

126. 870 P.2d 916 (Utah 1993).

> been interpreted in the criminal law context, despite language to that effect in *Salt Lake City v. Savage*. We think that the City Council has read the *Savage* standard out of context and without reference to the cases upon which it was grounded or our decisions since then. We therefore restate the burden to be met by one who challenges an enactment on constitutional grounds: The act is presumed valid, and we resolve any reasonable doubts in favor of constitutionality.[127]

A recent Wisconsin opinion took a different approach, essentially converting the formulation into a rhetorical flourish meant to emphasize that the justices should have a high degree of confidence of unconstitutionality prior to invalidating a statute. In *Mayo v. Wisconsin Injured Patients and Families Compensation Fund*, that court wrote:

> A party challenging the constitutionality of a statute bears a very heavy burden in overcoming the presumption of constitutionality. In order to be successful, the challenger must prove that the statute is unconstitutional "beyond a reasonable doubt." In the context of a challenge to a statute's constitutionality, "beyond a reasonable doubt" "expresses the '*force or conviction* with which a court must conclude, as a matter of law, that a statute is unconstitutional before the statute . . . can be set aside.'"[128]

As noted above, some state courts early defined "unconstitutional beyond a reasonable doubt" to "really" mean that the unconstitutionality is clear. An example is a 1901 West Virginia opinion, *Mayor of South Morgantown v. City of Morgantown*, where the court opined that "a court must move with great caution in declaring an act of the legislature unconstitutional, resolve all doubt in favor of its validity, and hold it unconstitutional only in cases where the act is plainly and palpably violative of the constitution."[129]

127. *Id.* at 920 (footnotes omitted) (citations omitted).

128. Mayo v. Wis. Injured Patients & Fams. Comp. Fund, 2018 WI 78, ¶ 27, 383 Wis. 2d 1, 24, 914 N.W.2d 678, 689 (alteration in original) (emphasis added) (citations omitted); *see also In re* Commitment of C.S., 2020 WI 33, ¶ 14, 391 Wis. 2d 35, 940 N.W.2d 875.

129. *See* Mayor of South Morgantown v. City of South Morgantown, 40 S.E. 15, 16–17 (W. Va. 1901); *see also supra* note 124 and accompanying text.

A recent example of a court *thinking* about the appropriateness of the formulation (but then punting) is *TABOR Foundation v. Regional Transportation District*,[130] in which Colorado's court wrote:

> We presume a statute is constitutional, and we have long required parties challenging the constitutionality of statutes to prove unconstitutionality beyond a reasonable doubt. The Foundation asks us to reconsider the beyond-a-reasonable-doubt standard for constitutional challenges, or at least for challenges to statutes under TABOR. It urges us to adopt a less onerous "plain showing" standard instead. But because we conclude the Foundation has failed to prove H.B. 13-1272 unconstitutional under either standard, we decline to reconsider our choice of standards today.[131]

Lively debate has arisen in Montana and Washington, both states that continue to be heavy users of "unconstitutional beyond a reasonable doubt." In *Oberson v. United States Department of Agriculture*,[132] Montana's Justice W. William Leaphart wrote a concurring opinion in order to critique the formulation in detail:

> I specially concur only to point out that in ¶ 22, the Court notes that "Oberson has proven, beyond a reasonable doubt, that the 'gross negligence' provision in § 23–2–653, MCA (1995), is 'overbroad,' extends 'beyond' its stated purpose and fails to pass rational basis review." This Court has applied this "beyond a reasonable doubt" standard to constitutional challenges for over 100 years, beginning with *State v. Camp Sing*. The standard is applied by many of our sister states, too numerous to cite. . . .
>
> . . . .
>
> Despite this time-honored and well accepted standard of proving unconstitutionality, I nonetheless find this to be an incongruous standard to apply to the proving of a legal proposition as opposed to an issue of fact. I agree with the New York Federal District Court's observation that the "beyond a reasonable doubt" standard is an "absurd standard of decision" for a question of law. . . .

130. 2018 CO 29, 416 P.3d 101 (en banc).
131. *Id.* at ¶ 15, 416 P.3d at 104 (citations omitted).
132. 2007 MT 293, 339 Mont. 519, 171 P.3d 715.

> . . . .
>
> I suggest that the Court adopt a standard whereby we invalidate a legislative enactment only upon a plain showing by the challenger that the legislation in question lacks a rational basis.[133]

Justice Leaphart appears to have been unsuccessful in bringing his Montana colleagues along with him. But in several recent state cases, the debate has become more heated, with a recent Washington case closely split on the meaning and usefulness of "unconstitutional beyond a reasonable doubt." In *Island County v. State*, Justice Richard Guy, in 1998, had distinguished the concept from the criminal evidentiary standard but seemed unable to decide what the formulation *did* mean.[134] He mentioned several rationales: rhetorical deference to the legislature; then a "full convinced" standard; and finally, a flat-out Marshallian statement that the judiciary has the last word:

> Our traditional articulation of the standard of review in a case where the constitutionality of a statute is challenged is that a statute is presumed to be constitutional and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt. While we adhere to this standard, we take this opportunity to explain the rationale of such a standard. The "reasonable doubt" standard, when used in the context of a criminal proceeding as the standard necessary to convict an accused of a crime, is an evidentiary standard and refers to " 'the necessity of reaching a subjective state of certitude of the facts in issue.' "
>
> In contrast, the "beyond a reasonable doubt" standard used when a statute is challenged as unconstitutional 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. The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution. We assume the Legislature considered the constitutionality of its enactments and afford some deference to that judgment. Additionally, the

133. *Id.* at ¶¶ 33–35, 339 Mont. at 529–30, 171 P.3d at 722–23 (Leaphart, J., concurring).
134. *See* Island County v. State, 955 P.2d 377, 380 (Wash. 1998) (en banc).

> Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution. Ultimately, however, the judiciary must make the decision, as a matter of law, whether a given statute is within the legislature's power to enact or whether it violates a constitutional mandate.[135]

This confused approach led to a vigorous debate later in *School Districts' Alliance for Adequate Funding of Special Education v. State*, in which Washington 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."[136] She reiterated that "this high standard is based on our respect for the legislative branch,"[137] and 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 are 'fully convinced, after a searching legal analysis, that the statute violates the constitution.'"[138] Five justices signed Owens's opinion.[139] But at the same time a majority signed either one of the concurrences or the dissent—all of which attacked the "unconstitutional beyond a reasonable doubt" concept.[140] Justice Debra Stephens argued that the "'beyond a reasonable doubt' standard is unnecessary and distracting."[141] She noted an "inherent tension" between the court's duty to construe the state constitution and appropriate deference to the legislature's policy-making role, and then she engaged in a thoughtful discussion of whether the "beyond a reasonable doubt" standard was "the proper constitutional lens through which to examine positive rights."[142] Justice Tom Chambers argued that "beyond a reasonable doubt" should be left solely as an evidentiary burden on a

135. *Island County*, 955 P.2d at 380 (citations omitted). For a detailed critique of the Washington State Supreme Court's inconsistent and contradictory use of multiple standards, see generally Hugh Spitzer, "*Unconstitutional Beyond a Reasonable Doubt"—A Misleading Mantra that Should be Gone for Good*, 96 WASH. L. REV. ONLINE 1 (2021).

136. *See* Sch. Dist. All. for Adequate Funding of Special Educ. v. State, 244 P.3d 1, 4 (Wash. 2010) (en banc) (citing *Island County*, 955 P.2d at 380).

137. *Id.* (citing *Island County*, 955 P.2d at 380).

138. *Id.* at 5 (citing *Island County*, 955 P.2d at 380).

139. *See id.* at 1.

140. *See id.* at 9-10.

141. *Id.* at 9 (Stephens, J., concurring).

142. *See id.* at 9–10.

party and that while the court should assume a statute is valid, it should "entertain no presumptions against its validity."[143]

Arizona's Supreme Court recently took the discussion one step further in *Gallardo v. State*,[144] in which the justices expressly rejected the "unconstitutional beyond a reasonable doubt" formulation:

> 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*.[145]

But this type of conscientious debate and reasoning is exceptionally rare in state court decisions that recite (or reject) the idea of unconstitutionality "beyond a reasonable doubt." Why is this? Why do a majority of state supreme courts continue to recite this formulation, albeit at widely varying frequencies? Does it make any difference in how judges decide cases, or is it principally a rhetorical device?

IV. WHAT COURTS DO—AND DON'T DO—WITH "UNCONSTITUTIONAL BEYOND A REASONABLE DOUBT"

State supreme court use of the "unconstitutional beyond a reasonable doubt" formulation is widely dispersed, but geographically and historically random, as we have seen.[146] In some jurisdictions it has appeared fleetingly, while in others it has become a standard catchphrase in court options—at least in opinions *upholding* statutes. There are several overlapping explanations for (or at least observations about) the formulation's odd history. For some courts, "unconstitutional beyond a reasonable doubt" means something rather different from what it says. In many instances it seems to have evolved through common law

143. *Id.* at 10 (Chambers, J., concurring).
144. 336 P.3d 717 (Ariz. 2014).
145. *Id.* at 720 (emphasis added) (citations omitted).
146. *See supra* notes 70–74, 85–87 and accompanying text.

borrowings without much reflection. And most of the time it serves to provide judges with political cover, a rhetorical device meant to signal legislators and the public. But the formulation rarely makes any real difference in court deliberations or reasoning, and it causes confusion and potential harm.

A. Something Different from What It Says

The state supreme courts that speak in terms of unconstitutionality "beyond a reasonable doubt" do not really mean that they will refuse to invalidate a statute if there is any rational argument whatsoever that the legislation might be constitutional. If the formulation were consistently followed as a standard or constitutional theory, then virtually every appellate decision on unconstitutionality would have to be unanimous (or at least the judges in the majority would have to regard any dissenting colleagues as irrational imbeciles). The fourteen courts that use the concept regularly[147] must mean something different. Green observed that many states have used the formulation interchangeably with the clarity approach, i.e., a high judicial confidence that legislation *clearly* violates the constitution.[148] Among the states that continue to actively voice the "unconstitutional beyond a reasonable doubt" standard, good examples of the clarity approach are provided by West Virginia[149] and Wisconsin,[150] and Green furnishes other historical examples.[151] Some active users of the formulation, such as Utah,[152] emphasize that "unconstitutional beyond a reasonable doubt" means that the party challenging the constitutionality of a statute has a heavy burden of convincing the court. But those states readily concede that the statement is quite different from the criminal evidence standard of proof of culpability.[153]

147. *See supra* note 71 and accompanying text.

148. *See supra* note 124 and accompanying text.

149. *See supra* note 124 and accompanying text.

150. *See* Mayo v. Wis. Injured Patients & Fams. Comp. Fund, 2018 WI 78, ¶ 27, 383 Wis. 2d 1, 24, 914 N.W.2d 678, 689 (stating that the formulation "expresses the 'force or conviction with which a court must conclude, as a matter of law, that a statute is unconstitutional . . . .'" (quoting League of Women Voters v. Walker, 2014 WI 97, ¶ 17, 357 Wis.2d 360, 371, 851 N.W.2d 302, 308)).

151. *See* Green, *supra* note 3, at 183–88, 185 n.186, 186 n.188.

152. *See* Soc'y of Separationists, Inc. v. Whitehead, 870 P.2d 916, 920 (Utah 1993).

153. *See, e.g.*, *Whitehead*, 870 P.2d at 920; Island County v. State, 955 P.2d 377, 380 (Wash. 1998) (en banc).

B. Common Law Courts Are Borrowers (for Better and Worse)

One of the principal characteristics of common law adjudicating is that judges routinely borrow from each other. Sometimes they carefully evaluate the reasoning of another court's opinions and thoughtfully adopt constitutional standards. But frequently a judge who is trying to support a decision will grab a phrase from a prior case, or a headnote, and latch onto a statement that sounds familiar and might help convince colleagues—even when the borrowed phrase has not been carefully evaluated. Such is often the case with "unconstitutional beyond a reasonable doubt" language, which was copied by state after state with little or no discussion[154]—and often dropped later from the discourse.[155] The uptick in usage of "unconstitutional beyond a reasonable doubt" during the Progressive Era suggests that whether or not state supreme courts were thinking through the formulation (mostly not), they had a distinct reason for latching onto the concept as a symbol of their increasing determination to defer to lawmakers' enactment of regulatory statutes that just a few years earlier, pro-business courts had invalidated.[156]

C. Signaling Deference to Legislatures (Even When Not Deferring)

Today's dominant use of "unconstitutional beyond a reasonable doubt" appears to be as a rhetorical flourish, what Professor Vicki C. Jackson calls a "rhetorical commitment[] to judicial deference."[157] It enables a court, when upholding a statute ardently challenged by an interest group or by an individual with a poignant story, to say, in essence: "We feel for you, but we're stuck with the statute because we can overturn it only if it is unconstitutional beyond a reasonable doubt, which as we all know is a *very* rigorous standard." This devil-made-me-do-it device is consistent with our finding that 83% of the recent opinions in which courts voiced the "unconstitutional beyond a reasonable doubt" formulation were in cases *upholding* statutes.[158] When a court mentions the formulation but proceeds to invalidate a statute, the opinion is signaling to legislators: "We certainly respect elected lawmakers, and we're *very* cautious about overturning a statute, but this one is clearly

154. *See supra* notes 121–25 and accompanying text.
155. *See supra* notes 84–89 and accompanying text.
156. *See supra* notes 112–15 and accompanying text.
157. Jackson, *supra* note 6, at 2348.
158. *See supra* Table 1.

unconstitutional—beyond a reasonable doubt (which we all know is a *very* rigorous standard)."

Courts can just as well emphasize the burden on challengers and the concept that they invalidate a law only if it is clearly, plainly, or manifestly unconstitutional—and they regularly do that.[159] But "unconstitutional beyond a reasonable doubt" survives as such a useful rhetorical tool for many state supreme courts. The conclusion that it is an oratorical device, rather than a real standard for deciding cases, is supported by the willingness of courts that voice the formulation when upholding statutes to ignore it when overturning laws. As described above, there are fourteen state supreme courts that have used "unconstitutional beyond a reasonable doubt" more than twenty times since 2000.[160] But during that period, the high courts in at least five of them—Alabama,[161] Iowa,[162] Ohio,[163] West Virginia,[164] and Washington[165]—have on occasion invalidated statutes on constitutional grounds without so much as mentioning the formulation.

D. What's the Harm?

Why should we care about judges using rhetorical flourishes that mean something different from what they say, especially when those flourishes make no difference in case outcomes? The problem is that contorting a familiar proof standard from criminal evidence law into a putative constitutional theory or rule of decision, misleads both lawyers and the public. It may in some instances be disingenuous and reduce respect for the judiciary.

American appellate judges pride themselves on straightforward explanations for their decisions. But some state courts voice "unconstitutional beyond a reasonable doubt" language followed

159. *See* Green, *supra* note 3, at 176–78.

160. *See supra* note 71 and accompanying text.

161. *See, e.g.*, Jefferson County v. Weissman, 69 So.3d 827, 844–45 (Ala. 2011) (Stuart, J., dissenting); King v. Campbell, 988 So.2d 969, 986 (Ala. 2007).

162. *See, e.g.*, Planned Parenthood of the Heartland v. Reynolds *ex rel*. State, 915 N.W.2d 206, 245–46 (Iowa 2017). For a description of Iowa's inconsistent use of the "beyond a reasonable doubt" standard, see Bruce Kempkes, *Rediscovering the Iowa Constitution: The Role of the Courts Under the Silver Bullet*, 37 Drake L. Rev. 33, 46–51 (1987).

163. *See, e.g.*, State *ex rel.* Espen v. Wood Cnty. Bd. of Elections, 154 Ohio St. 3d 1, 2017-Ohio-8223, 110 N.E.3d 1222, at ¶¶ 23–25; State v. Foster, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E.2d 470, at ¶ 3.

164. *See, e.g.*, State v. Hoyle, 836 S.E.2d 817, 832–34 (W. Va. 2019); Frantz v. Palmer, 564 S.E.2d 398, 404–05 (W. Va. 2001).

165. *See, e.g.*, State v. Villela, 450 P.3d 170, 176 (Wash. 2019); State v. Gregory, 427 P.3d 621, 641 (Wash. 2018); McCleary v. State, 269 P.3d 227, 258 (Wash. 2012) (en banc).

immediately with a statement that, "never mind, the court actually means something different," i.e., that a statute will not be invalidated unless it is clearly, manifestly, or convincingly unconstitutional. This causes confusion and frustration among people who take judges at their word. For example, a 2014 law review case note criticized the Washington Supreme Court's constitutional rejection of an initiative measure relating to tax increases.[166] That author seemed genuinely shocked that the court declined to follow Thayer's approach, arguing that based on that court's declaration of the "beyond a reasonable doubt" standard, the court had a duty to harmonize the statute with the constitution if a reasonable interpretation existed, writing that "[t]he judicial branch must uphold the statute in light of this reasonable interpretation."[167]

Next, "unconstitutional beyond a reasonable doubt" just might be a bit disingenuous. State supreme court justices are generally a thoughtful and honest group of people. They invoke "beyond a reasonable doubt" to placate disappointed challengers of statutes or, when courts overturn laws, as a sop to legislators or voters who might be angered by judicial nullification of an enacted law. One state supreme court justice defended the phrase as "simply a hortatory expression" when the justices are really saying that they respect the legislature's role.[168] But of course the court could simply say that, without using what appears to be some kind of constitutional theory or standard of decision.

State supreme courts have several workable alternative devices at their disposal. These include the widespread clarity (clearly unconstitutional) formulation,[169] as well as approaches that emphasize a presumption of constitutionality and the high burden of argumentation placed on those who challenge statutes.[170] Green has observed that courts frequently conflate "clearly unconstitutional" and "unconstitutional beyond a reasonable doubt."[171] But there is nothing misleading about "clearly unconstitutional." And there is nothing confusing when an appellate court states, that when reviewing a statute, it starts with a presumption that the law is constitutional and expects a challenger to mount a strong argument to the contrary. The bottom line is that courts ought to say what they mean, as simply and as clearly as possible. That

166. 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, 866–68 (2014).

167. *See id.* at 888.

168. *See* Island County v. State, 955 P.2d 377, 393 (Wash. 1998) (en banc).

169. *See supra* notes 63–66 and accompanying text.

170. *See supra* notes 88–93 and accompanying text.

171. Green, *supra* note 3, at 183–88.

is an accepted precept of judicial reasoning and writing in this country—an ideal that, with respect to the "unconstitutional beyond a reasonable doubt" formulation, would not be difficult to achieve if justices put their minds to it.