1993

Thayer Versus Marshall

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Printed in U.S.A.
Vol. 88, No. 1

THAYER VERSUS MARSHALL

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Professor Nagel's intriguing paper[1] suggests that James Bradley Thayer's clear error rule of constitutional adjudication[2] is not an effective vehicle for controlling, and indeed may even exacerbate, the tendency toward invective that often characterizes modern court decisions and legal arguments. Professor Nagel is too charitable. To the extent that Thayer's article has had an influence on either the style or substance of modern constitutional law, that influence has been even more pernicious than Professor Nagel lets on. The source of that problem, however, is less the clear error rule itself than the premises that generate and, in Thayer's view, justify the rule.

The case against Thayerism begins with an obvious but fundamental observation: As Professor Nagel notes in passing,[3] the kind of demonizing language and casual character assassination that he rightly regrets in legal discussions is routine in contemporary *political* discussions. And thus has it always been. Anyone who believes in a golden age of American political discourse should read the debates in Congress on the Alien and Sedition Acts—not to mention the text of the Sedition Act itself. It is no doubt regrettable that political debate takes, and has always taken, this unsavory form, but it is not especially surprising. Politics deals with values. Although some of us believe that propositions of value can be and ought to be subject to rational validation, there is unfortunately no consensus in our political culture about how to resolve normative questions in a substantively rational fashion. In the absence of such consensus, rational argument about values is unlikely to be fruitful, as there is no common standard by which arguments can be evaluated. And when argument is bound to fail, rhetoric, including invective, is a natural substitute.

But that is politics. Law, we might insist, is a different discipline, in which the cheap rhetorical tools that often work on a rationally unin-

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1 Robert F. Nagel, *Name-Calling and the Clear Error Rule*, 88 NW. U. L. REV. 193 (1993).

2 The rule prescribes that a court may disregard a legislative (or, presumably, an executive) act only "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." James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

3 Nagel, *supra* note 1, at 196.

formed electorate ought not to be given credence. We are entitled, a "Nagelian" might argue, to expect different, and better, from our judges and advocates than from our legislators and lobbyists. And indeed we are entitled to expect better—but only if we reject Thayer's rationale for the clear error rule.

As Thayer himself noted, although the clear error rule has a long and distinguished pedigree, it emphatically does not trace its origin to *Marbury v. Madison*[4] in either history or principle. Because this conference is fundamentally concerned with judicial review, it may be helpful to recall *Marbury*'s straightforwardly syllogistic argument for that practice: (1) the duty of courts is to decide cases in accordance with law; (2) the Constitution is supreme law, hierarchically superior to all other potential sources of law, including statutes; therefore, (3) it is the duty of courts to decide cases in accordance with the Constitution in hierarchical preference to all other potential sources of law, including statutes. This argument does not categorically preclude a clear error rule or some other form of deference to legislative or executive judgments, but it certainly does not generate or encourage any such rule. Under the *Marbury* analysis, one would be no more inclined to give deference to a legislative interpretation of the Constitution than to give deference to an agent's construction of a contract of agency.

Accordingly, Thayer did not try to derive the clear error rule from *Marbury*. To the contrary, he affirmatively ridiculed *Marbury*'s argument for judicial review and insisted that the clear error rule "corrected"[5] (to use Thayer's pointed term) what would otherwise have been the inappropriate operation of *Marbury*'s principles.

What, according to Thayer, is wrong with *Marbury*? Chief Justice Marshall's argument, he wrote, "took no notice of the remarkable peculiarities of the situation; it went forward as smoothly as if the constitution were a private letter of attorney, and the court's duty under it were precisely like any of its most ordinary operations."[6] In other words, *Marbury* presupposes a simple conception of constitutional adjudication in which one places a statute alongside the Constitution and then decides whether the two texts are consistent, using precisely the same tools of analysis that one would employ in more mundane legal tasks. This way of framing the inquiry, said Thayer in the central passage of his article,

> easily results in the wrong kind of disregard of legislative considerations; not merely in refusing to let them directly operate as grounds of judgment, but in refusing to consider them at all. Instead of taking them into account and allowing for them as furnishing possible grounds of legislative action, there takes place a pedantic and academic treatment of the texts of the constitution and the laws. And so we miss that combination of a lawyer's

[4] 5 U.S. (1 Cranch) 137 (1803).

[5] Thayer, *supra* note 2, at 140.

[6] *Id.* at 139.

> rigor with a statesman's breadth of view which should be found in dealing with this class of questions in constitutional law.[7]

By contrast, says Thayer, the clear error rule

> recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.[8]

Put less delicately, in Thayer's view, many questions of constitutional interpretation are not strictly legal questions, but are instead questions of political morality, to which conventional forms and methods of legal reasoning are not well suited. In Thayer's constitutional world, the judge needs both the "rigor" of the lawyer's craft and the "breadth" of the statesman's perspective.[9]

It is not hard to see how this principle could lead to the degradation of discourse in legal argument. If constitutional questions are really about politics rather than law, no one should be surprised if constitutional discourse takes on the familiar and unpleasant character of political discourse. If constitutional interpretation is really about values (or "substance," as it is sometimes called) rather than technical legalisms amenable to the lawyer's lowly craft, there is no more reason to expect lawyers and judges to solve the problems of the ages in a civil and rational fashion than to expect the rest of the political community to do so. So if we are not surprised that political candidates carelessly hurl around charges like "racism," we should not be surprised when "statesmanlike" judges behave the same way—in other words, when they behave like our statesmen. Nor can we even bemoan their behavior unless we can all agree on the appropriate methodology for rationally answering substantive questions of value. It is fruitless to criticize judges and lawyers for making bad moral and political arguments unless we can tell them how to make and recognize good ones.

There is, of course, more wrong with Thayer's argument than its potential to degrade discourse. Thayer's analysis not only undercuts the civility of our legal discourse, it fundamentally undercuts the basic rationale for judicial review. If the Constitution is not law in the traditional sense, courts should not merely give deference to legislative judgments; they should abandon the enterprise of judicial review altogether—at least until one can find (as Thayer did not) a rationale for judicial review that does not depend on the Constitution's status as

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[7] *Id.* at 138.

[8] *Id.* at 144.

[9] For an illuminating discussion of (for lack of a better phrase) the perils of judicial statesmanship, see James E. Bond, *The Perils of Judicial Statesmanship*, 7 OKLA. CITY U. L. REV. 399 (1982).

supreme law. In other words, unless a relatively pedantic, naive theory of constitutional adjudication is really correct, a persuasive case for any kind of judicial review is very difficult to sustain.

None of this means that Thayer has not made a valuable contribution to the legal enterprise. Quite the contrary: he made one contribution whose importance has yet to be adequately appreciated. As I have argued at length elsewhere,[10] any theory of legal interpretation must specify *both* what sorts of considerations count for or against the truth of any legal proposition *and* how much of that evidence must be amassed before a legal proposition can be deemed true. Put another way, in order to justify a proposition, we need both *rules of admissibility* (what counts?) and *standards of proof* (how much evidence do we need?). Thayer, unlike most scholars, at least addressed the latter consideration by alleging that propositions asserting the unconstitutionality of federal legislation should be deemed true only when they are established beyond a reasonable doubt. There are, of course, other possible standards of proof that one could apply to such propositions: one might accept them as true when they are supported by clear and convincing evidence or a preponderance of the evidence, or even simply because they are relatively better than any alternative propositions. But *some* standard of proof must be chosen, and Thayer helps bring that fact to our consciousness.

By analogy to Michael Perry's distinction between originalism and minimalism[11] (and more generally between the admissibility rules of an interpretative theory and the theory's method for handling either interpretative or normative uncertainty), the choice of a standard of proof for legal propositions is not, as a general matter, logically entailed by one's choice of an interpretative theory. One can be an originalist, for example, and without contradiction adopt any of the standards of proof set forth above. But the choice of a standard of proof is affected to some degree by one's normative justification for judicial review. If one believes in the *Marbury* rationale for judicial review, it is unlikely that one would adopt a "beyond a reasonable doubt" standard for propositions of unconstitutionality—no more than one would adopt such a standard for ordinary contract interpretation. Nor would one likely adopt any standard of proof that involves deference to Congress, the President, or the states. If the Constitution is a legal document with an ascertainable meaning, that meaning is, in principle, equally available to all persons. As Judge Frank Easterbrook once paraphrased John Marshall in a slightly different context, *Marbury*'s rule of interpretation is, "Every man for himself,"[12] which leaves no room for Thayer-style deference to political actors. Moreover, if the purpose of constitutionalism (and hence of judi-

[10] *See* Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859 (1992).

[11] *See* Michael J. Perry, *The Constitution, the Courts, and the Question of Minimalism*, 88 NW. U. L. REV. 84 (1993).

[12] Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 919 (1989-90).

cial review) is to check governmental power, Thayerian minimalism is doubly problematic. Consider a death row inmate who argues that his constitutional rights were violated either before or during his trial. As a normative matter, should that inmate really have to show *beyond a reasonable doubt* that the government behaved unconstitutionally (perhaps by passing the statute under which he was convicted), even though the *government* bears a heavy beyond-a-reasonable-doubt burden to show that the accused in fact committed the acts in question? Perhaps so, but the claim is hardly obvious.

Thayer's essay reminds us that the central question of constitutional theory is whether constitutional interpretation is essentially like interpretation of, as Thayer put it, a "private letter of attorney," or whether it is something larger, grander, and more value-laden—in other words, more *political*. To paraphrase Judge Easterbrook,[13] *Marbury* says the former, and *Marbury* is right.

[13] *Id.* at 924.