

REVISITING JAMES BRADLEY THAYER

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Mark Tushnet's recent essay,¹ prepared for this centennial symposium on James Bradley Thayer's famous article on judicial review,² has introduced a novel theme into the relatively slight corpus of Thayerian historical scholarship. Thayer has not hitherto precipitated a great deal of scholarly interest. His biography remains to be written, despite a relatively abundant collection of private papers,³ and to the extent that specialists have studied him, those studies pale in comparison to those given to many of his late nineteenth century contemporaries. Not only have Holmes and Langdell precipitated far greater attention, but so arguably have Thomas Cooley,⁴ Christopher Tiedeman,⁵ and John Norton Pomeroy.⁶ In Morton Horwitz's recent history of American legal thought from 1870 to 1960, Thayer receives only one reference, in a chapter on developments from 1945 to 1960.⁷

One well-known exception to this relatively scant treatment of Thayer exists. In the early twentieth century, Thayer's essay, *The Origin and Scope of the American Doctrine of Constitutional Law*, was "discovered" by a group of "progressive" legal scholars and policymakers, personified by Felix Frankfurter, and introduced into the canons of "approved" constitutional scholarship. Thayer's essay was read as endorsing a deferential posture for judges in reviewing the constitutionality of legislation, and applauded as a prescient exemplar of judicial self-re-

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¹ Mark Tushnet, *Thayer's Target: Judicial Review or Democracy?*, 88 NW. U. L. REV. 9 (1993).

² James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

³ Professor Jay Hook is preparing a biography of Thayer based on the James Bradley Thayer Papers in the Harvard Law School Library.

⁴ See CLYDE E. JACOBS, *LAW WRITERS AND THE COURTS* 26-32 (1954); ALAN R. JONES, *THE CONSTITUTIONAL CONSERVATISM OF THOMAS MCINTYRE COOLEY* (1987); PHILIP S. PALUDAN, *A COVENANT WITH DEATH* 249-73 (1975); G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* 115-22 (2d ed. 1988). An important recent treatment of Cooley and other late nineteenth century jurists is Stephen A. Siegel, *Historicism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1485-1515.

⁵ On Tiedeman, see Siegel, *supra* note 4, at 1515-39; JACOBS, *supra* note 4, at 59-63; ARNOLD M. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW* 16-18, 24-27 (1960).

⁶ On Pomeroy, see Siegel, *supra* note 4, at 1453-83; PALUDAN, *supra* note 4, at 219-48; John Norton Pomeroy, Jr., *John Norton Pomeroy*, in 8 GREAT AMERICAN LAWYERS 91-135 (William D. Lewis ed., 1909).

⁷ MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 262 (1992).

straint. In this form it penetrated not only legal circles but those of constitutional historians and political scientists, and came to be seen as an early warning against the judicial stance personified by *Lochner v. New York*.⁸ An apotheosis of this treatment was Arnold Paul's 1960 monograph, *Conservative Crisis and the Rule of Law*,⁹ which, in the course of a detailed analysis of late nineteenth century constitutional jurisprudence, presented Thayer as a sophisticated and prescient thinker.¹⁰

Tushnet's essay seeks to go beyond the orthodox characterizations of Thayer and to reclaim him as a historical figure, but in a particularistic fashion. Tushnet is essentially concerned with refuting the conventional belief that Thayer's *American Doctrine* essay was a response to *Lochner*-type decisions invoking aggressive judicial review, including, conceivably, *Lochner* itself. At one level Tushnet's task seems not particularly ambitious. Thayer's essay appeared in 1893, *Lochner* in 1905, so unless Thayer were a quite otherworldly being he could not have written in response to *Lochner*, and it takes little scholarly originality to grasp that fact. In other respects, however, Tushnet's principal claim—that Thayer was not only not responding to *Lochner*, but he was also not responding to examples of aggressive judicial review at all—is a provocative and significant one, deserving of extended attention.¹¹

My principal purpose in this Essay, however, is not to refute Tushnet's claim about Thayer, but to engage in the reconsideration of Thayer's jurisprudence that Tushnet's essay provokes. After setting forth Tushnet's arguments in Part I of the Essay, I suggest, in Part II, that they do not fully succeed in explaining Thayer's motivation in writing the *American Doctrine* essay, or in locating Thayer as a late nineteenth century jurist. The remaining sections of the Essay sketch out a framework by which that explanation and location might be accomplished. Parts III and IV characterize Thayer's approach to jurisprudential issues as consistent with the belief systems of nineteenth century Whig and gentry political cultures, concluding that Thayer's views were characteristic of Brahmin members of gentry political culture.¹² Part V analyzes Thayer's *American Doctrine* essay as an exercise in Brahmin legal science, whose characteristic form was to treat the "scientist" com-

⁸ 198 U.S. 45 (1905).

⁹ PAUL, *supra* note 5, at 96-99.

¹⁰ *Id.*

¹¹ See Tushnet, *supra* note 1, at 11. While Tushnet implies that orthodox scholarship has failed to note that *Lochner* was decided well after Thayer's *American Doctrine* essay, it seems unlikely that specialist scholars would make so elementary an error. Tushnet's general point, however, that specialist scholars have taken Thayer's essay as a reaction to *Lochner*-type review (that is, aggressive Supreme Court scrutiny of state legislation), seems incontrovertible. As Tushnet notes, and I will subsequently discuss, Thayer specifically reserved his deferential "rule of judicial administration" for instances in which federal courts were reviewing *federal* legislation or *state* courts were reviewing *state* legislation. See Thayer, *supra* note 2, at 144-54; Tushnet, *supra* note 1, at 9.

¹² The terms "Whig," "gentry," "Brahmin," and "political culture" are defined *infra*.

mentator as a historian who "proved," through an analysis of past sources, the validity of fundamental propositions of current political economy. The concluding section fashions an explanation for Thayer's motivation in writing the *American Doctrine* essay that rests on a characterization of him as one type of Brahmin legal scientist.

My characterization of Thayer is intended as a preliminary hypothesis: a fuller treatment would require investigation of a variety of archival and scholarly sources, many of which are referred to in the course of my argument. Current scholarship is arguably just beginning to crack open the world of the late nineteenth century jurists: conventional terms and approaches need to be rethought. In that enterprise Tushnet's essay is an important stimulus.

I. TUSHNET ON THAYER

Tushnet's interpretation of Thayer's essay is encapsulated in the following passage:

We can reassemble the pieces of Thayer's argument in this way. The restrictive rule of administration is justified because constitutional judgments are necessarily implicit in legislative enactments. Yet, because legislatures have mistakenly come to rely on judicial review to correct their "legal" errors, and have abandoned concern for "questions of justice and right," they actually make such judgments less often than they should. Further, even if legislatures make constitutional determinations, many times their decisions will not be reviewed by the courts. Unconstitutional statutes may therefore go into effect. Finally, courts may turn out to be "broken reeds," failing to exercise their power of judicial review appropriately. The defense of constitutional limitations thus demands a sturdier reed, which can be provided, as Thayer constructed the argument, only by insisting on greater *legislative* responsibility. That could be accomplished by "impressing on our people" a sense of responsibility for enforcing such limitations through the political process. As [Christopher] Tiedeman had in 1886, Thayer sought to "awaken the public mind."¹³

Unpacking this passage exposes one to the corpus of Tushnet's argument. Thayer's "restrictive rule of administration" refers to his polemical but arguably well-supported claim, which he first made in a letter to *The Nation* magazine in 1884,¹⁴ that under the American Constitution, judges, who concededly had the power to declare acts of legislatures unconstitutional, should in practice confine those declarations to cases where in their judgment no reasonable doubt existed as to the legislation's unconstitutionality.¹⁵ The statement that "constitutional judg-

¹³ Tushnet, *supra* note 1, at 24.

¹⁴ James B. Thayer, *Constitutionality of Legislation: The Precise Question for a Court*, *THE NATION*, Apr. 10, 1884, at 314.

¹⁵ *Id.* In his letter to *The Nation*, Thayer did not confine the "rule of administration" to cases where the legislation explicitly offended the text of the Constitution, as distinguished from extratextual principles such as "justice," "right," the "nature of things," or "first principles of republican

ments are necessarily implicit in legislative choices” refers to Thayer’s claim, fairly stated and effectively critiqued by Tushnet, that any legislative act rests on an explicit, if often unstated, determination that the act is constitutional. As Tushnet points out, this appears to be a wildly implausible claim to moderns, and was nowhere supported by Thayer, otherwise meticulous in his use of supporting authorities.

The next several sentences refer to Thayer’s effort to connect his claim that legislatures have the power to determine the constitutionality of the legislation they produce to his “restrictive rule” of judicial administration in the arena of constitutional review. Thayer argued that because many legislatures assumed that courts would review the constitutionality of their legislation, they declined in most cases even to give serious attention to the question of constitutional conformity. Ironically, however, the inertia of settled legislation, the fortuity of constitutional challenges, and the ineptitude or lassitude of judges resulted in much legislation being constitutional by default.

The remaining sentences in Tushnet’s passage suggest that by alerting the public to the relatively minimalist constitutional review functions of courts, Thayer intended to encourage *legislatures* to become more civic-minded, perhaps even more public-regarding. The last sentence indicates that, for Tushnet, Thayer’s purposes in writing his *American Doctrine* essay were comparable to those of his contemporary Christopher Tiedeman. Tushnet had previously treated Tiedeman as a jurist whose point of view, while resting on premises comparable to those of Thayer, represented an alternative to Thayer in its conclusions and implications, since Tiedeman, but not Thayer, embraced the “growing impact of class division on law.”¹⁶

The introduction of Tiedeman as Thayer’s foil signals the contextual dimensions of Tushnet’s interpretation. Thayer and Tiedeman, for Tushnet, are both examples of antebellum Jacksonian constitutionalists operating in the altered world of late nineteenth century America. Both begin with the Jacksonian assumption that class legislation was synonymous with special interest or “horizontal” legislation, an evil that could be solved by remedial general statutes enforcing the consensual politics of the community. For Jacksonians, the appropriate response on the part of those offended by such legislation was to “awaken the public mind” so that a resultant political consensus could eventually produce legislation obliterating legislative excesses. In Tushnet’s analysis, however, Tiedeman came to confront the altered status of class legislation in light of the reality of class divisions, and consequent “vertical” legislation, in the political economy of late nineteenth century America. Thayer, by

government.” While his rule was designed to confine judicial invalidation of legislation to the “overwhelming constitutional mandate” case, he did not insist that the “mandate” be grounded solely in the language of the constitutional text.

¹⁶ Tushnet, *supra* note 1, at 14.

contrast, ignored class antagonisms, insisting that the restoration of an antebellum Jacksonian political consensus was still possible. Tushnet ultimately concedes that Tiedeman's standard defense of constitutional review, which associated aggressive review with the protection of individual rights against "socialistic" or "communistic" legislation, was not consistent with Tiedeman's original jurisprudential premises. However, at the same time, he finds Tiedeman's approach more realistic and less archaic than that expressed by Thayer in his *American Doctrine* essay. Tiedeman appears as alternatively paranoid and incoherent, yet nonetheless living in the current world; Thayer, in contrast, appears as equally paranoid and troubled, but at the same time inclined to retreat to an outmoded Jacksonian set of assumptions about the capacity of the public mind to transcend special privilege and interest-group conflict.

Such, in outline, is Tushnet's interpretation of Thayer's famous essay, and there is something to be said for it. If one assumes that Tushnet is not attacking a straw person in his debunking of the conventional view of Thayer—and he cites orthodox sources clearly embracing that view—he has made a significant contribution to revising the "generalist" image of Thayer, even though some specialists, such as Paul, had demonstrated a far more sophisticated understanding of Thayer's essay as a historical document.¹⁷ Moreover, Tushnet has not only effectively reconstructed the logic of Thayer's argument, he has convincingly located some important concerns of Thayer—most particularly the goal of "awakening" the public so as to avoid "excessive" or "special" legislation—in the political economy of what he calls "Jacksonian constitutionalism."¹⁸

The result, in sum, is an interpretation of Thayer's essay, and of his constitutional jurisprudence, that advances our understanding of a neglected and stereotyped figure. At this point, however, I am reminded of a comment by Henry Hart, written over forty years ago in response to an article on Justice Holmes by Mark DeWolfe Howe. Hart said of Howe's article that it helped "to put a good many things in perspective," but seemed "to leave some crucial points in limbo."¹⁹

¹⁷ Paul's discussion of Thayer in *Conservative Crisis and the Rule of Law* demonstrates a clear understanding of Thayer's arguments in the *American Doctrine* essay and skillfully locates Thayer among contemporary commentators. Paul does, however, see Thayer's essay as an "emphatic caution to the judges" that the scope of judicial review was "severely limited, to be exercised only in the clearest cases," and never mentions the possibility that Thayer's primary audience may have been legislators and public citizens. See PAUL, *supra* note 5, at 96-99.

¹⁸ Tushnet, *supra* note 1, at 12 n.15 (citing HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* (1992)). One might note that the idea that the roots of Gilded Age conservative constitutionalism can be found in Jacksonian politics is not at all new. See, e.g., JONES, *supra* note 4, at 40-65; WHITE, *supra* note 4, at 112-22. Charles McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970 (1975), and Alan Jones, *Thomas M. Cooley and 'Laissez-Faire Constitutionalism': A Reconsideration*, 53 J. AM. HIST. 751 (1967), are the germinal sources for this interpretation.

¹⁹ Henry M. Hart, Jr., *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 929 (1951).

II. GETTING BEYOND TUSHNET'S INTERPRETATION

Two "crucial points" about Thayer's essay are arguably left "in limbo"²⁰ by Tushnet's analysis. The first has to do with the intended audience of Thayer's essay; the second with the intellectual framework in which Tushnet locates Thayer.

A. *Tushnet's Textual Arguments*

Although Tushnet effectively summons up other writings by Thayer to reinforce his claim that the essay was aimed at legislatures, there is very little language in the essay itself supporting that claim. Indeed when one reads through the essay in one sitting, one can understand why so many commentators have characterized it as directed at courts. The essay is almost wholly concerned with the decisions of courts, the language of courts, and the history of judicial review in America. Although Thayer makes numerous comments about the place of legislatures in the American constitutional system, when he seeks support for his "rule of administration," or even when he chooses to set forth competing views of the scope of judicial review, his sources are judicial sources. In short, one could fairly infer that Thayer was principally quoting from and citing judicial decisions because he expected that those sources would have greater appeal to judges and those interested in the work of judges.

Moreover, Thayer's style of scholarship makes his motivation particularly difficult to extract. His first statement of the "rule of administration" which he advanced in his *American Doctrine* essay provides an example. Thayer stated the rule in an 1884 letter to *The Nation*. Tushnet, in the course of his argument that Thayer's "audience was the country's leading political actors in the field of law, not its judges,"²¹ quotes a sentence from that letter in which Thayer speaks of the American constitutional system as having "tended to bereave our legislatures of their feelings of responsibility and their sense of honor."²² The remainder of the sentence, however, reads, "and also to lead the community off into mistaken views of the judiciary," and the paragraph in which the sentence appears ends as follows:

But recent decisions may help to show how great, under our system also, is legislative power, and how limited is judicial control. Since this is really so, it is a matter to be steadily and heavily emphasized by the courts, and no

²⁰ Hart's contrast between "perspective" and "limbo" gives me some unease. To put something "in perspective," given current attention to "perspectival" methodologies, seems a richly connotative statement. "Limbo," with its connotations of floating "questions" searching to be definitively "answered," seems less appropriate for a universe of commentary in which the relationship between interpreters and texts is taken to be far from determinate. But another image—that of Tushnet leaving us all in "limbo" as we try desperately to squeeze under a descending rope while others chant—was irresistible.

²¹ Tushnet, *supra* note 1, at 11.

²² *Id.* at 10.

less to be considered by legislatures and those who choose them.²³

Taken as a whole, the paragraph suggests that Thayer's audience is not legislatures in contradistinction to courts, but rather legislatures, courts, and concerned citizens. This audience is what one might expect on delivering an address before the Congress on Jurisprudence and Law Reform, part of the Columbian Exposition of 1893.

One could interpret the above comments as only a modest criticism of Tushnet, since one might argue that other commentators have completely ignored the nonjudicial audiences to which Thayer's essay was directed. But Tushnet's claim that Thayer's audience was *not* judges seems overstated. Moreover, the suggestion that Thayer's remarks were intended to influence all educated Americans concerned with "jurisprudence and law reform" renders more explicable one of the puzzles with which Tushnet began. If Thayer's essay was a response to overly aggressive judicial decisions, Tushnet asks, what were some of those decisions? He claims that the only candidates for "aggressive" judicial treatment of legislation in the years preceding Thayer's 1884 letter and 1893 essay were decisions reviewing *state* legislation, and Thayer's essay, as Tushnet points out, specifically confined his "rule of administration" to judicial review of the constitutionality of federal legislation.²⁴

Tushnet's claim about prior decisions is not entirely accurate. As Jay Hook has shown,²⁵ as late as 1855 there had been only one opinion since the original recognition of judicial review in *Marbury v. Madison*²⁶ in which the Supreme Court had declared an act of Congress unconstitutional, but between 1855 and 1869 the Court invalidated acts of Congress on six occasions.²⁷ Moreover, in two of those cases, *Ex parte Garland*²⁸ (testing the constitutionality of loyalty oaths for former members of the Confederacy) and *Hepburn v. Griswold*²⁹ (testing the constitutionality of paper bank notes as legal tender), Thayer's "rule of administration" had been articulated by Justice Samuel Miller, once in dissent, once in a majority opinion of the Court. Further, in two opinions issued close to the time of Thayer's 1884 letter to *The Nation*, the "rule of administration" again surfaced, once in a majority opinion by Chief Justice Morrison Waite in *The Sinking Fund Cases*,³⁰ once in a dissent by Justice Joseph Bradley in *The Civil Rights Cases*.³¹ Thayer's 1884 letter to *The Nation*, in fact, referred specifically to those two opinions.³²

²³ Thayer, *supra* note 14, at 315.

²⁴ Tushnet, *supra* note 1, at 9.

²⁵ Jay Hook, *A Brief Life of James Bradley Thayer*, 88 NW. U. L. REV. 1 (1993).

²⁶ 5 U.S. (1 Cranch) 137 (1803).

²⁷ See Hook, *supra* note 25, at 5.

²⁸ 71 U.S. (4 Wall.) 333 (1866).

²⁹ 75 U.S. (8 Wall.) 603 (1870).

³⁰ 99 U.S. 700, 718 (1878).

³¹ 109 U.S. 3, 9-10 (1883).

³² See Thayer, *supra* note 14, at 315.

Regardless of the accuracy of Tushnet's rendering of the context in which Thayer wrote his *American Doctrine* essay, the puzzle Tushnet has created largely dissolves if one treats Thayer's essay as directed at *multiple* audiences of Americans concerned generally with jurisprudential issues in the peculiarly American constitutional regime. Since Thayer's argument is quintessentially a structure of powers argument, not limited (as Tushnet points out) to judicial review based on extratextual sources as distinguished from specific textual provisions of the Constitution, any sort of response to constitutional issues by any American legislative or judicial body, or for that matter any commentator, could be fodder for that argument. As such, Thayer's essay can be seen as a response to any contemporaneous discussion of the nature of sovereign powers in the American system of constitutional government. I will have occasion to develop this point in subsequent sections of the Essay.

B. Tiedeman and Thayer as Jacksonian Constitutionalists

A second "crucial point" left "in limbo" by Tushnet's analysis is his characterization of Thayer, and his foil Tiedeman, as "Jacksonian constitutionalists." The characterization has two discrete difficulties, which I will discuss separately. The first difficulty, pursued in the remainder of this subsection, concerns Tushnet's use of the label "Jacksonian" as a catchall term subsuming ideological divisions among groups of commentators in two distinct periods in American history: the antebellum years, between 1830 and the Civil War, and the Gilded Age years, the last three decades of the nineteenth century. In the first period, Tushnet's nomenclature treats all constitutional commentators as Jacksonians, and in the second period, as former Jacksonians. This labeling, while convenient for Tushnet's argument,³³ distorts the universe of commentary in both periods. The second difficulty, reserved for subsequent portions of my Essay, is a product of the first. By indiscriminately labeling Thayer a Jacksonian constitutionalist, Tushnet fails to supply a sufficiently precise analysis of Thayer's jurisprudence to make sense of Thayer's motivation in writing the *American Doctrine* essay. In particular, Tushnet fails sufficiently to explicate Thayer's views on the nature and allocation of sovereign powers in the American system of government, jurisprudential issues that were central to the concerns of Thayer and his Gilded Age contemporaries.

Sharply put, Tushnet has subsumed the cultural labels of "Whig" and "Brahmin gentry" in the label "Jacksonian." This move need not be seen as inept or disingenuous, since "Jacksonian constitutionalist," if not an established term of art in the recent literature on nineteenth century

³³ The labeling, while more broadly employed by Tushnet than many other commentators, is not unique to him: others have felt that the term "Jacksonian constitutionalist," as applied to jurists in the post-Civil War period, is a meaningful one. See, e.g., GILLMAN, *supra* note 18, at 7-13.

constitutional theory, could be said to encapsulate one of the neo-orthodox arguments of that literature, some of which Tushnet cites.³⁴ But Tushnet's nomenclature not only reduces clarity, it robs his analysis of an opportunity to characterize Thayer's political economy in a more precise fashion, and thereby to locate his constitutional theory more precisely in time. The process of locating Thayer's views in a historical context, in fact, requires attention to two characterological terms Tushnet does not employ.

One begins the process of charting a more precise ideological road map of nineteenth century constitutional jurisprudence by introducing some additional political cultures that occupied the realm of orthodox discourse on issues of political economy in that century: Whigs and Democrats in the antebellum period; orthodox Republicans, orthodox Democrats, and gentry in the Gilded Age. Recent historical scholarship, in fact, has constructed a portrait of the Whig and gentry political cultures³⁵ that seems strikingly applicable to Thayer, particularly if emphasis is placed on a subcommunity of gentry culture, the New England Brahmins.

In oversimplified summary, that portrait could be sketched as follows. Whigs, while sharing certain starting assumptions about political economy with antebellum Jacksonian Democrats, differed from the latter in their attitude toward structure-of-powers issues in the American system of federated constitutional republicanism. For example, Whigs and

³⁴ In addition to citing GILLMAN, *supra* note 18, Tushnet cites Siegel, *supra* note 4. Additional studies associating Gilded Age constitutional jurisprudence with Jacksonian Democracy include Jones, *supra* note 18, and McCurdy, *supra* note 18.

³⁵ The term "political culture" requires definition, since the characterization of a group from a "political culture" perspective is often confused with more standard political characterizations. The term "Whig," for example, does not just mean persons who supported the principles and policies of the Whig Party; indeed it might include persons who did not support those policies on specific occasions. The term refers to persons who held a set of foundationalist assumptions on epistemological and metapolitical issues that distinguished them from others (say Democrats) belonging to a different political culture. To take the other central example in my discussion, the terms "gentry" and "Brahmin" also reflect persons sharing another set of foundationalist assumptions, in this instance not capable of being even loosely tied to a major political party. Members of the gentry and Brahmin gentry communities of political culture were often insurgent Republicans in the last three decades of the nineteenth century, sometimes supporting the Liberal Republican and Mugwump factions of the Republican Party. But they were also sometimes supporters of the Democratic Party, and they clashed with one another on a variety of specific issues of political economy. Nonetheless members of the Whigs, the antebellum Democrats, and the Brahmin gentry communities shared with one another distinctive assumptions about political economy. For further discussion of the term, see DANIEL W. HOWE, *THE POLITICAL CULTURE OF THE AMERICAN WHIGS* 1-10 (1979). See also the implicit use of a political culture approach in DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* xiv-xxii (1992). For two early examples of historians making use of the concept of political culture, in quite different ways, see ROBERT BERKHOFFER, *A BEHAVIORAL APPROACH TO HISTORICAL ANALYSIS* (1969); J.G.A. POCKOCK, *POLITICS, LANGUAGE, AND TIME* (1973). Of those approaches that of Pocock has been more influential in the work of Howe and Ross. See HOWE, *supra*, at 2; ROSS, *supra*, at xxi-xxii.

Democrats both believed that for a republican form of government to endure, civic virtue continually needed to be fostered, and special interests consistently needed to be restrained. Whigs, however, felt that a system of national political parties and patronage was inconsistent with those goals; the appropriate systemic remedy was a nonpartisan, active central government, serving both as a medium for facilitating economic improvements and for restraining and minimizing political conflict that emanated at the state and local levels. Democrats, in contrast, were more sanguine about the capacity of political parties and the political process to restrain interest group conflict and foster virtue. In particular, Democrats believed that the combination of a disciplined patronage system, linking local to regional and ultimately national politics, and the democratization of politics at the state level would obviate any need for a visible national government, which they feared would be dominated by social and economic elites.³⁶

In both the Whig and Democrat communities, sovereignty issues figured prominently in any conceptualization of an ideal polity. Both Whigs and Democrats were committed to, but concerned about, the concept of "Union" in the American system of government. For both groups "Union" was a crucial symbol of social cement, and yet a fragile, problematic entity. On the one hand, "Union" had connotations of a federal leviathan, becoming in practice the rationale for a tyrannical general government that would eventually obliterate state and local autonomy; on the other hand, "Union" was the talisman of American national independence and the only bulwark against the centrifugal pressures, emanating from the state level, that threatened the nation with disintegration. Mapping out the precise relationships among the sovereign partners in the American system of government was crucial to the maintenance of "Union" and of the future of the republic. Yet sovereignty issues, given the structural design of the Constitution's framers, were extraordinarily complex and delicate, especially given the massive territorial, political, and economic growth of the nation in the antebellum years.³⁷

Of course, in retrospect, neither the Whig, Democrat, or any other solutions to the antebellum crisis on sovereignty issues prevented the Civil War. The war's solution to those issues, however, was a forced solution, formally eliminating one element in the crisis, slavery, but not resolving the central problem of how "Union" could be preserved with-

³⁶ See HOWE, *supra* note 35, at 15-22.

³⁷ On the history of the concept of "Union" in antebellum American thought, see PAUL C. NAGEL, *ONE NATION INDIVISIBLE* 13-31, 109-39 (1964). For specific examples of contested sovereignty issues in the early nineteenth century, see G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE 1815-35*, at 485-594 (1988); CARL B. SWISHER, *THE TANEY PERIOD, 1836-64*, at 512-27 (1974); HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER THE LAW* 1-18 (1982).

out resulting in federal tyranny, political corruption, and the loss of the ideal of republican civic virtue. Notwithstanding the war, the starting assumptions of political economy, as the nation sought to reconstruct itself in the late 1860s and 1870s, remained antebellum assumptions. The potentially dramatic changes in the structure of constitutional powers instituted by the Thirteenth, Fourteenth, and Fifteenth Amendments, for example, were immediately identified by contemporaries as arguably more significant than the effects of those Amendments on race relations.³⁸

Although in some respects, therefore, the world of the 1870s resembled that of the 1830s, two important new elements had entered American culture. Both have been repeatedly commented upon by historians of the period; only recently have they begun to be connected to the structure of post-Civil War theories of political economy. The elements were secularization and the pace of industrialization; recent efforts to remap the conceptual universe of political economy in the Gilded Age have identified and analyzed a gentry (upper class centrist intelligentsia) response to those elements.³⁹

The Gilded Age subcommunity of political culture that has thus far received the most detailed scholarly analysis—at least if the inquiry is restricted to representatives of the gentry perspective—has been the New England Brahmins.⁴⁰ The term “Brahmin,” coined by Oliver Wendell

³⁸ See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT* 104-09 (1988); HYMAN & WIECEK, *supra* note 37, at 389-438.

³⁹ On the importance of secularization and the increased pace of industrialization as culturally significant developments in the post-Civil War years, see GEORGE M. FREDERICKSON, *THE INNER CIVIL WAR* 199-201 (1965); ROBERT H. WIEBE, *THE SEARCH FOR ORDER* 1-43 (1967). On gentry political culture, and the subcommunity of Brahmin members holding a gentry perspective, see generally GEOFFREY BLODGETT, *THE GENTLE REFORMERS: MASSACHUSETTS DEMOCRATS IN THE CLEVELAND ERA* (1966). See also JOHN G. SPROAT, *THE BEST MEN: LIBERAL REFORMERS IN THE GILDED AGE* 7-10 (1968); ROSS, *supra* note 35, at 61-95. My discussion of communities exhibiting various political culture perspectives is self-consciously restricted to literate elites, the sort of persons that were Thayer's social and professional peers. This is not to say that such perspectives are restricted to elites, and certainly not to suggest that elites are more worthy of attention to cultural historians than other groups. For a striking illustration of how connections can fruitfully be made between cultural ideologies, such as republicanism, and the attitudes of non-elites, see SEAN WILENTZ, *CHANTS DEMOCRATIC* (1984).

⁴⁰ Several reasons explain the relatively detailed analysis of postbellum Brahmin subculture, as distinguished from comparable subcultures that arose in Philadelphia or New York. Some derive from the continual fascination of twentieth century academics with “highbrow New England,” as embodied in the institutions of Harvard and Yale and associated social and intellectual circles. Beyond that, however, two reasons stand out: the long-standing tradition within New England upper-class intelligentsia of pursuing careers in learned professions (ranging from the ministry to literature, law, medicine, and higher education) that encourage their members to write and to leave written records of their observations of the world around them, and the comparatively early and intense interest of certain Brahmins in preserving private family papers as part of a strong subcultural interest in genealogy. The consequence is that the modern scholar finds a rich and varied storehouse of observations by New England Brahmins on American society in the Gilded Age.

Holmes, Sr. in an essay in the *Atlantic Monthly*,⁴¹ originally referred to a specific “highbrow” group within upperclass Boston, but has become a term of art, signifying any late nineteenth century upper-class New England intellectual. As such, the term encompasses a spectrum of persons with diverse views on specific political issues, parties, and candidates.⁴² It also encompasses persons with differing views on specific issues of political economy. Finally, it encompasses persons who, within the provincial social world of nineteenth century upper-class Boston, were treated as having different social antecedents, in part because of their different regional affiliations. Such persons ranged from the Cabots, the Lowells, the Adamses, and the Eliots through the Holmeses, the Grays, and the Ames to individuals, such as Thayer, whose families were not originally from Boston proper and whose social antecedents, according to the standards of “Boston society,” were consequently less exalted. Nonetheless, as a signifier of a political culture—that is of a community sharing a particular foundationalist epistemological perspective—the term “Brahmin” is useful and comparatively determinate.

An exploration of the relationship of New England Whig to Brahmin gentry theories of political economy provides a cultural window into the intellectual world of James Bradley Thayer. That relationship, if considered over a time span beginning in the 1830s and extending until around the time of Thayer’s death in 1902, reveals the presence, among highly educated and socially prominent New Englanders, of a relatively constant set of class assumptions about issues of political economy, superimposed on a dramatically changing epistemological and cultural context. Whigs and members of the Brahmin gentry shared a set of foundationalist assumptions. They believed that America was an exceptionally favored culture; that government should, as far as possible, be free from partisanship and be administered by elites; that racial or ethnic minorities should neither be fully assimilated into Anglo-Saxon America nor treated as debased persons, but protected by a constellation of paternalist policies; that a modestly affirmative federal presence would be helpful in the regime of economic relations; and that the truly decisive issues in the American polity were issues of sovereignty and political patronage (or corruption).

New England Whigs and Brahmins, however, lived in different time periods, and the belief structure of the two groups reflected that differ-

⁴¹ See G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES 11 (1993). Holmes, Sr.’s essay, *Brahma and Buddha*, is reprinted in 5 THE COLLECTED WORKS OF OLIVER WENDELL HOLMES 3 (Boston, Houghton Mifflin 1892).

⁴² For example, the political culture of those sharing a Brahmin gentry perspective within Massachusetts politics included some orthodox Republicans (Henry Cabot Lodge), some Mugwump Republicans (James Barr Ames), and some “Yankee Democrats” (Brooks Adams). The Brahmin gentry perspective, however, by no means included all articulate elite participants in Massachusetts politics. See RICHARD M. ABRAMS, CONSERVATISM IN A PROGRESSIVE ERA 30-52 (1964); BLODGETT, *supra* note 39, at 19-48.

ence. Whigs occupied a world where slavery was taken as a given, where religious principles were taken to be universalist and omnipresent, where commerce had not taken on a decidedly industrial cast, and where the promise of American exceptionalism, despite contradictions between slavery and natural rights principles, was taken as largely unqualified. The world in which members of the Brahmin gentry community developed their views on political economy no longer included *de jure* slavery, although it arguably included some *de facto* versions. This world was experiencing the increasing secularization of theories of knowledge, especially in the circles frequented by Thayer. It was rapidly taking on the appearance of a society symbolized by what Henry Adams eventually called the "dynamo": a perpetual motion machine typifying the permanent existence of the forces of mature industrial growth.⁴³

C. *Brahmins As Law Professors: Langdell and His Contemporaries at Harvard Law School*

The distinctive perspective of Brahmin gentry political culture was formed by this juxtaposition of Whig starting beliefs and the arguably novel epistemological and cultural developments of the Gilded Age. In the next section of this Essay, I will sketch out the Brahmin perspective in some detail. At this point, however, I want to mention the large number of individuals sharing a Brahmin perspective who were not only Thayer's chronological and social contemporaries, but also his professional associates.

Individuals that scholars have conventionally associated with the Brahmin perspective have not, with the possible exception of Oliver Wendell Holmes, Jr., been law professors.⁴⁴ Among those regularly identified as Brahmins have been, in addition to Henry and Brooks Adams, Henry and William James, and George Santyana,⁴⁵ persons such as Charles Eliot Norton, editor of the *North American Review*, Charles Eliot, President of Harvard University, and Wendell Phillips Garrison, assistant editor of *The Nation* magazine.⁴⁶ A fuller listing of members of

⁴³ The generalizations advanced in the last two paragraphs are supported by HOWE, *supra* note 35, at 11-22; ROSS, *supra* note 35, at 22-50; BLODGETT, *supra* note 39, at 33-42; and SPROAT, *supra* note 39, at 68-70, 145-54. On Henry Adams and his construction of the symbol "dynamo," which he juxtaposed against the medieval symbol, "virgin," see J.C. LEVINSON, *THE MIND AND ART OF HENRY ADAMS* 330-32 (1957); ROBERT DAWIDOFF, *THE GENTEEL TRADITION AND THE SACRED RAGE* 66-67 (1992). See also Yosai Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 230-43 (1964) (discussing the Brahmins Henry Adams, Henry James, and Oliver Wendell Holmes, Jr.).

⁴⁴ Even Holmes's identification as a Brahmin has, with the exception of Rogat's *Spectator* essay, *supra* note 43, principally been a *social* characterization (he and his father were members of the Brahmin class of Boston society) as distinguished from the broader epistemological characterizations advanced by works such as HOWE, *supra* note 35, and ROSS, *supra* note 35.

⁴⁵ This group, the Brahmin "exiles" and fin-de-siecle "pessimists," is the focus of DAWIDOFF, *supra* note 43.

⁴⁶ See, e.g., SPROAT, *supra* note 39, at 16-23; BLODGETT, *supra* note 39, at 20-23. In addition to

the New England Brahmin subcommunity of gentry political culture in the Gilded Age, however, would include most of the chaired professors of the Harvard law faculty during the deanship of Christopher Columbus Langdell, whose tenure spanned the years 1870 to 1895.

During Langdell's deanship (1870-1895), there were eight faculty members who were appointed to chairs: Langdell himself (1870), John Chipman Gray (1875), Charles Smith Bradley (1876), James Barr Ames (1879), William Keener (1888), Jeremiah Smith (1890), Holmes (1882), and Thayer (1874).⁴⁷ Of these all but Keener, a native of Georgia who was Story Professor for only two years, resigning to accept the deanship of Columbia, were residents of New England and graduates of Harvard Law School. Bradley, who served as the Bussey Professor for three years, had taken his undergraduate degree at Brown, although he was born in Northampton and was a cousin of Thayer.⁴⁸ The others were residents of Massachusetts or New Hampshire and graduates of both Harvard College and Harvard Law School. Ames, Gray, and Holmes were born in metropolitan Boston;⁴⁹ Langdell and Thayer came to Boston early in their lives.⁵⁰ Smith had spent several years practicing law and serving as a state supreme court judge in New Hampshire; Langdell practiced law in New York City for twenty years before his Harvard College friend, Charles Eliot, appointed him Dean in 1870.⁵¹

Not all the chaired professors of Langdell's deanship were from socially prominent (if not necessarily wealthy) families. While Bradley, Ames, Gray, and Holmes were, Langdell, Thayer, and Smith were not, and Keener's origins in Georgia place him outside Brahmin gentry culture in its social manifestations. Nonetheless, all the professors, with the possible exception of Keener, were "highbrow" intellectuals with a strong interest in public affairs.

Comparatively little, however, has been written on the political attitudes, as distinguished from the jurisprudential or pedagogic attitudes, of Harvard chaired professors during Langdell's tenure. Several reasons explain the disinclination of commentators to connect Langdell and his professorial contemporaries⁵² with communities of political culture in

The Nation and *The North American Review*, the *Atlantic Monthly*, based in Boston under the editorship of William Dean Howells (who had begun his career at *The Nation*), reflected Brahmin attitudes, especially after 1880. See SPROAT, *supra* note 39, at 96, 155.

⁴⁷ HARVARD LAW SCHOOL ASSOCIATION, *THE CENTENNIAL HISTORY OF HARVARD LAW SCHOOL 288-89* (1918).

⁴⁸ *Id.* at 197-99.

⁴⁹ Gray was technically born in Brighton, a town considered within the Boston metropolitan area. *Id.* at 205.

⁵⁰ See *id.* at 223-36 for the details of Langdell's early career.

⁵¹ *Id.* at 228.

⁵² During Langdell's deanship, Harvard Law School had other members of the teaching faculty, including Louis Brandeis, Brooks Adams, Eugene Wambaugh, and Joseph Beale. The latter two eventually became chaired professors; the former two were essentially adjuncts, combining teaching

the Gilded Age.

First, Langdell has been most commonly associated with two issues that at first glance seem quite removed from politics and public affairs: the "socratic" or "case" method in legal education and the idea of law as a science. Only recently has Langdell been seen as a kind of jurist in spite of himself, the myth of his "silence" on issues of philosophy or political economy exposed, and the late nineteenth century jurisprudential orthodoxy that he helped to establish begun to be recovered.⁵³ One of the consequences of this re-examination of Langdell's orthodoxy has been the "discovery" that Langdell did not simply write private law casebooks and an occasionally cryptic address extolling law as a science: he wrote a series of articles and essays on contemporary issues of public concern.⁵⁴

Second, only recently have scholars concentrated on the close connections made, within "highbrow" New England intellectual circles, among issues of law, literature, and public affairs, the lack of professional specialization among New England intellectuals through the Civil War, and the comparatively slow pace of professional and disciplinary specialization in the Gilded Age.⁵⁵ These features of "highbrow" New England

with law practice. *See id.* at 30-47. The far greater prominence of the chaired professors in setting standards for teaching, research, and participation in public affairs, however, justifies their being singled out. Most characterizations of Harvard Law School during Langdell's deanship assume that Langdell, Thayer, Gray, and Ames "were" the faculty. *See id.* at 30-33 ("The four great teachers—Langdell, Thayer, Gray and Ames—carried on . . . [the] School.").

⁵³ *See* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983). It is fair to say that with Grey's work, late nineteenth century formalist jurisprudence, which had hitherto been vastly oversimplified, even caricatured, in legal scholarship, has been reconfigured, allowing students of that jurisprudence not only to see its complexities and ambiguities, but to grasp its epistemological underpinnings in a far broader fashion. Instead of picturing Langdell and his Harvard contemporaries as formalists whose principal goal was the professionalization of legal education along pseudo-scientific lines, Grey's article suggested that the orthodoxy embraced by Langdell and other legal "scientists" was not comparably formalistic in public law and private law subjects, and that Langdell himself was not an ultraconservative on public law issues. *See id.* at 33-35. Grey's attention to the long-neglected public law dimensions of the Harvard scientists' work makes possible a location of Langdell and his contemporaries within the larger political cultures of the Gilded Age. One might say that with the publication of *Langdell's Orthodoxy*, an earlier incomplete and misleading association of Langdell's contemporaries with other "formalist conservatives" in the Gilded Age, exemplified by Morton White's 1947 book, *Social Thought in America: The Revolt Against Formalism*, was finally displaced.

⁵⁴ For a caricature of Langdell as a formalist, emphasizing Langdell's oft-quoted remark that "law is a science . . . [and] [a]ll the available materials of that science . . . are to be found in printed books . . .," see GRANT GILMORE, *THE AGES OF AMERICAN LAW* 42-67 (1977). For examples of Langdell's public law scholarship, see Grey, *supra* note 53, at 34-35.

⁵⁵ THOMAS L. HASKELL, *THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE* (1977), has routinely been interpreted as authority for the proposition that professional specialization rapidly developed in the Gilded Age. A closer reading of Haskell, however, suggests that his primary contribution is to demonstrate the tension within the late nineteenth century professions between an older conception of learned callings emphasizing broad-ranging professional pursuits and interests, and what was to become the dominant twentieth century conception, that of relatively narrow and tech-

culture in the Gilded Age meant that "highbrow" lawyers in New England, whether they entered academic life or not, were often as familiar with literature and politics as they were with the intricacies of law practice. Albert Konefsky and Richard Ferguson have shown the intimate connections and relationships among lawyers and literary figures in the antebellum years.⁵⁶ Such connections persisted after the Civil War, with the nexus of interaction among persons whose professional orientation placed them in legal or literary communities being a shared interest in contemporary issues of political economy.

A third reason why elite law professors have typically not been included in the conventional renderings of Brahmin political culture flows from the determined association Langdell and his contemporaries made between the pursuit of scholarship and the professional ideal of law as a science. Since the scientific analogy came to dominate the enterprise of legal scholarship for Langdell and his colleagues at Harvard, and since Langdell's own work, along with that of many of his Harvard contemporaries and those who followed them, was in private law subjects, there has been a tendency not only to ignore the public law scholarship emanating from Harvard Law School in the Gilded Age, but to believe that the epistemological premises of "Langdell's orthodoxy" were incompatible with open declarations of a scholar's ideological agenda on contested contemporary issues. A closer exploration of Thayer's scholarship, however, reveals that the ideal of law as a science could coexist quite readily with exploration of contemporary issues of political economy and even with affirmation of a normative contemporary agenda.

III. THAYER AS BRAHMIN LEGAL SCIENTIST

Thayer's early life, career, and perspective place him squarely within the Whig-Brahmin tradition. He was born in Haverhill, Massachusetts in 1831, the son of the editor of a county newspaper that consistently supported Whig politics.⁵⁷ He entered Harvard in 1848 and graduated in 1852, being constantly exposed to conventional Unitarian theology and,

nical professional disciplines. *See id.* at 23-27; *see also* MARY O. FURNER, *ADVOCACY AND OBJECTIVITY* 9 (1975) (describing "how rival patterns of professionalization developed, how dedication to reform and commitment to objective scholarship clashed and were integrated").

⁵⁶ *See* ROBERT D. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 201-72 (1984); Alfred S. Konefsky, *Law and Culture in Antebellum Boston*, 40 *STAN. L. REV.* 1119 (1988). While I agree with much of Ferguson's analysis, I think his conclusion that "[t]he grand style of the generalist really ended with the Civil War," Ferguson, *supra*, at 287, needs qualification. The triumph of the scientific analogy in the period from 1870 to the first World War has tempted scholars to conclude that with the emergence of "Langdellian" science, and the comparable growth of autonomy and specialization in other academic disciplines at the time, law professors ceased to think and write about "extralegal" issues. Thayer's career is an excellent illustration of the fallacy of that conclusion.

⁵⁷ *See* HARVARD LAW SCHOOL ASSOCIATION, *supra* note 47, at 277.

in an extracurricular fashion, to the writings of Emerson.⁵⁸ He married Emerson's niece, joined the Unitarian Church, and eventually became president of the American Unitarian Association.⁵⁹ His closest friend at Harvard was Chauncey Wright, one of the first members of the "Metaphysical Club," the post-Civil War society, composed of what its founder William James called the "very cream of Boston manhood,"⁶⁰ whose stated purpose was to explore the sources of philosophic universals in a secular world.⁶¹

When the Civil War began, Thayer, instead of entering military service (he was thirty at the time), joined the Loyal Publication Society, an abolitionist "news service" that disseminated "encouraging" information to northern soldiers and constituents.⁶² His brother and his brother-in-law were killed fighting with Union forces in the war.⁶³ In 1902, on Thayer's death, Booker T. Washington wrote his widow that Thayer

⁵⁸ See *id.*; Hook, *supra* note 25, at 2. Emerson was a significant figure for the generation of New England intellectuals born between 1830 and the 1850s. Emerson's *Nature* essay appeared in 1836, his *The American Scholar* essay the next year, and his controversial address on orthodox Unitarianism, the origins of his "transcendentalism," in 1838. For Thayer's contemporaries, and those of Oliver Wendell Holmes, Jr., ten years younger than Thayer, Emerson's views represented a liberating transition from orthodox Unitarian theology to its revisionist versions and, eventually, to more secular philosophies. Thayer's religious views will be subsequently discussed. See *infra* text accompanying notes 101-02. For Holmes's attachment to Emerson in his years as an undergraduate at Harvard from 1857 to 1861, see WHITE, *supra* note 41, at 35-39.

⁵⁹ See Hook, *supra* note 25, at 4.

⁶⁰ Letter from William James to Oliver Wendell Holmes (Jan. 3, 1868), *quoted in* WHITE, *supra* note 41, at 92.

⁶¹ On the "Metaphysical Club," see PHILIP WIENER, *EVOLUTION AND THE FOUNDERS OF PRAGMATISM* (1949). See also Robert W. Gordon, *Introduction to THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 1 (Robert W. Gordon ed., 1992); J.W. Burrow, *Holmes in His Intellectual Milieu*, in *THE LEGACY OF OLIVER WENDELL HOLMES, JR.*, *supra*, at 17. The Gordon and Burrow articles supplement Wiener's discussion of the "Metaphysical Club."

⁶² Charles Eliot Norton, the editor of the *North American Review*, was one of the founders of the Loyal Publication Society. See Hook, *supra* note 25, at 3. In April 1864, Norton wrote an article in the *North American Review*, analogizing the Union effort in the Civil War to the Christian crusades of the Middle Ages. Oliver Wendell Holmes, Jr., who two months earlier had returned to active service with the Union armies after convalescing from his third wound, wrote Norton in response:

[T]he story [of the two crusades] seems to come up most opportunely now when we need all the examples of chivalry to help us bind our rebellious desires to steadfastness in the Christian Crusade of the 19th century. If one didn't believe that this war was such a crusade, in the cause of the whole civilized world, it would be hard indeed to keep the hand to the sword.

Letter from Oliver Wendell Holmes, Jr. to Charles Eliot Norton (Apr. 17, 1864), *quoted in* TOUCHED WITH FIRE: CIVIL WAR LETTERS AND DIARY OF OLIVER WENDELL HOLMES, JR., 1861-1864, at 122 (Mark DeWolfe Howe ed., 1946). While Holmes added that "in all probability . . . I shall soon be mustered in for a new term of service," less than a month later he wrote his parents that "I have made up my mind to stay on the staff if possible till the end of the campaign & then if I am alive, I shall resign—I have felt for sometime that I didn't any longer believe in this being a duty." Letter from Oliver Wendell Holmes, Jr. to Dr. and Mrs. Oliver Wendell Holmes, Sr. (May 16, 1864), *quoted in* TOUCHED WITH FIRE, *supra*, at 122.

⁶³ See Hook, *supra* note 25, at 8.

had been "one of the best friends of my people."⁶⁴

As noted, before the war Thayer had entered Harvard Law School, graduating in 1856 and winning "the first prize" of that class for an extended essay on *The Right of Eminent Domain*, published that year in the *Boston Monthly Law Reporter*.⁶⁵ That same year he was admitted to the Suffolk County (Boston) Bar, remaining in private practice, with a partial interruption for his wartime duties, until 1874, when he joined the faculty of Harvard Law School.⁶⁶ During his years in private practice, Thayer came into close contact with Holmes, who joined Thayer's firm, Chandler, Shattuck, and Thayer, in 1866, a year after Thayer.⁶⁷ In 1869 Thayer was approached by the grandson of James Kent to prepare a twelfth edition of Kent's *Commentaries on American Law*. He secured Holmes's assistance on the project and eventually was relegated, at least publicly, to the status of one of the readers of Holmes's manuscript, Holmes taking full credit for the edition.⁶⁸

In sum, when Thayer joined the Harvard law faculty in 1874, he was in some respects the very personification of an antebellum New England Whig whose perspective had evolved into that of Brahmin political culture. Despite the general estrangement of Brahmins from orthodox Republican and orthodox Democrat attitudes toward issues of political economy, however, Brahmin political culture was capable of housing a variety of ideological orientations. Thayer's temperament and interests, for example, placed him quite far from the "genteel exiles" that inhabited one wing of Brahmin political culture. He was religious, albeit a Unitarian. Far from being estranged from Gilded Age America, he was, by all accounts, an energetic participant in the discussion of public issues, ranging from the "legal tender" debates of the late 1860s to the status of Indian tribes.⁶⁹ In addition to his casebook on constitutional law, apparently the first of its kind in American legal education,⁷⁰ and his scholar-

⁶⁴ Letter from Booker T. Washington (on file with Harvard Law School, Manuscript Division, Box 25, F-12).

⁶⁵ 19 MONTHLY L. REP. 241, 301 (1856).

⁶⁶ See HARVARD LAW SCHOOL ASSOCIATION, *supra* note 47, at 277. On Eliot's recruitment of Thayer, see 1 MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES 246 (1957).

⁶⁷ On Holmes's joining Thayer's firm, see HOWE, *supra* note 66, at 245-47.

⁶⁸ Kent's grandson protested against Holmes's treatment of Thayer, but Thayer declined to make a public incident of the matter, conceding that Holmes had done all the work on the edition. For the details, see WHITE, *supra* note 41, at 124-27.

⁶⁹ See, e.g., James B. Thayer, *The Dawes Bill and the Indians*, 61 ATLANTIC MONTHLY 315 (1888) [hereinafter *The Dawes Bill and the Indians*]; James B. Thayer, *A People Without Law*, 68 ATLANTIC MONTHLY 540, 676 (1891) [hereinafter *A People Without Law*]. The latter essay is reprinted in JAMES BRADLEY THAYER, LEGAL ESSAYS (1908), published posthumously by his son, Ezra Ripley Thayer.

⁷⁰ JAMES B. THAYER, CASES ON CONSTITUTIONAL LAW (Cambridge, G.H. Kent 1895). The 1895 edition has been treated as the "official" edition, but Thayer published and circulated an earlier version which he distributed to fellow legal scholars in 1894. That version was in four parts; the copy in the University of Virginia Law School library indicates that the succeeding parts were sent

ship on evidence,⁷¹ Thayer wrote on the status of America's Pacific territories,⁷² the treatment of labor issues by American judges,⁷³ and the constitutionality of insular tariffs,⁷⁴ each contested legal issues with obvious political ramifications.⁷⁵

The most significant dimension of Thayer's distinctive version of Brahmin political culture, however, was his markedly ambivalent response to the sovereignty issues that surfaced for Brahmins in the Gilded Age. As noted, antebellum Whigs had been particularly interested in two sorts of sovereignty issues: issues of federalism, seen through the idealized vantage point of an exceptional republic besieged by centrifugal pressures, and issues of economic regulation, invoking the tension in Whig political culture between solicitude for "vested" property rights and enthusiasm for commercial "improvements."⁷⁶ In his first work of legal scholarship, his prize-winning essay "Eminent Domain," Thayer revealed himself a quintessential Whig in finding the doctrine that allowed states to take private property for community improvements a novel, complicated, and profound legal development. Characteristically, he sought to explore the jurisprudential and constitutional justifications for the doctrine, finding them in the nature of sovereignty in a federated

by Thayer to Professor Charles Alfred Graves, then on the Washington and Lee faculty, between March 21, 1894 and March 20, 1895. In citing from Thayer's *Constitutional Law*, I will be referring to the 1894 version. See Hook, *supra* note 25, at 5, for the statement that Thayer's casebook was the first on constitutional law in an American law school. There had been numerous other treatises on the Constitution and constitutional law issues, but Hook is probably correct in identifying Thayer's casebook as the first in which the subject of constitutional law received nontreatise treatment.

⁷¹ Thayer's principal reputation as a scholar was in the field of evidence. His *Preliminary Treatise on Evidence at the Common Law* (1898) was described by the 1918 "official" history of Harvard Law School as his "most important single work." That treatise incorporated several earlier articles on evidence that had appeared in the *Harvard Law Review*, the *Atlantic Monthly*, and the *Yale Law Journal* between 1889 and 1898. For specific citations to those articles, see HARVARD LAW SCHOOL ASSOCIATION, *supra* note 47, at 330. In addition, Thayer published a casebook on evidence, *Select Cases on Evidence at the Common Law*, which first appeared in 1892 and was issued in a second edition in 1900. *Id.*

⁷² James B. Thayer, *Our New Possessions*, 12 HARV. L. REV. 64 (1899).

⁷³ James B. Thayer, *American Judges and the Interests of Labor*, 5 J. ECON. 503 (1891).

⁷⁴ James B. Thayer, *The Insular Tariff Cases in the Supreme Court*, 15 HARV. L. REV. 164 (1901).

⁷⁵ For cites about the particular importance of the latter two issues to Brahmins and other interested Gilded Age commentators, see BLODGETT, *supra* note 39, at 35-38, 78-80, 176-85, and sources therein; ROSS, *supra* note 35, at 98-101, and sources therein; SPROAT, *supra* note 39, at 172-77, 239-42, and sources therein. The first issue was regarded by Theodore Roosevelt as a litmus paper test of eligibility for the Supreme Court of the United States. He did not want to appoint anyone who believed in territorial self-determination. Oliver Wendell Holmes passed the test. See WHITE, *supra* note 41, at 300-01.

⁷⁶ See HOWE, *supra* note 35, at 81-87. For a case study of Whig responses to the latter set of issues, see LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* (1957). Lemuel Shaw, the Chief Justice of Massachusetts from 1830 to 1860, was a cultural icon for Whig and Brahmin lawyers who were contemporaries of Thayer and Holmes, as well as the father-in-law of Herman Melville.

constitutional republic.⁷⁷

We have seen, however, that the Whig solutions to antebellum sovereignty issues were no more successful than any others, and that by the advent of the Civil War the Whig Party had ceased to exist as a national political force. Moreover, the triumph of the Northern armies, the formal elimination of slavery, the occupation of Confederate states by military governments, the symbolic perpetuation of "Union," and the Reconstruction Amendments to the Constitution, drafted and implemented by a new force in national politics, the Republican Party, meant that the last three decades of the nineteenth century could not resemble the antebellum decades. Further, as noted, the intellectual and economic culture of America changed along with its politics: secularization significantly competed with orthodox religiosity, and massive industrialization succeeded the comparatively modest "commerce" of the prewar decades. Finally, American patterns of immigration began to change: over the last three decades of the nineteenth century, emigrants from southern and eastern Europe and, to a lesser extent, from Asia arrived in ever-increasing numbers, outpacing the more "established" emigrants from the British Isles and northern Europe.⁷⁸ The new patterns of immigration were accompanied, not entirely fortuitously, by "new" theories of political economy, drawing on works by Europeans and emphasizing the close relationship between industrialism and class conflict.⁷⁹

This conflux of factors, many commentators have suggested,⁸⁰ produced something like a "crisis of authority" among former Whigs, especially those with close associations to postbellum gentry culture. The crisis had two discrete effects on Brahmins. First, the crisis resulted in certain issues of political economy being identified as particularly vital and problematic in the Gilded Age republic. Among those issues were the problem of spoils—the confluence of patronage, wealth, and corruption in government—and the solution of civil service reform;⁸¹ the problem of congressionally mandated protective tariffs and the solution of a more enlightened mix between protectionism and free trade;⁸² the problem of racial and ethnic minorities in a world without slavery but in

⁷⁷ James B. Thayer, *The Right of Eminent Domain*, 9 MONTHLY L. REP. 240, 242-62 (1856).

⁷⁸ The classic treatment of late nineteenth century immigration and "nativist" responses remains JOHN HIGHAM, *STRANGERS IN THE LAND* (1955).

⁷⁹ The most complete treatment of the complex relationship between European thought, class conflict, and gentry affirmations of an exceptionalist vision of America in the Gilded Age is in ROSS, *supra* note 35, at 98-140.

⁸⁰ *See id.* at 53-142; *see also* BLODGETT, *supra* note 39, at 149-54; SPROAT, *supra* note 39, at 219-30.

⁸¹ *See* BLODGETT, *supra* note 39, at 65-68; SPROAT, *supra* note 39, at 257-71. *See generally* ARI HOOGENBOOM, *OUTLAWING THE SPOILS: A HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT, 1865-1883* (1968).

⁸² *See* BLODGETT, *supra* note 39, at 149-54; ROSS, *supra* note 35, at 77-81; SPROAT, *supra* note 39, at 172-82.

which the stigmatization of unassimilable minorities was a widely shared orthodoxy;⁸³ the problem of currency, exemplified by the political and legal debates about whether the federal government could issue paper bank notes as legal tender;⁸⁴ and the problem of whether groups of industrial laborers could organize with the goal of improving their economic and social power in expanding capitalist-controlled markets.⁸⁵

Second, the crisis in authority produced a novel and distinctive epistemology, one in which the concept of science took on great significance.⁸⁶ Science, for members of gentry communities, including Brahmins, emerged as a central and multifaceted ideal, reflected in enthusiasm for new fields of study, such as the Darwinist natural sciences and "professional" social science,⁸⁷ and in the conversion of gentry intellectuals to scientific methodologies, such as historism or historico-politics,⁸⁸ through which academics were expected to make contributions as (in the words of Charles Eliot) "expounders, systematizers, and historians."⁸⁹

⁸³ See BLODGETT, *supra* note 39, at 149-54; ROSS, *supra* note 35, at 146-48; SPROAT, *supra* note 39, at 29-34. For an example of one prominent Brahmin, Charles Eliot, struggling with the problem of how far to assimilate, and under what terms, stereotypically unassimilable minority groups, see HUGH HAWKINS, *BETWEEN HARVARD AND AMERICA* 181-92 (1972).

⁸⁴ See generally IRWIN UNGER, *THE GREENBACK ERA: A SOCIAL AND POLITICAL HISTORY OF AMERICAN FINANCE, 1865-1879* (1964).

⁸⁵ See ROSS, *supra* note 35, at 98-138.

⁸⁶ See FREDERICKSON, *supra* note 39, at 199-216; ROSS, *supra* note 35, at 57-67, 153-60.

⁸⁷ FURNER, *supra* note 55, at 35-58; HASKELL, *supra* note 55, at 242-56. See also the discussion of developments in the legal profession in G. EDWARD WHITE, *TORT LAW IN AMERICA* 20-37 (1980).

⁸⁸ See Siegel, *supra* note 4. While Siegel's article is one of the best discussions of constitutional jurisprudence in the Gilded Age, and significantly advances understanding of a number of late nineteenth century jurists, his choice of the term "historism," admittedly one in contemporary usage at the time, seems unfortunate.

"Historism" seems easily capable of being confused with "historicism," a label that, by signifying a general attitude toward the process of historical change itself rather than a particular enthusiasm for history as an enterprise capable of clarifying contemporary issues, can transcend various historical epochs. Historism as Siegel uses it is comparable to Ross's use of the term "historico-politics," another label in contemporary use in the Gilded Age that has not survived that time frame.

Ross quotes the evolutionary historian Herbert Baxter Adams as saying, in 1890, that "what I really represent in this University is the practical union of History and Politics," and that the "motto printed upon our University Studies and Seminary wall" was "History is past politics, and politics are present history." ROSS, *supra* note 35, at 69. In this example the terms "historico-politics" and "historism" emerge clearly, and one can see that those who held the perspective of "historism" found no contradiction in using history to prove the truth of foundational beliefs they held in the present. Neither term, however, is comparable to "historicism," which Ross elsewhere defines as "an understanding of history . . . as a process of continuous, qualitative change, moved and ordered by forces that lay within itself." *Id.* at xv. Under Ross's definition, a "historicist" perspective does not require any normative political theory of the role of history in the present, simply a recognition that cultures continually change.

⁸⁹ Charles W. Eliot, *quoted in* HARVARD LAW SCHOOL ASSOCIATION, *supra* note 47, at 31. Eliot was referring to the new style of full-time law professors at Harvard, "a body of men learned in the law who have never been on the bench or at the bar, but who nevertheless hold positions of great

In law the ideal of science had, of course, been of long-standing significance.⁹⁰ Science, in fact, had been one of the central professional justifications for a field whose practitioners appeared to engage in a good deal of mysterious unintelligible cant, and whose claim to authority was closely related to the idea that law was a determinate, self-regarding body of rules that, while inaccessible to all except savants, could claim that its principles were true, provable, and independent of human bias. But after the Civil War, the ideal of legal science arguably took a discrete Gilded Age form. Science in law, originally analogized quite precisely to geometry, began also to take on the baggage of "evolutionary" history. Increasingly, scientific scholarship in law became equated not simply with the proving of doctrinal truths through a highly stylized version of inductive, quasi-geometric logic,⁹¹ but with a distinctive version of purposive historical research.

Thus, in *The Common Law* Holmes attacked logic, meaning the geometric logic of Langdell's version of scientific reasoning, and offered in its place experience, by which he meant the simultaneous placement of orthodox private law doctrines in the context of history and contemporary theories of legislation, or what we would now call policy.⁹² Holmes's use of history was quite self-consciously intended as a basis for proving the validity of the contemporary policy claims he was making. So, for that matter, was his use of orthodox techniques of geometric logic, with its emphasis on stating comprehensive legal principles and confirming those principles in cases by purportedly inductive, analogical reasoning.⁹³ For Holmes, as for Langdell, history and legal science were

weight and influence." Eliot's model was not Thayer but James Barr Ames, who was appointed to the Harvard law faculty in 1873 without any previous experience in law practice. See *id.* at 30. In an 1895 essay, *The Teaching of English Law at Universities*, 9 HARV. L. REV. 169 (1895), Thayer vigorously supported Eliot's ideal of full-time law professors who functioned as "expounders, systematizers, and historians."

⁹⁰ The literature here is very familiar, ranging from Daniel Boorstin's book on Blackstone, DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* (1941), through Grey, *supra* note 53, to M.H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95 (1986). Suffice it to say that while the meaning of the "scientific analogy" or the "scientific ideal" in legal scholarship has decisively changed over time, law as a science has been a persistent enticement for legal theorists.

⁹¹ See the successful unpacking of the logical structure of Langdell's arguments in Grey, *supra* note 53, at 11-15.

⁹² OLIVER W. HOLMES, JR., *THE COMMON LAW* 1-3 (Mark D. Howe ed., 1963). On the origins and context of Holmes's celebrated contrast between logic and experience, with its pointed allusion to Langdell's work, see WHITE, *supra* note 41, at 149-53.

⁹³ For examples of Holmes's simultaneous use of history and logic, see HOLMES, *supra* note 92, at 5-25 (discussing early forms of liability). Holmes's stated logical perspective claimed to assume that "it is the merit of the common law that it decides the case first, and determines the principle afterwards." Oliver W. Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870). In fact, however, Holmes's (and Langdell's) technique was to begin with an established pair of mutually inconsistent principles and to show, by reasoning through analogy, that a given case was "like" one of the set of principles and "not like" the other. Where Langdell and Holmes parted company,

inextricably intertwined. In their belief that expounding, systematizing, and investigating the origins of a subject were self-reinforcing elements of a scientific scholarly methodology, they were characteristic of intellectuals seeking influence and authority in the Gilded Age.

IV. THAYER AND BRAHMIN POLITICAL CULTURE

Thayer's published writing, culminating in the *American Doctrine* essay, fits comfortably into the culture of Brahmin political economy and legal science. Thayer involved himself, either in his scholarship or in his political commentary, with the issues of political economy identified as particularly pressing and central by Brahmins in the Gilded Age. He was opposed to patronage and special interest legislation, most notably at the municipal level.⁹⁴ He supported congressional reform of the protectionist tariff system.⁹⁵ He wrote impassioned essays on the plight of Indian tribes, distinguishing between "civilized" and "Reservation" tribes and arguing that the latter, which in his view had not shown signs of assimilating themselves into white culture, should for that very reason be given the benefits of the Anglo-American system of justice.⁹⁶ In the first issue of the *Harvard Law Review*, in 1887, he published a lengthy analysis of the power of the federal government to make paper money legal tender.⁹⁷ Two years before his *American Doctrine* essay, he wrote a response to the left-wing economist Richard Ely's charge, in a British journal, that American judges were "supreme rulers" who used their power to "annul laws" in ways "adverse to the interests of labor."⁹⁸

In the response to Ely and the essays on the status of Indian tribes,

and where Langdell provoked Holmes to criticize him, was in the treatment of cases that were shown to be "unlike" one of the paired, inconsistent principles. Langdell simply accepted the predominance of one of the paired principles (for normative reasons) and declared decisions following the other "wrong." This enabled him to make his claim that "the number of legal principles is much less than commonly supposed." Holmes, although in effect doing the same thing in *The Common Law* (see, for example, his discussion of "act-at-peril" liability in torts, HOLMES, *supra* note 92, at 78-115), never flatly declared an inconsistent principle wrong. He either gave an assertive, cryptic, normative reason for preferring one principle to its paired opposite ("The general principle of our law is that loss from accident must lie where it falls," *id.* at 94), or, later in his career, rested in showing that the two principles were irreconcilable and judges simply chose one analogy over the other, exercising, as Holmes said in his 1899 essay, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 461 (1899), "the sovereign prerogative of choice." In the 1880s, however, Holmes's methodology was strikingly like that of Langdell.

⁹⁴ See HARVARD LAW SCHOOL ASSOCIATION, *supra* note 47, at 282; Hook, *supra* note 25, at 6 n.30.

⁹⁵ See HARVARD LAW SCHOOL ASSOCIATION, *supra* note 47, at 282; Hook, *supra* note 25, at 6 n.30.

⁹⁶ See *The Dawes Bill and the Indians*, *supra* note 69, at 315-22; *A People Without Law*, *supra* note 69, at 132-40.

⁹⁷ James B. Thayer, *Legal Tender*, 1 HARV. L. REV. 73 (1887).

⁹⁸ See Thayer, *supra* note 73, at 503-04 (quoting Ely). For Ely's views on economic issues, see Ross, *supra* note 35, at 102-17.

Thayer's language was fervent and pointed. But on most occasions he assumed the persona of the legal scholar, converting issues of political economy to issues of law and even claiming, in one place, that there was a sharp distinction between the two regimes.⁹⁹ The principal technique Thayer employed to depoliticize current issues in which, as a Whig turned Brahmin, he had a strong interest, was to convert the issues to scientific exercises in the analysis of sovereignty issues. Notably, of the numerous sovereignty issues Thayer explored as a scholar and constitutional law casebook editor, the vast majority involved issues of *federal* sovereignty: potential clashes between Congress and the federal judiciary under the Constitution. Only in two areas, the scope of federal common-law rulemaking and the impact of the Constitution's Takings and Contracts Clauses on state regulatory activity, particularly state eminent domain powers, did Thayer concern himself with the relationship between the federal judiciary and state sovereignty. In those two areas, moreover, he was not concerned with the power of state legislatures to restrict the noneconomic, civil rights of individuals. In sum, Thayer principally addressed sovereignty questions with an interest in exploring the scope of congressional legislative power.

Given Thayer's emphasis, an interesting question surfaces, a variant of a question asked by Tushnet. If Thayer's perspective was that of the Whig/Brahmin, why would he not have reacted *against* expansive congressional lawmaking powers when constitutional issues were at stake, given the Brahmins' recoil from the corruption and excess of national politics in the Gilded Age? An exploration of that question takes us to the heart of Thayer's ambivalent response to postbellum sovereignty issues, the response that precipitated the *American Doctrine* essay.

One starts that exploration with the premise that while Brahmin political culture was profoundly affected by secularization, the response of individual Brahmins to the presence of a secularized eschatology, in competition with theology, varied considerably. Holmes, for example, began as a disciple of Emerson, lost whatever religious faith he had during and after the Civil War, joined the "Metaphysical Club" to demonstrate his contempt for theologically based metaphysics, and derived his philosophical principles from an agnostic or atheistic base.¹⁰⁰ Thayer, by contrast, retained a personal theology, and believed strongly in the concepts of "mission" and "calling," through which elite members of a community sought, as an affirmation of their faith in God as well as their faith in humankind, to confer on less favored members the blessings and responsibilities of Christianity.¹⁰¹

Thayer was thus a Brahmin whose embrace of secularization was

⁹⁹ See Thayer, *supra* note 73, at 506.

¹⁰⁰ See WHITE, *supra* note 41, at 23-25, 90-93.

¹⁰¹ On Thayer's religious views, see Hook, *supra* note 25, at 2. On the secularization of the religious ideals of "mission" and "calling" in late nineteenth century America, see generally SYDNEY

partial, and who in addition appears to have retained an optimistic sense of human perfectibility and capacity for growth. Here again a contrast with Holmes is instructive. Holmes recognized, if he did not publicly acknowledge, the difference between himself and friends such as Penrose Hallowell, a militant Quaker abolitionist with whom Holmes enlisted in the Union army, and Thayer: Hallowell and Thayer had dimensions of generosity and selflessness that Holmes lacked. At the same time, Holmes believed that he had thought further into the meaning of the universe than persons such as Hallowell or Thayer: their religious faith, he believed, provided them with a vehicle for evading ultimate questions.¹⁰²

Embedded in the intellectual soil from which Thayer's religiosity sprung, then, was a belief in the essential benignity and perfectibility of his fellow humans. This belief muted his response to the cultural signals that many Brahmins found disturbing in the Gilded Age. Corruption, class conflict (personified by the struggle over organized labor), the runaway momentum of capitalist wealth, the arrival of diverse ethnic minorities on "Anglo-Saxon" land, the emergence of a new set of particularly threatening participants in American politics, the "new rich" and immigrant "machines"—all these signals were noted by Thayer, as they were noted by his Brahmin contemporaries. But they were not taken by Thayer as harbingers of despair. On the contrary, he took them as successive challenges for the revitalization of American political institutions.

Thayer's contributions to that revitalization, however, were couched in language with which he was intimately familiar—that of the legal scholar and essayist—and reflected his genuine interest in the intricacies of late nineteenth century legal analytics. Even as an essayist on political economy, he invoked the standard methodology of late nineteenth century legal science, as practiced by his chaired colleagues on the Harvard Law faculty. His particular version of that methodology placed a strong emphasis on history, on the logical analysis of paired, mutually opposing principles, and on what might fairly be called modest or even pragmatic policy ruminations.¹⁰³ In his *American Doctrine* essay his voice was that

E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* (1972); FREDERICK MERK, *MANIFEST DESTINY AND MISSION IN AMERICAN HISTORY* (1962).

¹⁰² For more detail on Holmes's relationships with Thayer and Hallowell, see WHITE, *supra* note 41, at 30-32, 123-27.

¹⁰³ The term "modest" is intended to suggest only that Thayer's overt policy suggestions were neither far-reaching in their immediate consequences (in part because they tended to be couched at a high level of abstraction) nor conveyed in assertive or polemical language. The term "pragmatic" needs to be used with care. There is such widespread interest in pragmatism, and so much current concern with revitalizing an earlier pragmatic tradition of American thought, that in my view the label is on the verge of being obfuscationist, as earlier labels such as "formalism" have become. Nonetheless, Thayer's intellectual temperament was clearly compatible with policy suggestions that avoided extremes.

of the Brahmin legal scientist, but it was also distinctively, albeit obscurely, his.

V. THE AMERICAN DOCTRINE ESSAY

Thayer began his *American Doctrine* essay by announcing that his subject would be the origin and “true scope” of the conceded power of American judges “to declare legislative Acts unconstitutional.”¹⁰⁴ Stating his task in that fashion signaled that the essay would be an exercise in “historico-politics,” that is, the use of historical exegesis to reveal a truth. It also signaled that Thayer would be adopting the conventional methodology of Brahmin legal science. Langdell and his confederates began their scientific inquiries with historical exegesis; Thayer would be writing in that tradition.

The essay was divided into five sections, and the relative length of those sections deserves comment. In the first section, consisting of five pages, Thayer turned to what could be called the history of “pre-established” judicial review.¹⁰⁵ In the second, occupying about four pages, he continued his historical exegesis, this time directing himself to the question of how “this power of the judiciary,” once it became established in America, “was to be conceived of.”¹⁰⁶ In the third, he introduced his “rule of administration,” the “reasonable doubt” standard of review, and examined “the course which the courts . . . have taken” in administering that rule.¹⁰⁷ This examination, which included discussions of treatise writers as well as courts, took up another four pages. At that point Thayer began his discussion of the “true scope” of the “American Doctrine,” which would occupy the balance of the essay, fourteen pages, ten of which were devoted to policy arguments in favor of the “rule of administration” and the last four of which clarified the scope of his argument and drew some openly normative conclusions from it.

As structured, then, Thayer’s essay was an almost perfect balance between three comparatively short sections on history and one comparatively lengthy section and one addendum on “politics,” that is, the policy implications of his conclusions about the “true scope” of judicial review in America. Moreover, his transition sentence between the history and politics portions of his essay made it clear that history was being presented as *determining* politics, in the sense of clarifying the essential political questions at stake in Thayer’s inquiry. “I have accumulated these citations and run them back to the beginning,” Thayer’s transition sentence ran, “in order that it may be clear that the rule in question is something more than a mere form of language, a mere expression of

¹⁰⁴ See Thayer, *supra* note 2, at 129.

¹⁰⁵ *Id.* at 129-34.

¹⁰⁶ *Id.* at 134-38.

¹⁰⁷ *Id.* at 138.

courtesy and deference." His history had shown that the "clear mistake," "reasonable doubt" rule of judicial power to review the constitutionality of legislation was something judges had not only subscribed to, but had taken seriously.

Commentators have pointed out, of course, that Thayer's history was highly purposive.¹⁰⁸ He argued that judicial review was a "remarkable power" and "remarkable practice," unique to America, not based on a written Constitution or the "oath" judges took to support that Constitution, but on the fortuity that in the American colonial experience, the Crown exercised review of colonial legislatures through written charters, thus cementing the practice of treating legislatures as other than ultimate sovereigns.¹⁰⁹ He offered not one shred of evidence linking the early American decisions establishing judicial review of legislation under the Constitution to these Crown charters. Indeed, it is highly unlikely that any evidence would have been forthcoming, since a post-Revolutionary American court, in the course of seeking to justify its power to nullify legislative acts, would not have been inclined to analogize itself to the tyrannical British Crown, the symbolic embodiment of Revolutionary grievances.

In his next historical section, in which Thayer argued that the power of judicial review, once established, was "conceived of . . . [s]trictly as a judicial one,"¹¹⁰ his actual citations from history were scanty and misleading. On behalf of the proposition that judicial powers were always strictly separated from legislative powers in the American constitutional republic, he cited statements from two state constitutions, one passed before the Federal Constitution was adopted in 1789 and the other less than a ringing statement of the separation of judicial from legislative powers.¹¹¹ He then added a quotation from his contemporary, Thomas Cooley, suggesting that a "common impression" that courts were "perfectly competent" to afford a remedy in every case where legislatures had "disregarded . . . the bounds of constitutional authority" was erroneous. Not only was Thayer's invocation of Cooley hardly an example from history, but Thayer also failed to add that Cooley had made the statement in the course of an argument for greater judicial *vigilance* in enforcing constitutional review powers.¹¹²

It was clear, in fact, that by this section of the *American Doctrine* essay, Thayer was openly fusing his historical exegesis and his perspec-

¹⁰⁸ See CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT* (1960); Hook, *supra* note 25, at 5-6.

¹⁰⁹ Thayer, *supra* note 2, at 129-31.

¹¹⁰ *Id.* at 134.

¹¹¹ Thayer gave as examples the Massachusetts Constitution, whose passage preceded that of the Federal Constitution, and the Kentucky Constitution, which qualified the separation of judicial from legislative powers by the phrase "except in the instances hereinafter expressly permitted."

¹¹² On Cooley's position on judicial review, which no commentator has found supportive of Thayer's argument, see PAUL, *supra* note 5, at 12-13, 232; Siegel, *supra* note 4, at 1502-14.

tive as a late nineteenth century commentator on issues of political economy. This became clear in the startling passage in which Thayer took a purportedly logical step from the conventional late nineteenth century assumption that separation-of-powers theory confined judicial power to the power "to determine, for the mere purpose of deciding a litigated question properly submitted to the court, whether a particular disputed exercise of [legislative] power was forbidden by the constitution."¹¹³ That step went as follows:

Moreover, such is the nature of this particular judicial question that the preliminary determination by the legislature is a fact of very great importance, since the constitutions expressly intrust to the legislature this determination; they cannot act without making it. Furthermore, the constitutions not merely intrust to the legislatures a preliminary determination of the question, but they contemplate that this determination may be the final one; for they secure no revision of it.¹¹⁴

As Tushnet points out, this passage involves a striking non sequitur. It does not at all follow, once one has interpreted separation-of-powers theory as narrowing judicial power to jurisdictionally based power, that one must conclude that legislatures have been expressly entrusted with the power not only to make preliminary determinations of the constitutionality of their own legislation, but to make final determinations. Thayer gives no satisfactory evidence in support of this conclusion: the evidence he gives, such as the persistence of some congressional legislation despite doubts expressed about its constitutionality, suggests only that sometimes Congress passes controversial legislation that is not immediately challenged. Such evidence implies very little about congressional motivation with respect to the constitutionality of the legislation, and even less about the validity of the proposition that when Congress passes legislation it can be said to be acting as the *final* determiner of that legislation's constitutionality. Such a proposition, in fact, was directly rejected by John Marshall in *Marbury v. Madison*,¹¹⁵ an opinion whose reasoning, Thayer said, "went forward as smoothly as if the constitution were a private letter of attorney"¹¹⁶

In fact, Thayer went even further, claiming that if the judiciary had been regarded under the Constitution "as the chief protection against

¹¹³ Thayer, *supra* note 2, at 135. Conventional late nineteenth and early to mid-twentieth century separation-of-powers theory posited a sharp distinction between *jurisdictional* and *substantive rulemaking* powers. Courts were assumed to have only *jurisdictional* power to scrutinize the actions of legislatures, not power to range beyond a particular "case or controversy" to fashion discretionary rules properly fashioned by legislatures. That sharp distinction was not made by earlier constitutional theorists, who assumed a coterminous relationship between the judicial and legislative powers of the federal government. See G. Edward White, *Recovering Coterminous Power Theory*, 14 NOVA L. REV. 155 (1989).

¹¹⁴ See Thayer, *supra* note 2, at 135.

¹¹⁵ 5 U.S. (1 Cranch) 137 (1803).

¹¹⁶ See Thayer, *supra* note 2, at 139.

legislative violations of [it], they would have . . . been let in . . . to a revision of the laws before they began to operate.” He then dropped a footnote, which Tushnet quite properly sees as a clue to his normative agenda in writing the essay. In the course of the footnote, which attempted to show that there was little debate about judicial review in the early state constitutions, Thayer said that “[w]e are much too apt to think of the judicial power of revising the acts of the other departments as our only protection against oppression and ruin.” Tushnet sees this comment as an implicit invitation to consider *legislative* revision of “the acts of other departments” as a significant protection, and that reading seems fair. But Thayer’s normative conclusions in the comment were intermingled with his historical analysis so as to make it appear that if one only appreciated the “true” history, one would realize that judges were never expected to be significantly involved in the process of constitutional revision. That statement was wholly unsupported, and rested on a novel theory of the constitutional implications of legislative acts, which Thayer had supplied himself.

In sum, Thayer’s perspective in the historical sections of his *American Doctrine* essay was consistently that of the legal scientist doing “historico-politics”: employing history to prove the truth of his normative propositions.¹¹⁷ He maintained this perspective in Part IV of the essay, but gradually devoted himself more and more to policy arguments. The heart of the essay, a series of paragraphs in Part IV, provides the core of those arguments. Here is that series, excerpted for clarity:

If [the duty of courts when reviewing the constitutionality of legislation] were in truth merely and nakedly to ascertain the meaning of the text of the Constitution and of the impeached Act of the legislature, and to determine, as an academic question, whether in the court’s judgment the two were in conflict, it would, to be sure, be an elevated and important office, one dealing with great matters, involving large public considerations, but yet a function far simpler than it really is. Having ascertained all this, yet there remains a question—the really momentous question—whether, after all, the court can disregard the Act. It cannot do this as a mere matter of course—merely because it is concluded that upon a just and true construction the law is unconstitutional. That is precisely the significance of the rule of administration that the courts lay down. It can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one—so clear that it is not open to rational question This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that

¹¹⁷ I will pass over Part III of Thayer’s *American Doctrine* essay, in which he assembled quotations from early judicial decisions supporting his “rule of administration.” Suffice it to say that while Thayer conceded that the “rule” had not been invariably followed, his citations suggested that it had been widely invoked. Most of Thayer’s citations involved dissenting opinions, statements from his own Gilded Age contemporaries, or positions that were later repudiated by the judges who advanced them.

the [c]onstitution 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. This is the principle which the rule that I have been illustrating affirms and supports.¹¹⁸

So far, the logic of Thayer's argument had proceeded from a critique of the "simpler function" of judicial review (ostensibly articulated by Marshall in *Marbury*), that of laying the text of the Constitution alongside the text of a piece of legislation and determining, "as an academic matter," whether the two were in conflict, to the recognition that judicial review "really is" a more complex and "momentous" process. The "rule of administration" was what made that process complex: it signified that there was an important distinction between legislation that was arguably in conflict with the Constitution and legislation that was unconstitutional beyond a reasonable doubt. In the latter case, the legislature had made a "clear mistake" in concluding that its action did not offend the Constitution—"so clear that it is not open to rational question."

Why should that rule, which posits a very deferential standard of review, command allegiance? Because, Thayer next claimed, the constitutional text was vague and open-ended ("admit[ting] of different interpretations"), and because the Constitution was designed to be adapted to "the great, complex, ever-unfolding exigencies of government." Given the premises that in passing legislation legislators made an implicit judgment on its constitutionality, that courts, not being lawmakers, should respect that judgment, that the constitutional text was indeterminate, and that the Constitution was intended to be capable of embracing change, Thayer's conclusion that "whatever [legislative] choice is rational is constitutional" inexorably followed. Then, in the tradition of Langdellian legal science, he converted his conclusion into a principle: the equating of rationality with constitutionality, as illustrated by the "clear mistake" standard of review.

Thayer then departed from the realms of logic and politics and returned to history. For the next few pages, he supplied more evidence from past cases, in private law subjects as well as in constitutional law,¹¹⁹ of the primacy of the rule. Among his examples was the practice in the other field of law that he had studied in great detail, evidence, of judges reversing the verdicts of juries only when "reasonable men could not fairly find as the jury have done."¹²⁰ The analogy between evidence and

¹¹⁸ See Thayer, *supra* note 2, at 133-44.

¹¹⁹ "In one application of [the rule of administration], as we all know, it is constantly resorted to in the criminal law in questions of self-defence, and in the civil law of tort in questions of negligence,—in answering the question what might an individual who has a right and perhaps a duty of acting under given circumstances, reasonably have supposed at that time to be true." *Id.* at 147.

¹²⁰ *Id.* (quoting Lord Esher).

constitutional law was, for Thayer, nearly exact. Whether a judge was reviewing the verdict of a jury or the constitutionality of legislation, the normative standard was the same: the "action [of the primary lawmaker] must not degenerate into an irrational excess"¹²¹

With this last phrase Thayer conjured up one of the nightmares of Brahmin political economists: a combination of new wealth, new political actors, and the old bugaboos of corruption and special privilege combining to produce "irrational excess[es]" among legislatures that served as a harbinger of cultural "degeneration." The nightmare moved him to reiterate his hope that the legislative branch would take stock of itself and maintain virtue, preserve exceptionalism, and forestall degeneration. As he put it:

It must indeed be studiously remembered, in judicially applying such a test as this of what a legislature may reasonably think, that virtue, sense, and competent knowledge are always to be attributed to that body. The conduct of public affairs must always go forward upon conventions and assumptions of that sort And so in a court's revision of legislative acts, as in its revision of a jury's acts, it will always assume a duly instructed body; and the question is not merely what persons may rationally do who are such as we often see, in point of fact, in our legislative bodies, persons untaught it may be, indocile, thoughtless, reckless, incompetent,—but what those other persons, competent, well-instructed, sagacious, attentive, intent only on public ends, fit to represent a self-governing people, such as our theory of government assumes to be carrying on our public affairs—what such persons may reasonably think or do, what is the permissible view for them The reasonable doubt, then, of which our judges speak is that reasonable doubt which lingers in the mind of a competent and duly instructed person who has carefully applied his faculties to the question. The rationally permissible opinion of which we have been talking is the opinion reasonably allowable to such a person as this.¹²²

By seeking to demonstrate that the "reasonable doubt" and "clear mistake" rules were the operative elements of judicial review in America, Thayer did not mean to equate judicial deference simply with the conventional platitude that "reasonable men might differ" on the constitutionality of legislation. He meant to equate deference with a judicial finding that "reasonable" *enlightened, instructed, virtuous* legislators would differ on that question. In other words, courts were to employ "class values" to determine whether a legislature that had passed a piece of legislation was an embodiment of the values of the "indocile, thoughtless, reckless, [and] incompetent," or of the values of the "competent, well-instructed, sagacious, [and] attentive," those "intent only on public ends" and thus "fit to represent a self-governing people." While American republicanism conventionally assumed the latter sort of persons "to

¹²¹ *Id.* at 148.

¹²² *Id.* at 149.

be carrying on our public affairs," judges were free to conclude otherwise.

VI. CONCLUSION: REVISITING THAYER'S MOTIVATION

At this point we are in a position to assess, more specifically, Thayer's motivation in writing the *American Doctrine* essay. In the course of that assessment two additional points that Thayer raised in the last sections of his essay need to be addressed. The first is his cryptic statement, followed by a footnote to an article by Brooks Adams deploring the Supreme Court's action in the two *Legal Tender Cases*,¹²³ that the "reasonable doubt" rule provided "a sufficient explanation . . . of some of the decisions which have alarmed many people in recent years—as if the courts were turning out but a broken reed." Thayer followed that comment by citing Adams as a "depressed, but interesting and incisive writer," who had concluded that the Court's legal tender decisions indicated that it "has fallen, and it is not probable it can ever again act as

¹²³ The *Legal Tender Cases* refer to a series of decisions by the Supreme Court in the 1869 and 1870 Terms in cases presenting constitutional challenges to congressional legislation passed in 1862 in response to the Civil War. The legislation in question authorized the issuance of demand notes (called greenbacks) as currency that could be redeemed only in interest-bearing twenty-year federal bonds. The greenbacks were made "lawful money and a legal tender in payment of all debts, public and private, within the United States." Act of February 25, 1862, 12 Stat. 345. After the end of the Civil War, greenbacks continued in circulation, but inflation depreciated their value, resulting in creditors demanding payment in coin (specie) or in paper money that reflected a value equivalent to specie. In the years immediately following the Civil War, the greenback policy had distinctly partisan overtones, being identified with the Republican Party.

The first challenge to the 1862 greenback legislation heard by the Court resulted in the Court striking down the legislation as a violation of the Contracts, Due Process, and Takings Clauses. *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870). Chief Justice Salmon P. Chase, who had been Secretary of the Treasury at the time of the legislation and who had ostensibly supported it, wrote the majority opinion for the Court. He was joined by four Justices who had affiliations with the Democratic Party; the three dissenting Justices were identified with the Republican Party.

Because of increased judicial business resulting from population growth after the Civil War, Congress had, apparently without reference to the legal tender issue, authorized the creation of two additional Justices of the Supreme Court, effective in the 1870 Term. President Ulysses S. Grant, a Republican, named two Justices, William Strong and Joseph P. Bradley, who were anticipated to be supporters of the greenback policy.

After considerable internal maneuvering within the Court and within the Grant administration, the Court agreed to hear reargument of *Hepburn* in the 1870 Term. Two pending cases involving the payment of debts involving greenback currency, *Knox v. Lee* and *Parker v. Davis*, were consolidated as *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870). In those cases the Court reversed itself, declaring that *Hepburn* had been a premature judgment. All the majority Justices in *Hepburn* save Justice Robert Grier, who had retired, dissented in *The Legal Tender Cases*, and the dissenters in *Hepburn*, plus Strong and Bradley, provided the new majority sustaining the greenback legislation. The sequence was widely perceived by commentators as a direct embroiling of the Court in politics. Characteristically, Thayer's article ostensibly ignored the "embroiling" issue, concentrating on textual and institutional arguments he derived from the Constitution.

an effective check upon the popular will"¹²⁴

Tushnet interprets this "broken reed" metaphor of Thayer as an instruction to prospectively virtuous legislators not to count on courts to bail them out if they allowed their "corrupt" or "dangerous" fellow legislators to initiate class legislation. The context of the metaphor, however, makes that interpretation at best incomplete. Since the metaphor appears just after Thayer had taken pains to suggest that the "reasonable doubt" standard is in actuality a class standard, by which judges, being "competent, well-instructed, sagacious, [and] attentive" persons, demand those qualities of legislators and sustain only "rational" legislation whose rationality can be tied to those qualities, the metaphor appears to be one intended to reassure rather than to warn. Thayer's reassurance is that by being deferential, courts are not being "broken reeds." They are simply implementing the "rule of administration" from the perspective of educated, competent, upstanding elites.

Seen in this fashion, the "broken reed" metaphor is consistent with a message to *all* enlightened and virtuous persons interested in issues of political economy in the Gilded Age. It is an exhortation for legislatures to ensure that they are peopled with such persons, who will make the kind of rational decisions that courts will support; for courts to scrutinize legislative acts not merely from a deferential perspective but from a deferential class-based perspective; and for citizens to be vigilant lest legislatures be taken over by the "indocile, thoughtless, reckless, [and] incompetent," in which case the "rule of administration," even sagaciously administered, may not be enough to "save a people from ruin. . . ."¹²⁵

The second point involves Thayer's distinctions at the very end of his essay. In Part V he sought to distinguish between three situations: judicial review where a court considered "the validity of the act of a co-ordinate department," the giving of "advisory opinions" by judges, and reviewing "acts of a department which is not co-ordinate."¹²⁶

Thayer quickly placed advisory opinions to one side ("not the exercise of the judicial function at all" because they were not given in real cases or controversies)¹²⁷ and indicated that his essay was directed specifically toward federal court constitutional review of congressional legislation or state court constitutional review of state legislation.¹²⁸ The "clear mistake" and "reasonable doubt" features of his "rule of administration" were largely reserved, he concluded, for Supreme Court review of acts of Congress. Indeed, he suggested that when a federal court reviewed state legislation, it was acting as a representative of a sovereign

¹²⁴ Brooks Adams, *Consolidation of the Colonies*, 55 ATLANTIC MONTHLY 307 (1885), quoted in Thayer, *supra* note 2, at 151 n.3.

¹²⁵ Thayer, *supra* note 2, at 156.

¹²⁶ *Id.* at 153.

¹²⁷ *Id.*

¹²⁸ *Id.*

“of higher authority,” whose “duty it is, in all its departments, to allow [the Federal Constitution] nothing less than its just and true interpretation; and having fixed this, to guard it against any inroads from without.”¹²⁹

This language apparently provides clear support for Tushnet’s claim that Thayer could not only not have had *Lochner* in mind when he wrote the essay, but also that he could not have been reacting to any pre-*Lochnerian* substantive due process decisions in which the Supreme Court had invoked aggressive review of state legislation.¹³⁰ But a section of the last paragraph of Thayer’s essay nonetheless seems to require explanation. The paragraph reads as follows:

If what I have been saying is true, the safe and permanent road toward reform is that of impressing upon our people a far stronger sense than they have of the great range of possible harm and evil that our system leaves open, and must leave open, to the legislatures, and of the clear limits of judicial power; so that responsibility may be brought sharply home where it belongs. The checking and cutting down of legislative power, by numerous detailed provisions in the Constitution, cannot be accomplished without making the government petty and incompetent. This process has already been carried much too far in some of our States.¹³¹ Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere. If this be true, it is of the greatest public importance to put the matter in its true light.¹³²

The excerpted passage, taken as a whole, lays bare Thayer’s perspective as a Brahmin political economist. He is speaking to “our people” at large. On the one hand, he is warning them about the “great range of harm and evil” that the American system “leaves open” because of its commitment to legislative sovereignty; on the other hand, he believes that with this warning responsibility, a sense of civic virtue, and greater

¹²⁹ *Id.* at 154-55.

¹³⁰ See, e.g., *Chicago, M. & St. P. Ry. v. Minnesota ex rel. R.R. & Warehouse Comm’n*, 134 U.S. 418 (1890).

¹³¹ Thayer’s reference to “the checking and cutting down of legislative power” as having “already been carried much too far” by judges “in some of our States” is puzzling. It would seem to need squaring with Thayer’s distinction between federal court review of congressional legislation and federal court review of state legislation; any such squaring would require Thayer’s remarks to be directed at *state court review of state legislation*. But then Thayer’s use of the term “Constitution” raises problems: why would state courts be passing on the constitutionality of state legislation under the Federal Constitution?

The puzzle is partially resolved if one notes that some state courts were invoking the jurisprudential principle of freedom of contract to invalidate actions of state legislatures in the late nineteenth century. See PAUL, *supra* note 5, at 45-52. Thayer may have thought that the derivation of “freedom of contract,” which was not precisely grounded in the state cases, had come from a reading of the Fourteenth Amendment’s Due Process Clause.

Nonetheless, Thayer gave only passing attention, in his *American Doctrine* essay, to the problem symbolized by *Lochner*, that is, the usurpation of state legislative “experimentation” by an ideological Supreme Court.

¹³² See Thayer, *supra* note 2, at 156.

attention to public affairs will be instilled in the people's representatives. He deplores the aggressive use of judicial review by state courts to "check and cut down" state legislative power; he wants no comparable practice to emerge with respect to Supreme Court review of Congress. He is appalled at the loss of virtue and the emergence of new wealth and new political actors in national politics, but at the same time he is confident that if the people see that "[u]nder no system can the power of courts go far to save a people from ruin," they will seek their "chief protection" in their representatives and in their own enlightenment.

But Thayer retains an escape route in case his assumptions about legislators and their constituents have been too sanguine. His "rule of administration," properly understood by enlightened elite judges, converts rationality to a class value, the rationality of Brahmins and their ilk. Should prospective legislative determinations of the constitutionality of their own legislation appear to be the "excesses" of unenlightened, uneducated, corrupt, reckless demagogues, Brahmin judges will know what to do. Here Thayer's confidence was surely buoyed by the fact that he had spent a year in England, observing and analyzing British judges as they worked with rules of evidence, before he first proposed his "rule of administration" in his 1884 letter to *The Nation*. An Anglophile, as were most of his chaired Harvard colleagues, Thayer believed that the Gilded Age, for all its excesses, was fundamentally an age dominated by Anglo-American "gentlemen." If British judges could determine the rationality of British jury verdicts, American judges could determine the rationality of Congress.

Thayer thus appears, in the *American Doctrine* essay, as a distinctive sort of Whig turned Brahmin, alternately hopeful and fearful of "the people" and their representatives, distinctly aware that the exceptional status of the American republic was being severely threatened, at the same time hopeful that virtue and civilization could flourish. He appears as a commentator devoted to legal science as "historico-politics," convinced that by a certain technique of analytical reasoning, in which issues of law and political economy were probed to their foundations in sovereignty, truth could be achieved. He appears as an optimistic, religious person in a secular world, his Unitarianism emerging as a sense of community obligations. Most tellingly, he appears as someone at once confident that he and his Brahmin contemporaries can, through the exercise of their talents and resources, "put matters in their true light," and fearful that there are forces unleashed in the world of the Gilded Age that he does not fully comprehend. He appears as anything but a prescient apostle of enlightened twentieth century jurisprudence. We need to learn much

more about Thayer and his “Brahmin scientist” contemporaries. We need to begin to see them as cultural figures rather than as caricatures of formalism or as progenitors of the Realists. We need to determine more precisely their origin and scope.