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## NAME-CALLING AND THE CLEAR ERROR RULE

*Robert F. Nagel\**

Given my generally skeptical orientation on judicial review, I am inclined to agree with much of James B. Thayer's famous and influential essay.<sup>1</sup> Reflection, however, forces me to the conclusion that his thinking has had a paradoxical and pernicious effect on our jurisprudence and on the broader political culture. Before developing my specific argument about the consequences of Thayer's position, I want to indicate one of the reasons for my gloom about the modern judiciary's role in constitutional interpretation. Since in the past I have not been especially persuasive in justifying other aspects of my pessimistic assessment, this effort today probably will not convert anyone. It might be useful, nevertheless, to depict some of what (in my view) has gone wrong. I shall then try to show how Thayer's ideas have inadvertently contributed to this state of affairs.

### I

A few months ago, the District Court for the City and County of Denver, Colorado was asked to issue a preliminary injunction against enforcement of a state constitutional amendment that had just been enacted by a vote of the people.<sup>2</sup> You have probably heard of "Amendment 2," which prohibits the state and its subdivisions from enacting or enforcing any law

whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of . . . [any] claim . . .

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\* Ira C. Rothgerber Professor of Constitutional Law, University of Colorado School of Law. A version of this Essay will appear in ROBERT F. NAGEL, *JUDICIAL POWER AND AMERICAN CHARACTER* (forthcoming 1994).

<sup>1</sup> James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). For a perspective on the relationship between Thayer's writings and my own positions, see Maurice J. Holland, Book Review, 8 CONST. COMMENTARY 196 (1991) (reviewing ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES* (1989)). See also James R. Stoner, Jr., *Constitutional Culture Shock*, 53 REV. POL. 396 (1991) (same).

<sup>2</sup> *Evans v. Romer*, No. 92 CV 7223, 1993 WL 19678 (Colo. Dist. Ct. Jan. 15, 1993), *aff'd*, 854 P.2d 1270 (Colo. 1993). Judge Jeffrey Bayless granted the motion.

[of] minority status, quota preferences, protected status or claim of discrimination.<sup>3</sup>

This provision, needless to say, had been vigorously debated among the thousands of Colorado voters; indeed, it continues to be the focus of intense political and economic pressures involving groups from across the country.<sup>4</sup> In our system, however, it fell to a solitary municipal judge to decide the issue, at least as a preliminary matter, and it probably will fall to a few other state and federal judges to resolve it on a more permanent basis.

I call your attention to this case because it involves, obviously, intense and profound differences of opinion about morality, human nature, and political justice. Opponents invoke important values such as personal autonomy, equality, and procedural fairness.<sup>5</sup> Supporters of the amendment, on the other hand, have concerns about the growing list of groups receiving special protection under various civil rights laws; they are anxious about the viability of the institution of marriage (which, after all, has historically been premised on the assumption that society can favor heterosexual relationships); and they are profoundly uncertain about egalitarian experimentation on policies having consequences for such a sensitive and mysterious matter as sexual identity.<sup>6</sup> Many of you probably sympathize with the values behind opposition to the amendment, and I suspect that some, perhaps most, of you are feeling an impulse to dispute the accuracy, sufficiency, or relevance of my reference to considerations behind support for the amendment. You may be inclined to believe that the amendment serves no legitimate public purpose at all.

If so, you can find your views spelled out (perhaps more strongly than you might wish) in the Plaintiffs' Brief in Support of a Motion for Preliminary Injunction.<sup>7</sup> That brief begins with a statement of the case, which includes a description not only of the defendants and the plaintiffs but also of "the proponents" of Amendment 2.<sup>8</sup> This section notes that the amendment was drafted and promoted by a nonprofit group called Colorado for Family Values (CFV). It asserts that CFV was assisted by the National Legal Foundation, which is described as "an organization founded by the Reverend Pat Robertson." After summarizing various statements made by CFV in support of its position on the amendment,

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<sup>3</sup> COLO. CONST. art. II, § 30b (voter-approved change).

<sup>4</sup> See, e.g., Jeffrey Leib, *Springs Hotel Cuts 60 Jobs*, DENV. POST, Mar. 6, 1993, at C1 (discussing boycott against Colorado and estimating a loss of \$33.8 million to Denver economy due to lost convention business).

<sup>5</sup> See Brief in Support of Plaintiffs' Motion for Preliminary Injunction, *Evans v. Romer*, No. 92 CV 7223, 1993 WL 19678 (Colo. Dist. Ct. Jan. 15, 1993), *aff'd*, 854 P.2d 1270 (Colo. 1993) [hereinafter Plaintiffs' Brief] (on file at the Northwestern University Law Review offices).

<sup>6</sup> See, e.g., Fred Brown, *Amend. 2 Boycott Spurs Backlash*, DENV. POST, Jan. 3, 1993, at A1 (giving results of poll of Coloradans).

<sup>7</sup> See Plaintiffs' Brief, *supra* note 5.

<sup>8</sup> Plaintiffs' Brief, *supra* note 5, at 4-9.

the brief asserts that CFV's campaign "is not the first effort in this country to legislate discrimination against gays, lesbians, and bisexuals." As the plaintiffs phrase it, "The first campaign by the religious right . . . was led by Anita Bryant in Dade County, Florida, in the 1970's." The brief then helpfully (but without revealing its source) defines the "religious right" as being characterized by "a belief that the Bible should be interpreted literally, opposition to a set of values labelled 'secular humanism,' and an evangelical commitment to convert and to limit the influence of Satan, liberalism, socialism, and communism."

Painting now with a broad brush, the brief asserts that in the early 1980s the "'New Right' political movement incorporated the religious right" and that "[t]he approach developed by the 'New Right' . . . to promote anti-homosexuality measures . . . is akin to Hitler's appeals to traditional German family values." This section of the brief ends by listing a series of organizations—"Paul Weyrich's Free Congress Foundation, Beverly LeHaye's Concerned Women of America, Jerry Falwell's Moral Majority, Robert G. Grant's Christian Voice, Phyllis Schlafly's Eagle Forum, Paul Cameron's Family Research Institute, Pat Robertson's Christian Coalition"—and by asserting that these organizations provided support for "what appeared to be local, grassroots efforts to defeat 'homosexual privilege proposals.'" It is unclear whether the plaintiffs mean that all or any of these organizations were behind local support for the Colorado amendment. Plaintiffs do note darkly that "[a]t least two national religious right organizations are based in Colorado Springs" where, as the brief had noted earlier, CFV is also located. To close the point, the plaintiffs assert that "several" employees of James Dobson's Focus on the Family "sit on Colorado for Family Values advisory boards."

To what is this sinister description of "the proponents" relevant? While the specific logical connections are largely left to the reader's imagination, the brief is quite clear about the general significance of the information.<sup>9</sup> It is used to support the argument that the purposes of those who voted for Amendment 2 were illegitimate.<sup>10</sup> Those purposes are described as a "desire to harm a politically unpopular group" and as an expression of "prejudice" and "fear" and "antipathy." The amendment's true and sole purpose was "to encourage and support discrimina-

<sup>9</sup> See Plaintiffs' Brief, *supra* note 5, at 4 n.8 ("A detailed description of the proponents of Amendment 2 is presented because of the plaintiffs' discussion of improper governmental purpose set out . . . below."). Judge Bayless granted the preliminary injunction in part on the ground that there is a reasonable probability that by having the State "endorse and give effect to private biases," Amendment 2 would be found to violate the Fourteenth Amendment. *Evans v. Romer*, 1993 WL 19678, at \*11. Governments are, of course, constantly in the business of enforcing private decisions, preferences, and moral judgments; at this stage of the litigation, Judge Bayless has not yet fully explained why he thinks "bias" might be the appropriate word in this case.

<sup>10</sup> See Plaintiffs' Brief, *supra* note 5, at 39-42.

tion." The proponents' "purportedly neutral rationale" was used to "mask their campaign of hatred."

Now, the issue of gay rights evokes powerful ideological and moral loyalties, but we can put such reactions aside long enough to acknowledge that the brief I have described is conspiratorial and ugly in its own way. Its circles of moral condemnation shift and merge until they envelop the voters of an entire state. When such absolutist rhetoric and such loose generalizations are used by, say, the John Birch Society, we recognize them for what they are.

Our electoral campaigns give full expression to deep fears, flimsy theories, and harsh accusations. (The debate that preceded enactment of Amendment 2 evidenced much of it on both sides of the issue.) In our political life, some of this is unavoidable and even useful. But how did it come to pass that in our ordinary courts of law it is thought appropriate and useful to characterize the official decisions of our fellow citizens in crude and extreme ways?

It is possible, of course, to answer this question by asserting that realism and accuracy sometimes require the public's motivations to be described in completely negative terms. Those who see Colorado voters as prejudiced and hate-filled will be inclined to this view.<sup>11</sup> But such an answer only moves my question: How did it come to pass that the educated people who give this answer (including careful lawyers) can so confidently and severely condemn the thinking and the motivations of hundreds of thousands of people? To me at least, this question is especially troubling in the circumstances of Amendment 2, where the decision being judged involved sensitive and elusive issues, which, while profoundly important to us all, are not fully understood by any of us.

## II

I have been describing an argument made in a single brief in a single case. Even if you accept my characterization of that argument, you must be saying, probably with some impatience, "But that case and that brief are not necessarily typical; moreover, even if they were indicative of some disturbing trend, you cannot lay this kind of excess at the feet of poor James B. Thayer."

Actually, the shrill and simplistic depiction of public purposes has become a common feature of our constitutional jurisprudence. It is such a frequent part of the work of even Supreme Court Justices (let alone everyday lawyers advocating their causes) that we are hardly conscious of it. At least, we are not usually surprised or offended by the harshness of the judgments that are so routinely passed. Accordingly, it is worth reviewing some of the well-known constitutional cases that have ended in

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<sup>11</sup> A *Denver Post/News 4* poll of Colorado voters (for what it is worth) indicated that the beliefs of the voters were complex and, on the whole, tolerant of homosexuals. See Brown, *supra* note 6.

insulting descriptions of the objectives of public decisions—not to count them up or analyze them—but to try to see their language without our usual sense of close familiarity.

The place to start is race. I realize that in both political debate and academic commentary, charges of “racism” are now endemic. Nevertheless, to me it is striking how free judges have felt to make the charge against other public officials and even, on occasion, against whole electorates. They have done so appropriately with respect to laws that are plainly intended to separate and stigmatize. But they have also made the accusation in more complicated and subtle circumstances. For example, school board decisions that fail to achieve prescribed levels of racial balance are termed “intentionally segregative acts,” even when the goal of balance was in competition with other legitimate public objectives, such as neighborhood schooling or funding for educational quality.<sup>12</sup> Although less frequently, courts have also made similar charges where the official action was facially neutral, nondiscriminatory in its immediate effect, and unrelated to any injunctive regime. Thus, a state constitutional affirmation of the absolute right of any person to sell private property was found to involve the state in private racial discrimination and to “encourage” such discrimination.<sup>13</sup> In any of these situations, the local authorities or voters may well have been wrong for one reason or another. But it surely is untrue to the complexity of what many of these people were trying to do to portray their purposes as “segregative” or “discriminatory.”

Given the central place that racism undoubtedly holds in our history, it may be that suspicions about official motivations and purposes in this area are specially justifiable or, at least, defensible. But the Justices have made analogous charges in a number of nonracial cases. They described the public’s objective in providing (but not requiring) separate nursing education for women as perpetuating nursing “as an exclusively woman’s job.”<sup>14</sup> They declared an apparently trivial and—at worst—morally ambiguous law, which allowed females to purchase beer at an earlier age than males, to be “invidious.”<sup>15</sup> The Court concluded that a city ordinance singling out group homes for the mentally retarded reflected an “irrational prejudice.”<sup>16</sup> An eligibility requirement for food

<sup>12</sup> *E.g.*, *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 537 (1979); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 463-64 (1979); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 200 n.10 (1973).

<sup>13</sup> *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967); *see also* *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) (holding unconstitutional a local initiative that allowed school boards to require busing for nonracial reasons while forbidding them to require busing for racial integration); *Hunter v. Erickson*, 393 U.S. 385 (1969) (holding unconstitutional an amendment to local charter that required ordinances regulating property transactions on the basis of race to be approved by majority of voters).

<sup>14</sup> *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 729 (1982).

<sup>15</sup> *Craig v. Boren*, 429 U.S. 190, 204 (1976).

<sup>16</sup> *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985).

stamps that excluded households containing unrelated members was said to be based on "a bare congressional desire to harm a politically unpopular group."<sup>17</sup> The Justices insisted that a prohibition on the distribution of contraceptives that distinguished between married and unmarried persons was wholly irrational.<sup>18</sup>

To describe public objectives as based on prejudice and irrationality and as aimed only at doing harm to specific groups—this seems to me an astonishingly condemning stance that on a wide range of issues our judges seem neither reluctant nor surprised to take. But the cases I have alluded to do not at all complete the bleak picture that the Supreme Court draws of the rest of us. In a variety of settings, Justices have described public officials as being intent on nothing less than the subversion of the Constitution itself. A law that authorized public school students to have a moment of silent meditation "or voluntary prayer" was, it turns out, intended to endorse prayer and even to return official prayers to the schools.<sup>19</sup> (This conclusion was largely based on what one legislative supporter had said.<sup>20</sup>) Similarly a law requiring "balanced treatment" of evolution and creation science in public schools was "clearly" intended to advance the creationists' religious viewpoint.<sup>21</sup> (The Court treated one legislator's statement that evolution was "contrary to his family's religious beliefs" as evidence for this conclusion.<sup>22</sup> In an earlier case, the Justices had based a similar conclusion about the influence of "fundamentalist sectarian conviction," in part, on the content of newspaper advertisements and letters to the editor.<sup>23</sup>) When Congress enacted the Flag Protection Act of 1989,<sup>24</sup> it was not giving voice to legitimate concerns about the importance of the flag as a symbol of national unity. It was, according to the Justices, only providing further proof of the "popular" inclination to stifle dissenting viewpoints.<sup>25</sup> When a state required that women who are seeking abortions be provided with certain truthful but troubling information, that state was not merely misguided on a morally complex issue; it was seeking to "intimidate women," to create the "opposite" of informed consent, and to defy the lawful author-

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<sup>17</sup> *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

<sup>18</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972); see also *Zobel v. Williams*, 457 U.S. 55 (1982) (holding dividend distribution plan that discriminated on basis of state citizenship irrational); *Reed v. Reed*, 404 U.S. 71, 76 (1971) (describing distinction in state law between men's and women's opportunities to be appointed as administrator of an estate as "arbitrary").

<sup>19</sup> *Wallace v. Jaffree*, 472 U.S. 38 (1985).

<sup>20</sup> *Id.* at 56-60.

<sup>21</sup> *Edwards v. Aguillard*, 482 U.S. 578, 591 (1987).

<sup>22</sup> *Id.* at 592 n.14.

<sup>23</sup> *Epperson v. Arkansas*, 393 U.S. 97, 108 n.16 (1968).

<sup>24</sup> 18 U.S.C. § 700 (Supp. II 1990).

<sup>25</sup> *United States v. Eichman*, 496 U.S. 310, 318-19 (1990). Analogously, the Court sometimes ignores evidence of, for example, valid public health objectives and depicts the public's purpose as protectionism or "economic discrimination." *E.g.*, *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951).



ity of the Court in much the same way that southern rioters tried to block school integration.<sup>26</sup>

It is possible that every law struck down by the Supreme Court using words like "irrational," "prejudiced," "invidious," "suppressive," and "defiant" were, on the whole, bad laws. I also concede that some of the motivations that went into their enactment may have been—probably were—regrettable or even reprehensible. I still insist that we have become inured to the extreme rhetoric the Justices use in characterizing the decisions of others. I also insist that, however ignorant or evil these other decisionmakers may be, this rhetoric (as well as the "findings" and legal analysis that it expresses) is inaccurate in that it does not leave enough room for the difficulty of the judgments involved, the ambiguity of human motivations, and the complex nature of public decisionmaking.

I have alluded to a substantial number of Supreme Court decisions, involving a range of legal subjects, that condemn public enactments as being expressions of prejudice or irrationality or invidiousness. Every such decision invites untold numbers of briefs of the sort filed to attack Amendment 2 in Colorado. And every such brief urges another of the thousands of state and lower federal courts to label some product of our political institutions as wholly unjustifiable (or worse). In short, to a remarkable extent, our courts have become places where the name-calling and exaggeration that mark the lower depths of our political debate are simply given a more acceptable, authoritative form. We legal academics have been so busy applauding the judiciary's theoretical capacity for elevated dialogue and sensitive moral decisionmaking that we have not much noticed the tenor of much of what the judges have actually had to say. Their condemnations are seldom directed at us or those with whom we identify anyway. And we are safe in assuming that the fears and animosities and guesses and hopes that animate our own political agendas are unlikely—since we educate the judges—to be crushed under the weight of words like "prejudice."

There are many reasons why the discourse of our public law has sunk so low. To begin with, the vocabulary of the law necessarily reflects the larger culture, and our society (say some critics) lacks the capacity for moral debate. If this is too bleak, there are also more specific factors at work. The adversary system, which honors argument more than discernment, tends to promote caricature; the adjudicatory system, dealing as it does with winners and losers, leaves little room for ambiguity; legal education is easier and more fun if it promotes forms of analysis that are both simple and self-serving; and so on. Within the broad parameters of the legal culture, one particular contributing factor seems to me to be this: The dominant version of judicial restraint, a doctrine that might have been expected to limit the range of cultural disputes to be resolved

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<sup>26</sup> *Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 759, 764-771 (1986).

by the courts and (in any event) to modulate the terms of legal discourse, has been Thayer's "clear error rule."

### III

The central proposition in Thayer's argument is that courts can declare a legislative act unconstitutional only when the law was "not merely . . . a mistake, but . . . a very clear one—so clear that it is not open to rational question."<sup>27</sup> One of the major purposes of this rule, according to Thayer, was to promote a proper degree of respect for legislative judgments. He emphasized how constitutional questions can "seem unconstitutional to one man, or body of men, [and] may reasonably not seem so to another."<sup>28</sup> He described the judicial decision as secondary, both in sequence and in importance. He said that constitutional questions properly involve issues of practicality in which legislatures can be expected to have expertise; moreover, he repeatedly warned against traditional legalistic methods as "pedantic," "narrow," and "literal." And he wanted it to be "studiously remembered" that the courts should always assume "virtue, sense, and competent knowledge" in the legislature.<sup>29</sup>

Nevertheless, the clear error rule does anticipate that sometimes courts will hold a legislature's constitutional judgment to be irrational. Thus Thayer's formulation seems to require courts to engage in at least some of the harsh terminology that I have said is now a significant part of our constitutional discourse. His rule, however, contemplates that the charge of irrationality will be rare and will be made in a way that is consistent with appropriate judicial humility. And, indeed, it is logically possible for a Thayerian court to disregard statutes infrequently and even then to express high regard for the enactors' motivations and knowledge. For instance, legislators might decide to ignore a very specific and profoundly immoral constitutional provision—such as a requirement, which was once a part of our fundamental charter, that each state deliver up escaped slaves. The resulting statute might be unconstitutional in a way "not open to rational question," and yet the legislators' action could be described as valiant, moral, and enlightened. Even the decision to violate a legal obligation to uphold the Constitution might be praiseworthy from many perspectives. Judges presumably would be faced with such statutes on few occasions and would invalidate them reluctantly—only because no rational view of the Constitution permitted judicial enforcement. Such a judge could express admiration for the ideas underlying the statute while "disregarding" it as a legal matter.

Although Thayer intended for the clear error rule to be applied in a way that is respectful of legislatures and although even when it leads to

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<sup>27</sup> Thayer, *supra* note 1, at 144.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 149.

the invalidation of a statute the rule is logically compatible with such application, the seeds of the opposite result lie throughout his essay. Indeed, as a realistic matter, Thayer's formulation is a recipe for creating a self-deluding and imperious judiciary.

The self-image of judges employing the clear error rule will be profoundly complacent. They must feel and announce great reluctance before invalidating a statute. Even when, on a "just and true construction," a law seems unconstitutional, they are to exercise restraint.<sup>30</sup> Naturally, these judges will be motivated to believe that they are highly selective in voiding legislation and that, when they do, their judgments are specially justified. Moreover, because Thayerian judges have had to reach "the really momentous question" raised by the clear error rule, they have entered the realm of statesmanship.<sup>31</sup> Their role goes far beyond that of mere lawyer. In constitutional cases they act as a kind of safety net, protecting the fundamental law against the worst violations, intervening only where (even given the widest range for "the great, complex, ever-unfolding exigencies of government") there is but a single rational conclusion.<sup>32</sup> Their judgments necessarily involve some of the most vital and imponderable political issues, yet their conclusions are finally a matter of inescapable legal duty. Respectful and restrained, intellectually capacious and yet rigorous, called to act only in the most extreme circumstance, these judges are—in brief—quiet heroes.

The view from the heroic perspective is a fine one, but what is to prevent heroic judges from running amok? The range of their decisions is not restricted to those few cases where a literal reading of the text or some other "pedantic" analysis can authoritatively decide the issue. Moreover, the sense of complacency and elevation encouraged by the clear error rule might reduce actual self-restraint even as it induces the conviction that discipline has been exercised. In particular, the heroic judge can be expected to brook no opposition or dissent after a determination of unconstitutionality. The disputed governmental policy, after all, was illegal in a way "not open to rational question." Political disagreement in this circumstance will tend to be perceived as illegitimate defiance, not as potentially useful information. In short, Thayer's methodology relies on judicial self-restraint in a way that greatly reduces the potential for external checks. Yet it is precisely the ambitions of leaders who see themselves as heroic that stand in greatest need of limits imposed from the outside.

Thayer's answer, of course, is that judges are permitted to override the decisions of others only when those decisions are clear errors. That is, Thayer believed that legislatures would not often make irrational constitutional judgments and that courts—if properly instructed about the

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<sup>30</sup> *Id.* at 144.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

need to presume good sense in legislators—would confine their power to those extraordinary occasions. This presupposes the happy circumstance that judges and political representatives have common criteria for “rational” constitutional decisions even when these decisions involve the evaluation of a wide assortment of practical considerations. Without this assumption, there is no reason why conscientious legislators (working from their criteria) might not frequently come to conclusions that (from the radically different perspective of a judge) appear clearly irrational. If this should occur, Thayer’s judges would tend to intervene often, to be unaware of the scope of the power they are exercising, and to be impervious to criticism.

## IV

To what extent do judges and political decisionmakers hold the same criteria for rational constitutional judgment? It is possible that a society exists where lawyers and general citizens fully share a general intellectual culture and a specific decisionmaking methodology. This could happen where lawyers exercise great power and thus shape the terms of public dialogue.<sup>33</sup> On the other hand, it would also seem likely where lawyers are subject to the influence of the wider culture—where, for example, legal training is not highly differentiated from other education, where the adjudicatory function is not isolated or specialized, and where lawyers do not constitute an identifiable economic and social class.

In our society, the intellectual methods employed by lawyers are no doubt used by virtually all other groups at least to a limited extent. And these methods overlap significantly with the problem-solving instincts of many in the educated, professional classes. However, American society is varied enough and lawyering is specialized enough that the judgmental standards common to the law are at least somewhat foreign to almost all nonlawyers, and they probably are downright alien to some groups.<sup>34</sup> The happy circumstance presupposed by Thayer’s formulation—that political representatives and judges will agree on standards for rational constitutional judgment—certainly cannot be assumed to exist. If the specific issue is one that evokes differential standards even from groups normally sympathetic to legal methods or if political influence has been exerted by groups for whom legalistic criteria are alien, the clear error rule will not serve as a constraint.

As an illustration of competing standards of rationality in operation, consider the issue of flag burning. Akhil Amar has called *Texas v. Johnson*<sup>35</sup> “plainly right, and even easy—indeed as right and easy a case in

<sup>33</sup> For my acknowledgement that judicial discourse has influenced the vocabulary of political debate, see Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Questions Doctrine*, 56 U. CHI. L. REV. 643, 667-68 (1989).

<sup>34</sup> See ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES* (1989).

<sup>35</sup> 491 U.S. 397 (1989).

modern constitutional law as any I know."<sup>36</sup> This sprightly description is probably accurate if it means that the Court's decision was consistent with cases and principles that are much admired within the legal profession (and especially by law professors such as Amar). As everyone knows, *Johnson* construed "speech" functionally to protect communicative conduct useful in political debate; it applied a strong principle against "content discrimination" for the often-asserted reason that public disapproval is a potentially boundless basis for permitting the suppression of an idea; and it acknowledged (as modern judges almost always do) that a sufficiently important public objective would nevertheless justify the statute.<sup>37</sup> The Court found that the State's purpose was insufficient because it could have been achieved in another way that would not have suppressed speech.<sup>38</sup> In fact, the Court asserted that its own ruling—as a symbol of our common commitment to tolerance—would satisfactorily sustain our sense of nationhood.<sup>39</sup> This form of analysis and these conclusions probably sum up the attitudes that have pervaded free speech law for decades. Amar is right, I think, that it is all self-evident to many lawyers, so clear as to be beyond reasonable disagreement.<sup>40</sup>

As it happened, of course, neither the Court's conclusion nor its reasoning seemed ineluctable to large segments of the American public. After *Texas v. Johnson*, the Congress quickly enacted the Flag Protection Act of 1989,<sup>41</sup> which the Court also invalidated,<sup>42</sup> giving the same self-evident reasons. As I have already indicated, the Justices dismissed the "groundswell" that prompted Congress and the President to act as further evidence of the populace's inclination to suppress ideas with which it disagrees.<sup>43</sup>

It is true that the urge to suppress had something to do with the political interpretation of the Constitution that the Court disregarded in *United States v. Eichman*.<sup>44</sup> But, if lawyers' intellectual standards can be set aside for a moment, it is the Court that appears irrational. Obviously, a functional definition of "speech" has potential ramifications that could obliterate the distinction between speech and conduct. While lawyers and judges may think that they can be trusted to avoid absurd extensions

<sup>36</sup> Akhil R. Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 125 (1992). Similarly, Mark Tushnet describes *Texas v. Johnson* as "simple and straightforward." Mark Tushnet, *Constitutional Cultures*, 24 LAW & SOC'Y REV. 199, 209 (1990) (reviewing ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES* (1989)); see also *infra* note 45.

<sup>37</sup> 491 U.S. at 404-6, 410, 412.

<sup>38</sup> *Id.* at 410, 418.

<sup>39</sup> *Id.* at 419-20.

<sup>40</sup> Not to all lawyers, however. See Paul Campos, *Advocacy and Scholarship*, 81 CAL. L. REV. 817 (forthcoming 1993) (presenting an extended critique of Amar's position).

<sup>41</sup> 18 U.S.C. § 700 (Supp. II 1990).

<sup>42</sup> *United States v. Eichman*, 496 U.S. 310 (1990).

<sup>43</sup> See *supra* text accompanying note 25.

<sup>44</sup> 496 U.S. 310 (1990).

of functionalism, the outcome in *Johnson* itself could be thought by the general public to undermine this assurance. After all, despite the fact that burning the flag is expressive, in our history this behavior has not been commonly viewed as protected "speech" any more than urinating on the flag has been.<sup>45</sup> Justices capable of taking leave of such long-established understandings might sensibly be thought capable of eventually dissolving the basic distinction upon which the Free Speech Clause depends.

Similarly, the "principle" against content discrimination is a plain sign of irrationality to someone operating on the basis of practical knowledge rather than conceptualism. To claim that the government can or should treat all ideas as equally valuable is almost literally crazy for the simple reason that some ideas are worthless or harmful. Of course, legal theorists know this but tend to believe that there is an extreme danger in permitting official judgments about content. Again, why should an experientially minded public regard this danger as real? Flag desecration laws had long existed in many states, and they had shown no sign of the kind of cancerous growth feared by the Court.<sup>46</sup>

Finally, the notion that judicially announced principles of tolerance can serve the same unifying purposes as the flag is suggestive of the sort of self-importance that in private lives precedes civil commitment. It assumes that nationhood is built entirely on the basis of ideas—indeed, specifically on certain civil libertarian ideas that have had great influence on the courts over the last seven decades—to the exclusion of emotional and symbolic bases. This assumption is at odds with the observed behavior of societies throughout history.

In sum, the flag burning controversy presents us with strong evidence that on at least some constitutional issues the legal profession and the general public possess profoundly different judgmental criteria. Lawyers, it seems, tend to honor abstract theory, conceptualism, and intellectualism generally; much of the public relies more on historical sense, practicality, and visceral experience. Is this intellectual divide long

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<sup>45</sup> The Court itself had, at one time, refrained from reaching the conclusion that burning the flag is "speech." See *Street v. New York*, 394 U.S. 576, 594 (1969); cf. *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (assuming only for purposes of argument that burning a draft card is speech). Nevertheless, Mark Tushnet can say:

[I]t seems to me clear that the general public understands that punishing people for burning flags is as pristine a violation of the core meaning of the first amendment as we are likely to see. Tushnet, *supra* note 36, at 209. Tushnet does not explain how he knows this, but the full passage strongly suggests that he is simply assuming that because his own opinions about the case are strong, they must be shared by "the general public." However, given that Tushnet is an unconventional thinker (a socialist, no less), his opinions are not likely to be an especially accurate index of the views of the average person.

<sup>46</sup> The Texas statute in *Johnson*, for example, applied only to public monuments, places of worship or burial, and to the state and national flags. 491 U.S. at 400 n.1 (quoting TEX. PENAL CODE ANN. § 42.09 (West 1989)).

enough and wide enough to turn Thayerian judges into the kind of self-deluding juggernaut that I have suggested is theoretically possible? The record of the federal judiciary over the past four decades is instructive. In many respects, that record displays exactly what would be predicted if the clear error rule were to be applied in circumstances of significant cultural division.

There have been, as we all know, innumerable judicial decisions invalidating political determinations. These decisions have touched virtually every topic of public concern, but they are concentrated and most spectacular in two kinds of areas. The first involves issues, such as freedom of speech and criminal procedure, where lawyers' thinking is highly specialized and, therefore, counter-intuitive to a broad range of the public. The second involves issues like abortion, school desegregation, and religion where public policies have been influenced by social classes that are educationally and socially distinct from the class occupied by lawyers. Neither of these sets of judicial decisions can be explained as manifestations of straightforward partisan differences. They have continued despite considerable changes in the political complexion of the bench. They appear, that is, to represent cultural disagreements.

This extraordinary array of decisions has not been accompanied by proportionate signs of self-awareness on the part of the judges exercising power. Many audacious opinions actually acknowledge the courts' responsibility to defer to majoritarian preferences and painfully examine the record for any sign of good sense. Indeed, even while ordering the redesign of a state's entire prison system or the reorganization of a city's program of public education, jurists profess great reluctance and humility. They seem genuinely regretful that the political decisionmakers did not face up to their responsibility to decide the issues in the way that the judges believe would have been correct. It is only this obduracy, the decisions say, that forces judicial intervention.<sup>47</sup>

Ostensibly respectful attitudes, however, tend to dissolve when political decisionmakers either defy or are thought likely to defy a judicial ruling. In such circumstances, the courts have freely expanded the scope of constitutional protections—by way of prophylactic rules, elaborate doctrines, and so on—in order to forestall not only outright defiance but

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<sup>47</sup> To take one egregious example, the court-ordered desegregation plan for the Kansas City school system had a price tag of over \$460 million and involved the creation of a performing arts middle school, a 25-acre wildlife area, and capital renovations "without parallel in any other school district in the country." *Missouri v. Jenkins*, 495 U.S. 33, 60-61 (1990) (Kennedy, J., concurring in part). When the citizenry declined to pay for this plan, the trial judge ordered a tax increase, explaining that he could see "no alternative." *Id.* at 51. For its part, the Supreme Court also adopted the language of moderation by invoking the need to respect the "integrity and function of local government institutions." *Id.* It concluded, therefore, that the lower court should have ordered the local authorities to raise taxes rather than raising them by itself. *Id.* This method, said the Court, would be entirely in keeping with the judicial function. *Id.* at 55.

also more shaded forms of disagreement.<sup>48</sup> On certain memorable occasions, the Supreme Court has used the specter of defiance to assert astonishingly grandiose claims for its own authority.<sup>49</sup> Lower courts in similar settings can be more direct; not uncommonly, they react by taking over more administrative or legislative functions and sometimes even by abridging the constitutional rights of those who express disagreement.<sup>50</sup>

All this is precisely what would be expected of judges possessing the self-image of reluctant hero that is a natural outgrowth of Thayerism. But, of course, the mentality of the clear error rule is only one of many possible causes of the characteristics of modern judicial power. Naive textualism, simplistic historicism, rampant pragmatism, arrogant rationalism, clanky doctrinalism—any of these can and do explain aspects of the phenomenon. Even if it is theoretically possible that Thayerism helped to build the contemporary judicial machine, why believe that it in fact did so or that it was a significant factor?

## V

It is only a slight overstatement to say that in modern times there has been just one intellectually respectable version of judicial restraint. Neither rigorous textualism nor serious historicism has been practiced by the Supreme Court, and piles of academic commentary have posed very significant questions about whether either approach is possible or would (in any event) result in a restrained judiciary. The banishment of these forms of legal traditionalism has been personalized in the Senate's rejection of Robert Bork's nomination to the Court and in the flood of harsh criticism spawned by his subsequent book.<sup>51</sup> By way of contrast, the reputation of the common-law methodology of Justice John Marshall Harlan has solid foundations in the work of eminent scholars like Alexander Bickel,<sup>52</sup> and it continues to grow. Recently, Harlan has been the subject of considerable and respectful academic interest.<sup>53</sup> His jurisprudence is held up as a model of responsible restraint even in popular journals.<sup>54</sup> Conservative Justices, including Sandra Day O'Connor, David

<sup>48</sup> See David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 208-09 (1988); Robert F. Nagel, *Disagreement and Interpretation*, 56 LAW & CONTEMP. PROBLEMS (forthcoming 1993).

<sup>49</sup> See *infra* text accompanying notes 75-80.

<sup>50</sup> See Robert F. Nagel, *Controlling the Structural Injunction*, 7 HARV. J.L. & PUB. POL'Y 395, 405-06 (1984).

<sup>51</sup> As was to be expected, the classic illustration is Ronald Dworkin, *Bork's Jurisprudence*, 57 U. CHI. L. REV. 657 (1990).

<sup>52</sup> See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 35-46 (1962); see also *infra* note 75.

<sup>53</sup> E.g., Symposium, *Centennial Conference in Honor of Justice John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 1 (1991).

<sup>54</sup> E.g., Jeffrey Rosen, *The Leader of the Opposition*, NEW REPUBLIC, Jan. 18, 1993, at 20, 27.



Souter, and Anthony Kennedy, find themselves being rehabilitated by mainstream commentators who find Harlan-like tendencies in their work.<sup>55</sup>

Harlan's opinions are highly regarded precisely because they display all the elements of Thayer's approach. Justice Harlan understood constitutional issues to involve, not the "narrow" or "literal" issues of text and history, but the grand and practical issues of political life. To these issues, however, he brought intellectual rigor rather than emotion or abstraction. He understood the need to defer to wisdom expressed in the political process. He was restrained both in his formulation of the issues and in his willingness to let the meaning of initial decisions be elaborated on a case by case basis. And Harlan saw the judiciary's task of interpretation as an aspect of its duty to adjudicate specific disputes.

Today Harlan is admired for all these attributes, but I think he is also admired because in actual operation his Thayerian methods led him to the role of quiet hero. In fact, his work set the stage for much of the cultural imperialism that is the record of the Court in the second half of this century.

Consider again Akhil Amar's characterization of the flag burning case, *Texas v. Johnson*.<sup>56</sup> He correctly described that decision as embodying free speech principles that have been very widely accepted and frequently applied. *Johnson* broke new ground only as a specific application of well-established ideas. The case most directly responsible for establishing these ideas is *Cohen v. California*,<sup>57</sup> a much admired opinion written by Justice Harlan. In upholding the right to wear a now famous "scurrilous epithet" sewn to a jacket, *Cohen* used virtually the same logic as the Court later employed in *Johnson*. In style, however, Harlan's opinion displays all the appealing attributes of a rigorous common-law decision. It defines the legal issue with great precision; it carefully and deferentially examines all the arguments for permitting suppression; its conclusion is painstakingly restricted to circumstances where the government has not shown "a more particularized and compelling reason for its actions."<sup>58</sup> But behind all this thoughtfulness and caution can be heard the voice of the hero.

Harlan dismisses the notion that the display of the words "fuck the draft" was inherently likely to cause a violent reaction as "plainly unten-

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<sup>55</sup> *Id.*; cf. Kathleen M. Sullivan, *Governmental Interests and Unconstitutional Conditions Law: A Case Study in Categorization and Balancing*, 55 ALB. L. REV. 605, 617 (1992) (discussing the use of balancing analysis by conservative Justices O'Connor, Souter, and Kennedy); Kathleen M. Sullivan, *Post Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992) (same).

<sup>56</sup> See *supra* note 36 and accompanying text.

<sup>57</sup> 403 U.S. 15 (1971).

<sup>58</sup> *Id.* at 26.

able" and reflecting an "undifferentiated fear or apprehension." <sup>59</sup> As for the claim that suppression served the purpose of maintaining a "suitable level of discourse within the body politic," Harlan invokes "examination and reflection."<sup>60</sup> He is confident that the sensibilities of passersby could be adequately protected if they would just (why didn't the local officials think of it!) avert their eyes. On the other hand, what is at stake in protecting this "trifling and annoying instance of . . . distasteful abuse of a privilege"<sup>61</sup> is, if only enough thought is applied, momentous. Protecting individual freedom here will serve to "produce a more capable citizenry and more perfect polity."<sup>62</sup> In fact, "no other approach would comport with the premise of individual dignity and choice upon which our political system rests."<sup>63</sup> Plainly, the officials of California had made an enormous error; the moral underpinnings of our political system were at risk; only the measured reflections of a few Justices lay between us and eventual calamity. This was a small decision, reluctantly and carefully arrived at, but it would serve the highest, not to say the most grandiose, purposes.

Some citizens who are not blessed with a legal education may plausibly wonder about the rationality of the Court's continuing claim that "the premise of individual dignity and choice upon which our political system rests" requires ordinary people to walk around with their eyes averted against what in some places has become a virtual onslaught of crude, offensive messages. Be that as it may, a second line of modern cases is, if anything, an even clearer example of the Court's cultural imperialism. These are the decisions that establish and elaborate the right to privacy, especially as this right applies to sexual conduct and to abortion.<sup>64</sup> This line descends, of course, directly from *Griswold v. Connecticut*,<sup>65</sup> which in turn grew directly from Justice Harlan's famous dissenting opinion in *Poe v. Ullman*.<sup>66</sup>

The *Ullman* dissent is, in most respects, vintage Thayerism. Harlan begins by arguing that the Court should not avoid deciding the constitutional question raised by a state's rule against the use of contraceptives. Like Thayer, Harlan emphasizes that the power of judicial review arises from the Court's "duty to decide . . . the particular controversies which come to it."<sup>67</sup> On the merits of the issue, Harlan departs somewhat from

<sup>59</sup> *Id.* at 23 (quoting *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 508 (1969)).

<sup>60</sup> *Id.* at 23-24.

<sup>61</sup> *Id.* at 25.

<sup>62</sup> *Id.* at 24.

<sup>63</sup> *Id.*

<sup>64</sup> For a discussion of the cultural aspects of opinions on the right to abortion, see KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984).

<sup>65</sup> 381 U.S. 479 (1965).

<sup>66</sup> 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

<sup>67</sup> *Id.* at 525.

Thayer by attempting to justify the imposition of a nondeferential standard for evaluating the State's purpose. Despite this, much of his analysis remains consistent with the clear error rule. He asserts that the Court should view the Constitution as a "basic charter of our society" rather than literally and that the Due Process Clause has become a general bulwark "against arbitrary legislation."<sup>68</sup> The constraints on judges in this endeavor are their own "judgment and restraint."<sup>69</sup> He acknowledges the controversial nature of the moral judgments that are involved in regulating human sexuality and notes that this alone requires the judge "to hesitate long before concluding that the Constitution precluded Connecticut from choosing as it has among these views."<sup>70</sup> Having expressed his reluctance and humility, Harlan is freed to explain his conclusion, which is that the application of the criminal prohibitions in the statute to married couples "is an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's life."<sup>71</sup> The State, says Harlan, has not "even remotely suggest[ed] a justification for the obnoxiously intrusive means it has chosen."<sup>72</sup> The law "involves what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of 'liberty,' the privacy of the home in its most basic sense."<sup>73</sup> What is at stake, in short, is "the very essence of constitutional liberty and security."<sup>74</sup>

Again, while Harlan describes the constitutional interest in terms of the most timeless aspects of civilization and the governmental action as both aberrational and utterly unjustifiable, he is still careful to limit the reach of the decision that he is urging on the Court. For example, he says his reasoning would not apply to intrusions required to enforce laws against adultery and fornication. The good Thayerian judge remains secure in the knowledge that his intervention has been exceptional and small. But, given the terms of Harlan's own opinion, these assurances ring hollow. Those terms make Harlan the protector of society's most basic and valuable principles against forces that are mindless and profoundly dangerous. Harlan establishes a role that is sure to be irresistible to the later judges who would actually determine the ultimate implications of the "modest" decision at hand.

In addition to continuing activism in the areas of free speech and privacy, the record of the Court in recent decades has been marked by extraordinary claims about the judiciary's institutional role. These claims have been the Court's response to political opposition. They are

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<sup>68</sup> *Id.* at 541.

<sup>69</sup> *Id.* at 542.

<sup>70</sup> *Id.* at 547.

<sup>71</sup> *Id.* at 539.

<sup>72</sup> *Id.* at 554.

<sup>73</sup> *Id.* at 548.

<sup>74</sup> *Id.* at 550 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

manifest in the largely unfettered prerogative of lower courts to assume administrative and legislative powers when faced with local resistance. They are also manifest in the Court's self-important descriptions of its own function. Most recently, for example, several of the Justices opined that at least on the most socially destructive and morally profound issues, such as abortion, it is the Supreme Court's job to call "the contending sides of a national controversy to end their national division."<sup>75</sup> Indeed, they went on to say that for the Court to give in to continuing disagreement on such an issue would threaten

the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to . . . speak before all others for their constitutional ideals.<sup>76</sup>

This language, which was authored by three Justices who no doubt view themselves as careful judicial moderates, is (or ought to be) embarrassing. But it is not really surprising; the groundwork had been laid for some time. In part, it was laid by that earlier embodiment of judicial modesty, Justice John Marshall Harlan. Harlan, as you know, signed *Cooper v. Aaron*, which asked the American public "to recall some basic constitutional propositions which are settled doctrine."<sup>77</sup> These included a reiteration of the familiar assertion that the federal judiciary is "supreme in the exposition of the law of the Constitution," a claim that the Justices described as "respected by . . . the Country as a permanent and indispensable feature of our constitutional system [ever since *Marbury v. Madison*]."<sup>78</sup> This proposition presumably not being open to rational question, the Court went on to say that the Court's decisions themselves are the "supreme law of the land" and that, accordingly, every state officer is obligated to support these decisions.<sup>79</sup> All this, said the Court, is "indispensable for the protection of the freedoms guaranteed . . . for all of us."<sup>80</sup>

A vast distance seems to separate the modest Thayerian assumption that the power of judicial review arises from a legal duty to decide cases and the exasperated pronouncement in *Cooper v. Aaron* that all officials must obey the "supreme expositor." It might be thought, therefore, that

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<sup>75</sup> *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2815 (1992) (opinion of Justices O'Connor, Souter, and Kennedy). This exalted self-image is based, I suspect, partly on the unfortunate influence of some hyper-excited academic commentary. This, too, is traceable to Thayer, who influenced (for example) Bickel, who once wrote that the independent federal judiciary is "a bulwark, or at any rate a symbol, that might just preserve and protect the very regime itself at some awful moment of supreme peril." ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 180-81 (1970).

<sup>76</sup> *Casey*, 112 S. Ct. at 2816.

<sup>77</sup> 358 U.S. 1, 17 (1958).

<sup>78</sup> *Id.* at 18.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 20.

this specific idea should not be attributed to Harlan. He was only one of the Justices who signed the opinion, and the circumstances of the case were extraordinary. The lineage of the expansive claims of *Cooper*, however, does go back to Harlan himself. It was this proponent of judicial restraint who insisted that the following sentence be included in *Brown II*: "[I]t should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."<sup>81</sup> It is clear enough, I think, why Harlan would favor this, the strongest language in *Brown II*, and why he would later sign *Cooper v. Aaron*. The rigorous and restrained analysis in his opinions was in significant instances only a prelude to the extravagant characterization of the societal interests to be served by the Justices' decisions. Dissent that threatens such decisions threatens those lofty interests; it threatens the authority of judges who already believe they have done the minimum necessary to protect us from policies that, without any possible justification, threaten the social fabric. Under this view, disagreement is intolerable.

### CONCLUSION

I do not want to be misunderstood as having argued that Thayerism necessarily leads the courts to the kind of cultural imperialism that has characterized the judicial record for the past several decades or that Harlan laid the groundwork for all aspects of that record. The clear error rule can restrain judges, and Harlan was often restrained.<sup>82</sup> What I have tried to say is that, given enough cultural separation between jurists and political leadership, Thayer's ideas in operation can be expected to—and did—produce a great deal of disrespectful, intolerant, and expansive judicial decisionmaking. That is, his prescription, applied in our circumstances, led to what it was intended to avoid. Given the extent of cultural division in our society, those who want the courts to introduce civil discourse into our political relations will have to look beyond the clear error rule.

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<sup>81</sup> *Brown v. Board of Educ.*, 349 U.S. 294, 300 (1955). Gerald Gunther, who was clerking for Harlan at the time, "vividly" remembers "that the Justice pressing most insistently for added muscle in the decree was *not* one of the well-known liberals on the Court, but rather Harlan. More specifically, it was Harlan's voice and pen that was solely responsible for the toughest single sentence in *Brown II*." Gerald Gunther, *Another View of Justice Harlan—A Comment on Fried and Ackerman*, 36 N.Y.L. SCH. L. REV. 67, 68 (1991) (emphasis in original).

<sup>82</sup> For differing positions of how restrained Harlan was, see the articles in the symposium cited *supra* note 53.