

# PROPOSITION 187 AND THE GHOST OF JAMES BRADLEY THAYER

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Provoked by the ugliness of Proposition 187 — California's recent anti-immigration initiative — the ghosts of at least three fully documented Americans could be excused for returning briefly to say "I told you so." One is James Madison, who famously warned against forms of democracy that fail to check popular prejudices and resentments.<sup>1</sup> A second is Fred Allen, who somewhat less famously dismissed California as "a wonderful place to live — if you happen to be an orange."<sup>2</sup> The third is James Bradley Thayer, the least familiar of the three today, but arguably the most influential law professor in American history. His grounds for claiming vindication are the subject of this essay.

## I.

But first some background. Thayer taught at Harvard Law School from 1874 until his death in 1902.<sup>3</sup> This was a formative period in American legal education. Thayer's colleagues at Harvard included Christopher Columbus Langdell, John Chipman Gray, James Barr Ames, and, briefly, Oliver Wendell Holmes, Jr.;<sup>4</sup> in the words of a later, not atypical admirer, Thayer "was one of the giants at the Harvard Law School during its

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1. See, e.g., THE FEDERALIST No. 10 (James Madison).

2. ROBERT TAYLOR, FRED ALLEN: HIS LIFE AND WIT 186-87 (1989) (quoting letter from Fred Allen to Goodman Ace). But cf. Eric Reguly, *In California, Even the Oranges are Starting to Look Elsewhere*, FIN. POST, Dec. 2, 1991, at U16.

3. THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL, 1817-1917 276-83 (1918) [hereinafter CENTENNIAL HISTORY].

4. See *id.* at 220, 228; Joseph H. Beale, *Langdell, Gray, Thayer and Ames — Their Contribution to the Study and Teaching of Law*, 8 N.Y.U. L.Q. REV. 385 (1931).

'golden age.'"<sup>5</sup> Nor was his influence limited to Harvard; Thayer also helped found and served as the first president of the Association of American Law Schools.<sup>6</sup> More importantly, he left indelible marks in both of his two principal fields of scholarship, evidence and constitutional law.

Thayer taught three of the leading evidence scholars of the early twentieth century — Charles Chamberlayne, John McKelvey and John Henry Wigmore. Wigmore's monumental treatise, dedicated in part to Thayer's memory,<sup>7</sup> was in large measure an elaboration and completion of Thayer's 1898 *Preliminary Treatise on Evidence at the Common Law*.<sup>8</sup> Similarly, the current edition of a leading evidence casebook traces its lineage directly back to Thayer's *Select Cases on Evidence at the Common Law*, first published in 1892.<sup>9</sup> Chamberlayne called Thayer the "American protagonist of the modern law of Evidence";<sup>10</sup> others have called him "the greatest of all evidence scholars."<sup>11</sup>

Even more striking, though, is the mark Thayer left in constitutional law. In 1893 Thayer published an article entitled *The Origin and Scope of the American Doctrine of Constitutional Law*.<sup>12</sup> This may well be, as Henry Monaghan has claimed, "the

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5. Wallace Mendelson, *The Influence of James B. Thayer upon the Work of Holmes, Brandeis and Frankfurter*, 31 VAND. L. REV. 71 (1978); see also CENTENNIAL HISTORY, *supra* note 3, at 277 ("In company with Langdell, Ames, and Gray, he laid the foundations of the Law School as the present generation knows it.").

Not that Thayer was without flaws. "As a teacher," it is reported, "he now and then fell a little short, by reason of the very excellence of his mind. . . . The average man was sometimes bewildered by his discriminations and cautious hesitation." *Id.* at 38. Nonetheless, we are reassured, "while not every pupil understood him, all loved him." *Id.*

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

7. See 1 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW vii (Peter Tillers rev. 1983).

8. See WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 6 (1985); Hook, *supra* note 6, at 5.

9. See JACK B. WEINSTEIN ET AL., CASES AND MATERIALS ON EVIDENCE iii (8th ed. 1988).

10. Charles Frederic Chamberlayne, *The Modern Law of Evidence and Its Purpose*, 42 AM. L. REV. 757, 758 (1908). Chamberlayne wrote his own multivolume treatise on evidence, which today is notable chiefly for having been "conspicuously ignored." TWINING, *supra* note 8, at 8. Regarding Wigmore's competing and far more successful treatise, Chamberlayne wrote, "It is obvious but well-merited praise to say of Dean Wigmore's work that he has written very much such a treatise as Professor Thayer had led us reasonably to believe he might have written had he lived to finish his work in this respect." Chamberlayne, *supra*, at 762.

11. TWINING, *supra* note 8, at 5.

12. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893), reprinted in JAMES BRADLEY THAYER, LEGAL ESSAYS 1 (1908). The article grew out of a paper Thayer presented at the Congress on Jurisprudence and Law Reform at the 1893 Chicago World's Fair. See *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. v (1988).

most influential essay ever written on American constitutional law."<sup>13</sup> Holmes agreed "heartily" with the piece.<sup>14</sup> Justice Frankfurter thought Thayer "the great master of constitutional law"<sup>15</sup> and called *Origin and Scope* "exquisite"<sup>16</sup> and "the great guide for judges";<sup>17</sup> Frankfurter is said to have read the essay "so many times that he could recite whole passages from memory."<sup>18</sup> Frankfurter's mentor Justice Brandeis, who studied constitutional law under Thayer and later considered him a close friend,<sup>19</sup> cited *Origin and Scope* in three of his separate opinions.<sup>20</sup> Judge Learned Hand, according to his biographer Gerald Gunther, "frequently viewed himself as articulating variations on Thayer's themes."<sup>21</sup> And when Chief Justice Burger dissented in

13. Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 7 (1983); see also, e.g., WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* 125 (1994) (describing the essay as "perhaps the single most influential piece of legal scholarship in American history").

14. David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 462 n.34 (1994) (quoting letter from Holmes to Thayer (Nov. 2, 1893)). Holmes was an Associate Justice of the Massachusetts Supreme Judicial Court when Thayer's article appeared. He wrote to Thayer that "[s]ubstantially I agree with it heartily and it makes explicit the point of view from which implicitly I have approached Constitutional questions upon which I have differed from some of the other judges." *Id.*

15. FELIX FRANKFURTER, *Mr. Justice Brandeis and the Constitution*, in FELIX FRANKFURTER ON THE SUPREME COURT 247, 252 (Philip B. Kurland ed., 1970).

16. FELIX FRANKFURTER, *Mr. Justice Cardozo and Public Law*, in FELIX FRANKFURTER ON THE SUPREME COURT, *supra* note 15, at 401, 404.

17. FELIX FRANKFURTER REMINISCES 300 (Harlan B. Phillips ed., 1960).

18. MICHAEL E. PARRISH, *FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS* 21 (1982).

Frankfurter entered Harvard Law School in the fall of 1902, several months after Thayer's death, see *id.* at 16; CENTENNIAL HISTORY, *supra* note 3, at 283; he recalled later that throughout the time of his attendance Thayer's "echoes . . . were still resounding." FELIX FRANKFURTER, *John Marshall and the Judicial Function*, in FELIX FRANKFURTER ON THE SUPREME COURT, *supra* note 15, at 533, 542.

19. See Mendelson, *supra* note 5, at 73. Brandeis wrote in 1890 that Thayer "was my best friend among the instructors at the Law School and we have been quite intimate ever since." Letter from Louis Brandeis to Alice Goodmark (Oct. 13, 1890), reprinted in 5 LETTERS OF LOUIS D. BRANDEIS 92-93 (Melvin I. Urofsky & David W. Levy eds., 1971).

20. See *Ashwander v. TVA*, 297 U.S. 288, 354 n.12 (1936) (Brandeis, J., concurring); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 285 (1932) (Brandeis, J., dissenting); *Eisner v. Macomber*, 252 U.S. 189, 238 (1920) (Brandeis, J., dissenting).

21. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 52 (1994). For examples of Hand's variations, see *LEARNED HAND, THE BILL OF RIGHTS* 73-74 (1958) and *LEARNED HAND, The Spirit of Liberty*, in *THE SPIRIT OF LIBERTY* 189, 190 (Irving Dilliard ed. 1952). Compare, for example, Hand in *The Spirit of Liberty* — "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it." — with these words from the closing quotation of *Origin and Scope*: "Insofar as the popular will is healthy, nations prosper despite the imperfections and deficiencies of their institutions. But where common sense is lacking, where passions rule, the most perfect of constitutions, the wisest of laws are impotent." Thayer, *supra* note 12, at 156 n.2 (quoting 1 AMABLE CHARLES FRANQUET, *LE COMTE DE FRANQUEVILLE, LE SYSTÈME*

1982 from the Supreme Court's ruling in *Plyler v. Doe* that Texas could not constitutionally deny public education to undocumented schoolchildren, he turned for support in part to Thayer.<sup>22</sup>

So what was it Thayer had written? *Origin and Scope* was the first significant scholarly call for what we would now label "judicial restraint." But it was a peculiar call by current standards. Thayer did not argue that in reviewing acts of Congress the Supreme Court must limit itself to enforcing the literal terms of the Constitution, or, where those terms are ambiguous, to the "intent of the Framers."<sup>23</sup> On the contrary, Thayer derided that approach to constitutional interpretation as "pedantic" and "petty"; it lacked, he thought, "that combination of a lawyer's rigor with a statesman's breadth of view which should be found in dealing with this class of questions."<sup>24</sup> Thayer recognized that constitutional interpretation often involves "a range of choice and judgment."<sup>25</sup> But he believed that in exercising their judgment judges should defer rather sweepingly to the choices made by legislators: no federal statute should be struck down, he argued, unless Congress could not reasonably have believed it constitutional. Thayer contended that an act of Congress should be invalidated only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one, — so clear that it is not open to rational question."<sup>26</sup>

This was not the law then, and it is not the law now. Weak echoes of Thayer's "clear mistake" rule can be heard today in the

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JUDICIAIRE DE LA GRANDE BRETAGNE 25 (1893)). I thank Peter Starr for the translation.

22. 457 U.S. 202, 253 n.15 (Burger, C.J., dissenting).

23. Compare Thayer, *supra* note 12, at 138:

The court's duty, we are told, is the mere and simple office of construing two writings and comparing one with another, as two contracts or two statutes are construed and compared when they are said to conflict; of declaring the true meaning of each, and, if they are opposed to each other, of carrying into effect the constitution as being of superior obligation, — an ordinary and humble judicial duty, as the courts sometimes describe it.

with, e.g., *United States v. Butler*, 297 U.S. 1, 62 (1936) (Roberts, J.):

When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.

and JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES vi (Carolina Academic Press 1987) (1833), quoted in ROBERT H. BORK, THE TEMPTING OF AMERICA 6 (1990) ("The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties.").

24. Thayer, *supra* note 12, at 138.

25. *Id.* at 144.

26. *Id.*

"rational basis" branch of equal protection doctrine,<sup>27</sup> and in the Supreme Court's intermittent lip service to "the traditional presumption in favor of the constitutionality of statutes enacted by Congress."<sup>28</sup> But "rational basis" review involves deference only to judgments that Congress made or could have made about the practical wisdom of particular laws, not to legislative interpretations of the Constitution. And notwithstanding "the traditional presumption," no one really expects the Supreme Court to uphold statutes it is convinced violate the Constitution — at least not so long as the Court continues to reaffirm that "[i]t is emphatically the province and duty of the judicial department to say what the law is."<sup>29</sup>

But what Holmes, Brandeis and Frankfurter took from Thayer was not so much his recommended standard for judicial review — a standard the Supreme Court has never truly adopted — but rather an *attitude* about judicial review, and certain reasons for that attitude. The attitude is one of reluctance, of restraint. Judicial review, Thayer thought, was at best a necessary evil and should be kept to a bare minimum. Thayer thus associated himself with what Justice Douglas later described as "a school of thought here that the less the judiciary does, the better."<sup>30</sup> With little exaggeration, Thayer can be described as the school's founder.<sup>31</sup>

And while Thayer's "clear mistake" rule never really caught on, his school of thought plainly has done a brisk business. Bold and even arrogant judging has never exactly gone out of style, but neither, in our century, has judicial restraint as a *principle* ever lacked abundant and vocal champions. Indeed, particularly in the last two decades, the virtue of judicial restraint and the evil of judicial "activism" have become virtual "platitudes[s] of our political culture"<sup>32</sup> — platitudes with which anyone nominated

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27. See, e.g., *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

28. *Bowen v. Kendrick*, 487 U.S. 589, 617 (1988); see also, e.g., *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985); *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981).

29. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), *quoted with approval in*, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 833 n.40 (1988), *TVA v. Hill*, 437 U.S. 153, 194 (1978), *United States v. Nixon*, 418 U.S. 683, 703 (1974), *Cooper v. Aaron*, 358 U.S. 1, 18 (1958), and *Fairbank v. United States*, 181 U.S. 283, 286 (1901).

30. *Flast v. Cohen*, 392 U.S. 83, 110 (1968) (Douglas, J., concurring).

31. David Luban has gone further, suggesting that theories of judicial restraint trace back to Thayer through "a kind of intellectual *Gemeinschaft* almost unparalleled in the history of juridical ideas." Luban, *supra* note 14, at 451-52.

32. Luban, *supra* note 14, at 450.

for a federal judgeship, for example, is expected to express ritualized agreement.<sup>33</sup> We have Thayer in part to thank for that.

Not everyone, of course, is grateful. There remain those, myself included, who believe that judicial restraint serves too often simply as an excuse for letting the powerful prevail. Particularly when the rights of disfavored minorities are implicated, we are apt to agree with Justice Douglas that the judiciary "is often the one and only place where effective relief can be obtained" — and that "where wrongs to individuals are done by violation of specific guarantees, it is abdication for the courts to close their doors."<sup>34</sup>

Asked for an illustration of the need for unrestrained judicial review, we might well point to Proposition 187. Not only do the statutes adopted through that initiative violate, among other things, the rights of innocent schoolchildren in the same appalling manner as the Texas law struck down by the Supreme Court in *Plyler v. Doe*, but the very fact that the California laws were adopted by popular initiative suggests that their victims are unlikely to find redress through the political system, at least not anytime soon.<sup>35</sup> Indeed, Julian Eule argued cogently several

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33. See Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 781-82 (1983). A recent, more or less typical example:

Senator THURMOND. Judge Thomas, under our Constitution, we have three very distinct branches of government. The role of the judiciary is to interpret the law. However, there have been times when judges have gone beyond their responsibility of interpreting the law and, instead, have exercised their individual will as judicial activists. Would you please briefly describe your views on the topic of judicial activism?

Judge THOMAS. I think, Senator, that the role of a judge is a limited one. It is to interpret the intent of Congress, the legislation of Congress, to apply that in specific cases, and to interpret the Constitution, where called upon, but at no point to impose his or her will or his or her opinion in that process, but, rather, to go to the traditional tools of constitutional interpretation or adjudication, as well as to statutory construction, but not, again, to impose his or her own point of view or his or her predilections or preconceptions.

*Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. 135 (1991).

34. *Flast v. Cohen*, 392 U.S. at 111 (Douglas, J., concurring).

35. The objectionable aspects of Proposition 187 are hardly limited to its disregard for the equal protection rights of undocumented schoolchildren. Other provisions of the initiative — particularly its denial of health care to undocumented aliens — may be equally immoral; and other constitutional infirmities of the law — particularly its dubious compatibility with the Supremacy Clause — may prove of more practical importance. See *infra* note 67; Maura Dolan, *Parts of Prop. 187 May be Blocked 2 or More Years*, L.A. TIMES, Nov. 16, 1994, at A1 (describing legal challenges to the initiative). But the provisions of Proposition 187 barring undocumented children from public schools received particular attention during the debate over passage of the initiative, in large part because those provisions so blatantly violate *Plyler v. Doe*. I focus on those provisions for the same reason.

years ago that judicial review is especially important for laws adopted through the initiative process — precisely because that process gives full sway to raw majority preferences, circumventing what Madison found so vital, the checks and balances of representative democracy.<sup>36</sup>

If Professor Eule joined Madison's ghost in saying "I told you so," it would be hard to blame either of them. But Thayer's grounds for claiming vindication are less obvious. At first glance, Proposition 187 seems to offer Thayer's ghost reason only to hang its head in shame. How could a law that cries out for judicial review possibly vindicate the classic call for judicial restraint? To see the answer, we need to take a closer look at the arguments Thayer advanced.

## II.

Why did Thayer favor judicial restraint? Not, as we have seen, because he thought judges are required simply to apply the law as they "find" it, in the same manner that they would interpret a contract or any other legal instrument — Thayer thought that view of constitutional adjudication hopelessly simplistic. His arguments for judicial restraint were more interesting, and they were several.

Thayer began his essay with a *structural* argument. He suggested that the narrow scope of judicial review could be inferred from the limited and delayed opportunities provided for that review — i.e., only when and if the constitutionality of a statute became germane to a specific, litigated case. If the scope of judicial review was intended to be broad, Thayer argued, the occasions for its exercise would not have been so "incidental and postponed."<sup>37</sup> This argument tends to strike late twentieth-century ears as contrived and unconvincing,<sup>38</sup> and Thayer, in any event, seems to have had less than his full heart in it. He placed a good deal more emphasis on two other arguments.

The first of these was *institutional*. Members of Congress, no less than Justices of the Supreme Court, are sworn and charged

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36. See Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990).

37. Thayer, *supra* note 12, at 136.

38. Harry Wellington's reaction is, I imagine, typical:

I confess that I do not understand this argument. It does not seem to me that there is any relation between the time of review and its purportedly limited scope, let alone a necessary relation. Indeed, the argument seems to run the other way: time and a specific case give the Court an opportunity and a perspective different from those of Congress. Strong deference to the interpretation by Congress of the Constitution mitigates this judicial advantage.

HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION 73-74 (1990).

to uphold the Constitution. As a matter of comity between the judicial and legislative branches, Thayer thought the Court owed deference to the implicit judgment of Congress that the statutes it passed were constitutional. "[T]here can be no permanent or fitting *modus vivendi* between the different departments," he reasoned, "unless each is sure of the full co-operation of the others, so long as its own action conforms to any reasonable and fairly permissible view of its constitutional power."<sup>39</sup>

Because this argument has diminished force when a federal court reviews the constitutionality of *state* laws — federal supremacy then comes into play — Thayer did not advocate applying the "clear mistake" rule in such cases.<sup>40</sup> Professor Eule has noted that Thayer's institutional argument seems even less applicable to judicial review of the results of the initiative process; although Article VI requires legislators at both the federal and state level to swear to support the Constitution, "the Constitution does not ask the voters to assess a measure's constitutionality."<sup>41</sup> But Thayer also advanced another argument for judicial restraint, one that can be applied more generally.

This last argument was *instrumental*, and there is reason to believe it is the one that mattered the most to Thayer.<sup>42</sup> Thayer labored under no illusions about the actual character of Congress — "in point of fact," he recognized, legislators too often were

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39. Thayer, *supra* note 12, at 152. Nine years before he published *Origin and Scope*, Thayer argued similarly in a letter to *The Nation*:

[T]he function of the court is not that of fixing the construction of the Constitution which it believes to be the sound one, but that of determining whether another body, charged with an independent function which incidentally requires it to put a construction upon the Constitution, has discharged its office or exercised its judgment in an unreasonable manner.

James B. Thayer, *Constitutionality of Legislation: The Precise Question for a Court*, *THE NATION*, Apr. 10, 1884, at 314, 315.

40. See Thayer, *supra* note 12, at 154-55.

41. Eule, *supra* note 36, at 1537.

42. In addition to the arguments described in text, Thayer also alluded to a fourth, strategic reason for judicial restraint — institutional self-preservation. He did so by quoting, midway through *Origin and Scope*, a South Carolina equity opinion that argued for a narrow scope of judicial review not only because of "the high deference due to legislative authority," but also because "[t]he interference of the judiciary with legislative Acts, if frequent or on dubious grounds, might occasion so great a jealousy of this power and so general a prejudice against it as to lead to measures ending in the total overthrow of the independence of the judges." Thayer, *supra* note 12, at 142 (quoting *Byrne v. Stewart*, 3 S.C. Eq. (3 Des.) 466, 476 (1812)). In light of the minimal attention Thayer gave to the danger of provoking such "jealousy" and "prejudice," it is hard to agree with Jonathan Macey's suggestion that this was the argument for judicial restraint Thayer deemed "most important." Jonathan R. Macey, *Thayer, Nagel, and the Founders' Design: A Comment*, 88 Nw. U. L. REV. 226, 230 (1993). Others, however, have given the argument greater weight. See, e.g., ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 103-05 (1976).



"indocile, thoughtless, reckless, [and] incompetent."<sup>43</sup> Consequently, as Paul Kahn has pointed out, judicial restraint could not ultimately be justified for Thayer by any notion of "institutional competence" or "representational capacity."<sup>44</sup> In the end, what motivated Thayer was "an instrumentalism aimed at the moral development of the larger community."<sup>45</sup>

Thayer spelled out his instrumental argument in the concluding paragraph of *Origin and Scope*:

No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows. And moreover, even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it. If what I have been saying is true, the safe and permanent road towards 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. . . . Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere.<sup>46</sup>

Thayer returned to this theme, with eloquence and feeling, nine years later in a short biography he wrote of John Marshall:

Great and, indeed, inestimable as are the advantages in a popular government of this conservative influence, — the power of the judiciary to disregard unconstitutional legislation, — it should be remembered that the exercise of it, even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary ways, and correcting their own errors. . . . The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that.<sup>47</sup>

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43. Thayer, *supra* note 12, at 149.

44. PAUL W. KAHN, *LEGITIMACY AND HISTORY* 85 (1992).

45. *Id.*

46. Thayer, *supra* note 12, at 155-56 (footnote omitted).

47. JAMES BRADLEY THAYER, *JOHN MARSHALL* 106-07 (1901). Thayer also reiterated here his institutional argument for judicial restraint:

It is this majestic representative of the people whose action is in question, a coördinate department of the government, charged with the greatest functions, and invested, in contemplation of the law, with whatsoever wisdom, virtue, and knowledge the exercise of such functions requires. To set aside the acts of such a body, representing it its own field, which is the very high-

Justice Frankfurter quoted this passage, which he called "as wise as any that I know in analyzing what is really involved when the theory of this Court's function is put to the test of practice," at the conclusion of his passionate and unusually personal dissent from the Court's invalidation of compulsory flag salutes in public schools.<sup>48</sup> And it was to this passage that Chief Justice Burger turned in his dissent in *Plyler v. Doe*.<sup>49</sup>

Frankfurter and Burger have not been the only ones impressed. In the ninety years since Thayer's death, his instrumental argument against judicial review has been adopted by writers ranging from Henry Steele Commager<sup>50</sup> and Elliot Richardson<sup>51</sup> to Alexander Bickel,<sup>52</sup> Paul Brest,<sup>53</sup> and Cass Sunstein.<sup>54</sup> Strong echoes of the argument can be heard in suggestions that, for example, *Roe v. Wade*<sup>55</sup> was a bad decision because it short-circuited the political process<sup>56</sup> and sapped the will of the pro-choice movement,<sup>57</sup> or that antidiscrimination decisions have done more harm than good by "lull[ing] racial minorities" into dependence "on judicial review rather than on minority political strength for the protection of minority interests."<sup>58</sup> In one form or another, Thayer's fear that reliance on courts will make people lazy — "if we are wrong, they say, the courts will correct it" — has haunted the institution of judicial review throughout most of our century.

est of all, the ultimate sovereign, should be a solemn, unusual, and painful act.

*Id.* at 109.

48. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 667 (1943) (Frankfurter, J., dissenting).

49. 457 U.S. 202, 253 n.15 (1982) (Burger, C.J., dissenting).

50. See HENRY STEELE COMMAGER, *MAJORITY RULE AND MINORITY RIGHTS* 72-74 (1943).

51. See Elliot L. Richardson, *Freedom of Expression and the Function of the Courts*, 65 HARV. L. REV. 1, 52 (1951).

52. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 21-22 (2d ed. Yale University Press 1986) (1962); ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 28 (1975).

53. See Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623, 1629 (1988) [hereinafter Brest, *Further Beyond the Republican Revival*].

54. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 145-46 (1993).

55. 410 U.S. 113 (1973).

56. See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791, 2882 (1992) (opinion of Scalia, J.); MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 43-50 (1987); Richard A. Posner, *What Has Pragmatism to Offer Law?*, in *PRAGMATISM IN LAW & SOCIETY* 29, 42 (Michael Brint & William Weaver eds., 1991).

57. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE* 339 (1991); SUNSTEIN, *supra* note 54, at 145.

58. GIRARDEAU A. SPANN, *RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA* 166 (1993); see also, e.g., SUNSTEIN, *supra* note 54, at 145.

Again, not everyone has been spooked. *Brown v. Board of Education*<sup>59</sup> is not without its supporters,<sup>60</sup> and there is plenty of reason to believe that *Roe v. Wade* not only saved the lives of countless women who were not in a position to wait for the abortion issue to be "worked out at the state level,"<sup>61</sup> but also served, as Justice Blackmun later claimed, as "a milestone in the emancipation of women."<sup>62</sup> More broadly, those of us unsympathetic to calls for greater judicial restraint have tended to dismiss Thayer's instrumental argument as empirically implausible, if not downright "fanciful."<sup>63</sup> If pressed, we would probably assert with Justice Brennan that "the effect is generally the opposite of that which Thayer posited," because "an active judiciary" functions "as the calmer, cooler party to a dialogue from which the community benefits over time."<sup>64</sup>

59. 347 U.S. 483 (1954).

60. See, e.g., RICHARD KLUGER, *SIMPLE JUSTICE* (1975); Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952); cf. Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1382 (1988) (concluding that civil rights activists won important victories by combining litigation with "direct action, mass protest, and individual acts of resistance").

61. *Casey*, 112 S.Ct. at 2882 (opinion of Scalia, J.).

62. Ruth Marcus, *Author of 'Roe' Remains Proud, Protective of It*, WASH. POST, Apr. 20, 1992, at A1, A4.

Even Gerald Rosenberg, who charges that *Roe* "seriously weakened the political efficacy of pro-choice forces," see ROSENBERG, *supra* note 57, at 339, concedes that "the replacement of illegal abortions by legal abortions removed a serious health hazard to women," *id.* at 355. See also, e.g., Willard Cates et al., *Legalized Abortion: Effect on National Trends of Maternal and Abortion-Related Mortality (1940 through 1976)*, 132 AM. J. OBSTET. GYNECOL. 211 (1978) (crediting *Roe* with helping to reduce abortion mortalities); *Deaths from Legal and Illegal Abortions Drop After 1973 Decisions*, 11 FAM. PLAN. PERSP. 318 (1979) (same).

For a careful assessment of the broader significance of *Roe*, see DAVID J. GARROW, *LIBERTY AND SEXUALITY* (1994). Garrow finds little support for the claim raised in hindsight that abortion rights could safely have been left to the political process; he attributes those claims to "faulty historical memories." *Id.* at 616. "From the immediate vantage point of 1973," he notes, with fresh memories of a "devastating" referendum defeat in Michigan and a "dire, narrowly averted threat" to abortion liberalization in New York, supporters of abortion rights understandably expressed no regrets that the Supreme Court had deemed a woman's choice with regard to abortion "a constitutionally protected right rather than a criminally punishable preference that could be left to the annual vagaries of state legislative votes or statewide popular referenda." *Id.* at 616-17.

63. Luban, *supra* note 14, at 460. The argument has also been attacked as confused; judicial review, some have suggested, is no more "from the outside" than legislative or administrative action. See, e.g., KENNETH L. KARST, *BELONGING TO AMERICA* 230 (1989); Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 74-75 (1986).

64. William J. Brennan, Jr., *Why Have a Bill of Rights?*, 9 OXFORD J. LEGAL STUD. 425, 433 (1989). For similar sentiments, see, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 93 (1921) ("[T]he presence of this restraining power . . . tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith."); COX, *supra* note 42, at 117 ("The great opinions of the Court . . . [have] an influence just the reverse of what Thayer feared;

But does it really happen that way? Or is it possible Thayer was right? Here is where we come back to Proposition 187.

### III.

On November 9, 1994, California voters — or rather the 47% of the state's eligible voters who actually cast ballots<sup>65</sup> — approved Proposition 187 by a margin of 59% to 41%.<sup>66</sup> The key provisions of the initiative prohibit undocumented aliens from receiving publicly funded health care, social services, or education, and require state agencies — including public schools — to verify the "legal status" of all who receive their services.<sup>67</sup>

The Texas law struck down by the Supreme Court in *Plyler v. Doe* similarly barred the provision of state-funded education to children not lawfully admitted to United States.<sup>68</sup> Because that law, like Proposition 187, imposed "a lifetime hardship on a discrete class of children not accountable for their disabling status," a majority of the Court found it inconsistent with the constitutional guarantee of equal protection.<sup>69</sup> The dissenters, led by Chief Justice Burger, disagreed with the majority's legal analysis,

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[they] provid[e] a stimulus and quicke[n] moral education."]; KENNETH L. KARST, *LAW'S PROMISE, LAW'S EXPRESSION* 177 (1993) ("[O]ur experience in the civil rights era confirms . . . that judicial review, focused on the values of respected participation in the community's public life, can enlarge the people's political capacity, helping to vitalize the sense of citizens' moral responsibility to each other."); MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 19 (1982) ("[O]ur experience with the Supreme Court in the modern period suggests that judicial review, rather than deadening, can stir the polity's sense of moral responsibility."); Paul A. Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 552 (1951) ("Jefferson apart, our preceptors in civil liberties have tended to be judges, whose opinions imponderably but surely influence our course of action far beyond the occasions which have called them forth."); Rostow, *supra* note 60, at 210 ("[T]he work of the Court can have, and when wisely exercised does have, the effect not of inhibiting but of releasing and encouraging the dominantly democratic forces of American life.").

65. See Dan Walters, "Motor Voter" Not So Simple, *SACRAMENTO BEE*, Jan. 30, 1995, at A3.

66. See Paul Feldman, *Figures Behind Prop. 187 Look at its Creation*, *L.A. TIMES*, Dec. 14, 1994, at A3.

67. See CAL. EDUC. CODE §§ 48215, 66010.8 (West Supp. 1995) (codifying Proposition 187, §§ 7-8); CAL. HEALTH & SAFETY CODE § 130 (West. Supp. 1995) (codifying Proposition 187, § 6); CAL. WELF. & INST. CODE § 10001.5 (West. Supp. 1995) (codifying Proposition 187, § 5). On November 20, 1995, United States District Judge Mariana Pfaelzer invalidated many of these provisions, including the exclusion of undocumented children from public elementary and secondary schools. See *League of United Latin American Citizens v. Wilson*, 1995 U.S. Dist. LEXIS 17720 (C.D. Cal. Nov. 20 1995). Judge Pfaelzer found the latter provisions "[c]learly" inconsistent with *Plyler v. Doe*, *id.* at 22; she found other parts of the initiative preempted by the Supremacy Clause and federal statutory law. For a fuller discussion of the terms of Proposition 187, see Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1560-63 (1995).

68. See *Plyler v. Doe*, 457 U.S. 202, 205 (1982).

69. *Id.* at 223.

but concurred "without hesitation" that it was "senseless," "folly," and "wrong" for "an enlightened society to deprive any children — including illegal aliens — of an elementary education."<sup>70</sup> Not a single member of the Court took issue with Justice Brennan's conclusions in his opinion for the majority that "many of the undocumented children disabled by the classification will remain in this country indefinitely," that "some will become lawful residents or even citizens of the United States," and that "[b]y denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."<sup>71</sup>

How, then, could the backers of Proposition 187 — including former federal immigration officials and California's current governor and attorney general — ask California to adopt a similar law? And how could Californians go along? Part of the explanation would greatly interest Thayer: if we are wrong, they said, the courts will correct it.

Far from ignoring *Plyler v. Doe*, backers of Proposition 187 made the decision a central part of their case to the electorate. The precise terms of the initiative were unimportant, they argued, because at least some of those terms — including the expulsion of all undocumented children from public schools — might never take effect.<sup>72</sup> The point, they explained, was simply "to provoke court action"<sup>73</sup> and to "send a message" to government officials.<sup>74</sup>

70. *Id.* at 242 (Burger, C.J., dissenting).

71. *Id.* at 223, 230.

72. See, e.g., Ken McLaughlin & Scott Thurm, *Enforcement Questions Dog Prop. 187 Supporters*, FRESNO BEE, Nov. 6, 1994, at A20 ("Those behind Prop. 187 acknowledge its impact will be decided in the courts, and they admit opponents would be likely to win a court order barring most or all of the measure from taking effect.").

73. Herman Schwartz, *The Constitutional Issue Behind Proposition 187*, L.A. TIMES, Oct. 9, 1994, at M1 (quoting Alan C. Nelson, "immigration commissioner from 1982-89 and a co-author of the initiative").

74. See, e.g., Patrick J. McDonnell & Dave Leshner, *Clinton, Feinstein Declare Opposition to Prop. 187*, L.A. TIMES, Oct. 22, 1994, at A1 ("This is a message initiative and we're sending a message to Washington, to Sacramento: Enough's enough," said Robert R. Kiley, a Yorba Linda-based political consultant who is among Proposition 187's founders."); Gebe Martinez & Doreen Carvajal, *Creators of Prop. 187 Largely Escape Spotlight*, L.A. TIMES, Sept. 4, 1994, at A1 ("What we wanted to do," Robert Kiley said, "is wake up the Legislature."); Felicia Cousart, *Candidates Agree on Merits of Prop. 187*, FRESNO BEE, Oct. 28, 1994, at B3 ("Assembly candidate Bryn Batrich . . . said the case will be fought in the courts but 'in the meantime the debate must and will continue, and, as a taxpayer and a voter, I am voting yes for Proposition 187 to send that message to Washington D.C. and state legislators.'"); *Life & Times: And Close the Door Behind You — The Immigration Initiative* (KCET television broadcast, Nov. 2, 1994) [hereinafter *Life & Times*] (remarks of Ron Prince, co-author of Proposition 187, that "the only way" to pressure for increased border enforcement "is to pass an initiative that sends a message").

Arguments about expelled schoolchildren were thus dismissed as mere "rhetoric" — "I don't expect to see any child thrown out of school," a prominent sponsor explained, "because the minute this bill passes, and it will, there'll be legal challenges all the way up to the Supreme Court, and that's exactly what we want to see."<sup>75</sup> Harold Ezell, "the most publicly recognizable leader of the pro-187 movement,"<sup>76</sup> emphatically agreed:

I think the Supreme Court will make a decision that will grandfather the kids that are already here as of a certain date, and that decision then will become the law of the land. . . . We want to go back and say, okay Supreme Court, you make the decision, you tell us how it should be handled from now on, because here are the numbers — in the lawsuit they'll have all of the costs of educating illegals, they'll have the projections of what's going to continue if you don't do something about it — and you make the decision.<sup>77</sup>

California Governor Pete Wilson, running successfully for reelection, likewise endorsed Proposition 187 as a way "to provoke a legal challenge"<sup>78</sup> and "to send a message to Washington to stop illegal immigration."<sup>79</sup> Asked in a televised debate whether he thought undocumented children should be expelled from school, "Wilson declined a direct answer, saying that provision of the measure will have to be tested in the U.S. Supreme Court first."<sup>80</sup> State Attorney General Dan Lungren, also headed for reelection, ultimately took the same position; one day before the election he endorsed Proposition 187 not as a just law

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75. *Life & Times*, *supra* note 74 (remarks of William King). King, a former Border Patrol official, was among the originators of Proposition 187. See Patrick J. McDonnell, *L.A. Police Panel Joins Foes of Measure*, L.A. TIMES, Oct. 19, 1994, at B1.

76. Feldman, *supra* note 66.

77. *Life & Times*, *supra* note 74. Ezell co-authored the initiative after serving as Western Regional Director of the Immigration and Naturalization Service. See Feldman, *supra* note 66.

78. *Decision '94 / Special Guide to California's Elections*, L.A. TIMES, Oct. 30, 1994, at W3 (quoting speech by Wilson on Sept. 17, 1994).

79. *Life & Times*, *supra* note 74 (speech by Wilson). On other occasions, Wilson argued that what Proposition 187 was "all about" was getting the federal government to reimburse the state for the costs of illegal immigration. Bill Stall & Amy Wallace, *Prop. 187 Key to Getting U.S. Aid, Wilson Argues*, L.A. TIMES, Oct. 29, 1994, at A1; see also Ken Chavez, *Governor Endorses "Save Our State" Bid*, SACRAMENTO BEE, Sept. 16, 1994, at A1 (quoting Wilson's argument that Proposition 187 "sends a message" that "[i]f they permit illegal immigration to occur, they must pay the consequences of that to the states.").

80. Bill Stall & Amy Wallace, *Wilson, Brown Meet at Last in Bitter Debate*, L.A. TIMES, Oct. 15, 1994, at A1. The previous month, a spokesperson had "clarified" Wilson's position by explaining that "[i]f it's upheld, that is fine with him." Daniel M. Weintraub & Bill Stall, *Wilson Would Expel Illegal Immigrants From Schools*, L.A. TIMES, Sept. 16, 1994, at A1 (quoting Communications Director Leslie Goodman).

but as "the right vehicle to carry the matter before the U.S. Supreme Court."<sup>81</sup>

It is important not to overstate matters. A good number of factors contributed to the victory of Proposition 187, including a fair amount of racism, thinly veiled when veiled at all.<sup>82</sup> But an important part of the sales pitch for the initiative was precisely the argument Thayer feared: don't worry, the courts will make sure it's okay. This argument may not have been pressed with complete sincerity; some of the same people who claimed to welcome judicial review before the election lost enthusiasm for the process once it began.<sup>83</sup> But the argument was made nonetheless, and it was made loudly and often.

There is reason, moreover, to believe that it mattered. Anecdotal reports suggest that a significant number of Californians

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81. Eric Bailey, *Lungren Backs Prop. 187*, L.A. TIMES, Nov. 8, 1994, at A3 (paraphrasing Lungren).

82. Governor Wilson, for example, warned that "[w]e cannot educate every child from here to Tierra del Fuego," and Ezell argued, "If you want to live in a third-world state, go move to one. But I don't want California to be one." *Life & Times*, supra note 74; see also Weintraub & Stall, supra note 80 (quoting Wilson). Another key backer of the initiative denied that it was motivated by racism, but had difficulty putting the issue to rest. "I want to get totally off of the subject of racism," she explained. "In the state of California, we happen to have an overabundance of people of hispanic heritage." *Life & Times*, supra note 74 (remarks of Barbara Coe). Coe co-authored Proposition 187 and helped lead the campaign for its approval. See Paul Feldman & Patrick J. McDonnell, *Prop. 187 Sponsors Swept Up in National Whirlwind*, L.A. TIMES, Nov. 14, 1994, at A1; David Reyes, *Prop. 187 Ruling Awaited with Confusion and Angst*, L.A. TIMES, Dec. 31, 1994, at A1. See generally Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 650-61 (1995) (discussing role of race in the campaign for and passage of Proposition 187).

83. When United States District Judge William Matthew Byrne, Jr. temporarily blocked implementation of the initiative pending review, for example, Ron Prince vowed not to allow the state and federal officials "to overturn the will of the people." Paul Feldman & James Rainey, *L.A. Joins Challenge to Prop. 187*, L.A. TIMES, Nov. 18, 1994, at A1. Ezell complained, "It's the typical thing. They found a liberal judge and then they got him to buy into their stuff." Paul Feldman & James Rainey, *Parts of Prop. 187 Blocked By Judge*, L.A. TIMES, Nov. 17, 1994, at A1. Robert Kiley responded more strongly to Byrne's action: "I'm angry. This is a mandate and we are dealing with liberal judges appointed by previous administrations. Their job is to interpret the law, not thwart the will of the people." After United States District Judge Mariana Pfaelzer extended Byrne's bar pending a full hearing on the constitutionality of the initiative, Ezell, too, grew more critical: "The people are ticked, and there needs to be some way to stop the kind of things this woman judge is trying to do." Paul Feldman, *Uncertain Fate of Prop. 187 Tests Patience*, L.A. TIMES, Mar. 28, 1995, at A3, 17. Governor Wilson — who had backed the initiative, he said, in order "to provoke a legal challenge" and "to send a message to Washington" — joined in the criticism of Pfaelzer, warning that "[t]he patience of Californians will soon wear thin if their will is not carried out." *Id.* at A3. And when Judge Pfaelzer invalidated key portions of the initiative — including the provisions banning undocumented children from public elementary and secondary schools — Ezell charged that she had "given a turkey decision for Thanksgiving to the 5 million Californians who said 'Yes on 187.'" Eric Malnic, *Anger, Elation Greet Ruling on Immigration*, L.A. TIMES, Nov. 21, 1995, at A1.

voted for Proposition 187 not because they approved of its terms but in order "to send a message," and that they felt comfortable disregarding the initiative's actual provisions because they believed that some or all of those provisions would be judicially invalidated.<sup>84</sup> Poll results, although inconclusive, suggest the same thing. Shortly before the election, for example, 60% of Orange County voters said they favored the initiative, even though a slightly larger majority of 62% said they would not alert authorities to undocumented students — a step the initiative requires school officials to take.<sup>85</sup> In a separate statewide survey, those who intended to vote for the initiative cited as their principal reason a desire to "[d]o something about illegal immigration."<sup>86</sup> And in exit polls only 2% of those voting for Proposition 187 identified "It would throw children out of school" as one of the statements they agreed with most about the initiative; 78% picked "It sends a message that needs to be sent."<sup>87</sup>

Again, sentiments appeared to change once court action began; one poll four months after the election found that 97% of those who had voted for Proposition 187 now favored immediate implementation of the law.<sup>88</sup> And all along, some voters — no doubt more than those who admitted it to pollsters — *did* want to "throw children out of school." Plainly, not every supporter of Proposition 187 relied on the courts to weed out its objectionable aspects.<sup>89</sup> But enough did to be troubling.

Shortly before the election a national columnist applauded Proposition 187 as an attempt by Californians to "reclaim" deci-

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84. See, e.g., Doreen Carvajal, *Prop. 187 Has Even Its Backers a Bit Uneasy*, L.A. TIMES, Oct. 31, 1994, at A1; Leonel Sanchez, *Supporters of Immigration Issue Dug In: They Just Want to Send a Message to Washington*, SAN DIEGO UNION-TRIB., Oct. 31, 1994, at B1.

85. See Carvajal, *supra* note 84.

86. See Paul Feldman, *Support for Proposition 187 Erodes, but it Still Leads*, L.A. TIMES, Oct. 27, 1994, at A1. Among likely voters who said they were voting for Proposition 187, 35% said they were doing so to "[d]o something about illegal immigration"; only 18% cited a desire to "[s]top immigrants from using public services." See *id.*

87. See Daniel M. Weintraub, *Crime, Immigration Issues Helped Wilson, Poll Finds*, L.A. TIMES, Nov. 9, 1994, at A1.

88. Paul Feldman, *Most Call Prop. 187 Good, Want it Implemented Now*, L.A. TIMES, Mar. 13, 1995, at A1. The poll asked respondents whether they thought that it was "appropriate to delay the implementation of Proposition 187 while the lawsuits are being considered," or that the initiative "should have been implemented immediately after the voters approved it." Respondents were not asked specifically whether they favored immediate implementation of the provisions barring undocumented children from public schools.

89. See, e.g., Paul Feldman, *Uncertain Fate of Prop. 187 Tests Patience*, L.A. TIMES, Mar. 28, 1995, at A3 (quoting remarks by initiative co-sponsor Barbara Coe that judges "have no right to negate the will of the people," and that "[i]n an ideal world . . . when the people spoke, that would be the end of the subject — it would be the law.").



sional authority "usurp[ed]" by the courts.<sup>90</sup> Plainly he had it wrong. Proposition 187 may well reflect, in part, "the culture of judicial activism,"<sup>91</sup> but not because it was a revolt against that culture. On the contrary, the backers of Proposition 187 invited voters to *rely* on judicial activism as a way to free themselves from the moral responsibility of self-governance. And there is reason to believe that a significant number of voters accepted the invitation. As Thayer would say, that is no light thing.

#### IV.

Two questions remain. If voters *did* rely on the courts to strike down objectionable provisions of Proposition 187, is that really so bad? And if it is, what should be done?

The first question is the easier of the two — it *is* so bad. That might not be immediately obvious. Why not, a voter might ask, leave constitutionality, including questions of "due process" and "equal protection," to the courts? Isn't that why we pay judges? Legislators, of course, have long raised similar questions. Judge Abner Mikva — formerly Congressman Mikva — once pointed out that "[t]he fastest way to empty out the chamber is to get up and say, 'I'd like to talk about the constitutionality of this bill.' Members of Congress believe that's what courts are for."<sup>92</sup> If legislators, sworn to support the Constitution, think that way, why shouldn't voters — who, as Professor Eule points out, have no legal obligation to assess constitutionality?<sup>93</sup>

The answer is that legislators shouldn't think that way, and neither should voters.<sup>94</sup> The Constitution is too important to be left to the courts. Even if we could trust the courts to get everything right, we should not want to, because there is a good deal of value in broad and sustained public debate over the kinds of fundamental matters the Constitution addresses. And, of course, we can't trust courts to get everything right. The judiciary has well-known institutional advantages in interpreting the Constitu-

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90. George F. Will, *Courts Have Become Legislatures*, SAN DIEGO UNION-TRIB., Oct. 30, 1994, at G2.

91. *Id.*

92. Linda Greenhouse, *What's a Lawmaker to Do About the Constitution?*, N.Y. TIMES, June 3, 1988, at B6 (quoting Mikva); see also Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C.L. REV. 587 (1983); Abner J. Mikva & Joseph R. Lundy, *The 91st Congress and the Constitution*, 38 U. CHI. L. REV. 449 (1971).

93. See *supra* text accompanying note 41.

94. For more elaborate discussions of the points raised in this paragraph, see SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988); Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975); Paul Brest, *Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175 (1986) [hereinafter Brest, *Constitutional Citizenship*]; and Paul Brest, *Who Decides?*, 58 S. CAL. L. REV. 661 (1985).

tion, but it is not infallible, and it even has some special weaknesses. Judicial review, as Thayer noted, is "incidental and postponed" — an inherently haphazard way to ensure compliance with the Constitution. The judiciary as a whole, let alone the Supreme Court, is far from demographically representative of the American public. And any group of nine people is capable of atrocious judgment. Within the last century, after all, the Supreme Court has upheld racially segregated railroad cars,<sup>95</sup> the forced sterilization of "mental defectives,"<sup>96</sup> the wartime internment of Americans of Japanese ancestry,<sup>97</sup> and the execution of defendants who may be innocent.<sup>98</sup>

More to the point, four justices thought *Plyler v. Doe* wrong when it was decided, and a majority of today's Court might well share that view.<sup>99</sup> In the end, Proposition 187 — including the provisions requiring school officials to report and expel undocumented children — may be upheld. Having enacted a message, Californians may wind up with a law.

That may happen even if a majority of the Supreme Court finds the initiative vile. The dissenters in *Plyler*, remember, called the Texas law "senseless" and "wrong." They argued not that the law was fair, but that the unfairness of the law did not render it unconstitutional. They argued, in other words, for a kind of judicial restraint. "The Constitution," the *Plyler* dissenters explained, "does not provide a cure for every social ill."<sup>100</sup> Justice Scalia struck a similar note a decade later, concurring in the Court's refusal to stop an execution to allow review of newly discovered evidence of the prisoner's innocence: "the unhappy truth [is] that not every problem was meant to be solved by the United States Constitution, nor can be."<sup>101</sup>

This is one possible response to the kind of public buck-passing illustrated in the debates over Proposition 187: trim back the scope of judicial review by distinguishing sharply between questions of constitutionality and those of simple fairness. It is a response, as Chief Justice Burger noted, largely consistent with the argument made over a century ago by James Bradley Thayer.

But it is almost certainly the wrong response. As a practical matter, the boundary between considerations of constitutionality and those of fairness is far from distinct. What is "due process"

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95. See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

96. See *Buck v. Bell*, 274 U.S. 200 (1927).

97. See *Korematsu v. United States*, 323 U.S. 214 (1944).

98. See *Herrera v. Collins*, 113 S. Ct. 853 (1993).

99. See Eugene Volokh, *A More Conservative Supreme Court May Overturn the 1982 Decision that Guarantees Education to Illegal Alien Children*, L.A. DAILY NEWS, Nov. 20, 1994, at 5.

100. 457 U.S. at 253 (Burger, C.J., dissenting).

101. *Herrera v. Collins*, 113 S. Ct. 853, 875 n.1 (1993) (Scalia, J., concurring).

about if not some notion of procedural justice? What does "equal protection" promise if not some kind of equitable treatment? There is no way to divorce these constitutional guarantees from broad questions of public morality without trivializing them. For better or worse, our Constitution provides more than a set of formal procedures for lawmaking; it also codifies certain fundamental social tenets, providing us in the process with "a common language with which to carry on debate about the distribution and use of power in our society."<sup>102</sup> As a consequence, as Paul Brest and Sanford Levinson have argued, the legal and moral aspects of a law are often inextricably entwined, and "many of our most important moral issues are quite properly treated as constitutional questions."<sup>103</sup> Asking the public to draw a bright line between due process and "equal protection," between equal protection and "equal protection," is not just asking them to do something difficult — it is asking them to join in a mistake.

That answers Burger and Scalia, but it does not quite answer Thayer. For Thayer lamented not just the failure to distinguish between constitutionality and fairness, but also the abdication of all questions of constitutionality to the courts: "even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it."<sup>104</sup> And Thayer's remedy was not just for the courts to restrict themselves to questions of constitutionality, but for them to defer there too, within reason, to the results of the political process. Even judges with a broad view of equal protection, he would say, should refrain from insisting on their views, lest they "dwarf the political capacity of the people" and "deaden its sense of moral responsibility."<sup>105</sup>

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102. H. Jefferson Powell, *What the Constitution Means for Your Town, and for You*, DES MOINES REG., Dec. 18, 1986, at 13a (quoted in LEVINSON, *supra* note 94, at 191).

103. Brest, *Constitutional Citizenship*, *supra* note 94, at 175; see also LEVINSON, *supra* note 94, at 191; cf. Louis Henkin, *An Immigration Policy for a Just Society?*, 31 SAN DIEGO L. REV. 1017, 1023 (1994) ("If we are to have a just immigration policy we will have — at least — to write a new constitutional slate, folding immigration back into the Constitutional fold, subjecting our immigration policy to our fundamental values, to due process of law, to equal protection of the laws.").

104. Thayer, *supra* note 12, at 155-56. Under one well-pedigreed view of constitutionality, of course, deferring all questions of "legality" to the courts makes perfect sense, because the Constitution means no more and no less than whatever the judiciary says it means. See, e.g. LEVINSON, *supra* note 94, at 37-50 (tracing view of courts as engaged in "hierarchical 'authoritative' interpretation" of the Constitution). Other than its pedigree, though, this view has little to recommend it — particularly given the unavoidable blurring of the boundary between constitutional claims and moral claims. It is one thing to abide by the Supreme Court's judgments; it is quite another to believe everything the Supreme Court says. Professor Levinson is surely right that it debases the Constitution to see it as condoning "whatever can get the approval of a court." *Id.* at 48.

105. THAYER, *supra* note 47, at 107.

The passage of Proposition 187, and the debate leading up to that passage, suggest that this danger is less easily dismissed than friends of judicial activism have sometimes supposed. It is harder to argue now than it was before November 1994 that the dwarfing and deadening Thayer warned about were wholly fanciful. The arguments advanced by the proponents of Proposition 187, and apparently accepted by many voters, are too close for comfort to the buck-passing Thayer described.

That does not necessarily mean that judges should be more circumspect in protecting constitutional rights. But those of us unconvinced by Thayer's argument for judicial restraint may want to think more carefully about what we find wrong with it — and about whether, even if we disagree with Thayer's advice to judges, he has a broader message worth our attention.

My own reasons for finding Thayer's argument for judicial restraint unconvincing have to do with history, responsibility, and uncertainty. History suggests rather strongly that there will be plenty of horrible laws passed with or without judicial activism. California, for example, began its long tradition of nativist legislation in the middle of the nineteenth century, long before there were activist judges around to blame.<sup>106</sup> In fact, the causation ran in the other direction: anti-Chinese laws in California not only provided the setting for the Supreme Court's first application of the Equal Protection Clause to discrimination against groups other than blacks,<sup>107</sup> but also helped spur the rise, first in the Ninth Circuit and then in the Supreme Court, of the doctrine of substantive due process.<sup>108</sup> *Plyler v. Doe* may have helped smooth the way for the passage of Proposition 187, but it is idle

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106. See, e.g., ALEXANDER SAXTON, *THE RISE AND FALL OF THE WHITE REPUBLIC* 294-96 (1990); Leonard Pitt, *The Beginnings of Nativism in California*, 30 PAC. HIST. REV. 23 (1961). Thayer himself gave unintentional evidence of xenophobia's deep roots in California. After visiting San Francisco's Chinatown in 1871 with Ralph Waldo Emerson, Thayer recalled with approval Emerson's wonderment "at the strange way in which our civilization seemed to fail to take hold of these people, and at their persistence in herding and huddling together, when there was such vast room all about them." JAMES BRADLEY THAYER, *A WESTERN JOURNEY WITH MR. EMERSON* 54 (Book Club of California 1980) (1884).

107. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

108. See *In re Ah Chong*, 2 F. 733 (C.C.D. Cal. 1880); *In re Tiburcio Parrott*, 1 F. 481 (C.C.D. Cal. 1880); *How Ah Kow v. Nunan*, 12 F. Cas. 252 (C.C.D. Cal. 1879); *In re Ah Fong*, 1 F. Cas. 213 (C.C.D. Cal. 1874). For useful discussions of the role these cases played in the development of substantive due process, see Christian G. Fritz, *Due Process, Treaty Rights, and Chinese Exclusion, 1882-1891*, in ENTRY DENIED 25 (Sucheng Chan ed., 1991); Charles J. McClain and Laurence Wu McClain, *The Chinese Contribution to the Development of American Law*, in ENTRY DENIED, *supra*, at 3; CARL BRENT SWISHER, STEPHEN J. FIELD, CRAFTSMAN OF THE LAW 205-39 (Phoenix Books 1969) (1930); Howard Graham, *Justice Field and the Fourteenth Amendment*, 52 YALE L.J. 851 (1943).

to suppose that similar laws would never be passed if judges would just stop striking them down.

It is even idler today than it was in Thayer's time, precisely because, as Thayer predicted, our institutions and political practices have developed against a backdrop of judicial review. Even Paul Brest, who thinks Thayer's warning about dwarfing and deadening "was surely right,"<sup>109</sup> finds "far-fetched" the suggestion that if today "the courts simply stopped intervening, the people and their representatives would take up the task."<sup>110</sup> And even Justice Frankfurter, Thayer's most devoted apostle, warned against "stultification of the responsibility which the course of constitutional history has cast upon [the] Court."<sup>111</sup>

That responsibility is not solely a matter of history; it is also, in part, a matter of principle, and of exercising power in an uncertain world. Judges swear an oath to apply the Constitution faithfully, and, as Justice Blackmun once admonished, that oath applies even when constitutional rights lack "clearly ascertainable boundaries," and even when they "give rise to bitter dispute."<sup>112</sup> Bad as it is for the public to shirk its responsibility, the solution cannot be for judges to shirk theirs. Leaving constitutional rights to be protected by others is always perilous, regardless whether the "others" are judges, elected officials, or voters.<sup>113</sup> A significantly less active judiciary might elicit a significantly more responsible electorate — but it might not. As Thomas Grey has pointed out, "[t]he one thing we do know for certain is that if we forego the judges' help . . . we will lose the limited but concrete support for constitutional rights that comes from actual legal remedies."<sup>114</sup> Perhaps Proposition 187 would not have been passed without *Plyler v. Doe*. We will never know.

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109. Brest, *Further Beyond the Republican Revival*, *supra* note 53, at 1629.

110. Brest, *Constitutional Citizenship*, *supra* note 94, at 182. Paul Freund drew a similar distinction: "to conjecture on the responsibility and self-restraint of government had judicial review not been adopted is less hazardous than to estimate the consequence of a shift in practice after more than a century and a half of accommodation to the tradition of judicial sanctions." Freund, *supra* note 64, at 552-53.

111. *Rochin v. California*, 342 U.S. 165, 173 (1952).

112. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 771 (1986).

113. Consider, for example, Justice Brennan's failure in 1973 to gain a fifth vote for declaring sex-based classifications "inherently suspect" and therefore subject to "close judicial scrutiny." *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (plurality opinion). Justice Powell, joined by Chief Justice Burger and Justice Blackmun, argued it was "prematur[e] and unnecessar[y]" for the Court to take this step, because Congress had approved the Equal Rights Amendment and had submitted it to the states. *Id.* at 692 (Powell, J., concurring in the judgment); cf. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN* 255 (1979) (claiming that Justice Stewart, who concurred in the judgment without opinion, balked at joining the plurality opinion in part because he was "certain the Equal Rights Amendment would be ratified").

114. Thomas C. Grey, *Thayer's Doctrine: Notes on its Origin, Scope, and Present Implications*, 88 Nw. U. L. Rev. 28, 41 (1993).

What we do know is that, without *Plyler v. Doe*, Texas would have denied thousands of innocent children a basic education.

For a variety of reasons, then, the passage of Proposition 187 falls a good deal short of showing that Thayer was right about how judges should approach their work. Still, Thayer's ghost can claim a kind of vindication — not vindication of Thayer's advice to judges, but vindication of his warning to the rest of us. That is a warning not about jurisprudence but about civics, and it is a warning we would do well to heed.

What Thayer's ghost can and should remind us is that judicial review, like any safeguard, runs the risk of encouraging irresponsibility — precisely the kind of shortsighted and shameful irresponsibility evident in the passage of Proposition 187. That does not mean the safeguard should be removed or even weakened. But it does mean we need to be vigilant. It means we need to pay greater and more constant attention to our constitutional aspirations, and resolutely to resist the temptation to leave those matters solely to the courts. “[O]ur chief protection lies elsewhere.”<sup>115</sup>

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115. Thayer, *supra* note 12, at 156.