

UNCONSTITUTIONAL BUT NOT UNCONSTITUTIONAL ENOUGH

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When one imagines a judge deciding whether a statute violates the U.S. Constitution, the natural question that comes to mind is whether the statute violates the constitutional doctrine raised. And that is precisely what the U.S. Supreme Court considers. But—as this Article demonstrates in an original fifty-state survey—this approach is far from universal. In forty-four states and the District of Columbia, there is case law instead requiring that a party arguing a legislative enactment violates the U.S. Constitution prove not only that the enactment is unconstitutional, but also that it is unconstitutional beyond a reasonable doubt.

Shining a light on a practice that has received little attention in scholarship, this Article demonstrates through a case study how the beyond-a-reasonable-doubt standard of proof can be outcome determinative. In a Colorado appellate case, a judge found a statute under which the defendant was convicted to be unconstitutionally vague but not unconstitutionally vague beyond a reasonable doubt. Thus, the judge determined it was appropriate to uphold the defendant's felony convictions.

This Article argues that state courts' use of the beyond-a-reasonable-doubt standard of proof to determine whether a legislative enactment violates the U.S. Constitution is wrong as a matter of policy and doctrine. States apply the wrong substantive federal law when they apply a heightened standard of proof to federal constitutional claims. Under the reverse-Erie doctrine, which dictates when state courts must apply federal law, state courts' application of the standard violates the Supremacy Clause. State courts play

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a critical—and often unchecked—role in adjudicating federal constitutional claims. When state courts apply the wrong constitutional law, as occurs with state courts’ use of the beyond-a-reasonable-doubt standard, unconstitutional statutes remain on the books and individual constitutional rights remain unprotected.

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INTRODUCTION

In 2021, a Colorado Court of Appeals judge found a statute under which a criminal defendant was convicted to be unconstitutionally vague but concluded that he was bound to uphold the conviction because the statute was not unconstitutionally

vague “beyond a reasonable doubt.”¹ In other words, the concurring judge determined that the defendant’s felony convictions should be upheld on direct appeal even though the statute under which the defendant was convicted violated the U.S. Constitution.²

Reading the beyond-a-reasonable-doubt standard might be prompting a moment of pause: the standard a jury applies to determine the evidentiary question of whether someone is guilty of a crime? Yes, many states apply the highest standard in the judicial system³ when determining whether the U.S. Constitution is violated. In forty-four states (including Colorado) and the District of Columbia, there is case law stating that the moving party must prove a legislative enactment is unconstitutional beyond a reasonable doubt (or meet a standard of a similarly worded phrase).⁴ Under the beyond-a-reasonable-doubt standard, a judge who is convinced that a statute is unconstitutional but is not convinced of its unconstitutionality beyond a reasonable doubt would be required to uphold the unconstitutional statute.

The beyond-a-reasonable-doubt standard is a clear example of what Judge Richard Posner calls constitutional restraint, which is a reluctance to declare a statute or act unconstitutional.⁵ The standard dates back to the nineteenth century⁶ but has

¹ *People v. Plemmons*, 490 P.3d 1112, 1127 (Colo. App. 2021) (Taubman, J., specially concurring), *aff’d in part, rev’d in part*, 517 P.3d 1210 (Colo. 2022).

² *See id.* at 1127–28.

³ *See infra* Appendix A; Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 523 (2012); *see also* *California ex rel. Cooper v. Mitchell Bros. Santa Ana Theater*, 454 U.S. 90, 93 (1981) (“Three standards of proof are generally recognized, ranging from the ‘preponderance of the evidence’ standard employed in most civil cases, to the ‘clear and convincing’ standard reserved to protect particularly important interests in a limited number of civil cases, to the requirement that guilt be proved ‘beyond a reasonable doubt’ in a criminal prosecution.” (footnote omitted)); CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 5122 (2d ed. 2024) (footnotes omitted) (“The heaviest burden falls on the prosecution in criminal cases; the jury must be satisfied of the defendant’s guilt ‘beyond a reasonable doubt.’ The demand for proof coming as close to certainty as is humanly possible reflects an understanding that convictions of the innocent threaten the legitimacy of the criminal justice, and by implication, the state itself. Indeed, the Supreme Court has held that heavy burden is required by the Sixth Amendment and is thus binding on the states.”).

⁴ The various phrases used are in Appendix A. Page 18 explains why I grouped those similar phrases all under the beyond-a-reasonable-doubt standard given the impact of the language despite the slightly different varied language.

⁵ Posner, *supra* note 3, at 520–25.

⁶ *See Ogden v. Saunders*, 25 U.S. 213, 270 (1827).

long been abandoned by the U.S. Supreme Court.⁷ Even though scholars such as Judge Posner have declared that constitutional restraint has “died” in both academia and the courts,⁸ the standard is alive (but perhaps not so well) in forty-four state courts and the District of Columbia.⁹

This Article’s core claim is that the beyond-a-reasonable-doubt standard violates the Supremacy Clause and that its persistence presents a serious problem of doctrine and policy. When a state court applies the beyond-a-reasonable-doubt standard of proof, the state court fails to apply the proper federal law as required by the Supremacy Clause. An application of the reverse-*Erie* doctrine demonstrates that state courts’ use of the heightened standard of proof to address federal constitutional claims is improper.¹⁰ The U.S. Supreme Court has held the burden of proof for evidentiary standards is substantive for purposes of the *Erie* and the reverse-*Erie* doctrine.¹¹ Such precedent supports that the standard of proof for legal questions is federal substantive law that state courts must apply.¹² Considering the significant number of state court cases that adjudicate the constitutionality of legislative enactments, with little chance of oversight from the U.S. Supreme Court,¹³ this is a pressing concern.

This Article has five parts. Part I begins with an explanation of the origins of the beyond-a-reasonable-doubt standard to address legal questions and the abandonment of such a standard by the U.S. Supreme Court. Part I then turns to

⁷ See *Blodgett v. Holden*, 275 U.S. 142, 147 (1927).

⁸ Posner, *supra* note 3, at 533, 546–50.

⁹ See *infra* pp. 18–19 and Appendix A.

¹⁰ See *infra* Part IV.

¹¹ See *infra* section IV.B.2.

¹² See *infra* section IV.B.2.

¹³ The U.S. Supreme Court grants review of few cases per year. The U.S. Supreme Court reports that each term, “approximately 5,000–7,000 new cases are filed in the Supreme Court.” *The Supreme Court at Work*, SCOTUS, <https://www.supremecourt.gov/about/courtatwork.aspx> [<https://perma.cc/A4PW-U4QU>] (“Plenary review, with oral arguments by attorneys, is currently granted in about 80 of those cases each Term, and the Court typically disposes of about 100 or more cases without plenary review.”). The number of cases from state courts to which it grants review is particularly low. Alicia Bannon, *The U.S. Supreme Court’s Declining State Case Docket*, STATE CT. REP. (Oct. 3, 2024), <https://statecourtreport.org/our-work/analysis-opinion/us-supreme-courts-declining-state-case-docket> [<https://perma.cc/J5Z3-L32C>]; see also Adam Feldman, *Empirical SCOTUS: The Importance of State Court Cases Before the Supreme Court*, SCOTUSBLOG (Sep. 4, 2020), <https://www.scotusblog.com/2020/09/empirical-scotus-the-importance-of-state-court-cases-before-scotus/> [<https://perma.cc/2PSA-FRA4>].

state courts' use of the beyond-a-reasonable-doubt standard. Because there are unique problems when state courts differ from the U.S. Supreme Court when adjudicating federal constitutional claims, Part I presents an original fifty-state survey conducted through a combination of targeted keyword and keycite searches examining the prevalence of the beyond-a-reasonable-doubt standard in state courts when state courts adjudicate federal constitutional claims.¹⁴

Part II details the advantages and criticisms of the use of the beyond-a-reasonable-doubt standard. While few defend the standard in judicial opinions or in the legal academy, there are many ready to criticize the heightened standard to address legal questions. The critiques include that: (1) the application requires courts to uphold unconstitutional statutes; (2) its use is contrary to the Framers' understanding of separation of powers; (3) the standard provides improper extreme deference to legislatures; and (4) the standard is meaningless.

Part III explores whether the standard matters to the outcomes of cases. Part III first explains the argument that the standard does not actually impact the outcome of cases but rather is merely "cover" judges use when denying a constitutional challenge to a legislative enactment. Then, Part III details in depth a Colorado Court of Appeals case where a judge expressly said his decision depended on the application of the beyond-a-reasonable-doubt standard, using that case as an example of reasoning that may be lurking unstated beneath the surface of cases in many other jurisdictions.

Despite the many criticisms of the use of the beyond-a-reasonable-doubt standard for federal constitutional claims, its use continues in state courts. Part IV thus demonstrates that state courts' use of the beyond-a-reasonable-doubt standard to address federal constitutional claims violates the Supremacy Clause. While the famous *Erie* doctrine is well researched,¹⁵

¹⁴ While two studies have already noted the prevalence of the standard in state courts, neither study focused on the use of the standard to adjudicate federal constitutional claims. One study researched the first date state courts used the standard, and another lumped together the use of the standard to adjudicate federal or state constitutional claims without distinguishing the two. See Christopher R. Green, *Clarity and Reasonable Doubt in Early State-Constitutional Judicial Review*, 57 S. TEX. L. REV. 169, 179–82 (2015); see also Hugh Spitzer, *Reasoning v. Rhetoric: The Strange Case of "Unconstitutional Beyond a Reasonable Doubt,"* 74 RUTGERS U.L. REV. 1429, 1431, 1436–39 (2022).

¹⁵ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

the reverse-*Erie* doctrine plays an important, and often undervalued, role in our concurrent judicial systems.¹⁶

The reverse-*Erie* doctrine requires that state courts apply federal substantive law when adjudicating federal claims.¹⁷ Even if a state law or rule is arguably procedural for purposes of the reverse-*Erie* doctrine, it violates the Supremacy Clause to apply such law or rule when it would unnecessarily burden the federal right at issue and when it may be outcome determinative.¹⁸

Adding the beyond-a-reasonable-doubt standard of proof to a legal question is an incorrect application of substantive federal law because it changes the constitutional doctrine that states apply when adjudicating a federal constitutional claim. Further support that the application of the beyond-a-reasonable-doubt standard should be viewed as substantive for purposes of the reverse-*Erie* doctrine is that the U.S. Supreme Court has held that burdens of proof for evidentiary questions are substantive in both the *Erie* and reverse-*Erie* contexts.

Even viewing the beyond-a-reasonable-doubt standard as procedural for purposes of reverse-*Erie*, applying the balancing test established in *Felder v. Casey*¹⁹ (which balances state interests against federal interests and outcome differences),²⁰ it violates the Supremacy Clause when states apply the beyond-a-reasonable-doubt standard. A state's interest in affording deference to legislators that the U.S. Supreme Court does not afford cannot outweigh the unnecessary burden to federal constitutional rights and outcome differences resulting from the application of the beyond-a-reasonable-doubt standard.

¹⁶ "[R]everse-*Erie*, often misunderstood, mischaracterized, and misapplied by judges and commentators, goes strangely ignored by most scholars. . . . Consequently, the denigrated or ignored reverse-*Erie* doctrine appears to be, on its own, both a potentially instructive and an undeniably important feature of the fundamental relationship of state and federal law." Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1, 2-4 (2006). There is scant discussion in the legal academy about reverse-*Erie*. See Philip A. Tarpley, *The Doctrine in the Shadows: Reverse-Erie, Its Cases, Its Theories, and Its Future with Plausibility Pleading in Alaska*, 32 ALASKA L. REV. 213, 215-16 (2015) (describing how reverse-*Erie* framework could support requiring state courts to adopt federal pleading standards).

¹⁷ Clermont, *supra* note 16, at 29-30.

¹⁸ *Felder v. Casey*, 487 U.S. 131, 150-51 (1988); see also *Johnson v. Fankell*, 520 U.S. 911, 918 (1997); Clermont, *supra* note 16, at 6-7, 20-28; Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 962, 985 (2001).

¹⁹ *Felder*, 487 U.S. at 138.

²⁰ *Id.*

Finally, Part V explains why the use of the beyond-a-reasonable-doubt standard in state court is a pressing issue. Many federal constitutional rights are adjudicated in state courts with little oversight from the U.S. Supreme Court. Thus, it is essential that state courts apply the correct federal constitutional law.

I

ORIGINS AND STATUS OF THE STANDARD

This Part outlines the origins and current status of the beyond-a-reasonable-doubt standard. Subpart I.A explains the origins of the beyond-a-reasonable-doubt standard when evaluating the constitutionality of legislative enactments. Subpart I.B explains the current U.S. Supreme Court jurisprudence when evaluating the constitutionality of a legislative enactment, which does not include the use of the beyond-a-reasonable-doubt standard. Subpart I.C describes the results of a fifty-state survey, which reveals the continued widespread use by state courts of the beyond-a-reasonable-doubt standard.

A. Origins

The origins of the beyond-a-reasonable-doubt standard as a standard to address legal questions can be traced to an 1827 U.S. Supreme Court case, state court decisions throughout the nineteenth century, and an 1893 law review article.²¹

In 1827, in *Ogden v. Saunders*,²² the U.S. Supreme Court first employed the beyond-a-reasonable-doubt standard to address a legal question. Before then, the U.S. Supreme Court had not required such a heightened standard. The judiciary's ability to review the constitutionality of a statute dates back to *Marbury v. Madison*,²³ but absent from that watershed opinion was a requirement that the statute be established to be unconstitutional beyond a reasonable doubt.²⁴ Yet, in *Ogden*, when analyzing whether a state bankruptcy law violated the U.S. Constitution, the Court stated: "It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favour

²¹ See *People v. Plemmons*, 490 P.3d 1112, 1125 (Colo. App. 2021) (Taubman, J., specially concurring), *aff'd in part, rev'd in part*, 517 P.3d 1210 (Colo. 2022).

²² *Ogden v. Saunders*, 25 U.S. 213 (1827).

²³ *Marbury v. Madison*, 5 U.S. 137 (1803).

²⁴ See generally *id.*

of its validity, until its violation of the constitution is proved beyond all reasonable doubt.”²⁵

The beyond-a-reasonable-doubt standard also appeared in state court decisions throughout the nineteenth century and early twentieth century.²⁶ According to a study by Professor Christopher Green, thirty state supreme courts employed the beyond-a-reasonable-doubt standard when analyzing their state constitutions during the nineteenth century.²⁷

The standard became much more prevalent in legal academic discussions after an influential 1893 law review article by Professor James Bradley Thayer.²⁸ Thayer advocated for the beyond-a-reasonable-doubt standard when courts review the constitutionality of a statute.²⁹ Under Thayer’s theory, the judge must find the statute’s unconstitutionality is “not open to rational question.”³⁰ Even if a judge thought a statute was unconstitutional, under Thayer’s approach, the judge would need to uphold the statute if the judge maintained any uncertainty.³¹

While more attention was given to the standard after Thayer’s famous article, the standard did not last long in the U.S. Supreme Court’s jurisprudence.³² After Thayer’s article, the standard appeared in at least one majority U.S. Supreme Court opinion and numerous dissents during the first part of

²⁵ *Ogden*, 25 U.S. at 270.

²⁶ Green, *supra* note 14, at 179–82.

²⁷ *Id.*

²⁸ Spitzer, *supra* note 14, at 1435–39; *see also* Posner, *supra* note 3, at 522; Vicki C. Jackson, *Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Fact-finding, and Proportionality*, 130 HARV. L. REV. 2348, 2348 (2017) (referring to Thayer’s article as “perhaps the most famous essay in U.S. constitutional law”).

²⁹ The best-known and best-developed version of (3) (constitutional restraint) has a clear beginning and end, and I will organize my discussion around its eighty-one-year history. It begins with an 1893 article by Harvard law professor James Bradley Thayer in which he argued that a statute should be invalidated only if its unconstitutionality is “so clear that it is not open to rational question.”

Posner, *supra* note 3, at 522 (2012) (quoting James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893)).

³⁰ James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

³¹ “Judges who thought a statute unconstitutional but were not sure they were right would be required by Thayer’s formula to uphold the statute and thus would be upholding a law that they thought, albeit with less than complete confidence, actually was unlawful.” Posner, *supra* note 3, at 523.

³² Spitzer, *supra* note 14, at 1431–32.

the twentieth century.³³ However, in the U.S. Supreme Court's 1927 decision in *Blodgett v. Holden*,³⁴ the Court departed from the beyond-a-reasonable-doubt standard. The Court did not explicitly state it was leaving behind the heightened standard of proof.³⁵ But without applying the beyond-a-reasonable-doubt standard, the Court held a tax statute was arbitrary and violated the plaintiff's right to Due Process.³⁶ The concept of the beyond-a-reasonable-doubt standard appeared once more in a U.S. Supreme Court majority opinion in 1958,³⁷ but otherwise disappeared from U.S. Supreme Court cases.³⁸

B. Current U.S. Supreme Court Jurisprudence

Recent U.S. Supreme Court opinions apply no heightened standard of proof for constitutional challenges. The opinions state no "standard" to address the legal question. The opinions state the constitutional doctrine and address whether the doctrine is met.

Looking at several recent cases where the U.S. Supreme Court held a legislative enactment to be unconstitutional, the U.S. Supreme Court went right to the substantive law; it did not add an additional standard of deference. In *Trump v. Slaughter*, the Court held that the federal statute limiting the President's power to remove Federal Trade Commissioners only for cause violated the separation of powers.³⁹ Missing from the opinion

³³ See *Adkins v. Child's Hosp.*, 261 U.S. 525, 544 (1923) ("This Court, by an unbroken line of decisions from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt."), *overruled by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); see also *Blodgett v. Holden*, 275 U.S. 142 (1927); Spitzer, *supra* note 14, at 1431–32 (2022) ("[Thayer's] 'beyond a reasonable doubt' concept [was cited by the Court] only eleven times after his article was published, almost always in dissents from decisions invalidating regulatory statutes.").

³⁴ See *Blodgett* 275 U.S. 142; see also Laura J. Gibson, *Beyond a Reasonable Doubt: Colorado's Standard for Reviewing a Statute's Constitutionality*, 23 COLO. LAW. 835, 836 (1994).

³⁵ *Blodgett*, 275 U.S. at 147.

³⁶ *Id.*

³⁷ *Fed. Hous. Admin. v. Darlington, Inc.*, 358 U.S. 84, 90–91 (1958) ("[E]very possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt" (quoting *Union Pac. R.R. Co. v. United States*, 99 U.S. 700, 718 (1878))).

³⁸ Spitzer, *supra* note 14, at 1431–32; see also Hugh Spitzer, "Unconstitutional Beyond a Reasonable Doubt"—A Misleading Mantra That Should Be Gone for Good, 96 WASH. L. REV. ONLINE 1, 10–11 (2021), <https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=1060&context=wlro> [https://perma.cc/3CJM-MTY7].

³⁹ *Trump v. Slaughter*, No. 25-332, slip op. at 2 (U.S. June 29, 2026).

was any additional “standard” of proof the moving party had to meet to prove the law’s unconstitutionality.⁴⁰ Likewise, in *Wolford v. Lopez*,⁴¹ the U.S. Supreme Court announced and applied the substantive constitutional test without reference to a standard of deference.⁴²

When analyzing the constitutionality of a federal statute regulating a candidate’s personal loans to their campaigns in *FEC v. Ted Cruz for Senate*,⁴³ the Court dove right into a First Amendment analysis without first announcing a standard of proof the moving party must meet.⁴⁴ Indeed, in rejecting the government’s argument that the Court should “defer to Congress’s ‘legislative judgment’” that the statute in question “further[s] an anticorruption goal,”⁴⁵ the Court restated the basic principle it was tasked to do: “In the end, it remains our role to decide whether a particular legislative choice is constitutional.”⁴⁶

Indeed, no other U.S. Supreme Court cases from the past five years invalidating a legislative enactment added a heightened “standard” of proof to the substantive constitutional doctrine the moving party must meet to prove a legislative enactment unconstitutional.⁴⁷

⁴⁰ See *id.* at 2–36.

⁴¹ *Wolford v. Lopez*, No. 24-1046, slip op. (U.S. June 25, 2026).

⁴² *Id.* at 2–24.

⁴³ *FEC v. Cruz*, 142 S. Ct. 1638 (2022).

⁴⁴ *Id.* at 1650–52.

⁴⁵ *Id.* at 1656.

⁴⁶ *Id.* Similarly, in *National Republican Senatorial Committee v. FEC*, the Court held the provision of the Federal Election Campaign Act (FECA) limiting spending by political parties in coordination with candidates violated the First Amendment with no reference to an additional deferential standard. *Nat’l Republican Senatorial Comm. v. FEC*, No. 24-621, slip op. at 1–29 (U.S. June 30, 2026).

⁴⁷ See, e.g., *Carson ex rel. O.C. v. Makin*, 142 S. Ct. 1987, 1996–2002 (2022) (holding that Maine’s state law that required any secondary schools receiving state funds from a tuition assistance program be “nonsectarian” violated the Free Exercise Clause of the First Amendment without an additional standard of proof to prove unconstitutionality); *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022) (holding New York state law violated the Second Amendment without applying an additional standard of proof); *United States v. Washington*, 142 S. Ct. 1976, 1983–86 (2022) (holding a Washington state workers’ compensation state law violated the Supremacy Clause with no reference to an additional standard); *Siegel v. Fitzgerald*, 142 S. Ct. 1770, 1775, 1780–83 (2022) (holding a fee increase in the bankruptcy system that was not uniform across States violated the Bankruptcy Clause’s uniformity requirement); *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1978–86 (2021) (holding the “unreviewable authority wielded by [Administrative Patent Judges] during inter partes review is incompatible with their appointment by the Secretary to an inferior office” without adding an additional standard to prove unconstitutionality); *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382–89 (2021)

The U.S. Supreme Court's refusal to apply a heightened standard of proof and its silence as to the applicable standard of proof suggest the Court is implicitly applying a preponderance of the evidence standard of proof when determining the constitutionality of a legislative enactment. Indeed, "[t]he standard of proof for law normally seems to be 'more likely than not.'"⁴⁸ What is abundantly clear is that when determining the constitutionality of a legislative enactment, the U.S. Supreme Court applies the substantive law at issue without an additional heightened standard of proof.

Even when the U.S. Supreme Court last made a statement about the type of standard of proof it was applying, it was not the beyond-a-reasonable-doubt standard. In 2000, the U.S. Supreme Court applied a "plain showing" standard in *United States v. Morrison*⁴⁹ in addressing whether Congress exceeded its powers under the Commerce Clause when it passed the Violence Against Women Act.⁵⁰ The Court stated: "Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."⁵¹ Three years later, the U.S. Supreme Court recited *Morrison*'s language in *McConnell v. FEC* to hold such standard was not met when the plaintiff argued a federal election law exceeded Congress's authority under the Election Clause.⁵² Otherwise, the *Morrison* plain-showing standard has not been cited in subsequent U.S. Supreme Court cases.

(applying a First Amendment analysis to a California regulation requiring charities to disclose a list of their donors with no heightened standard other than the exacting scrutiny standard for First Amendment challenges to compelled disclosure); *Collins v. Yellen*, 141 S. Ct. 1761, 1783–87 (2021) (holding the Recovery Act's "for cause" removal restriction on the President's removal authority for the Director of the Federal Housing Finance Agency (FHFA) violated the separation of powers); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2069, 2071–74 (2021) (holding a California regulation granting labor organizations a "right to take access" to an agricultural employer's property without compensation violated the Takings Clause of the Fifth Amendment).

⁴⁸ Cf. KEVIN M. CLERMONT, A GENERAL THEORY OF EVIDENCE AND PROOF: FORMING BELIEFS IN TRUTH 218 (2024) ("The standard of proof for law normally seems to be 'more likely than not.' The judge would start with the seemingly most likely of the alternative views of the law occurring to him or her, one in which the judge believes each inference more than the judge disbelieves it." (footnote omitted)).

⁴⁹ *Morrison*, 529 U.S. at 607.

⁵⁰ *Id.* at 605–07.

⁵¹ *Id.* at 607.

⁵² *McConnell v. FEC*, 540 U.S. 93, 187 (2003), *overruled by* *Citizens United v. FEC*, 558 U.S. 310 (2010).

It is worth noting that the U.S. Supreme Court provides deference to legislatures in numerous instances and through various mechanisms. One obvious example is the extremely deferential standard of rational-basis review, requiring that absent a situation where heightened scrutiny is involved, a law does not violate the Equal Protection Clause as long as the classification is “rationally related to a legitimate state interest.”⁵³ Constitutional avoidance principles present another way in which U.S. Supreme Court limits its role in reviewing the constitutionality of legislative enactments.⁵⁴ In a similar vein, the justiciability doctrine restricts cases the U.S. Supreme Court reviews, which reduces the U.S. Supreme Court’s oversight capacity.⁵⁵ The U.S. Supreme Court is not hesitant to provide deference to legislatures, but it does not do so through the blanket application of the beyond-a-reasonable-doubt standard of proof when evaluating the constitutionality of all legislative enactments.

C. The State Court Landscape

Despite the complete abandonment of the beyond-a-reasonable-doubt standard by the U.S. Supreme Court to determine the constitutionality of a legislative enactment, the use of the standard of proof is widespread in state courts.

The continued prevalence of the beyond-a-reasonable-doubt standard is often understated. In 2012, Judge Posner said that Thayer’s theory of constitutional deference, which is essentially the use of the beyond-a-reasonable-doubt standard to determine the constitutionality of legislative enactments, had “died.”⁵⁶

At least two prior studies have noted the frequency with which the standard appears in state court decisions, albeit in manners distinct from that of this Article. Professor Christopher Green studied the appearance of the beyond-a-reasonable-doubt standard in state courts when analyzing their *state* constitutions.⁵⁷

⁵³ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 615 (7th ed. 2023) (quoting *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)).

⁵⁴ *Id.* at 19 (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341, 346–49 (1936)).

⁵⁵ *Id.* at 19–97.

⁵⁶ Posner, *supra* note 3, at 533, 546–50 (“I have tried to explain the vulnerability of Thayerian theory (it might better be called a rhetoric than a theory), but I have not explained its death. It died on two fronts: in the academy (except for the handful of hyper-Thayerians), and in the courts.”).

⁵⁷ Green, *supra* note 14, at 175–82.

Green found that every state, except Alaska,⁵⁸ “embraced a reasonable-doubt-style formulation of the presumption of constitutionality.”⁵⁹ Green studied the dates that state courts first adopted the beyond-a-reasonable-doubt standard; however, Green did not determine whether the state courts continued to use the beyond-a-reasonable-doubt standard of proof.⁶⁰

Professor Hugh Spitzer also conducted a study regarding state courts’ use of the beyond-a-reasonable-doubt standard as a legal standard.⁶¹ Spitzer studied the use of the terms “beyond a reasonable doubt” and “rational doubt” from January 1, 2000, to January 31, 2020.⁶² Spitzer found:

Thirteen state courts and the District of Columbia, scattered from Vermont down to Texas and up to Alaska, never used the formulation during the first twenty years of this century. Only fourteen jurisdictions used the concept with relative frequency—more than twenty times in the same period. Montana, with seventy-four instances, was the most frequent user. The supreme courts of eighteen states mentioned “unconstitutional beyond a reasonable doubt” between one and ten times in the study period, and in five states, the wording appeared between eleven and twenty times. Overall, a solid majority of states use the formulation infrequently.⁶³

Spitzer’s study does not indicate that his research distinguishes between constitutional challenges made under a state constitution and those made under the Federal Constitution.⁶⁴

This Article builds upon these prior studies in several ways. While many of the same policy concerns are present when the beyond-a-reasonable-doubt standard is used to evaluate a claim under the U.S. Constitution or a state constitution, there are particular concerns and substantive

⁵⁸ *Id.* at 179. While stated as a presumption, Alaska does recite a presumption regarding resolving any doubts in favor of a law’s constitutionality. *See State v. N. Pac. Fishing, Inc.*, 485 P.3d 1040, 1047 (Alaska 2021) (“‘A presumption of constitutionality applies,’ and we resolve any doubts in favor of a law’s constitutionality.” (quoting *Alaska Dep’t of Revenue v. Andrade*, 23 P.3d 58, 71 (Alaska 2001))).

⁵⁹ Green, *supra* note 14, at 179.

⁶⁰ *Id.* at 179–82; *see also* Spitzer, *supra* note 14, at 1439.

⁶¹ *See generally* Spitzer, *supra* note 14.

⁶² *Id.* at 1440.

⁶³ *Id.* at 1440–41 (footnotes omitted).

⁶⁴ *See generally id.* at 1440–42.

problems when state courts use the standard to adjudicate federal constitutional claims. To be sure, there are policy concerns present for the use of the deferential standard for any constitutional challenges, state or federal. For example, regardless of whether the standard is employed for a federal or state constitutional claim, the use of the beyond-a-reasonable-doubt standard undermines the judiciary's check on majoritarian rule.⁶⁵ However, state courts are permitted to interpret their constitutions as they see fit.⁶⁶ The same cannot be said for how state courts interpret the Federal Constitution. There are unique considerations when state courts adjudicate federal constitutional claims, mainly, the role of the Supremacy Clause (as will be discussed in Part IV). Thus, this Article provides a fifty-state survey examining only where the beyond-a-reasonable-doubt standard was used to adjudicate a federal claim.⁶⁷

Further, Spitzer counted only cases finding terms "beyond a reasonable doubt" and "rational doubt" as cases using the beyond-a-reasonable-doubt standard. As detailed in the table in Appendix A, I counted numerous variations of the language as employing the beyond-a-reasonable-doubt standard. For example, I counted as using the beyond-a-reasonable-doubt standard when the court stated: "Any doubt as to the constitutionality of a statute must be resolved in favor of its constitutionality."⁶⁸ Also, sometimes the standards were phrased as presumptions and sometimes they were phrased as burdens to meet.⁶⁹ I recognize the wording differs, but I included

⁶⁵ Cf. Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 77-87 (1989) (describing the ways in which the judiciary can "compensate[] for many of the problems with the majoritarian process," including its political insulation, case-by-case approach, and judicial ethics).

⁶⁶ Richard Boldt & Dan Friedman, *Constitutional Incorporation: A Consideration of the Judicial Function in State and Federal Constitutional Interpretation*, 76 MD. L. REV. 309, 334-37 (2017).

⁶⁷ This Article's study also differs from Spitzer's study because Spitzer searched only the highest courts. When intermediate appellate courts employ the beyond-a-reasonable-doubt standard remains relevant because intermediate appellate decisions are still binding on trial courts.

⁶⁸ *Alpe v. Fed. Nat'l Mortg. Ass'n*, 662 S.W.3d 650, 652 (Ark. 2023).

⁶⁹ Rules that fix the burden of proof are often mislabeled "presumptions." The best known of these is the so-called "presumption of innocence"—but there are others. These cannot be "true presumptions" because a true presumption cannot arise without proof of some "basic fact" but the criminal defendant can claim the "presumption of innocence" without proving anything. To avoid confusing these pseudo-presumptions [sic] with the real thing, scholars long ago suggested that rules that fix the burden of persuasion

phrases that arguably all employ the same extremely high level of deference. Recognizing that not all will agree that the various phrases with slightly different wording have the same meaning as the beyond-a-reasonable-doubt standard, I have indicated in the table in Appendix A where the wording varied and what the wording was.

In conducting the fifty-state survey, I searched reported cases after *Morrison*'s release, May 15, 2000, as that is arguably the last date the U.S. Supreme Court announced any type of standard of proof to be used to determine the constitutionality of a legislative enactment.⁷⁰ The standard used by the U.S. Supreme Court in *Morrison* was plain showing, not beyond-a-reasonable-doubt; thus, there should have been no doubt after that opinion that the beyond-a-reasonable-doubt standard was not the standard used by the U.S. Supreme Court. I marked a "Yes" in the table in Appendix A for states where there is a state appellate court case citing the beyond-a-reasonable-doubt standard after May 15, 2000, and the standard has not been overruled. For the states in the table where I list "No," it means that I did not find any appellate cases after May 15, 2000, citing the beyond-a-reasonable-doubt standard when reviewing a federal constitutional challenge to a legislative enactment, or that such use of the standard has been abandoned in that state, as noted by an appellate state court opinion.

I found that at least forty-four states and Washington, D.C. continue to use the beyond-a-reasonable-doubt standard in some capacity. Appendix A details the exact wording used by

be called "assumptions." We shall use this term because though it has caught on with only a few writers, it has proved more popular with the state drafters.

Wright, *supra* note 3 (footnotes omitted).

⁷⁰ To search extensively in each jurisdiction, I used many combinations of search terms as well as keycites. My search combinations included but were not limited to:

adv: (unconstitution! OR constitution!) /10 "beyond a reasonable doubt"

adv: (Resolv! /s "doubts") /p (constitution! OR unconstitution!).

adv: (unconstitutional! OR constitution!) /10 "doubt!"

adv: Resolv! /s "doubts"

My keycite searches included searching through what was tagged under the keycite 92K1004: "Constitutional Law" -> Enforcement of Constitutional Provisions" -> Determination of Constitutional Questions -> Presumption and Construction as to Constitutionality" -> "Doubt" -> "Proof Beyond a Reasonable Doubt." I also searched through the more general keycite 92K990, which was the "In general" tag under "Presumptions and Construction as to Constitutionality." I conducted such thorough searching because I did not want to understate the problem.

the states and provides citations. Below is a summary of my findings:

States Citing BRD Standard		States Not Citing BRD Standard
Alabama	Nebraska	Arizona
Alaska	New Hampshire	Georgia
Arkansas	New Jersey	Maryland
California	New Mexico	Nevada
Colorado	New York	Oregon
Connecticut	North Carolina	Vermont
Delaware	North Dakota	
Florida	Ohio	
Hawaii	Oklahoma	
Idaho	Pennsylvania	
Illinois	Rhode Island	
Indiana	South Carolina	
Iowa	South Dakota	
Kansas	Tennessee	
Kentucky	Texas	
Louisiana	Utah	
Maine	Virginia	
Massachusetts	Washington	
Michigan	Washington, D.C.	
Minnesota	West Virginia	
Mississippi	Wisconsin	
Missouri	Wyoming	
Montana		

What is abundantly clear is that the beyond-a-reasonable-doubt standard is prevalent throughout the state court system when analyzing federal constitutional claims. Part II highlights the defenses and critiques of the beyond-a-reasonable-doubt standard before Part III turns to whether it really matters that state courts continue to use the heightened standard.

II

POLICY CONCERNS

This Part details the rationales that the proponents of the beyond-a-reasonable-doubt standard advance before turning to the many critiques of the standard. Subpart II.A explains the rationales that those in favor of the standard provide. Subpart II.B outlines the critiques of requiring the moving party to prove a legislative enactment unconstitutional beyond a reasonable doubt.

A. Rationales

What is curious about the widespread continuation of the beyond-a-reasonable-doubt standard in state courts is that there are few defenders (at least publicly) of the standard but many detractors, both in the legal academy and in judicial opinions.⁷¹

Perhaps the most prominent defender of the standard was Thayer in his 1893 article.⁷² Judge Posner astutely summarized Thayer's rationalization for the high standard as follows:

1. Restraint was necessary because courts' authority to invalidate a law enacted by the national legislature was "an American innovation with a thin basis in the constitutional text, and was still controversial when he wrote."⁷³
2. Because a law takes effect before a court could hear a constitutional challenge to the statute, "this implied that the legislature had to make an independent constitutional judgment"⁷⁴
3. "[Q]uestions relating to the power of the different branches of government are inescapably political, and so courts have perforce to use political, rather than just legal, criteria in answering them. Thayer thought that such criteria would generally favor restraint."⁷⁵
4. "[I]f courts enforced constitutional limitations to the hilt, legislators would stop thinking about the constitutionality of proposed legislation and just think about how the courts would react."⁷⁶

⁷¹ "[Thayerian theory] died on two fronts: in the academy (except for the handful of hyper-Thayerians), and in the courts." Posner, *supra* note 3, at 546.

⁷² See Thayer, *supra* note 30, at 154.

⁷³ Posner, *supra* note 3, at 524.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

A more recent defense of the beyond-a-reasonable-doubt standard appeared in a 1998 Washington Supreme Court case, *Island County v. State*.⁷⁷ In *Island County*, the court provided an explanation and rationale for the use of the beyond-a-reasonable-doubt standard when assessing the constitutionality of a statute:

The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution. We assume the Legislature considered the constitutionality of its enactments and afford some deference to that judgment. Additionally, the Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution.⁷⁸

Oddly, after providing such rationales, the majority then asserted a seemingly contrasting view that the judiciary must declare whether the statute violated the constitution: “Ultimately, however, the judiciary must make the decision, as a matter of law, whether a given statute is within the legislature’s power to enact or whether it violates a constitutional mandate.”⁷⁹

There has been much more ink spilled about the problems with the beyond-a-reasonable-doubt standard. I’ll briefly explain some of the critiques.

B. Critiques

1. *Requirement for Courts to Uphold Unconstitutional Statutes*

The most obvious concern for applying the beyond-a-reasonable-doubt standard is that true application of the standard requires courts to uphold unconstitutional statutes.⁸⁰ Judge Posner referred to “the weakest part of

⁷⁷ *Island Cnty. v. State*, 955 P.2d 377 (Wash. 1998).

⁷⁸ *Id.* at 380.

⁷⁹ *Id.*

⁸⁰ Posner, *supra* note 3, at 523. In his special concurrence criticizing the standard, Judge Taubman referred to the beyond-a-reasonable-doubt standard as “illogical.” *People v. Plemmons*, 490 P.3d 1112, 1125 (Colo. App. 2021) (Taubman, J., specially concurring), *aff’d in part, rev’d in part*, 517 P.3d 1210 (Colo. 2022). Judge Taubman emphasizes how the standard would, in theory, permit courts to conclude a statute is constitutional when they would otherwise find it to be unconstitutional. *Id.* at 1126–27.

Thayer's theory" as the fact "that it tells judges to uphold statutes that they consider unconstitutional."⁸¹

In his article exploring different types of judicial self-restraint, Judge Posner explores how constitutional restraint is "in sharp conflict" with a judicial restraint where a judge is devoted to applying the law (which he calls legalism or formalism).⁸² "The Constitution is law, and applying it may be inconsistent with a policy of reluctance to declare a statute or executive decision unconstitutional."⁸³

Indeed, if judges truly applied the beyond-a-reasonable-doubt standard of proof, it seems difficult to ever declare a statute unconstitutional. As Judge Frank Easterbrook writes:

Because the many hundreds of constitutional decisions over the years represent coalitions of Justices with very different approaches to constitutional law, doubt is everywhere; a large stock of precedents containing incompatible decisions enables almost anything to be "proved" in a semi-logical manner, which greatly increases the domain of constitutional doubts.⁸⁴

One could imagine a judge concluding a statute is unconstitutional but recognizing there is reasonable doubt as to that conclusion, given the many approaches to constitutional law. This would require the judge to uphold the statute despite the judge's conclusion that the statute is unconstitutional.

2. Separation of Powers Issues

According to critics, the beyond-a-reasonable-doubt standard presents a separation of powers issue. In a special concurrence in *People v. Plemmons* calling for Colorado to abandon the beyond-a-reasonable-doubt standard, Judge Daniel Taubman argues that the heightened standard: "misapprehends the Framers' understanding of the separation of powers."⁸⁵ (*Plemmons* will be explained in detail in Part III.) Judge Taubman reasoned that "[b]efore the Constitution

⁸¹ Posner, *supra* note 3, at 546.

⁸² *Id.* at 520–21.

⁸³ *Id.* at 521.

⁸⁴ Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1405 (2002).

⁸⁵ *Plemmons*, 490 P.3d at 1126 (Taubman, J., specially concurring).

was ratified, Alexander Hamilton wrote in Federalist 78 that '[t]he interpretation of the laws is the proper and peculiar province of the courts.' In recognizing the power of judicial review, Federalist 78 presaged the holding in *Marbury v. Madison*.⁸⁶ Judge Taubman argues that using the heightened standard is contrary to the Framers' intent because neither Federalist 78 nor *Marbury* employed such a standard.⁸⁷

Marbury famously held that the "constitution is superior to any ordinary act of the legislature" and highlighted that to hold otherwise would require the courts to "close their eyes on the constitution."⁸⁸ When courts apply the beyond-a-reasonable-doubt standard, they arguably "close their eyes on the constitution." The extreme deference puts courts in a position where they are not tasked with interpreting the Federal Constitution but instead are tasked to determine whether the violation is so egregious as to meet the beyond-a-reasonable-doubt standard.

3. *Improper Extreme Deference to Legislatures*

Others highlight the extreme deference the beyond-a-reasonable-doubt standard gives to legislatures. Decades prior to Judge Taubman's call to end Colorado's use of the beyond-a-reasonable-doubt standard, Colorado Court of Appeals Judge John Briggs wrote a special concurrence in an opinion attacking the use of the beyond-a-reasonable-doubt standard (although the parties had not raised the issue in that case).⁸⁹ Judge Briggs' complaints included that the standard creates an extreme degree of deference to legislatures, which fails to recognize that legislatures might vote for a law because of political reasons even if they doubt the constitutionality of the enactment.⁹⁰

Judge Posner similarly questioned the notion that "legislators deliberate in a responsible and creative fashion about the constitutionality of proposed legislation."⁹¹ Judge Posner said: "The U.S. Senate is malapportioned. The American political process at all levels is corrupted by money, interest groups,

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Marbury v. Madison*, 5 U.S. 137, 178 (1803).

⁸⁹ *United Air Lines, Inc. v. City & Cnty. of Denver*, 973 P.2d 647, 655-60, 659 (Colo. App. 1998) (Briggs, J., specially concurring), *aff'd sub nom.*, *United Airlines, Inc. v. City & Cnty. of Denver*, 992 P.2d 41 (Colo. 2000).

⁹⁰ *Id.*

⁹¹ Posner, *supra* note 3, at 525.

public ignorance and apathy, and inherent limitations of representative democracy, in which the people vote for persons rather than for policies.”⁹²

Regardless of whether one subscribes to Judge Posner’s pessimistic view of legislative bodies, it is not difficult to think of reasons legislators may not thoroughly evaluate the constitutionality of each piece of legislation they pass. One obvious reason is that many legislators are not lawyers,⁹³ and constitutional doctrines are often incredibly complicated. Another reason is that some legislators may be intensely focused on the “policy” of the enactment over potential concerns regarding the enactment’s constitutionality.⁹⁴ Extreme deference to legislators regarding legal questions pertaining to the constitutionality of their legislation ignores many political realities.

4. *Meaningless or Opportunistic*

Another critique of the beyond-a-reasonable-doubt standard is that the standard is meaningless. In a special concurrence in *Plemmons*, Judge Taubman asserts that “Colorado’s appellate courts often recite the beyond a reasonable doubt standard without ever applying it.”⁹⁵ Likewise, in his special concurrence attacking the continuation of the beyond-a-reasonable-doubt standard in Colorado, Judge Briggs noted that the beyond-a-reasonable-doubt standard had not been the “expressed basis for striking down a legislative enactment in any of our state’s appellate opinions” and noted that judges may not actually be applying it given that there are divided courts on decisions involving the constitutionality of an enactment.⁹⁶

⁹² *Id.* at 550.

⁹³ See generally *State Legislator Demographics*, NAT’L CONF. STATE LEGISLATURES (Dec. 1, 2020), <https://www.ncsl.org/about-state-legislatures/state-legislator-demographics> [https://perma.cc/83RX-KP4S] (outlining low percentages of state legislators with law degrees).

⁹⁴ See Daniel D. Domenico, *The Constitutional Feedback Loop: Why No State Institution Typically Resolves Whether a Law Is Constitutional and What, If Anything, Should Be Done About It*, 89 DENV. U. L. REV. 161, 181–82 (2011) (describing how some members of “policy branches” “appear to believe that it is the role of others (especially the courts) to answer constitutional questions while the policy branches concern themselves only with policy”).

⁹⁵ *People v. Plemmons*, 490 P.3d 1112, 1127 (Colo. App. 2021) (Taubman, J., specially concurring), *aff’d in part, rev’d in part*, 517 P.3d 1210 (Colo. 2022).

⁹⁶ *United Air Lines, Inc. v. City & Cnty. of Denver*, 973 P.2d 647, 657 (Briggs, J., specially concurring), *aff’d sub nom. United Airlines, Inc. v. City & Cnty. of Denver*, 992 P.2d 41 (Colo. 2000).

Spitzer found in the cases from 2000–2020 reciting “unconstitutional beyond a reasonable doubt” that “(83%) involved instances in which the court upheld a statute, while only 108 were cases in which a statute was overturned (16%).”⁹⁷ Spitzer takes that to mean that the standard is “not a presumption or doctrine that drives the outcome of cases.”⁹⁸ Spitzer argues that “most of the time it serves to provide judges with political cover, a rhetorical device meant to signal legislators and the public” and that the standard “rarely makes any real difference in court deliberations or reasoning.”⁹⁹ As will be explained in Part III, though, one could conclude precisely the opposite of Spitzer’s conclusions based on the results. Of the cases reciting the standard, 83 percent of the cases upheld the challenged statute, and thus, the standard had a significant impact on the cases. Spitzer, though, concludes: “In most states, ‘unconstitutional beyond a reasonable doubt’ has become a jingle that is dropped into cases when convenient (usually when upholding statutes) and then ignored when it is not convenient.”¹⁰⁰

Judge Posner had a similar critique of constitutional restraint, which he said was “for the most part a mask for outcomes reached on other grounds. Adherence to it was opportunistic.”¹⁰¹ Judge Posner pointed out how unlikely it would be for a judge to actually apply the standard, asserting no originalist or judge with any constitutional theory would say: “I think the original meaning of the Second Amendment is that people have a right to own guns for self-defense, and the challenged statute or ordinance doesn’t permit that, but reasonable persons might disagree with my reading of history, so I’ll vote to uphold the enactment.”¹⁰²

With this last criticism in mind, it is essential to look deeper into what the beyond-a-reasonable-doubt standard looks like in action. Spitzer’s study provides an important insight into a large-scale analysis of how the standard is employed (or not) in state courts. However, Part III provides an example where a judge said the beyond-a-reasonable-doubt standard was outcome determinative.

⁹⁷ Spitzer, *supra* note 14, at 1433, 1442.

⁹⁸ *Id.* at 1433.

⁹⁹ *Id.* at 1457.

¹⁰⁰ *Id.* at 1433.

¹⁰¹ Posner, *supra* note 3, at 550.

¹⁰² *Id.* at 537.

III

PEOPLE V. PLEMMONS CASE STUDY

If the final critique is true that the beyond-a-reasonable-doubt standard of proof is meaningless, a natural question is does it matter if state courts continue using the standard? Despite concluding that the standard does not impact cases, Spitzer still argues for the abdication of the standard because the standard misleads lawyers and the public and may also be disingenuous.¹⁰³ While I agree with both critiques, I believe there is more harm than just being misleading and disingenuous.

We know from Spitzer's study that the use of the standard, at least in some jurisdictions, appears to be opportunistic.

However, it is not clear that all the cases citing the heightened standard would come out the exact same way without the "cover." Perhaps, without such cover, the outcomes would be different because courts might feel compelled, in at least some cases, to rule that an enactment is unconstitutional.

There is at least one case where the judge explicitly said the beyond-a-reasonable-doubt standard was outcome determinative to his decision. In *People v. Plemmons*, Colorado Court of Appeals Judge Taubman stated his decision on how the case should be decided depended on the beyond-a-reasonable-doubt standard.¹⁰⁴

The *Plemmons*' defendant spat on the faces of two police officers who were conducting a welfare check on her amid concerns that she was suicidal.¹⁰⁵ Based on the spitting, Plemmons was charged with second-degree assault under a subsection that states a person commits second-degree assault if she spits on a peace officer with "intent to infect, injure, or harm."¹⁰⁶ Spitting on a peace officer with the intent to

¹⁰³ Spitzer, *supra* note 14, at 1459.

¹⁰⁴ *People v. Plemmons*, 490 P.3d 1112, 1127 (Colo. App. 2021) (Taubman, J., specially concurring), *aff'd in part, rev'd in part*, 517 P.3d 1210 (Colo. 2022). The Colorado Supreme Court ultimately reviewed the *Plemmons* case on other issues but refused to accept certiorari regarding the use of the beyond-a-reasonable-doubt standard. Petition for Writ of Certiorari, *Plemmons v. People*, 517 P.3d 1210 (Colo. 2021) (No. 2021SC183) (seeking certiorari regarding whether the spitting subsection of second-degree assault was unconstitutionally vague and whether the party must prove a statute unconstitutional beyond a reasonable doubt); *see also* *Plemmons v. People*, 517 P.3d 1210, 1216 n.4 (accepting certiorari only as to the questions involving the harm jury instruction and whether there was sufficient evidence to sustain the defendant's conviction).

¹⁰⁵ *Plemmons*, 490 P.3d at 1115–16.

¹⁰⁶ *Id.* at 1116.

“harass, annoy, threaten, or alarm” is third-degree assault.¹⁰⁷ Second-degree assault is a felony whereas third degree assault is a misdemeanor.¹⁰⁸ The trial court instructed the jury that harm in second-degree assault included only psychological or emotional harm.¹⁰⁹ Plemmons was convicted of second-degree assault.¹¹⁰

Plemmons argued on appeal that the second-degree assault subsection under which she was convicted was unconstitutionally vague, both facially and as applied to her.¹¹¹ She argued that the second-degree assault subsection invites arbitrary or discriminatory enforcement because the line is “amorphous” between “harm” in second-degree assault and “harass, annoy, threaten, or alarm” in third-degree assault.¹¹²

The majority opinion stated that “a party challenging a statute’s constitutionality ‘bears the burden of proving its unconstitutionality beyond a reasonable doubt.’”¹¹³ The majority then analyzed the meaning of “harm” and whether its lack of definition invites arbitrary or discretionary enforcement because of the similarity to the third-degree assault statute.¹¹⁴

The majority held that the term “harm” in the second-degree assault statute is ambiguous and turned to the legislative history to define the term.¹¹⁵ The majority then concluded that based on its analysis, including an examination of the legislative history, that the trial court’s definition of harm in second-degree assault including only psychological or emotional harm was “consistent with the General Assembly’s intent and an appropriate way of ensuring the second-degree assault statute’s constitutionality.”¹¹⁶ The majority then held that the statute was not unconstitutionally vague because it was not likely to invite arbitrary or discriminatory enforcement.¹¹⁷

In a special concurrence, Judge Taubman asserted that the beyond-a-reasonable-doubt standard determined whether the

¹⁰⁷ *Id.* at 1118.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1116.

¹¹¹ *Id.*

¹¹² *Id.* at 1118.

¹¹³ *Id.* at 1116 (quoting *Dean v. People*, 366 P.3d 593, 596 (Colo. 2016)).

¹¹⁴ *Id.* at 1118.

¹¹⁵ *Id.* at 1118–19.

¹¹⁶ *Id.* at 1119–20.

¹¹⁷ *Id.* at 1120.

defendant's convictions should be vacated.¹¹⁸ Judge Taubman reasoned that because the term "harm" in the second-degree assault statute was ambiguous and the majority had to turn to the legislative history to define it, there was a risk of discriminatory and arbitrary enforcement of the statute.¹¹⁹ Judge Taubman explained, "[I]f we presume that the second-degree assault statute is constitutional, but do not consider its unconstitutionality beyond a reasonable doubt, I would conclude that the second-degree assault statute is unconstitutionally vague."¹²⁰ Judge Taubman reasoned though that applying the beyond-a-reasonable-doubt standard of proof, "analysis of the legislative history may well lead to the conclusion that the statute is not so 'vague, indefinite, and uncertain' that courts are unable to determine the legislature's intent."¹²¹

Judge Taubman explained the impact the standard made on his decision as part of his attack on the standard altogether. For judges who do not want to change the standard or where the issue was not raised, it is unsurprising that we do not see more opinions detailing that under the prevailing standard the judge would find a statute constitutional, but under a different standard they would have found the statute unconstitutional. Thus, contrary to Spitzer's conclusion that the standard is meaningless, it is impossible to know what impact there would be if the standard did not exist. We have at least one example where the beyond-a-reasonable-doubt standard was outcome-determinative for an appellate judge.

While it is obviously important when the application of the heightened standard impacts the outcomes of cases, state courts' application of the heightened standard of proof is concerning even when the outcome might not be different, but state litigants are held to a different standard. When state courts apply the wrong law when adjudicating federal constitutional claims, it undermines how our concurrent judicial systems operate. Litigants in state courts deserve the same protections afforded by the U.S. Constitution as litigants in federal courts.

¹¹⁸ *Id.* at 1127 (Taubman, J., specially concurring).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1128.

¹²¹ *Id.*

IV

THE DOCTRINAL ERROR

Despite the numerous critiques and the real impact that the beyond-a-reasonable-doubt standard can have in cases, the use of the standard continues in many state courts. I was able to find only one state, Arizona, to explicitly abandon the beyond-a-reasonable-doubt standard.¹²² In *Gallardo v. State*, the constitutional challenge at issue in the case was a challenge under the Arizona constitution, but the Arizona Supreme Court used broad language when disavowing the use of the beyond-a-reasonable-doubt standard: “Assessing the constitutionality of a law fundamentally differs from determining the existence of historical facts, the determination of which is subject to deference. We therefore disapprove the use of the ‘beyond a reasonable doubt’ standard for making constitutionality determinations.”¹²³ Indeed, in subsequent opinions reviewing federal constitutional claims, the Arizona Supreme Court cites *Gallardo* to assert it applied *de novo* review and did not recite the beyond-a-reasonable-doubt standard.¹²⁴

Two other states’ highest supreme courts have briefly entertained the question about whether to continue the use of the standard when evaluating state constitutional claims. The Colorado Supreme Court accepted certiorari to determine whether the beyond-a-reasonable-doubt standard should apply for challenges under a provision of Colorado’s Constitution, but ultimately declined to answer that question because it held that under either standard (beyond-a-reasonable-doubt or the plaintiff’s proposed plain-showing standard), the challenged enactment was not unconstitutional.¹²⁵ In a Montana special concurrence, Justice William Leaphart, joined by two other justices, criticized the use of the beyond-a-reasonable-doubt standard when evaluating a claim under the Montana Constitution:

¹²² See *Gallardo v. State*, 336 P.3d 717, 720 (Ariz. 2014). However, six years later, Justice Bolick noted in a concurrence that the standard “still erroneously appears in the Arizona trial handbook.” *State v. Arevalo*, 470 P.3d 644, 652 n.1 (Ariz. 2020) (Bolick, J., concurring).

¹²³ *Gallardo*, 336 P.3d at 720 (citation omitted).

¹²⁴ See, e.g., *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 899 (Ariz. 2019); *Horne v. Polk*, 394 P.3d 651, 654 (Ariz. 2017). A federal question was at issue in *State v. Arevalo*, and in a concurrence, three justices discussed how the Arizona Supreme Court abandoned the beyond-a-reasonable-doubt standard as part of their discussion against the continued use of the presumption of constitutionality. *Arevalo*, 470 P.3d at 648, 652.

¹²⁵ *TABOR Found. v. Reg'l Transp. Dist.*, 416 P.3d 101, 103 n., 104 (Colo. 2018).

“Despite this time-honored and well-accepted standard of proving unconstitutionality, I nonetheless find this to be an incongruous standard to apply to the proving of a legal proposition as opposed to an issue of fact.”¹²⁶

The standard continues outside of these three states, largely unquestioned in state courts. The arguments against the use of the standard have been plentiful, but state courts have not left behind the standard.¹²⁷ This continued use is not only wrong as a matter of policy, but also as a matter of doctrine.

I begin in subpart IV.A by outlining the roots behind the concept that state courts adjudicate federal claims. I then explain that when state courts do, they must normally apply federal law under the reverse-*Erie* doctrine.

In subpart IV.B and subpart IV.C, I detail how state courts’ use of the beyond-a-reasonable-doubt standard to address federal constitutional claims violates the Supremacy Clause under the reverse-*Erie* doctrine. Under the reverse-*Erie* doctrine, state courts must apply federal substantive law when adjudicating federal claims.¹²⁸ Section IV.B.1 explains how applying the beyond-a-reasonable-doubt standard is an incorrect application of federal substantive law because it changes the constitutional doctrine that state courts apply when adjudicating a federal constitutional claim. Section IV.B.2 details how the U.S. Supreme Court case law holding that the burden of proof for evidentiary questions is substantive in the *Erie* and reverse-*Erie* contexts supports the conclusion that the standard of proof for legal questions is substantive.

As explained in subpart IV.C, even if the standard of proof is viewed as procedural, under *Felder’s* balancing of states’ interests, federal interests, and outcome differences, it violates the Supremacy Clause when states apply the beyond-a-reasonable-doubt standard to constitutional challenges because its application unnecessarily burdens federal constitutional rights and can be outcome determinative.¹²⁹

¹²⁶ *Oberson v. U.S. Dep’t of Agric., Forest Serv.*, 171 P.3d 715, 723 (Mont. 2007) (Leaphart, J., concurring).

¹²⁷ *See supra* Part III.

¹²⁸ Clermont, *supra* note 16, at 6–7, 20–28.

¹²⁹ *Felder v. Casey*, 487 U.S. 131, 138 (1988); *cf.* Clermont, *supra* note 16, at 6–7, 20–28 (describing the contours of the reverse-*Erie* doctrine); Bellia, *supra* note 18, at 962 (“Congress may, by implication, require state courts to follow federal procedural rules when application of a state procedural rule would unnecessarily burden a federal right.”).

A. State Courts' Adjudication of Federal Claims

1. Concurrent Jurisdiction

For centuries, the U.S. Supreme Court has reinforced the role of state courts in adjudicating federal claims.¹³⁰ State courts' role in adjudicating federal claims is enshrined in two places in the U.S. Constitution: the Supremacy Clause and the Madisonian Compromise.¹³¹ The Supremacy Clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹³²

¹³⁰ See, e.g., *Haywood v. Drown*, 556 U.S. 729, 731, 735 (2009); *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 221 (1916) ("[L]awful rights of the citizen, whether arising from a legitimate exercise of state or national power, unless excepted by express constitutional limitation or by valid legislation to that effect, are concurrently subject to be enforced in the courts of the State or nation when such rights come within in the general scope of the jurisdiction conferred upon such courts by the authority, State or nation, creating them."); *Clafin v. Houseman*, 93 U.S. 130, 133 (1876). As Alexander Hamilton famously said:

When in addition to this we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.

Howlett ex rel. Howlett v. Rose, 496 U.S. 356, 369 (1990) (quoting *THE FEDERALIST* No. 82, at 132 (Alexander Hamilton) (Edward Bourne ed., 1947) (alteration in original)).

¹³¹ *Printz v. United States*, 521 U.S. 898, 907 (1997) ("These early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power. That assumption was perhaps implicit in one of the provisions of the Constitution, and was explicit in another. In accord with the so-called Madisonian Compromise, Article III, § 1, established only a Supreme Court, and made the creation of lower federal courts optional with the Congress—even though it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States. And the Supremacy Clause, Art. VI, cl. 2, announced that 'the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.'" (citation omitted)); see also Paul J. Katz, *Standing in Good Stead: State Courts, Federal Standing Doctrine, and the Reverse-Erie Analysis*, 99 NW. U. L. REV. 1315, 1320–23 (2005).

¹³² U.S. CONST. art. VI, cl. 2.

The principle that state courts would adjudicate federal claims and apply federal law is also implicit in Article III, Section 1 of the U.S. Constitution, known as the Madisonian Compromise,¹³³ which reads: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”¹³⁴ Because the Constitution was drafted giving Congress the discretion to create lower federal courts, implicit in that discretion is an assumption that state courts would adjudicate federal claims.¹³⁵

In 1876, in *Claflin v. Houseman*,¹³⁶ the U.S. Supreme Court rejected an argument that state courts did not have concurrent jurisdiction with federal courts over a federal claim (there, a bankruptcy claim).¹³⁷ In supporting its holding, the Court explained that “[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are.”¹³⁸ Throughout the twentieth century, the U.S. Supreme Court has affirmed this basic principle, even stating that state courts have a “duty to safeguard and enforce” federal rights.¹³⁹

More than a century later, the U.S. Supreme Court continues to embrace the same principle. In 2009, in holding in *Haywood v. Drown*¹⁴⁰ that a New York law divesting New York’s trial courts of general jurisdiction over Section 1983 suits seeking money damages from correction officers violated the Supremacy Clause, the Court referred to a “strong . . . presumption of concurrency” between federal and state courts.¹⁴¹ The Court held that presumption is “defeated only in two

¹³³ *Printz*, 521 U.S. at 907.

¹³⁴ U.S. CONST. art. III, § 1.

¹³⁵ See *Printz*, 521 U.S. at 907; see also Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction over Federal Claims*, 105 MINN. L. REV. 1211, 1230 (2021).

¹³⁶ *Claflin v. Houseman*, 93 U.S. 130 (1876).

¹³⁷ *Id.* at 134–35.

¹³⁸ *Id.* at 136.

¹³⁹ See, e.g., *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 222 (1916); *Testa v. Katt*, 330 U.S. 386, 388–89, 394 (1947) (rejecting Rhode Island state court’s reasoning that it refused to hear a federal claim on the grounds that a state need not enforce “penal laws” of the federal government); *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 367 (1990) (“Federal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature.”).

¹⁴⁰ *Haywood v. Drown*, 556 U.S. 729 (2009).

¹⁴¹ *Id.* at 731, 735.

narrowly defined circumstances: first, when Congress expressly ousts state courts of jurisdiction; and second, “[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts.”¹⁴² Thus, for more than a century, the U.S. Supreme Court has consistently held that state courts are generally required to adjudicate federal claims.

2. Reverse-Erie

While adjudicating federal claims, state courts may be faced with the decision of what law to apply: federal or state.¹⁴³ This choice is sometimes referred to as the “reverse-*Erie* doctrine.”¹⁴⁴ While some aspects of the reverse-*Erie* doctrine are reminiscent of the *Erie* doctrine, the fundamental question differs. While *Erie* tells “the federal actor when to apply state law rather than create federal law,” reverse-*Erie* tells “the state actor when to apply existing federal law under the influence of the Supremacy Clause.”¹⁴⁵

Professor Clermont astutely describes the reverse-*Erie* doctrine as follows: “federal law—be it constitutional, statutory, or common law—will apply pursuant to the Supremacy Clause in state court, subject to the Constitution or Congress having already chosen the applicable law, whenever it preempts state law or whenever it prevails by an *Erie*-like judicial choice of law.”¹⁴⁶

¹⁴² *Id.* at 735 (citations omitted) (quoting *Howlett*, 496 U.S. at 372).

¹⁴³ Kevin M. Clermont, *Signaling Deference to Another Sovereign's Law*, 59 GONZ. L. REV. 207, 237 (2024) (“Subject to the Constitution or Congress having already chosen the applicable law, federal law—be it constitutional, statutory, or common law—applies in state court whenever it preempts state law or whenever it prevails by an *Erie*-like judicial choice of law.”).

¹⁴⁴ *Id.*

¹⁴⁵ Kevin M. Clermont, *Degrees of Deference: Applying vs. Adopting Another Sovereign's Law*, 103 CORN. L. REV. 243, 265–66 (2018).

¹⁴⁶ Clermont, *supra* note 16, at 44. Prof. Clermont provides another nice definition of the reverse-*Erie* doctrine in Clermont, *supra* note 145, at 266 (“The generalized reverse-*Erie* question—whether federal law should displace state law—is a relatively simple one if the Constitution or Congress, the latter acting within constitutional limits, actually chose to displace state law in state courts, expressly or impliedly. If so, that choice is binding on the state courts under the Supremacy Clause.”); see also Bennett, *supra* note 135, at 1229 (“Because federal law binds state judges, they must apply it in cases that present it.”); Jacob L. Burnett, Note, *A Bug or a Feature?: Exclusive State-Court Jurisdiction over Federal Questions*, 170 U. PA. L. REV. ONLINE 147, 158 (2022), <https://repository.law.upenn.edu/Documents/Detail/a-bug-or-a-feature-exclusive-state-court-jurisdiction-over-federal-questions/142933> [<https://perma.cc/TF7P-T6Y6>].

Just as in *Erie* cases, where federal courts' decisions on whether to apply federal or state law can be complicated,¹⁴⁷ reverse-*Erie* situations can likewise not always be clear-cut. Generally, state courts adjudicating a federal claim apply federal law "on clearly substantive questions" and state law "on clearly procedural questions," though there are exceptions when federal procedure applies over state procedure.¹⁴⁸ On a basic level, substantive law consists of "rights and duties," whereas procedural law is "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."¹⁴⁹ Regardless of whether a rule may be considered procedural, the U.S. Supreme Court has held that it is contrary to the law to apply a state rule or law that would unnecessarily burden the federal right at issue.¹⁵⁰

Much of the reverse-*Erie* doctrine pertains to preemption and determining the reach of federal law.¹⁵¹ As Dean Erwin Chemerinsky describes, preemption plays an important role in the balancing of our concurrent judicial systems.¹⁵² "A broad view of preemption leaves less room for governance by state and local governments," Chemerinsky explains.¹⁵³ Conversely, "a very narrow preemption doctrine minimizes the reach of federal law and risks undermining the federal objectives."¹⁵⁴

Preemption can be express or implied.¹⁵⁵ Express preemption occurs when Congress explicitly states that it is withdrawing power from the State.¹⁵⁶ Implied preemption may be field or conflict.¹⁵⁷ Field preemption occurs where Congress

¹⁴⁷ Cf. *Gasperini v. Ctr. for Hums., Inc.*, 518 U.S. 415, 427 (1996) ("Classification of a law as 'substantive' or 'procedural' for *Erie* purposes is sometimes a challenging endeavor.").

¹⁴⁸ Robert M. Bloom & Hillary Massey, *Accounting for Federalism in State Courts: Exclusion of Evidence Obtained Lawfully by Federal Agents*, 79 U. COLO. L. REV. 381, 408 (2008).

¹⁴⁹ *Hanna v. Plumer*, 380 U.S. 460, 464 (1965) (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

¹⁵⁰ Clermont, *supra* note 16, at 40; see also Bellia, *supra* note 18, at 962.

¹⁵¹ Clermont, *supra* note 16, at 5–8, 20–28.

¹⁵² CHEMERINSKY, *supra* note 53, at 370–71.

¹⁵³ *Id.* at 371.

¹⁵⁴ *Id.*

¹⁵⁵ *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376–77 (2015).

¹⁵⁶ *Arizona v. United States*, 567 U.S. 387, 399 (2012).

¹⁵⁷ *Oneok, Inc.*, 575 U.S. at 376–77.

occupies an entire field and the State is forbidden to take action in that field.¹⁵⁸ Conversely, “conflict pre-emption exists where ‘compliance with both state and federal law is impossible,’ or where ‘the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”’”¹⁵⁹

In order to determine the reach of federal law in some reverse-*Erie* cases, judicial choice-of-law may come into play.¹⁶⁰ When there is not a conflict preemption, under *Felder v. Casey*, state courts balance “state interests, federal interests, and outcome differences” under judicial choice of law.¹⁶¹ This balancing must occur where the question involves a question of obstacle preemption or where the court is determining the extent of the federal law.¹⁶²

With these basic principles about the reverse-*Erie* doctrine in mind, as will be explained next, the standard of proof to address the constitutionality of a legislative enactment is substantive. Even if the standard is viewed as procedural, under *Felder* balancing, it violates the Supremacy Clause when states apply the beyond-a-reasonable-doubt standard because its application unnecessarily burdens federal constitutional rights and may be outcome determinative.

B. Incorrect Application of Federal Substantive Law

1. *Wrong Constitutional Doctrine*

When state courts apply the beyond-a-reasonable-doubt standard of proof to challenges that a legislative enactment violates the U.S. Constitution, the courts apply the wrong federal substantive law. Adding the beyond-a-reasonable-doubt standard substantively changes the constitutional doctrine state courts apply when adjudicating the constitutional claim, which changes the litigant's rights.

¹⁵⁸ *Arizona*, 567 U.S. at 401.

¹⁵⁹ *Oneok, Inc.*, 575 U.S. at 377 (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 100, 101 (1989)).

¹⁶⁰ Clermont, *supra* note 16, at 5–9.

¹⁶¹ *Id.* at 35 (“So, the reverse-*Erie* balance should, and does, closely resemble the *Erie* balance. In fact, the basic methodologies are the same. Courts balance state interests, federal interests, and outcome differences. Yet the last of those three factors plays out a little differently in the different settings of state court and federal court.”); see also Bloom & Massey, *supra* note 148, at 409.

¹⁶² Clermont, *supra* note 16, at 41.

In defining constitutional doctrines, it becomes clear that adding a layer to such doctrines is an incorrect application of substantive law.

When one thinks of the framework for First Amendment claims, the dormant Commerce Clause, or Equal Protection, there is no doubt that constitutional tests or doctrines established by the U.S. Supreme Court are substantive law.¹⁶³ In his influential book, *Implementing the Constitution*, Professor Richard Fallon describes types of tests that the Court often uses to enforce constitutional guarantees.¹⁶⁴ Fallon asserts that “it is largely through the formulation (and subsequent application) of tests that the Court discharges its responsibilities for constitutional implementation.”¹⁶⁵

While there is much debate about how to define various constitutional frameworks or tests (whether it be “as defining substantive constitutional rights, as implementing constitutional norms, as ‘constitutional common law,’ or as ‘constitutional decision rules,’”¹⁶⁶) as Professor Abbe Gluck describes, “they are indisputably viewed as ‘real’ doctrine.”¹⁶⁷

In an interesting article regarding how to define judicial doctrine,¹⁶⁸ Professor Daniel Epps provides a thorough discussion of judicial constitutional doctrines. One of Epps’s citations indicates how basic the principle is that constitutional doctrine is substantive law. Epps states: “Missouri couldn’t open its courts to claims arising under the First Amendment but then insist that its courts apply rational basis review for all First Amendment claims.”¹⁶⁹ The footnote following that sentence reads:

This proposition—that federal law governs federal claims—seems sufficiently elementary that no citation should be needed. But for a particularly good, and recent, recapitulation of the principle, see *James v. City of Boise*, 136 S. Ct.

¹⁶³ Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1915–16 (2011).

¹⁶⁴ RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 76–101 (Harvard Univ. Press 2001).

¹⁶⁵ *Id.* at 76.

¹⁶⁶ Gluck, *supra* note 163, at 1915–16 (footnotes omitted).

¹⁶⁷ *Id.*

¹⁶⁸ Daniel Epps, *Harmless Errors and Substantial Rights*, 131 HARV. L. REV. 2117, 2158–61 (2018).

¹⁶⁹ *Id.* at 2164.

685 (2016) (per curiam), where the Court explained why state courts may not “disregard [its] rulings on federal law.”¹⁷⁰

In *James v. City of Boise*, the U.S. Supreme Court reasserted the same principle that it has held for centuries: “The Idaho Supreme Court, like any other state or federal court, is bound by this Court’s interpretation of federal law.”¹⁷¹

Regardless of how one characterizes constitutional doctrine, there is no dispute that the doctrine is part of the substantive law. If the U.S. Supreme Court wished to require every constitutional challenge to be proven beyond a reasonable doubt, it would have said so. But, as detailed in Part II, the U.S. Supreme Court has not done so. Thus, it is improper for states to apply a different standard when adjudicating constitutional challenges. Yet, that is precisely what applying an additional standard that the moving party must meet for all constitutional challenges does.

The beyond-a-reasonable-doubt standard often appears in opinions in two ways. It is either recited in the standard of review section and then the substantive constitutional test is stated later (without reference to the beyond-a-reasonable-doubt standard)¹⁷² or it is merged into the articulation of the substantive test or the ultimate conclusion.¹⁷³ Both recitations are incorrect applications of federal law, but looking at examples where the standard is merged into the substantive test or the ultimate conclusion provides stark examples of how the wrong substantive test is being applied.

Take the void-for-vagueness doctrine as an example. When stating the void-for-vagueness doctrine, the U.S. Supreme Court does not add a layer of proving vagueness beyond a reasonable doubt. In *United States v. Davis*,¹⁷⁴ the Court described the prohibition against vague laws as requiring that “statutes must give people ‘of common intelligence’ fair notice of what the law demands of them,”¹⁷⁵ and at no point referred to the moving party having to prove

¹⁷⁰ *Id.* at 2164 n.294 (citation omitted).

¹⁷¹ *James v. City of Boise*, 577 U.S. 306, 307 (2016).

¹⁷² *See, e.g.*, *State v. Pine*, 548 P.3d 390, 395 (Mont. 2023)

¹⁷³ *See infra* notes 179–188 and accompanying text.

¹⁷⁴ *United States v. Davis*, 139 S. Ct. 2319 (2019).

¹⁷⁵ *Id.* at 2325 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

such a violation of principles beyond a reasonable doubt.¹⁷⁶ Likewise, in *Sessions v. Dimaya*,¹⁷⁷ the Court defined the void-for-vagueness doctrine without any reference to a presumption or burden:

The void-for-vagueness doctrine, as we have called it, guarantees that ordinary people have ‘fair notice’ of the conduct a statute proscribes. *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972). And the doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges.¹⁷⁸

Yet, state courts routinely merge tests together to create a constitutional test distinct from what the U.S. Supreme Court applies:

- “To demonstrate that [a statute] is unconstitutionally vague as applied to [him], the [defendant] therefore must . . . demonstrate beyond a reasonable doubt that [he] had inadequate notice of what was prohibited or that [he was] the victim of arbitrary and discriminatory enforcement.”¹⁷⁹
- “A person who challenges a statute as unconstitutionally vague must demonstrate that the statute is unconstitutional beyond a reasonable doubt.”¹⁸⁰
- “We presume that ordinances are constitutional and the party challenging the ordinance must prove vagueness beyond a reasonable doubt.”¹⁸¹
- “[The defendant] bears the burden of establishing the unconstitutional vagueness of our ban on the

¹⁷⁶ *Id.* (“Vague laws contravene the ‘first essential of due process of law’ that statutes must give people ‘of common intelligence’ fair notice of what the law demands of them. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); see *Collins v. Kentucky*, 234 U.S. 634, 638 (1914). Vague laws also undermine the Constitution’s separation of powers and the democratic self-governance it aims to protect. Only the people’s elected representatives in the legislature are authorized to ‘make an act a crime.’ *United States v. Hudson*, 7 Cranch 32, 34 (1812). Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people’s ability to oversee the creation of the laws they are expected to abide.”).

¹⁷⁷ *Sessions v. Dimaya*, 584 U.S. 148 (2018).

¹⁷⁸ *Id.* at 155–56.

¹⁷⁹ *State v. Ares*, 284 A.3d 967, 976–77 (Conn. 2022) (alterations in original) (quoting *State v. Fields*, 24 A.3d 1243, 1260 (Conn. 2011)).

¹⁸⁰ *State v. Kortkamp*, 633 N.W.2d 863, 866 (Minn. Ct. App. 2001).

¹⁸¹ *City of Pasco v. Shaw*, 166 P.3d 1157, 1163 (Wash. 2007).

unauthorized practice of law beyond a reasonable doubt.”¹⁸²

- “Insofar as he is challenging section 76-1-601(5)(a) as unconstitutionally vague, Defendant bears the burden of demonstrating its unconstitutionality ‘beyond a reasonable doubt.’”¹⁸³

Reminiscent of the critique that the standard requires courts to uphold statutes that are unconstitutional, many opinions’ holdings indicate that they are not answering the question of whether a legislative enactment is unconstitutional, but rather, whether it is unconstitutional beyond a reasonable doubt:

- “The petitioners have not met the heavy burden of showing vagueness beyond a reasonable doubt.”¹⁸⁴
- “Because these provisions of [the city ordinance] convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices, [the defendant] did not demonstrate that the sections at issue are unconstitutionally vague beyond a reasonable doubt.”¹⁸⁵
- “[The defendant] fails to carry his burden of proving that the stalking statute is unconstitutionally vague beyond a reasonable doubt. Accordingly, his claim fails.”¹⁸⁶
- “Thus the statute is not unconstitutionally vague beyond a reasonable doubt.”¹⁸⁷
- “We are simply not convinced ‘beyond a reasonable doubt’ that he has demonstrated the unconstitutional vagueness of the statute.”¹⁸⁸

In these examples, the state court is applying a different test and addressing a different ultimate legal question than what the U.S. Supreme Court applies when addressing void for vagueness challenges.

¹⁸² *People v. Shell*, 148 P.3d 162, 172 (Colo. 2006).

¹⁸³ *State v. Wilkinson*, 407 P.3d 1045, 1051 (Utah Ct. App. 2017).

¹⁸⁴ *Shaw*, 166 P.3d at 1164.

¹⁸⁵ *State v. Kisil*, 246 N.E.3d 963, 971 (Ohio Ct. App. 2024), *aff’d sub nom.*, *Huron v. Kisil*, No. 2024-0640, 2025 WL 2404306 (Ohio Aug. 20, 2025).

¹⁸⁶ *State v. Bradford*, 308 P.3d 736, 743 (Wash. Ct. App. 2013).

¹⁸⁷ *State v. Kortkamp*, 633 N.W.2d 863, 867 (Minn. Ct. App. 2001).

¹⁸⁸ *State v. Robinson*, 618 N.W.2d 306, 319 (Iowa 2000).

Thus, when state courts apply the beyond-a-reasonable-doubt standard, the courts are applying different substantive law than the U.S. Supreme Court does for the same constitutional legal challenge.

Another example of state courts improperly merging the beyond-a-reasonable-doubt standard into the doctrinal test occurs with recitations of rational basis review under the Equal Protection Clause. A “merged” rational basis test is routinely misstated to create an even more deferential standard than the already incredibly deferential rational basis standard.¹⁸⁹ Of course, “[u]nder the rational basis test, a law will be upheld if it is *rationally related to any legitimate government purpose*.”¹⁹⁰ Colorado Supreme Court case *People v. Diaz* demonstrates improper merging: “Under [the rational basis] standard, the challenging party must prove beyond a reasonable doubt that the classification bears no rational relationship to a legitimate legislative purpose or government objective, or that the classification is unreasonable, arbitrary, or capricious.”¹⁹¹ The beyond-a-reasonable-doubt standard becomes part of the very test to consider whether the rational basis standard is met.

¹⁸⁹ See, e.g., *HealthONE v. Rodriguez ex rel. Rodriguez*, 50 P.3d 879, 893 (Colo. 2002) (“Under the rational basis standard of review, a statutory classification will stand if it bears a rational relationship to legitimate governmental objectives and is not unreasonable, arbitrary, or capricious. There is a presumption of constitutionality for a classification analyzed under the rational basis standard. The burden is on the party challenging the classification to establish its unconstitutionality beyond a reasonable doubt. In addition, we have noted that ‘[i]f any conceivable set of facts would lead to the conclusion that a classification serves a legitimate purpose, a court must assume those facts exist.’” (quoting *Christie v. Coors Transp. Co.*, 933 P.2d 1330, 1333 (Colo. 1997))); *People v. Diaz*, 347 P.3d 621, 627 (Colo. 2015) (“Under this standard, the challenging party must prove beyond a reasonable doubt that the classification bears no rational relationship to a legitimate legislative purpose or government objective, or that the classification is unreasonable, arbitrary, or capricious.”); *People v. Hernandez*, 488 P.3d 1055, 1063–64 (Colo. 2021) (“Where no suspect class is identified and no fundamental right is at issue, we apply a rational basis standard of review. This standard requires proof ‘beyond a reasonable doubt that the classification bears no rational relationship to a legitimate legislative purpose or government objective’ or that the classification is ‘unreasonable, arbitrary, or capricious.’ To establish a violation, the classification must ‘arbitrarily single out a group of persons for disparate treatment,’ without singling out others who are similarly situated. However, ‘[i]f any conceivable set of facts would lead to the conclusion that a classification serves a legitimate purpose, a court must assume those facts exist.’” (first quoting *Diaz*, 347 P.3d at 627; then quoting *Indus. Claim Appeals Off. v. Romero*, 912 P.2d 62, 66 (Colo. 1996); and then quoting *Romero*, 912 P.2d at 67)).

¹⁹⁰ Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL’Y 401, 402, 402 n.6 (2016) (collecting U.S. Supreme Court cases).

¹⁹¹ *Diaz*, 347 P.3d at 627.

State courts also tend to inappropriately merge these standards in Commerce Clause challenges. A Wisconsin Court of Appeals case stated: "To succeed, appellant telephone companies must show beyond a reasonable doubt that sec. 77.52(2)(a)4., Stats., impermissibly burdens interstate commerce."¹⁹² Indeed, such a merged test was a reason for a dissent in a Colorado Supreme Court case:

The majority invokes the Colorado doctrine that acts of the General Assembly are presumed constitutional unless proven otherwise beyond a reasonable doubt. However, this formula has never, to my knowledge, been applied by the United States Supreme Court in a Commerce Clause case. It is inconsistent with the burdens of proof set forth in *Hunt* and *Pike*. Therefore, I would not apply it to the present case.¹⁹³

The above are just a few examples in which it is abundantly clear that by merging tests or holdings, the state courts are applying the wrong substantive law.

2. *Burden of Proof for Evidentiary Questions*

Further proof that state courts' application of the beyond-a-reasonable-doubt standard of proof to legal questions is an incorrect application of substantive federal law can be found in existing U.S. Supreme Court precedent. The U.S. Supreme Court has held that burdens of proof for evidentiary questions are substantive in both the *Erie* and reverse-*Erie* contexts.¹⁹⁴ Before turning to the cases themselves, a brief note about the similarities of proving a question of fact and a question of law helps demonstrate the cases' value.

In his book, *A General Theory of Evidence and Proof: Forming Beliefs in Truth*, Professor Clermont argues that "[q]uestions

¹⁹² Wis. Tel. Co. v. Wis. Dep't of Revenue, 371 N.W.2d 825, 828 (Wis. Ct. App. 1985).

¹⁹³ Archer Daniels Midland Co. v. State, 690 P.2d 177, 191 n.4 (Colo. 1984) (Lohr, J., dissenting) (citing U.S. Supreme Court Dormant Commerce Clause cases).

¹⁹⁴ See, e.g., Dick v. N.Y. Life Ins. Co., 359 U.S. 437, 441, 446 (1959) ("Under the *Erie* rule, presumptions (and their effects) and burden of proof are 'substantive'" (footnote omitted)); Palmer v. Hoffman, 318 U.S. 109, 116-17 (1943); Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942); Cities Serv. Oil Co. v. Dunlap, 308 U.S. 208, 212-23 (1939); Cent. Vt. Ry. Co. v. White, 238 U.S. 507, 512 (1915); see also Dale A. Nance, *Choice of Law for Burdens of Proof*, 46 N.C. J. INT'L L. 235, 248 (2021) ("[F]ederal courts have consistently held that most burden of proof rules are substantive for vertical choice-of-law purposes and should be governed by the relevant state law, or at least should be governed by state law whether or not they are characterized as substantive.").

of law are epistemically equivalent to questions of fact.”¹⁹⁵ He continues, “‘If one makes any propositional claims about what the law is, regardless of what one has in mind by “law,” one is making claims of fact.’ Thus, the analysis of finding fact extends to proving law.”¹⁹⁶ Under such logic, when deciding whether the application of the beyond-a-reasonable-doubt standard to a constitutional legal question is substantive under the reverse-*Erie* doctrine, it is persuasive that the U.S. Supreme Court has held that the burden of proof (which includes the standard of proof) for evidentiary questions is substantive for purposes of *Erie* and reverse-*Erie*.¹⁹⁷

In a reverse-*Erie* case predating *Erie* itself, the U.S. Supreme Court recognized that the burden of proof is “part of the very substance” of a party’s case.¹⁹⁸ In *Central Vermont Railway Co. v. White*, the U.S. Supreme Court considered a claim under the Federal Employers’ Liability Act brought in Vermont state court.¹⁹⁹ In contrast, Vermont required that the plaintiff prove that he was not guilty of contributory negligence.²⁰⁰ The Court held that the federal burden of proof should apply rather than the Vermont rule, holding “it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure.”²⁰¹

In three cases decided in four years, the U.S. Supreme Court held that the burden of proof was “substantive,” and thus, required application of state law in the *Erie* context and federal law in the reverse-*Erie* context. In *Cities Service Oil Co. v. Dunlap*,²⁰² the U.S. Supreme Court held that the federal court should apply a Texas rule asserting that the party

¹⁹⁵ CLERMONT, *supra* note 48, at 217.

¹⁹⁶ *Id.* at 217–18 (quoting Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 863, 865 (1992)).

¹⁹⁷ See *Burden of Proof*, BLACK’S LAW DICTIONARY (12th ed. 2024) (“A party’s duty to prove a disputed assertion or charge; a proposition regarding which of two contending litigants loses when there is no evidence on a question or when the answer is simply too difficult to find. The burden of proof includes both the *burden of persuasion* and the *burden of production*.”); *Standard of Proof*, BLACK’S LAW DICTIONARY (12th ed. 2024) (“The degree or level of proof demanded in a specific case, such as ‘beyond a reasonable doubt’ or ‘by a preponderance of the evidence’; a rule about the quality of the evidence that a party must bring forward to prevail.”).

¹⁹⁸ Cent. Vt. Ry. Co. v. White *ex rel.* White, 238 U.S. 507, 512 (1915).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Cities Serv. Oil Co. v. Dunlap, 308 U.S. 208 (1939).

attacking the legal title of land claiming a superior equity in the land carries the burden of proof.²⁰³ The Court said:

[W]e think it relates to a substantial right upon which the holder of recorded legal title to Texas land may confidently rely. Petitioner was entitled to the protection afforded by the local rule . . . Proof that petitioner did not purchase for value and in good faith was "part of the very substance" of respondents' cause.²⁰⁴

Likewise, in *Palmer v. Hoffman*,²⁰⁵ citing to *Cities Service Oil Company*, the Court held, "[t]he question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases (*Erie R. Co. v. Tompkins*, 304 U.S. 64) must apply."²⁰⁶

In a reverse-*Erie* case, in *Garrett v. Moore-McCormack Co.*,²⁰⁷ a plaintiff seaman brought suit under a federal statute called the Jones Act in a Pennsylvania state court for an injury that occurred at sea, and at issue was the validity of a release of liability that the plaintiff signed.²⁰⁸ The Pennsylvania courts applied the Jones Act but held that the burden of proof relating to the validity of a release was procedural, not substantive, and thus applied Pennsylvania state law.²⁰⁹ Pennsylvania state law required the plaintiff to sustain the burden of proof when attacking the validity of a release.²¹⁰ Federal law required the person trying to get a seaman to release his rights to show that it was adequately executed.²¹¹ The U.S. Supreme Court reversed the Pennsylvania Supreme Court, holding that the federal burden of proof for a release must apply because the burden of proof "was a part of the very substance of his claim and cannot be considered a mere incident of a form of procedure."²¹²

The above case law provides further support that the application of the beyond-a-reasonable-doubt standard of proof is substantive for purposes of the reverse-*Erie* doctrine and thus federal law applies. As described in Part II, the applicable

²⁰³ *Id.* at 212.

²⁰⁴ *Id.* (quoting *Cent. Vt. Ry. Co.*, 238 U.S. at 512).

²⁰⁵ *Palmer v. Hoffman*, 318 U.S. 109 (1943).

²⁰⁶ *Id.* at 117.

²⁰⁷ *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 239 (1942).

²⁰⁸ *Id.* at 240-41.

²⁰⁹ *Id.* at 242.

²¹⁰ *Id.*

²¹¹ *Id.* at 247-48.

²¹² *Id.* at 248-49.

federal law for reviewing constitutional challenges to legislative enactments entails applying the substantive constitutional doctrine with no heightened standard of proof.

C. Even If Procedural, Federal Law Applies Under *Felder*

Despite the strong arguments in favor of viewing the standard of proof as part of the substantive law courts apply, even if one were to view the standard of proof as procedural, under the *Felder* balancing test, it violates the Supremacy Clause for state courts to apply the beyond-a-reasonable-doubt standard of proof.

State application of the beyond-a-reasonable-doubt standard of proof unnecessarily burdens federal constitutional rights and may be outcome determinative. In both the civil and criminal contexts, the U.S. Supreme Court has held that state courts cannot apply state rules or laws, even if procedural in nature, that unnecessarily burden federal rights.

Before turning to the *Felder* balancing test, it is helpful to set the stage with *Brown v. Western Railway of Alabama*, where the U.S. Supreme Court emphasized both the concern about outcome differences and the importance of not applying state rules or enactments that unnecessarily burden federal rights.²¹³ In *Brown*, the plaintiff brought an action in Georgia state court alleging a violation of the Federal Employers' Liability Act.²¹⁴ The state court dismissed the action applying a local rule "to construe pleading allegations 'most strongly against the pleader,'" ²¹⁵ which was stricter than federal practice.²¹⁶ Noting concerns about a resulting lack of uniformity in the adjudication of federal rights, the Court held that the state court erred in applying the local rule.²¹⁷ The Court reasoned that "[s]trict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws."²¹⁸

In *Felder v. Casey*,²¹⁹ the U.S. Supreme Court engaged in a balancing analysis to ultimately reject the application of a state

²¹³ *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 296–99 (1949).

²¹⁴ *Id.* at 294.

²¹⁵ *Id.* at 295.

²¹⁶ *Id.* at 295–98.

²¹⁷ *Id.* at 299.

²¹⁸ *Id.* at 298.

²¹⁹ *Felder v. Casey*, 487 U.S. 131, 131 (1988).

procedural law.²²⁰ The plaintiff filed a Section 1983 lawsuit in Wisconsin state court.²²¹ Wisconsin had a notice-of-claim statute, requiring that plaintiffs bringing suit in state court against governmental defendants notify the defendant of certain aspects related to the suit and then wait 120 days before filing the suit.²²² The U.S. Supreme Court engaged in a balancing analysis to determine that the state law was inconsistent with federal law:

Because the notice-of-claim statute at issue here conflicts in both its purpose and effects with the remedial objectives of § 1983, and because its enforcement in such actions will frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court, we conclude that the state law is pre-empted when the § 1983 action is brought in a state court.²²³

The U.S. Supreme Court cited to the Supremacy Clause as the constitutional force behind its refusal to apply the state procedural law:

Under the Supremacy Clause of the Federal Constitution, “[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,” for “any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.”²²⁴

In *Felder*, “although preemption terminology might remain in play, reverse-*Erie*’s balancing methodology is phasing in and taking over in reality.”²²⁵ In such judicial choice of law, the Supremacy Clause is still the constitutional force displacing the state law, but judges must engage in a balancing test.²²⁶

Engaging in a similar type of balancing as in *Felder*, in *Johnson v. Fankell*,²²⁷ the U.S. Supreme Court held that the federal law regarding interlocutory appeals did not apply in state court.²²⁸ In *Johnson v. Fankell*, the plaintiff filed a

²²⁰ *Id.* at 150–51, 153.

²²¹ *Id.* at 135.

²²² *Id.* at 134.

²²³ *Id.* at 138.

²²⁴ *Id.* (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)).

²²⁵ *Clermont*, *supra* note 16, at 41.

²²⁶ *See id.*

²²⁷ *Johnson v. Fankell*, 520 U.S. 911 (1997).

²²⁸ *Id.* at 913.

Section 1983 suit in Idaho state court.²²⁹ The defendants moved to dismiss on qualified immunity grounds.²³⁰ The district court denied the motion to dismiss, and the defendants appealed the denial of that motion.²³¹ Relying on an Idaho Appellate Rule, the Idaho Supreme Court held that an order denying summary judgment was not appealable as an interlocutory appeal.²³² The defendants appealed to the U.S. Supreme Court, arguing that allowing for interlocutory appeals of denial of qualified immunity was necessary to protect “a substantial federal right.”²³³

The U.S. Supreme Court disagreed with the *Johnson* defendants, reasoning: (1) the dismissal of the “appeal rested squarely on a neutral state Rule regarding the administration of the state courts,” and (2) the application of the state procedural rule was “less an interference with *federal* interests than a judgment about how best to balance the competing *state* interests of limiting interlocutory appeals and providing state officials with immediate review of the merits of their defense.”²³⁴ The Court also noted that the denial of the interlocutory appeal was not “outcome determinative” like it was in *Felder*.²³⁵

The U.S. Supreme Court has embraced the same concerns as outlined in the above civil cases²³⁶ about burdening federal rights in criminal contexts. For example, *Chapman v.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* at 913–14.

²³² *Id.* at 914.

²³³ *Id.*

²³⁴ *Id.* at 918–20.

²³⁵ *Id.* at 920.

²³⁶ As recently as 2025, the U.S. Supreme Court has continued to express concern regarding state court practices that burden a federal right in civil contexts. *Williams v. Reed*, 145 S. Ct. 465 (2025). In *Williams v. Reed*, individuals seeking unemployment benefits in Alabama sued the Alabama Secretary of Labor, alleging the Department of Labor deprived them of due process by unlawfully delaying processing of their benefits. *Id.* at 467. The Alabama Supreme Court ruled that the plaintiffs “could not sue under § 1983 to challenge delays in the administrative process until the claimants completed that process.” *Id.* at 468. The U.S. Supreme Court referred to the Alabama ruling as a “catch-22” because the claimants would not be able to sue until they completed the administrative process, but the relief they sought was to expedite the process. *Id.* Citing to *Felder* in its reasoning, the U.S. Supreme Court held, “In the unusual circumstances presented here—where a state court’s application of a state exhaustion requirement in effect immunizes state officials from § 1983 claims challenging delays in the administrative process—state courts may not deny those 1983 claims on failure-to-exhaust grounds.” *Id.* at 470.

*California*²³⁷ demonstrates a rejection of a state court's rule relating to litigating federal constitutional claims when the rule fails to adequately protect the federal constitutional rights implicated. In *Chapman*, the U.S. Supreme Court rejected California's harmless error standard for when evaluating whether reversal for a constitutional violation was warranted.²³⁸ In so holding, the U.S. Supreme Court distinguished between a state's harmless-error rule where the only error was of "state procedure or state law" and an error where the U.S. Constitution was violated.²³⁹

The *Chapman* Court held that the question implicated in the case was a federal question: "Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied."²⁴⁰ The Court then expressly assumed responsibility for protecting federal rights in state court: "With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights."²⁴¹ The U.S. Supreme Court had "no hesitation" in announcing it was the Court's responsibility to protect the federal right at question.²⁴²

The exclusionary rule is another example of where states must apply a federal rule when determining whether the Federal Constitution is violated.²⁴³ In *Mapp*, the U.S. Supreme Court referred to requiring that states apply the exclusionary rule as "logically and constitutionally necessary."²⁴⁴ The

²³⁷ *Chapman v. California*, 386 U.S. 18 (1967).

²³⁸ *Id.* at 23-24.

²³⁹ *Id.* at 21.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* ("We have no hesitation in saying that the right of these petitioners not to be punished for exercising their Fifth and Fourteenth Amendment right to be silent—expressly created by the Federal Constitution itself—is a federal right which, in the absence of appropriate congressional action, it is our responsibility to protect by fashioning the necessary rule.").

²⁴³ *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) ("Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government.").

²⁴⁴ *Id.* at 655-56.

Mapp Court reasoned that “the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold.”²⁴⁵ The Court continued, “[t]he very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts.”²⁴⁶

Making it harder to prove a constitutional violation in state court than in federal court is an unnecessary burden on a federal right. By definition, adding the beyond-a-reasonable-doubt standard makes it harder to prove the federal constitutional claim. Any state interest in providing substantial deference to legislators cannot prevail over the federal interest in protecting federal constitutional rights. The U.S. Supreme Court has emphasized the important federal interest in not unnecessarily burdening federal rights in both the civil and criminal contexts.²⁴⁷ Further, as has been detailed in the *Plemmons* case, the beyond-a-reasonable-doubt standard of proof can be outcome determinative. Thus, applying the beyond-a-reasonable-doubt standard to federal constitutional claims presents the same concern as in *Felder*—different outcomes “based solely on whether the claim is asserted in state or federal court.”²⁴⁸ State courts’ use of the beyond-a-reasonable-doubt standard differs from *Johnson* where the interests were solely state interests, not federal interests, and the procedure was not outcome determinative.²⁴⁹ Applying the test announced in *Felder* and applied in *Johnson*, even viewing states’ application of the beyond-a-reasonable-doubt standard of proof as procedural, states’ application of the heightened standard violates the Supremacy Clause.

In short, no matter how one categorizes the beyond-a-reasonable-doubt standard of proof, whether it be substantive or procedural, federal law must apply over state law. When states add an additional layer of deference to federal constitutional doctrines, it is improper under reverse-*Erie* and violates the Supremacy Clause.

²⁴⁵ *Id.* at 657.

²⁴⁶ *Id.* at 657–58 (quoting *Elkins v. United States*, 364 U.S. 206, 221 (1960)).

²⁴⁷ See, e.g., *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 298 (1949); *Chapman*, 386 U.S. at 21; *Mapp*, 367 U.S. at 655.

²⁴⁸ *Felder v. Casey*, 487 U.S. 131, 138 (1988).

²⁴⁹ *Johnson v. Fankell*, 520 U.S. 911, 918–20 (1997).

V

A PRESSING ISSUE

The incorrect application of federal constitutional law by state courts is important because federal constitutional claims are routinely litigated in state court, often with little chance of review from the U.S. Supreme Court.²⁵⁰

The U.S. Supreme Court takes very few state court cases.²⁵¹ An article detailing the declining state court docket before the U.S. Supreme Court found that as of October 3, 2024, only two out of twenty-eight cases that the Court agreed to hear that term arose from state court.²⁵² From 2005 to 2019, the percentage of cases before the U.S. Supreme Court arising from state courts oscillated between seven percent and twenty percent.²⁵³ This is an extremely small number when considering the number of cases filed in state court. Between 2012 and 2022, 98.5 percent of U.S. cases were filed in state court, as compared to 1.5 percent filed in federal court.²⁵⁴

Federal constitutional issues are routinely litigated in state courts. Indeed, many criminal cases provide avenues to challenge legislative enactments as unconstitutional, and defendants in state court prosecutions generally must litigate their cases in state courts. Despite the significant number of criminal cases litigated each year in state court, in the 2022 U.S. Supreme Court term, there were fifty-six merits rulings, but only one merits ruling that came from a state criminal conviction.²⁵⁵

The unlikelihood of review from a state criminal conviction is particularly stark when considering the fact that the U.S. Supreme Court takes far more cases from the paid appeal docket—as opposed to the *in forma pauperis* docket—even

²⁵⁰ “[S]tate trial courts and state IACs will be disposing of the vast majority of cases dealing with federal issues in state courts.” Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 362 (2002); see also Clermont, *supra* note 16, at 4 (“[A]s everybody knows, the volume of business in state courts dwarfs that in federal courts, and federal law covers a wide array of litigation-producing activities that end up in state court.”).

²⁵¹ Bannon, *supra* note 13.

²⁵² Feldman, *supra* note 13.

²⁵³ *Id.*

²⁵⁴ Nat’l Ctr. for State Cts., *Federal and State Caseloads: Trends, 2012–2023*, CT. STATS. PROJECT, <https://www.courtstatistics.org/court-statistics/state-versus-federal-caseloads> [<https://perma.cc/4GQC-8CPU>].

²⁵⁵ Steve Vladeck, *Bonus 36: Why Congress Should Expand the Supreme Court’s Docket*, ONE FIRST (July 20, 2023), <https://www.stevavladeck.com/p/bonus-36-why-congress-should-expand> [<https://perma.cc/XU3N-3594>].

though those cases are a minority of the docket.²⁵⁶ As Professor Steve Vladeck noted, in the October 2020 Term, “paid filings accounted for 34.48% of all appeals, but 95.83% of granted cases.”²⁵⁷ When considering how many criminal defendants are indigent and represented by public defenders, this statistic further indicates how unlikely constitutional rights in criminal proceedings are to be addressed by the U.S. Supreme Court.

Another example of how often federal constitutional rights litigation occurs in state courts appears in the Second Amendment context. State courts hear almost twice as many Second Amendment claims as federal courts.²⁵⁸ In a study by Professors Eric Ruben and Joseph Blocher, the authors found that from June 26, 2008, to February 1, 2016, 441 Second Amendment challenges were decided by state appellate courts as compared to 221 Second Amendment challenges decided by federal appellate courts.²⁵⁹

There are also limitations in the U.S. Supreme Court’s ability to review constitutional claims litigated in state courts.²⁶⁰ One such limitation is that a party with standing must ask the U.S. Supreme Court to review the case.²⁶¹ Given the significant effort and cost of petitioning the U.S. Supreme Court for certiorari review, with little chance of success, many cases where important constitutional issues are litigated never even appear at the U.S. Supreme Court’s doorstep.

Thus, a significant number of constitutional challenges are litigated in state courts. Many state courts are applying an inappropriately high constitutional standard, and the U.S. Supreme Court is rarely intervening in these cases. This leaves many people subject to potentially unconstitutional legislative enactments without adequate protection.

²⁵⁶ Steve Vladeck, 98. *Why is the Court’s Docket Shrinking?*, ONE FIRST (Sep. 9, 2024), <https://www.stevevladeck.com/p/98-why-is-the-courts-docket-shrinking> [<https://perma.cc/4Y9R-NNDR>].

²⁵⁷ *Id.*

²⁵⁸ Eric Ruben, *SCOTUS’s 2nd Amendment Decision Leaves Open Questions for State Courts*, STATE CT. REP. (June 26, 2024), <https://statecourtreport.org/our-work/analysis-opinion/scotuss-2nd-amendment-decision-leaves-open-questions-state-courts> [<https://perma.cc/SGY5-E8AM>]; see also Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433, 1473 (2018).

²⁵⁹ Ruben & Blocher, *supra* note 258, at 1455, 1473.

²⁶⁰ Anthony J. Bellia Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1505 (2006).

²⁶¹ *Id.* at 1505 n.12.

CONCLUSION

State courts' continued use of the beyond-a-reasonable-doubt standard when determining whether a legislative enactment violates the U.S. Constitution presents a serious problem of policy and doctrine. Forty-four states and the District of Columbia have case law reciting the high standard when evaluating federal constitutional claims. An application of the reverse-*Erie* doctrine demonstrates that when state courts apply the beyond-a-reasonable-doubt standard, they fail to apply the proper federal law as required by the Supremacy Clause. State courts are a critical avenue by which many challenge the constitutionality of legislative enactments, and the persistent improper application of federal constitutional law should concern us all.

APPENDIX

SURVEY OF WHICH U.S. STATES HAVE THE
BEYOND-A-REASONABLE-DOUBT STANDARD

State	BRD Standard Cited in Post-Morrison Appellate Case (and Not Disavowed by State Appellate Court) ²⁶²
Alabama	Yes ^{*263}
Alaska	Yes ^{*264}
Arizona	No ²⁶⁵

²⁶² The “*” indicates there was case law in the jurisdiction that applies the beyond-a-reasonable-doubt standard when reviewing legislative enactments, but the case law did not describe the standard with the exact phrase “unconstitutional beyond a reasonable doubt.”

²⁶³ *Ex parte D.W.*, 835 So. 2d 186, 190 (Ala. 2002) (“All these principles are embraced in the simple statement that *it is the recognized duty of the court to sustain the act unless it is clear beyond reasonable doubt that it is violative of the fundamental law.*” (quoting *Ala. State Fed’n of Lab. v. McAdory*, 18 So. 2d 810, 814–15 (Ala. 1944), *cert. dismissed*, 325 U.S. 450 (1945))); *see also* *State v. Solomon*, 274 So. 3d 1017, 1026 (Ala. Crim. App. 2018) (analyzing whether criminal statute violated the federal Due Process Clause and stating “it is the recognized duty of the court to sustain the act unless it is *clear beyond reasonable doubt that it is violative of the fundamental law*” (quoting *Ala. State Fed’n of Lab.*, 18 So. 2d at 815)).

²⁶⁴ *State v. N. Pac. Fishing, Inc.*, 485 P.3d 1040, 1047 (Alaska 2021) (“‘A presumption of constitutionality applies,’ and we resolve any doubts in favor of a law’s constitutionality.” (quoting *Alaska Dep’t of Revenue v. Andrade*, 23 P.3d 58, 71 (Alaska 2001))).

²⁶⁵ *See* *Gallardo v. State*, 336 P.3d 717, 720 (Ariz. 2014) (“Assessing the constitutionality of a law fundamentally differs from determining the existence of historical facts, the determination of which is subject to deference. We therefore disapprove the use of the ‘beyond a reasonable doubt’ standard for making constitutionality determinations.” (citation omitted)). In *Gallardo v. State*, the constitutional challenge at issue in the case was a challenge under the Arizona constitution, but the Arizona Supreme Court used broad language when disavowing the use of the beyond-a-reasonable-doubt standard. *Id.* In subsequent opinions addressing federal constitutional claims, the Arizona Supreme Court cites *Gallardo* to assert it applied *de novo* review and did not recite the beyond-a-reasonable-doubt standard. *See, e.g.,* *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 899 (Ariz. 2019); *Horne v. Polk*, 394 P.3d 651, 654 (Ariz. 2017). A federal question was at issue in *State v. Arevalo*, and in a concurrence, three justices discussed how the Arizona Supreme Court abandoned the beyond-a-reasonable-doubt standard as part of their discussion against the continued use of the presumption of constitutionality. 470 P.3d 644, 647, 652 (Ariz. 2020) (Bolick, J., concurring).

Arkansas	Yes ^{*266}
California	Yes ^{*267}
Colorado	Yes ²⁶⁸
Connecticut	Yes ²⁶⁹
Delaware	Yes ^{*270}
Florida	Yes ^{*271}
Georgia	No
Hawaii	Yes ²⁷²
Idaho	Yes ²⁷³

²⁶⁶ *Alpe v. Fed. Nat'l Mortg. Ass'n*, 662 S.W.3d 650, 652 (Ark. 2023) ("Any doubt as to the constitutionality of a statute must be resolved in favor of its constitutionality."); *see also* *Smith v. Pavan*, 505 S.W.3d 169, 177 (Ark. 2016) ("Any doubt as to the constitutionality of a statute must be resolved in favor of its constitutionality, and before an act will be held unconstitutional, the incompatibility between it and the constitution must be clear."), *rev'd*, 582 U.S. 563 (2017).

²⁶⁷ *Copley Press, Inc. v. Superior Ct.*, 141 P.3d 288, 308 (Cal. 2006) ("Unconstitutionality must be clearly, positively, and certainly shown by the party attacking the statute, and we resolve doubts in favor of the statute's validity.").

²⁶⁸ *People v. Moreno*, 506 P.3d 849, 852 (Colo. 2022) ("A litigant challenging the validity of a statute must prove the statute is unconstitutional beyond a reasonable doubt.").

²⁶⁹ *Alico, LLC v. Town of Somers*, 304 A.3d 851, 855 (Conn. 2023) ("A validly enacted statute carries a strong presumption of constitutionality, and a party who wishes to challenge it on constitutional grounds bears the heavy burden of proving its unconstitutionality beyond a reasonable doubt.").

²⁷⁰ *Hoover v. State*, 958 A.2d 816, 821 (Del. 2008) ("Further, '[a]ll reasonable doubts as to the validity of a law must be resolved in favor of the constitutionality of the legislation.'" (alteration in original) (quoting *McDade v. State*, 693 A.2d 1062, 1065 (Del. 1997))); *see also* *State v. Reeves*, 316 A.3d 408, 428 (Del. Super. Ct. 2024) ("To the extent there are reasonable doubts as to the validity of a law, those doubts must be resolved in favor of the constitutionality of the legislation.").

²⁷¹ *Fla. Dep't of Revenue v. DIRECTV, Inc.*, 215 So. 3d 46, 50 (Fla. 2017) ("All statutes come 'clothed in a presumption of constitutionality,' and this Court will invalidate a statute only if a challenger has shown its invalidity 'beyond reasonable doubt.'" (quoting *Crist v. Fla. Ass'n of Crim. Def. Laws.*, 978 So. 2d 134, 139 (Fla. 2008))).

²⁷² *State v. Calaycay*, 449 P.3d 1184, 1195 (Haw. 2019) ("[W]here it is alleged that the legislature has acted unconstitutionally, this court has consistently held that every enactment of the legislature is presumptively constitutional, and a party challenging the statute has the burden of showing unconstitutionality beyond a reasonable doubt. The infraction should be plain, clear, manifest, and unmistakable." (quoting *State v. Gaylord*, 890 P.2d 1167, 1177–78 (Haw. 1995))).

²⁷³ *State v. Bennett*, 125 P.3d 522, 525 (Idaho 2005) ("Additionally, 'it is a general rule that "a legislative act should be held to be constitutional until it is shown beyond a reasonable doubt that it is not so, and that a law should not be

Illinois	Yes ^{*274}
Indiana	Yes ^{*275}
Iowa	Yes ²⁷⁶
Kansas	Yes ^{*277}
Kentucky	Yes ²⁷⁸
Louisiana	Yes ^{*279}
Maine	Yes ^{*280}
Maryland	No ²⁸¹

held to be void for repugnancy to the Constitution in a doubtful case.”” (quoting *Bradbury v. Idaho Jud. Council*, 28 P.3d 1006, 1011 (Idaho 2001) (quoting *Sanderson v. Salmon River Canal Co.*, 263 P. 32, 35 (Idaho 1927))).

²⁷⁴ *Kopf v. Kelly*, 240 N.E.3d 1094, 1109–10 (Ill. 2024) (“‘All statutes carry a strong presumption of constitutionality,’ and they must be upheld as constitutional ‘whenever reasonably possible, resolving all doubts in favor of their validity.’” (quoting *People v. Pepitone*, 106 N.E.3d 984, 988 (Ill. 2018))).

²⁷⁵ *State v. Timbs*, 134 N.E.3d 12, 23 (Ind. 2019) (“[W]e presume the statute is constitutional and ‘resolve all reasonable doubts concerning [the] statute in favor of constitutionality.’” (second alteration in original) (quoting *State v. S.T.*, 82 N.E.3d 257, 259 (Ind. 2017), *modified* (Mar. 8, 2023))).

²⁷⁶ *State v. Newton*, 929 N.W.2d 250, 254 (Iowa 2019) (“Because we presume statutes are constitutional, ‘[t]he challenger bears a heavy burden, because it must prove the unconstitutionality beyond a reasonable doubt.’” (alteration in original) (quoting *Taft v. Iowa Dist. Ct.*, 879 N.W.2d 634, 638 (Iowa 2016))).

²⁷⁷ *State v. Bollinger*, 352 P.3d 1003, 1010 (Kan. 2015) (“This court presumes that statutes are constitutional and resolves all doubts in favor of passing constitutional muster.”).

²⁷⁸ *Teco/Perry Cnty. Coal v. Feltner*, 582 S.W.3d 42, 45 (Ky. 2019) (“In considering an attack on the constitutionality of legislation, this Court has continually resolved any doubt in favor of constitutionality rather than unconstitutionality.” (quoting *Hallahan v. Mittlebeeler*, 373 S.W.2d 726, 727 (Ky. 1963))).

²⁷⁹ *See State v. Hill*, 341 So. 3d 539, 545 n.3 (La. 2020) (“As a general matter, statutes are presumed constitutional, and any doubt is to be resolved in the statute’s favor. . . . ‘Constitutional scrutiny favors the statute. Statutes are presumed to be valid, and the constitutionality of a statute should be upheld whenever possible.’” (citations omitted) (quoting *State v. Griffin*, 495 So. 2d 1306, 1308 (La. 1986))).

²⁸⁰ *Jones v. Sec’y of State*, 238 A.3d 982, 988 (Me. 2020) (“‘[A]ll reasonable doubts must be resolved in favor of the constitutionality’ of the enactment.” (alteration in original) (quoting *Goggin v. State Tax Assessor*, 191 A.3d 341, 347 (Me. 2018))).

²⁸¹ There was a Maryland Court of Appeals case, *Kane v. Bd. of Appeals of Prince George’s Cnty.*, which recited a reasonable-doubt standard for municipal ordinances as part of a larger description of what happened in a 1959 case. 887 A.2d 1060, 1073–74 (Md. 2005) (“In *McBriety v. Baltimore*, 148 A.2d 408 (Md. 1959), a Baltimore City ordinance requiring the licensing and registration of rental properties was challenged. The Court’s analysis first pointed out that ‘[t]here is also a presumption that a municipal ordinance is reasonable and for the public good, and the burden of proving the contrary is on those who attack it.’ *Id.*

Massachusetts	Yes ²⁸²
Michigan	Yes* ²⁸³
Minnesota	Yes ²⁸⁴
Mississippi	Yes* ²⁸⁵
Missouri	Yes* ²⁸⁶
Montana	Yes ²⁸⁷

at 414. If there are any reasonable doubts regarding the validity of the ordinance, they are resolved in its favor. *Id.* The Court also stated that this presumption remains, even if the exercise of police power may cause a loss to the individual. *Id.*” (alteration in original)). Because it appears that reference to the validity of ordinances was part of a description of the 1959 case, as opposed to seemingly citing a standard being applied in the current case, and was not stated specific to constitutional challenges, I did not count the case as indicating Maryland had current good law that employed the beyond-a-reasonable-doubt standard.

²⁸² *Commonwealth v. Dufresne*, 181 N.E.3d 1050, 1058 (Mass. 2022) (“The challenging party bears the burden of demonstrating beyond a reasonable doubt that there are no conceivable grounds which could support [the statute’s] validity” (alteration in original)) (quoting *Gillespie v. City of Northampton*, 950 N.E.2d 377, 382 (Mass. 2011))).

²⁸³ *Bonner v. City of Brighton*, 848 N.W.2d 380, 388 (Mich. 2014) (“Every reasonable presumption or intendment must be indulged in favor of the validity of the act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity.” (quoting *Cady v. Detroit*, 286 N.W. 805 (Mich. 1939))).

²⁸⁴ *State v. Hatch*, 962 N.W.2d 661, 663 (Minn. 2021) (“[W]e will ‘uphold a statute unless the challenging party demonstrates that the statute is unconstitutional beyond a reasonable doubt.’” (quoting *State v. Craig*, 826 N.W.2d 789, 791 (Minn. 2013))).

²⁸⁵ *Kansler v. Miss. Dep’t of Revenue*, 263 So. 3d 641, 645 (Miss. 2018) (“The party challenging the constitutionality of a statute is burdened with carrying his case beyond all reasonable doubt before this Court has authority to hold the statute, in whole or in part, of no force or effect.” (quoting *In re T.L.C.*, 566 So. 2d 691, 696 (Miss. 1990), *overruled on other grounds by In re J.T.*, 188 So. 3d 1192 (Miss. 2016))).

²⁸⁶ *State v. Williams*, 673 S.W.3d 467, 473 (Mo. 2023) (“Statutes must, if possible, be construed as consistent with the Constitution; doubts are to be resolved in favor of validity[.]” (alteration in original) (quoting *State v. Young*, 695 S.W.2d 882, 883 (Mo. 1985))), *cert. denied*, 144 S. Ct. 1039 (2024); *cf.* *Ambers-Phillips v. SSM DePaul Health Ctr.*, 459 S.W.3d 901, 905 (Mo. 2015) (“The Court ‘resolve[s] all doubt in favor of the [statute’s] validity.’” (alterations in original) (quoting *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 5 (Mo. 1984))).

²⁸⁷ *State v. Pine*, 548 P.3d 390, 395 (Mont. 2023) (“When reviewing ‘legislative enactments, the constitutionality of a legislative enactment is *prima facie* presumed, and every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt.’ Furthermore, ‘the party challenging a statute bears the burden of proving it is unconstitutional beyond a reasonable doubt and, if any doubt exists, it must be resolved in favor of the statute.’” (quoting *State v. Sedler*, 473 P.3d 406, 409 (Mont. 2020))).

Nebraska	Yes ^{*288}
Nevada	No
New Hampshire	Yes ^{*289}
New Jersey	Yes ^{*290}
New Mexico	Yes ^{*291}
New York	Yes ²⁹²
North Carolina	Yes ²⁹³

²⁸⁸ State v. Montoya, 933 N.W.2d 558, 581 (Neb. 2019) (“In considering these two constitutional challenges, we presume § 28-707 to be constitutional and resolve all reasonable doubts in favor of its constitutionality. The burden to clearly demonstrate that a statute is unconstitutional rests upon the party making the claim of unconstitutionality. A penal statute must be construed so as to meet constitutional requirements if such can reasonably be done.” (footnotes omitted)).

²⁸⁹ Deere & Co. v. State, 130 A.3d 1197, 1207 (N.H. 2015) (“In reviewing a legislative act, we presume it to be constitutional and will not declare it invalid except upon inescapable grounds. . . . When doubts exist as to the constitutionality of a statute, those doubts must be resolved in favor of its constitutionality.” (quoting Am. Fed’n of Tchrs.—N.H. v. State, 111 A.3d 63, 68 (N.H. 2015))).

²⁹⁰ State v. Higginbotham, 313 A.3d 847, 858 (N.J. 2024) (“We will thus not strike a statute as unconstitutional ‘unless its repugnancy to the Constitution is clear beyond a reasonable doubt.’” (quoting State v. Smith, 276 A.3d 1114, 1124 (N.J. 2022))).

²⁹¹ State ex rel. Foy v. Austin Cap. Mgmt., Ltd., 355 P.3d 1, 10 (N.M. 2015) (“Defendants bear the burden of proving that [the legislative enactment] is unconstitutional beyond all reasonable doubt.”).

²⁹² Walt Disney Co. v. Tax Appeals Trib., 249 N.E.3d 1174, 1181 (N.Y. 2024) (“Appellants argue that this construction of former Tax Law § 208(9)(o) facially violates the dormant Commerce Clause. They must therefore ‘surmount the presumption of constitutionality accorded to legislative enactments by proof beyond a reasonable doubt’” (quoting Matter of Moran Towing Corp. v. Urbach, 787 N.E.2d 624, 627 (N.Y. 2003))); People v. Davis, 912 N.E.2d 1044, 1047 (N.Y. 2009) (“[A] party who asserts that a statute is facially unconstitutional must demonstrate ‘beyond a reasonable doubt’ that the statute suffers from ‘wholesale constitutional impairment.’” (citations omitted) (quoting *In re E.S.*, 863 N.E.2d 100, 105 (N.Y. 2007))); see also People v. Cabrera, 230 N.E.3d 1082, 1087 (N.Y. 2023) (“Preservation of a constitutional challenge, in particular, ‘ensures that the drastic step of striking duly enacted legislation will be taken not in a vacuum but only after the lower courts have had an opportunity to address the issue and the unconstitutionality of the challenged provision has been established beyond a reasonable doubt.’” (quoting People v. Baumann & Sons Buses, Inc., 846 N.E.2d 457, 460 (N.Y. 2006))).

²⁹³ State v. Strudwick, 864 S.E.2d 231, 240 (N.C. 2021) (“It is the burden of the proponent of a finding of facial unconstitutionality to prove beyond a reasonable doubt that an act of the General Assembly is unconstitutional in every sense.”).

North Dakota	Yes ²⁹⁴
Ohio	Yes* ²⁹⁵
Oklahoma	Yes ²⁹⁶
Oregon	No
Pennsylvania	Yes* ²⁹⁷
Rhode Island	Yes ²⁹⁸
South Carolina	Yes ²⁹⁹
South Dakota	Yes* ³⁰⁰
Tennessee	Yes ³⁰¹

²⁹⁴ *State v. Francis*, 882 N.W.2d 270, 274 (N.D. 2016) (“All regularly enacted statutes carry a strong presumption of constitutionality. . . . The presumption of constitutionality is so strong that a statute will not be declared unconstitutional unless its invalidity is, in the court’s judgment, beyond a reasonable doubt.” (quoting *State v. Baxter*, 863 N.W.2d 208, 210–11 (N.D. 2015), *vacated*, 885 N.W.2d 64 (N.D. 2016))).

²⁹⁵ *State v. Greivous*, 223 N.E.3d 323, 329 (Ohio 2022) (“For this court to find R.C. 2953.08(D)(3) unconstitutional, Greivous must establish ‘beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible’ Further, ‘doubts regarding the validity of a legislative enactment are to be resolved in favor of the statute.’” (citations omitted) (first quoting *State ex rel. Dickman v. Defenbacher*, 128 N.E.2d 59, 60 (Ohio 1955); then quoting *State v. Gill*, 584 N.E.2d 1200, 1201 (Ohio 1992))).

²⁹⁶ *State v. Howerton*, 46 P.3d 154, 158 (Okla. Crim. App. 2002) (“A statute is presumed to be constitutional and the person alleging its unconstitutionality has the burden of proving same beyond a reasonable doubt.” (quoting *State v. Johnson*, 877 P.2d 1136, 1139 (Okla. Crim. App. 1992))).

²⁹⁷ *Commonwealth v. Torsilieri*, 316 A.3d 77, 86 (Pa. 2024) (“Indeed, a party challenging legislation as unconstitutional bears a heavy burden, and all doubts are to be concluded in favor of a finding of constitutionality.”).

²⁹⁸ *State v. Vose*, 287 A.3d 997, 1003 (R.I. 2023) (“This Court has held that the party contesting the constitutionality of a statute has ‘the burden of proving beyond a reasonable doubt that the challenged enactment is unconstitutional.’” (quoting *State v. Allen*, 68 A.3d 512, 516 (R.I. 2013))).

²⁹⁹ *Jones v. State*, 889 S.E.2d 590, 595 (S.C. 2023) (“[A] legislative act will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond a reasonable doubt.” (quoting *Curtis v. State*, 549 S.E.2d 591, 597 (S.C. 2001))).

³⁰⁰ *State v. Anderson*, 867 N.W.2d 718, 720 (S.D. 2015) (“To be invalidated a statute must be proved a breach of legislative power beyond a reasonable doubt. Only when the unconstitutionality of a statute is plainly and unmistakably shown will we declare it repugnant to our Constitution.” (quoting *State v. Outka*, 844 N.W.2d 598, 606 (S.D. 2014))).

³⁰¹ *State v. Allison*, 618 S.W.3d 24, 45 (Tenn. 2021) (“Thus, we must ‘indulge every presumption and resolve every doubt in favor of the statute’s constitutionality.’” (quoting *State v. Pickett*, 211 S.W.3d 696, 700 (Tenn. 2007))).

Texas	Yes ^{*302}
Utah	Yes ^{*303}
Vermont	No
Virginia	Yes [*]
Washington	Yes ³⁰⁴
Washington, D.C.	Yes ³⁰⁵
West Virginia	Yes ³⁰⁶
Wisconsin	Yes ³⁰⁷
Wyoming	Yes ^{*308}

³⁰² Treto v. Treto, 622 S.W.3d 397, 401 (Tex. App. 2020) (“We resolve all doubts in favor of a statute’s constitutionality.”).

³⁰³ State v. Outzen, 408 P.3d 334, 338 (Utah 2017) (“Whether a statute is constitutional presents a question of law. We presume the statute is constitutional, and we ‘resolve any reasonable doubts in favor of constitutionality.’” (quoting Brown v. Cox, 387 P.3d 1040, 1043 (Utah 2017))).

³⁰⁴ In re Detention of Herrick, 412 P.3d 293, 295 (Wash. 2018) (“A statute is presumed constitutional, and the party challenging it bears the burden of proving it is unconstitutional beyond a reasonable doubt.”).

³⁰⁵ Richman Towers Tenants’ Ass’n v. Richman Towers LLC, 17 A.3d 590, 620 (D.C. 2011) (“That presumption [of constitutionality] continues in effect ‘until the contrary is shown beyond a reasonable doubt.’” (quoting Hornstein v. Barry, 560 A.2d 530, 533 n.5 (D.C. 1989))).

³⁰⁶ State v. Mills, 844 S.E.2d 99, 104 (W. Va. 2020) (“Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.” (quoting State *ex rel.* Appalachian Power Co. v. Gainer, 143 S.E.2d 351, 353 (W. Va. 1965))).

³⁰⁷ State v. Wood, 780 N.W.2d 63, 71 (Wis. 2010) (“Accordingly, the party raising the constitutional claim . . . must prove that the challenged statute is unconstitutional beyond a reasonable doubt.”).

³⁰⁸ Hardison v. State, 507 P.3d 36, 39 (Wyo. 2022) (“Normally, this burden is heavy in that appellant must clearly and exactly show the unconstitutionality beyond any reasonable doubt.”).