mistake, but have made a very clear one,—so clear that it is not open to rational question." [729] Whether phrased this way or phrased so that a statute is not to be voided unless it is unconstitutional beyond all reasonable doubt, the rule is of ancient origin [730] and of modern adherence.[731] In operation, however, the rule is subject to two influences, which seriously impair its efficacy as a limitation. First, the conclusion that there has been a clear mistake or that there is no reasonable doubt is that drawn by five Justices if a full Court sits. If five Justices of learning and detachment to the Constitution are convinced that a statute is invalid and if four others of equal learning and attachment are convinced it is valid, the convictions of the five prevail over the convictions or doubts of the four. Second, the Court has at times made exceptions to the rule in certain categories of cases. Statutory interferences with "liberty of contract" were once presumed to be unconstitutional until proved to be valid; [732] more recently, presumptions of invalidity have expressly or impliedly been applied against statutes alleged to interfere with freedom of expression and of religious freedom, which have been said to occupy a "preferred position" in the constitutional scheme of things.[733]

Exclusion of Extra-Constitutional Tests.—Another maxim of constitutional interpretation is that courts are concerned only with the constitutionality of legislation and not with its motives, policy, or wisdom,[734] or with its concurrence with natural justice, fundamental principles of government, or the spirit of the Constitu-

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[729] *The Origin and Scope of the American Doctrine of Constitutional Law*, in J. THAYER, LEGAL ESSAYS 1, 21 (1908).

[730] *See* Justices Chase and Iredell in Calder v. Bull, 3 U.S. (3 Dall.) 386, 395, 399 (1798).

[731] *E.g.*, Flemming v. Nestor, 363 U.S. 603, 611 (1960).

[732] "But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances." Adkins v. Children's Hospital, 261 U.S. 525, 546 (1923).

[733] Kovacs v. Cooper, 336 U.S. 77, 88 (1949). Justice Frankfurter's concurrence, id. at 89–97, is a lengthy critique and review of the "preferred position" cases up to that time. The Court has not used the expression in recent years but the worth it attributes to the values of free expression probably approaches the same result. Today, the Court's insistence on a "compelling state interest" to justify a governmental decision to classify persons by "suspect" categories, such as race, Loving v. Virginia, 388 U.S. 1 (1967), or to restrict the exercise of a "fundamental" interest, such as the right to vote, Kramer v. Union Free School District, 395 U.S. 621 (1969), or the right to travel, Shapiro v. Thompson, 394 U.S. 618 (1969), clearly imports presumption of unconstitutionality.

[734] "We fully understand . . . the powerful argument that can be made against the wisdom of this legislation, but on that point we have no concern." Noble State Bank v. Haskell, 219 U.S. 104 (1911) (Justice Holmes for the Court). *See also* Trop v. Dulles, 356 U.S. 86, 120 (1958) (Justice Frankfurter dissenting).