REVIEW: KEEPING OUR REPUBLIC

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BERNHARDT, DAVID. YOU REPORT TO ME: ACCOUNTABILITY FOR THE FAILING ADMINISTRATIVE STATE. NEW YORK: ENCOUNTER BOOKS, 2023.

THAPAR, AMUL. THE PEOPLE'S JUSTICE: CLARENCE THOMAS AND THE CONSTITUTIONAL STORIES THAT DEFINE HIM. NEW YORK: REGNERY PUBLISHING, 2023.

WALLACH, PHILIP. WHY CONGRESS. NEW YORK: OXFORD UNIVERSITY PRESS, 2023.

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Americans love Benjamin Franklin. An electricity-experimenting daredevil, an independent thinker whose penchant for pithy one-liners shines through his legendary almanac, and an unflinching partisan for his home state, America's first—and arguably greatest[1]—commonwealth (Pennsylvania), what's not to like?

Perhaps no quotation of Franklin's has endured to greater acclaim than his quip on September 18, 1787, at the end of a grueling summer of drafting a constitution to replace the Articles of Confederation. As the story goes, when asked what kind of government this new constitution would institute, Franklin responded, "A republic, if you can keep it."

Franklin's declaration has reverberated ever since. Justice Neil Gorsuch used it as the title of his 2019 book.[2] Former House Speaker Nancy Pelosi invoked it as she announced that the House would seek to impeach former President Donald Trump.[3] Scores of articles (including this one) have leveraged it for titles and analytical frameworks.[4]

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[1] This assertion is the first, though maybe not the last, for which that disclaimer about the author speaking only for himself is necessary.

[2] NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT (2019).

[3] *Transcript of Pelosi Weekly Press Conference Today*, HOUSE.GOV (Sep. 26, 2019) https://pelosi.house.gov/news/press-releases/transcript-of-pelosi-weekly-press-conference-today-43 ("Article II does not make anyone a king. That's exactly what our Founders avoided. So said Benjamin Franklin when he came out on the Independence Hall steps, and they said, 'Dr. Franklin, what do we have, a monarchy or a Republic?' He said, 'A Republic, if we can keep it.'").

[4] *See, e.g.*, Adam J. White, *A Republic, If We Can Keep It*, THE ATLANTIC (Feb. 4, 2020) https://www.theatlantic.com/ideas/archive/2020/02/a-republic-if-we-can-keep-it/605887/; Michael Kimmage, *A Republic, If You Can Keep It*, AM. PURPOSE (Jul. 11, 2023); Richard R. Beeman, *Perspectives on the Constitution: A Republic, If You Can Keep It*,

Its cultural resonance is as deep now as its revolutionary character was then. But more profound than Franklin's aphorism is the text of that constitution itself. Especially its first word, "we." True, the Constitution's preamble contains high-minded rhetoric about the aspiration to form a union more perfect each day than the one before it. At its core, though, "we" is a statement about where sovereign power lies: the people.

But cognizant of the peril in concentrating power,[5] almost immediately, our charter for a new republic began to divide it. First, the Constitution "split the atom of sovereignty" between the federal government and the states.[6] And from there, in its first three articles, it divided the power that remained in the federal government among three departments: the legislative, the executive, and the judiciary.[7] For any institution under this new constitution to discharge power in a manner inconsistent with what it delineates would be to act ultra vires, beyond the law.

I begin with these first principles not to belabor a Schoolhouse Rock conception of American democracy,[8] but to start with the premise that the legitimate exercise of power in the United States must trace its origin to this constitutional structure. Two leading originalist scholars of their generation—William Baude and Stephen Sachs—treat this idea like a chain of title, arguing that our law "comprises the rules which were law at the Founding and everything that has been lawfully done under them since."[9] Although this framework may more commonly examine claims about rights, it applies with equal force to matters of structure.[10] This idea that process drives the legitimacy of legal change is uniquely part of our constitutional fabric and, indeed, our law.[11]

Against that backdrop enter three new books: *Why Congress* by Philip Wallach, *You Report to Me* by David Bernhardt, and *The People's Justice* by Judge Amul Thapar. Superficially, the first is about Article I, the second is about Article II, and the third is about Article III. Really, though, they offer complementary perspectives on the structural separation of powers: the first offering perspective from outside the institution, the last two from within. And taken together, they paint a rich portrait of what a government that operates in accordance with our Constitution might look like. Just as importantly, they offer a call to reclaim the substantive value of procedure—the idea that self-government according to a rule of law prescribed in advance through methods that are ours until we change them has inherent value, independent of particular outcomes.

NATIONAL CONSTITUTION CENTER. https://constitutioncenter.org/education/classroom-resource-library/classroom/perspectives-on-the-constitution-a-republic-if-you-can-keep-it.

[5] *See generally* Federalist No. 47.

[6] *See* U.S. Term Limits v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

[7] *See* U.S. CONST. arts. I, II & III.

[8] Though our republic would quite likely be healthier if we leaned into Schoolhouse Rock's civic-minded spirit.

[9] William Baude & Stephen Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 812 (2019). Other scholars, no less thoughtful, would push harder on "lawfully" than others to argue that legitimate changes in legal process can lead to legitimate change to substantive law. *See, e.g.*, Richard Fallon, *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107 (2008) (arguing that non-originalist precedent, for example, can attain the status of binding law through ongoing practice); *cf.* William Baude, *Constitutional Liquidation*, 71 STANFORD L. REV. 1 (2019) (envisioning a more limited role for the evolution of constitutional meaning through historical practice in the face of textual indeterminacy).

[10] *See, e.g.*, Jud Campbell, *General Citizenship Rights*, 132 YALE L.J. 611, 696–97 (2023).

[11] *See* Stephen Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 839 (2015).

I should note here this review essay's ulterior motive: to announce that the Federalist Society's 2024 National Student Symposium, to be held at Harvard Law School, will focus on this structural separation of powers. Specifically, what is the point? And rather than gloss over practical questions of implementation or dwell in the land of hollow ipse dixit (where, unfortunately, talk of the structural separation of powers often languishes), the symposium will focus squarely on the question of why we should care so much about procedure.

In a panel on federalism, we will explore the curious—and sometimes nebulous—line between federal and state governments. We will consider how common law adjudication in states relates to the legislation we demand to make law at the federal level. We will examine how states may regulate the content of substantive rights and whether state regulation may transcend state borders.[12] We will think about the Tenth Amendment. And we will weigh what all of this means for the "double security" federalism ostensibly provides to the people's liberty.[13]

In a panel on executive-legislative relations, we will examine the possible tension between a desire for stability across presidential administrations (implicit in the rule of law) and the president's role in driving policy change (part of the accountability rationale in recent Supreme Court decisions such as *Seila Law*[14]). Along the way, we will consider how useful the unitary executive theory and the nondelegation doctrine might be to analyzing these sorts of questions.

In a panel on judging, we will focus on how the judicial role as it has evolved comports with our constitutional structure. In particular, we will examine universal vacatur under the Administrative Procedure Act, the evolution of standing doctrine (including "special solicitude" for states), and the arguments for and against so-called "judicial supremacy," the idea that judges are the final, unreviewable arbiter of what the law means.

Finally, in a panel on changing how we separate powers, we will confront the question of what to do if we are unsatisfied with how our Constitution configures powers. Can it be changed? If so, how? Elections? New statutes? Judicial reinterpretation? Liquidation? Constitutional amendments? A constitutional convention? We will consider the virtue of large-scale constitutional reform as well as what we can learn from states (and perhaps even judicial reform efforts in other countries, like Israel).[15]

The animating theme of the symposium will be the substantive value of separating power. All three of these books cast new light on that question, making them well worth examining in connection to this symposium.

I. WALLACH

The most substantial book of the trio, Wallach's ode to Congress makes the case that a legislature—for all its warts—remains the one indispensable institution in a republic like ours. Not only is this true as a matter of constitutional first principles, but, Wallach argues, it is also true as a practical matter. Only through the legislative process can Americans reconcile their

[12] *See e.g.*, Tyler v. Hennepin County, 598 U.S. 631 (2023); National Pork Producers v. Ross, 143 S. Ct. 1142 (2023).
[13] THE FEDERALIST NO. 51 (James Madison).
[14] Seila Law v. Consumer Financial Protection Bureau, 140 S. Ct. 2183 (2020).
[15] *Cf.* Jeffrey Sutton, *Administrative Law in the States: An Introduction to the Symposium*, 46 HARV. J.L. & PUB. POL'Y 307 (2023).

"disparate interests, conflicting visions of the good, and divergent judgments about prudent policy" in a way that is legitimate and enduring.[16] That might be true in some sort of metaphysical sense—against some external, outcome-oriented metric, the policies that emerge from Congress might just be "better." But Wallach's thesis is that some combination of the formal imprimatur of a representative institution and the functional bargaining inherent in the legislative process leads to a "viable and functional politics . . . far more valuable to our social well-being than a few technocratically optimal policy choices ever could be."[17] Put more simply, in a republic, the process is the point.

The remainder of the book tracks the effect of how legislative process has evolved on the capacity of Congress. Wallach structures his story in three sections: when Congress worked,[18] how Congress transformed,[19] and the cost of congressional dysfunction,[20] his contemporary diagnosis falling somewhere between declinist screed and low-key cheerleading[21] He closes with three visions for what Congress's future might hold.[22] In contrast to many books of this genre, in which policy recommendations read like a slapdash appendage that cheapens the preceding analysis, Wallach's concluding reflections are the best part of the book.

In the opening section, Wallach offers two vignettes that, in his telling, show Congress at its best. The second is more convincing than the first. Wallach begins by detailing Congress's interactions with the Roosevelt administration during World War II, especially in the realm of domestic policy. Conceding that "even history buffs" might draw a blank as to Congress's role in World War II and acknowledging Congress's tendency to delegate to nascent executive agencies, Wallach nevertheless contends that "delegations were bounded, both in scope and in time, and legislators did not merely recede into the background once they empowered executive branch officials. . . . Their efforts were indispensable in generating the trust in the executive branch's activities (including secretive ones) that was necessary to marshal the nation's resources effectively."[23] Interesting nuggets about the Current Tax Payment Act of 1943 and the reauthorization of the Office of Price Administration notwithstanding, the chapter can have the feel of reverse engineering a totalizing goldilocks justification for Congress's behavior.[24] To be sure, staring down the barrel of the Holocaust amid a nationwide war effort that fueled dramatic social change likely had a certain clarifying effect as to the stakes of congressional action (or inaction). But this chapter was the first of a few occasions where the general zeitgeist of the time

[16] PHILIP WALLACH, WHY CONGRESS 1 (2023).

[17] *Id.* at 3.

[18] *Id.* at Chapters 2–3.

[19] *Id.* at Chapters 4–6.

[20] *Id.* at Chapters 7–8.

[21] *Compare* Beau Baumann, *Americana Administrative Law*, 111 GEORGETOWN L.J. 466 (2023) (accusing conservative judges, in particular, of "deploying cynical and declinist notions of Congress to justify judicial self-aggrandizement"), *with* Simon Bazelon & Matt Yglesias, *The Rise and Importance of Secret Congress*, SLOW BORING (Jun. 21, 2021) https://slowboring.com/p/the-rise-and-importance-of-secret (arguing that out of the spotlight, Congress remains remarkably effective in passing bipartisan legislation on lower-salience issues).

[22] WALLACH, *supra* note 16, at Chapters 9–11.

[23] *Id.* at 47.

[24] *See e.g.*, *id.* at 55 ("[W]e can acknowledge that Congress was obliged to endow the executive with unprecedented power without supposing that the questions of *how* it should do so were obvious or trivial. Congress needed to fashion a regime that was potent but still accountable, capable of beating back hostile empires without itself becoming imperious.")

seems likely to have played a more formative role in shaping congressional behavior than Wallach lets on through his necessarily Congress-centered account.

Wallach's second vignette is more compelling. Complicating the popular narrative about President Johnson and Martin Luther King Jr. as the "great men" of the struggle for civil rights,[25] Wallach focuses on legislative bargaining in Congress laying the groundwork for the broad, enduring social consensus that the Civil Rights Act of 1964 prefigured.[26] It is a tough case. Treating the requirement that two-thirds of senators vote to break what became a 75-day filibuster as a "blessing in disguise" and praising the Senate's "wisdom" in celebrating its "institutional values and therefore the endurance of the American republic" by naming one of its office buildings after Richard Russell, one of the chief architects of that filibuster, are not arguments most scholars would make.[27] But those rhetorical flourishes are peripheral to Wallach's core argument: in contrast to what southerners regarded as the "undemocratic imposition" of *Brown v. Board of Education*,[28] the painstaking legislative process conferred a procedural legitimacy on the Act that preempted meaningful backlash and enabled bipartisan consensus on civil rights that changed the nature of American public opinion.[29]

Wallach describes the legislative maneuvering in detail. It suffices here to make two observations. First, Senate Minority Leader Everett Dirksen (R–IL) bought into the legislative process, tinkered with the bill around the edges, and ultimately claimed credit for advancing the bill with support from the Senate's Republican minority.[30] Letting a "white, antigovernment Midwestern conservative . . . [who] blocked legislation for years . . . [be] allowed to take credit for" a bill he was finally forced to accept "irked liberals."[31] But it gave Dirksen and his Republican conference a stake in the outcome. Second, Senate leaders—perhaps having no other choice—let "obstruction" play out on the Senate floor. In those days, the filibuster stopped other action on the Senate floor, so it forced attention on the matter at hand. And after seventy-five days and 534 hours of debate, the bill passed 73–27.[32] Thereafter, only a "tiny minority" of elected Southerners obstructed the Act's implementation; the legislative process displayed to Americans having laid bare the overwhelming consensus forged in the Senate.[33]

In Wallach's telling, the lesson of Congress's ability to pass civil rights legislation is simple: "A well-functioning legislature is indispensable to ensuring that in the process of navigating social changes, no group is driven to desperation."[34] Only in a legislature can the vast diversity

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[25] *See, e.g.*, JON MEACHAM, THE SOUL OF AMERICA: THE BATTLE FOR OUR BETTER ANGELS (2019).

[26] WALLACH, *supra* note 16, at 70.

[27] *See id.* at 71–72; 88; *see also id.* at 72 ("For those 21st-century readers who regard racism as the worst sin imaginable, this forbearance may seem like something to be ashamed of. Such an absolutist position is fundamentally anti-democratic and insensitive to the value of social peace.").

[28] 347 U.S. 483 (1954).

[29] WALLACH, *supra* note 16, at 88–90; *accord.* Justin McCarthy, *U.S. Approval of Interracial Marriage at New High of 94%*, GALLUP (Sep. 10, 2021) https://news.gallup.com/poll/354638/approval-interracial-marriage-new-high.aspx (noting that from 1958 until 2021, the percentage of the American public expressing approval of marriage between Black people and white people rose from 4% to 94%).

[30] *Id.* at 82.

[31] *Id.* (citing JULIAN ZELIZER, FIERCE URGENCY OF NOW 120 (2015)).

[32] *Id.* at 88.

[33] *Id.* at 88–89.

[34] WALLACH, *supra* note 16, at 93.

of a country like ours and the vast complexity of the challenges we face interact in ways that lead to lasting social peace.

But not every legislature. And not the one we have today. In the decades that followed that high point of civil rights legislation in the 1960s, political realignment, institutional reform, and societal change have left Congress on the path to "decrepitude."[35] With the benefit of hindsight, the warning signs are legion.

During a period of Democratic dominance in Congress and Republican dominance in the White House during the 1970s and 1980s, Republicans lost the faith. Even after reclaiming control of the House in 1994, Speaker Newt Gingrich's institutional reforms—such as giving the president a line-item veto and repealing the War Powers Resolution—sought to hamstring his own institution at the expense of the presidency, his Reaganite critiques about the president's superior electoral legitimacy sounding awfully Wilsonian in their contempt for Congress.[36]

Democrats, meanwhile, lost the plot. A clash between Reps. Richard Bolling (D–MO) and Phillip Burton (D–CA) lays bare the tension between process and outcomes that has led us to the worst of both worlds. Just a few years after the success of civil rights legislation, the pair clashed ostensibly over the jurisdictional divides between committees and subcommittees in the Democratic caucus.[37] Bolling, the putative institutionalist who favored centralization, accused Burton of having the "damn fool idea that getting something done [is] more important than the process of democracy real to people."[38] Burton, who sought to divert power to subcommittees (where more junior and more liberal members could exercise greater influence over policy), accused Bolling of being a "white collar liberal" whose "interest in rules blinded him to the importance of winning policy victories."[39]

The period's reforms—cameras in committee rooms, increased use of the legislative veto (prior to its eradication by the Supreme Court)[40], sunset provisions requiring congressional reauthorization of programs, and appropriations riders allowing members to exercise greater control over spending among them—certainly increased the level of *activity* in Congress.[41] But by trying to focus on everything, Congress in fact ended up focusing on little more than performative process and hollow outcomes that laid the groundwork for members of Congress to "run[] for Congress by running against Congress,"[42] what came to be known as "Fenno's paradox."[43]

Implicit in much of Wallach's argument is the idea that, when functioning at its fullest potential, Congress gives Madisonian factions skin in the game—an incentive to play ball rather than complain (and grandstand and fundraise) from the sidelines. By its nature, Congress

[35] *Id.* at 225.
[36] *Id*. at 130; 140; 244. On the Wilsonian critique of Congress, *see id.* at 30–42.
[37] *Id.* at 102.
[38] *Id.*
[39] *Id.*
[40] Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983).
[41] WALLACH, *supra* note 16, at 113–14; 117.
[42] *Id.* at 119.
[43] *See generally* RICHARD FENNO, HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS (1978).

requires broad buy-in to succeed.[44] Absent those incentives, Congress does the bare minimum to keep the lights on and the trains running: appropriating money and delegating broad swaths of authority to the executive branch through eleventh-hour deals negotiated by party leaders absent meaningful debate.[45] That dynamic fuels a vicious cycle. The more power delegated, the less pressure on Congress to act, the more pressure on presidential administrations to stretch that power to (perhaps even beyond) its limits, the more contentious issues inevitably end up in the courts whose rulings—generally on questions of procedure and constitutional structure—are refracted through the lens of policy outcomes, which is understandable (if not excusable) given the dearth of meaningful policy making efforts elsewhere in the federal government. Wallach walks through this story in the area of immigration,[46] but it is hardly limited there. Environmental regulation, where a recent iteration of this cycle birthed a more robust rejoinder from the Supreme Court in the form of the major questions doctrine,[47] is another example.

One response to these dynamics is resignation. This vision treats presidential elections as the ultimate expression of public opinion, the Supreme Court as the final site for political contestation, and Capitol Hill largely as a fancy building for press conferences by legislators seemingly powerless to do anything but lobby the administration, litigate in the courts, and raise money—lots of money.[48] Wallach calls that vision decrepitude, and he acknowledges (somewhat ruefully) that it is the current course.[49] Another response, surrender (which has some proponents on the right and on the left), would shift our attention to the executive branch, perhaps with some form of administrative process replacing legislative process as a legitimating force for public policymaking.[50] In this vision, conspicuous failure in the form of government shutdowns or debt ceiling disasters would eventually lead to some degree of congressional reform that puts the functioning of government on autopilot with the day-to-day levers pulled by the president.[51] This system would have some echoes of parliamentary democracy, but as Wallach warns, would short-circuit the deliberative work that legislatures can achieve.[52]

Unsurprisingly, Wallach favors a third path he calls "revival."[53] Resting on a coup against party leadership, internal organizing by congressional moderates, and substantial investments in the legislature's staff capacity, the path to this revival that Wallach outlines is somewhat fanciful (as he acknowledges).[54] But it is worth taking this vision seriously on its own terms. To sustain a body capable of working through the pressing challenges of the day, Wallach argues that Congress will need to be willing to let go of minor ones (which he concedes is at odds with many

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[44] *Cf.* James Curry & Frances Lee, *Non-Party Government: Bipartisan Lawmaking and Party Power in Congress*, 17 PERSPECTIVES ON POLITICS 47 (2019) (observing that the coalitions that have supported major legislation are just as bipartisan in the 2010s as they were in the 1970s).

[45] WALLACH, *supra* note 16 at 149; 173.

[46] *Id.* at 189–90.

[47] *See* West Virginia v. EPA, 597 U.S. __ (2022).

[48] WALLACH, *supra* note 16, at 227.

[49] *Id.* at 228.

[50] *See, e.g.*, WILLIAM HOWELL & TERRY MOE, RELIC: HOW OUR CONSTITUTION UNDERMINES EFFECTIVE GOVERNMENT AND WHY WE NEED A MORE POWERFUL PRESIDENCY (2016); ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022).

[51] WALLACH, *supra* note 16, at 238–39.

[52] *Id.* at 244–45; 247.

[53] *Id.* at 251.

[54] *Id.* at 255.

of his fellow conservatives' prescriptions).[55] Messy though it may be, Wallach argues such revival will have a salutary effect: "[T]hrough Congress' deliberations, we come to feel that the country's future is ours."[56] That is the essence of "why Congress."[57]

II. BERNHARDT

David Bernhardt seeks to answer a different question, though one connected and no less important to the structural separation of powers. A longtime official in the Department of Interior who rose from aide in the administration of George W. Bush to secretary in that of Donald Trump, Bernhardt offers his take on the role of executive branch officials in our system of government. The book's title—a reference to his first conversation with President Trump upon becoming Secretary of the Interior in 2019—provides at least part of his answer: officials in the executive branch report to and serve at the pleasure of the elected president.[58] The other part of his answer emerges in various examples throughout the remainder of the book: the text of statutes.[59] Taken together, Bernhardt's answer is consistent with a classic exposition of the unitary executive theory, that all executive power is vested in a president whose agents discharge whatever discretion the faithful execution of the law allows in his name (and must do so in accordance with his wishes).[60]

And if the book stopped there, it would be unoffensive and useful enough, as these sorts of policy memoirs go, if a bit prosaic. Where Bernhardt makes a real contribution, however, is with his apparent audience. This book is written as a field guide for public servants in a future presidential administration that takes the rule of law seriously and wants to implement a president's agenda effectively. Peppered with anecdotes from his time in government service, Bernhardt's book provides a first-hand account of how administrative agencies work on the ground. Although it offers a whirlwind tour that bounces from administration to administration and incident to incident with asides that do not always seem central to its argument,[61] *You Report to Me* nevertheless provides a useful introduction to administrative law for those not already steeped in the subject and would be well-placed on the bookshelves of those charged with implementing an administration's policy program.

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[55] *Id.* at 260 (citing JAMES BURNHAM, CONGRESS AND THE AMERICAN TRADITION 347 (1959)).

[56] WALLACH, *supra* note 16, at 262.

[57] *Id.* at 263.

[58] DAVID BERNHARDT, YOU REPORT TO ME: ACCOUNTABILITY FOR THE FAILING ADMINISTRATIVE STATE 2 (2023).

[59] *See, e.g.*, *id.* at 10.

[60] *See, e.g.*, Myers v. United States, 272 U.S. 52 (1926).

[61] *E.g.*, mocking a Fish and Wildlife Service (FWS) employee who reported that her job was to "speak for the mice," *see* BERNHARDT, *supra* note 58, at 139; four pages to explain his disagreement with a memo written by a different FWS employee about the status of the Northern Spotted Owl, *see id.* at 49–53; a two-paragraph aside condemning Dr. Deborah Birx, the "career bureaucrat who was selected to coordinate the Trump administration's coronavirus response," for circumventing elected officials and their designees that seemed a bit gratuitous in a chapter about accountability for the civil service that had made its point long before, *id.* at 46.

Successive chapters walk through the basics of delegation,[62] agency adjudication,[63] judicial deference,[64] presidential directive authority,[65] and the removal power.[66] Written in plain English with limited (though sufficient) legalese, the chapters provide a useful primer on the constitutional principles, case law, and statutes that shape each area. But just as valuable are anecdotes nestled within the chapters that illuminate how agencies actually operate day to day.

For example, Bernhardt discusses the practice of "sue and settle," in which outside groups sue an agency for something like missing a statutory deadline and an agency—rather than litigate the issue to judicial resolution—enters a consent decree committing to a set of actions in exchange for ending the lawsuit.[67] Sounds innocent enough. And as Bernhardt acknowledges, "entering a consent decree or settlement agreement can be a prudent use of taxpayer resources, avoiding costly, drawn-out litigation that an agency is likely to lose."[68] But as Bernhardt explains, so many agencies miss so many deadlines and benchmarks that their entire regulatory agendas can be driven by negotiation with litigants rather than the traditional notice-and-comment rulemaking process.[69] Sometimes, such suits can even be collusive, allowing an agency to "tie its hands" to an unpopular position through litigation to evade political accountability.[70] This under-the-radar practice bears on the structural separation of powers along the same dimension as higher profile issues like the president's authority to remove agency heads,[71] and Bernhardt effectively links the issues in his larger quest to explain how government operates.

Bernhardt closes with a chapter on "driving change as a political appointee" that lays bare the true purpose of the book: coaching a future administration to cut through bureaucratic inertia and effect policy change.[72] To his credit, from explaining in gory detail the differences between political appointees requiring Senate confirmation, Schedule C and noncareer Senior Executive Service advisory positions, and the career civil service to advising agency "beachhead teams" at the start of a new administration to secure control of an agency's Executive Resources Board, Bernhardt remains laser-focused on authority *within* the law.[73] And although he makes rather fine distinctions between the verve with which he encourages future administration officials to search for legal authority and the skepticism with which he treated an effort by the Biden administration's Bureau of Land Management to identify new ways to fight climate change,[74] the importance of good judgment and forbearance shines through his admonition that the law—rather than policy preferences—must act as an agency's ultimate restraint: "Appointees must try

[62] *Id.* at 49.
[63] *Id.* at 79.
[64] *Id.* at 97.
[65] *Id.* at 115.
[66] *Id.* at 139.
[67] *Id.* at 108–10.
[68] *Id.* at 109.
[69] *Id.* (citing Jamie Conrad, *We Shouldn't Dismiss 'Sue and Settle' – or Other Regulatory Problems*, REG. REV. (May 18, 2015), https://www.theregreview.org/2015/05/18/conrad-sue-and-settle/).
[70] *Cf.* Arizona Grocery v. Atchison, Topeka & Santa Fe Railway, 284 U.S. 370 (1932).
[71] *See generally* Seila Law v. Consumer Financial Protection Bureau, 140 S. Ct. 2183 (2020) (holding that limitations on the president's ability to fire an agency head unconstitutionally limits his ability to discharge the executive power).
[72] BERNHARDT, *supra* note 58, at 173.
[73] *See id.* at 178; 182.
[74] *Compare id.* at 190, *with id.* at 74.

to provide their superiors with unbiased, intellectually honest advice regarding their options under the law. The president's preferred policy outcomes can usually be achieved in various ways, but in the unlikely event that Congress has not delegated authority to the agency to take the president's preferred 10ctionn, political appointees should make that fact clear to their superiors and suggest how such authority could be gained."[75]

Article II, Section 3 of the Constitution requires the president to "take care that the laws be faithfully executed." Bernhardt closes by calling attention to the word "faithfully" as it is used in a different context, the oath of office taken by all federal officials *except* the president.[76] In both cases, the word highlights the fidelity to one's role that Bernhardt argues ought to animate the whole executive branch: Congress passes laws, the president decides how to implement those laws, and administrative agencies execute the president's command within the bounds of those laws. Therefore, in our republic, Bernhardt writes, all administration officials "report to you and me."[77]

III. THAPAR

Fidelity to role is an overarching theme in *The People's Justice* too.[78] Written by Judge Amul Thapar, who joins a coterie of his Sixth Circuit colleagues in authoring recent books,[79] the importance of this tribute to Justice Clarence Thomas lies not in breaking new doctrinal ground, nor revealing new biographical details about Justice Thomas, nor even in synthesizing Justice Thomas's jurisprudence in a new way. Rather, *The People's Justice* stands for the simple proposition that the Constitution belongs to all of us. And although the judiciary is not a representative body, Judge Thapar argues forcefully that respect for the Constitution's original meaning—as ratified by the people's representatives and reflected in Justice Thomas's brand of originalism—tends towards outcomes that promote human flourishing.

Judge Thapar's story unfolds in twelve chapters, each discussing an opinion authored by Justice Thomas (all of which, intriguingly, happen to be concurrences or dissents).[80] What makes

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[75] *Id.* at 190. *But cf. Remarks by President Biden on Fighting the Covid-19 Pandemic*, THE WHITE HOUSE (Aug. 3, 2021) https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/03/remarks-by-president-biden-on-fighting-the-covid-19-pandemic/ (President Biden announcing the extension of an eviction moratorium despite acknowledging that "the bulk of the constitutional scholarship says that it's not likely to pass constitutional muster" but hoping that the moratorium would have a salutary effect until there was time for a court to say so).

[76] *See* 5 U.S.C. § 3331 ("I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.")

[77] BERNHARDT, *supra* note 58, at 211.

[78] AMUL THAPAR, THE PEOPLE'S JUSTICE: CLARENCE THOMAS AND THE CONSTITUTIONAL STORIES THAT DEFINE HIM (2023).

[79] *See, e.g.*, JEFFREY SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION (2022); JEFFREY SUTTON, FIFTY-ONE IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018); RAYMOND KETHLEDGE & MICHAEL ERWIN, LEAD YOURSELF FIRST: INSPIRING LEADERSHIP THROUGH SOLITUDE (2017); JOHN K. BUSH, SHOULD WE CANCEL THE FOUNDERS? (forthcoming).

[80] In order, those cases and opinions are: *Kelo v. City of New London*, 545 U.S. 469 (2005) (Thomas, J., dissenting); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Thomas, J., concurring); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Thomas, J., concurring in part and dissenting in part); *Gonzales v. Raich*, 545 U.S. 1 (2005) (Thomas, J., dissenting); *Doe v. United States*, 593 U.S. __ (2021) (Thomas, J., dissenting from denial of certiorari); *McKee v. Cosby*, 586 U.S. __ (2019) (Thomas, J., concurring in the denial of certiorari); *Brumfield v. Cain*, 576 U.S. 305 (2015) (Thomas, J., dissenting); *City of Chicago v. Morales*, 527 U.S. 41 (1999) (Thomas,

the book unique among works that self-consciously promote originalism[81] is Judge Thapar's unapologetic invocation of the stories of the individuals who were characters in what reached the Supreme Court as "cases and controversies" and the consequences of the Court's decisions.[82] In Judge Thapar's telling, although Justice Thomas "is committed to applying the law equally to all, come what may," more often than not, that orientation means his rulings will favor "the ordinary people who come before the Court—because the core idea behind originalism is honoring the will of the people."[83] The purpose of the book is not to test that proposition empirically. But in highlighting numerous cases in which convoluted court-created doctrine departs from how Justice Thomas understands the Constitution's original meaning,[84] *The People's Justice* serves as a useful corrective to accounts of originalism as subterfuge to serve special interests.[85] Rightly considered, originalism prevents special interests (or interests of any other kind) from "usurp[ing] power from the people" in whose name our Constitution was adopted unless and until they decide to change it themselves.[86]

One particularly moving chapter in Judge Thapar's book tells the stories of Betty Smothers and her son, Warrick Dunn. Early in the morning on January 7, 1993—just two days after Dunn turned eighteen—Betty, an off-duty police officer, was murdered while working a second job as a security guard.[87] The oldest of six siblings, Warrick, a star high school running back who would go on to play at Florida State and later in the NFL, was "thrust into the role of father to his five younger siblings."[88] Twenty-two years and a trail of state and federal appeals later,[89] the Supreme Court held in *Brumfield v. Cain*[90] that the state court that had sentenced Betty's killer to death had

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J., dissenting); *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (Thomas, J., concurring in part and concurring in the judgment); *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011) (Thomas, J., dissenting); *State Farm v. Campbell*, 538 U.S. 408 (2003) (Thomas, J., dissenting); *Virginia v. Black*, 538 U.S. 343 (2003) (Thomas, J., dissenting).

[81] *See* THAPAR, *supra* note 78, at XVIII.

[82] *See* U.S. CONST. art. III, § 2, cl. 1.

[83] THAPAR, *supra* note 78, at XXI.

[84] On how Justice Thomas evaluates the original meaning of the Constitution, *see* Gregory Maggs, *Which Original Meaning of the Constitution Matters to Justice Thomas?* 4 N.Y.U. J.L. & LIBERTY 494 (2009).

[85] *See, e.g.*, MICHAEL WALDMAN, SUPERMAJORITY: HOW THE SUPREME COURT DIVIDED AMERICA 184; 267 (2023); ERIC SEGALL, ORIGINALISM AS FAITH (2018).

[86] *Rosenkranz Originalism Conference Features Justice Thomas '74*, YALE LAW SCHOOL (Nov. 4, 2019), https://law.yale.edu/yls-today/news/rosenkranz-originalism-conference-features-justice-thomas-74; *cf.* Baude & Sachs, *supra* note 9.

[87] THAPAR, *supra* note 78, at 108–09.

[88] *Id.* at 110.

[89] Kevan Brumfield was convicted by a jury that unanimously recommended the death penalty after finding three aggravating factors. *See* Brumfield v. Cain, 576 U.S. 305, 330 (2015) (Thomas, J., dissenting). He went on to appeal his conviction in state court on direct appeal, THAPAR *supra* note 78, at 112, and then, in 2003, filed his first amended habeas petition, raising, in light of the Supreme Court's intervening ruling in *Atkins v. Virginia*, 536 U.S. 304 (2002), that he was mentally disabled and thus ineligible for the death penalty, *id.* at 113. The state court denied his petition, finding insufficient facts to support his claim of disability. *Id.* He then filed a federal habeas petition in 2004. *See* Brumfield v. Cain, 854 F. Supp. 2d 366, 372 (M.D. La. 2012). Six years later, the federal court held an evidentiary hearing. *Id.* Eighteen months after that, a federal district court ruled that the state court had denied Brumfield's *Adkins* claim based on an unreasonable determination of facts and had incorrectly applied clearly established Supreme Court precedent in failing to provide funds to Brumfield to develop his claim. *See Brumfield*, 576 U.S. at 333–34 (Thomas, J., dissenting) (summarizing the procedural history). The Supreme Court ruled in 2015, and a resentencing hearing—in which Brumfield was sentenced to life in prison without parole—occurred in 2016. THAPAR, *supra* note 78, at 120.

[90] 576 U.S. 305 (2015).

made unreasonable factual findings about his mental capacity when determining that his death sentence did not violate the Court's ruling in *Atkins v. Virginia*.[91]

Justice Thomas dissented.[92] In his view, the record before the state habeas court—all the way back in 2003—supported the judge's finding that Brumfield was not intellectually disabled.[93] To rule for Brumfield, Justice Thomas wrote, the majority took "a meritless state-law claim, recast it as two factual determinations, and then award[ed] relief despite ample evidence in the record to support each of the state court's actual factual determinations."[94] Justice Thomas's opinion also described Warrick Dunn and the crime's impact on his life; Justice Thomas's dissenting colleagues did not join that part of the opinion, which Justice Alito wrote in a separate dissent "is inspiring and will serve a very beneficial purpose if widely read" but is not "essential to the legal analysis in this case."[95]

Judge Thapar frames this case as an example of the attention Justice Thomas pays to victims of crimes.[96] But *how* Justice Thomas pays attention to the rights of victims of crimes is key. He did not go searching in the Constitution's interstices for lurking "penumbras" or "emanations" that might give rise to an unenumerated, substantive right.[97] Rather, Justice Thomas let the structural separation of powers—especially the vertical separation of powers inherent in our federal system—do the work. Federal habeas review of state court convictions, Justice Thomas explained, is a final backstop and imposes an intentionally high standard.[98] Why? For one thing, states are a separate sovereign.[99] Although state criminal proceedings must comply with incorporated federal rights, federal courts generally have no supervisory role over state courts; they adjudicate claims on behalf of a different sovereign, the United States. But Congress defined a limited exception. Through the habeas statute, federal law defines limited circumstances when federal courts may review state court convictions.[100] Part of what offended Justice Thomas about the majority's ruling in *Brumfield* was the majority's decision, in his view, to "toss[] [the state court] proceedings aside, concluding that the state court based its decision to deny Brumfield's *Atkins* claim on an 'unreasonable determination of the facts,' even as it concede[d] that the record include[d] evidence supporting that court's factual findings."[101]

Justice Thomas's concerns about federal habeas proceedings extending beyond what the statute permits transcend *Brumfield*. Just last November, he dissented from the denial of certiorari in *Shoop v. Cunningham*,[102] in which the Sixth Circuit had granted an evidentiary hearing "on the mere possibility that it might turn up some kind of admissible evidence supporting some sort of

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[91] 536 U.S. 304 (2002) (holding that the Eighth Amendment prohibits the execution of mentally disabled individuals).

[92] Brumfield v. Cain, 576 U.S. 305, 324 (2015) (Thomas, J., dissenting).

[93] THAPAR, *supra* note 78, at 119.

[94] *Id.* (quoting *Brumfield*, 576 U.S. at 342 (Thomas, J., dissenting)).

[95] *Brumfield*, 576 U.S. at 350 (Alito, J., dissenting).

[96] THAPAR, *supra* note 78, at 118.

[97] *Cf.* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.")

[98] *Brumfield*, 576 U.S. at 343 (Thomas, J., dissenting).

[99] *See id.* (citing Harrington v. Richter, 562 U.S. 86, 103 (2011)).

[100] *Id.* at § 2254(d).

[101] *Brumfield*, 576 U.S. at 349 (Thomas, J., dissenting).

[102] 598 U.S. __ (2022).

cognizable claim."[103] Echoing his opinion in *Brumfield*, Justice Thomas pointed to real costs of breaching structurally separated powers: "It shows profound disrespect, not merely to the State, but to citizens who perform the difficult duty of serving on capital juries, to the surviving victims of Cunningham's atrocious crimes, to the memories of the two young girls whose lives he snuffed out, and to their families who still, two decades later, have no assurance that justice will ever be done."[104]

As Judge Thapar points out in the conclusion of the book, sometimes Justice Thomas's originalism leads him to rule for criminal defendants, even when his conservative colleagues do not join him.[105] If Justice Thomas were Senator Thomas, he might not vote for some of the outcomes his opinions have reached.[106] But as Judge Thapar argues, "[Justice Thomas] knows, like all originalists, that you cannot fully respect a people unless you respect their choices, too. For that reason, Justice Thomas enforces the Constitution as the American people created it. He understands that ours isn't just a Constitution for the people. It's a Constitution by the people. So Justice Thomas sees his job as a humble one: to try his best to figure out what the American people understood the Constitution to mean when they ratified it."[107] That orientation, Judge Thapar posits, is why, when Justice Thomas autographs a copy of the Constitution, he writes, "This is your Constitution."[108] Because it is.

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All three of these books center institutions, but they also center the role of people and, perhaps most fundamentally, "the people"—the sovereign actors in whose name this union formed—in doing the work of governing in our constitutional system. To some degree, all three books paint an idealized portrait of how the institutions and those who operate within them ought to behave. Well over two centuries into this constitutional order, we are not working on a blank canvas. But returning to the first principles of Congress, the executive, the courts, and federalism—as these books invite—yields several important insights.

First, in our Constitution, articles preceded amendments.[109] Our Constitution delineates the structure of our government before it delineates the substantive rights that government may not abridge. In a republic like ours, the process of self-government *is* a substantive outcome. Sure, extraconstitutional means may produce short-term solutions, but short-circuiting the process that the Constitution designed not only tends to fail to develop the durable consensus to which lasting policy solutions are anchored,[110] it also erodes the perceived utility in following (or the perceived

[103] *Id.* Slip Op. at 12 (Thomas, J., dissenting).

[104] *Id.* Slip Op. at 13 (Thomas, J., dissenting).

[105] *See, e.g.*, Alleyne v. United States, 570 U.S. 99, 103 (2013) (holding that the original meaning of the Sixth Amendment requires that any fact that, by law, increases the penalty for a crime must be found by a jury).

[106] Judge Thapar suggests that *Gonzales v. Raich*, discussed in pp. 67–86, might be an example. THAPAR, *supra* note 78, at 213.

[107] *Id.* at 211.

[108] *Id.* at 214.

[109] I owe this construction to Judge Patrick Bumatay, who told attendees at the 2023 Federalist Society National Student Symposium that one of his favorite clerkship interview questions is "articles or amendments?"

[110] *See, e.g.*, WALLACH, *supra* note 16, at 90–93.

capacity of) the Constitution's process the next time.[111] That doom loop undermines the notion of representative self-government—the processes inherent in the structural separation of powers are, for now, part of "our law."[112]

But their status is contested. And their normative value is not always obvious, especially to those who spend their days doing more than thinking about legal theory. Modern originalism centers how the people understand the law. [113] The modern conservative legal movement, meanwhile, traces its origins to three elite law schools: Harvard, Chicago, and a third one that need not be named.[114] Ironically, then—but perhaps unsurprisingly—ordinary citizens have not always been the target for explanations about why originalism, particularly in the separation of powers context, matters to daily life. That is a problem.

And responding effectively to hyperbolic attacks on the legitimacy of constitutional institutions (namely, the Supreme Court)[115] requires more than mere assertions about the system working like it is supposed to; explanations must explain *why* the system is supposed to work that way.

All three of these books help develop such explanations that can resonate beyond the legal academy. For example, Wallach explains the connection between actually legislating and developing social trust.[116] Bernhardt shows the pitfalls of executive agencies freelancing beyond their statutory authorization.[117] Judge Thapar disentangles the process of judging from its substantive outcomes.[118] Taken together, all three authors shed light on why politics operating short of our constitutional order can simultaneously feel hollow and chaotic.[119] Put more simply, the authors explain what our institutions are good for and why we might want to preserve them.

The essence of a legitimate institution is one where you can lose, move on, and live to fight another day, trusting that you got a fair shake and believing that continued engagement in the

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[111] *See, e.g.*, BERNHARDT, *supra* note 58, at 198 (recalling a conversation with a senator who told him that an issue was "too complicated for Congress to deal with" and, after Bernhardt responded that it was Congress's job to "mak[e] complicated policy decisions," agreed that "Congress really should act . . . [but would not] until the political need to act was more acute").

[112] *Cf.* Baude & Sachs, *supra* note 9, at 812; William Baude, *Is Originalism Our Law?* 115 COLUM. L. REV. 2349 (2015).

[113] *See generally* THAPAR, *supra* note 78, at 211.

[114] *Cf.* Kyle Swanson, *At Hill, Chief Justice Roberts Offers Advice, Laughs*, MICH. DAILY (Sept. 13, 2009) https://www.michigandaily.com/uncategorized/hill-chief-justice-roberts-offers-advice-laughs/ (Chief Justice Roberts, responding to a question about Supreme Court justices attending elite institutions, observing, "Not all of the justices went to elite institutions; some went to Yale.")

[115] *See, e.g.*, Aaron Belkin & Mark Tushnet, *An Open Letter to the Biden Administration on Popular Constitutionalism*, BALKINIZATION (July 19, 2023) https://balkin.blogspot.com/2023/07/an-open-letter-to-biden-administration.html (condemning "MAGA justices" and urging the Biden administration to pursue "popular constitutionalism" in response); *see also* Thomas Koenig, *The Incoherence of Illegitimacy*, THE DISPATCH (July 15, 2023) https://thedispatch.com/article/the-incoherence-of-illegitimacy/ (criticizing attacks on the Supreme Court's legitimacy as conceptually confused).

[116] *See, e.g.*, WALLACH, *supra* note 16, at 40–42.

[117] *See, e.g.*, BERNHARDT, *supra* note 58, at 52–53.

[118] *See, e.g.*, THAPAR, *supra* note 78, at 211–14.

[119] *See, e.g.*, JASON BIVINS, EMBATTLED AMERICA: THE RISE OF ANTI-POLITICS AND AMERICA'S OBSESSION WITH RELIGION (2022); COLIN HAY, WHY WE HATE POLITICS (2007); Jonathan Rauch, *How American Politics Went Insane*, THE ATLANTIC (July 2016) https://www.theatlantic.com/magazine/archive/2016/07/how-american-politics-went-insane/485570/.

republic is better than all alternatives.[120] Keeping a republic depends on institutions that durable majorities see as legitimate.

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I opened this essay with that famous story about Benjamin Franklin. But I left out a major character: Franklin's interlocutor. Her name was Elizabeth Willing Powel.

According to the journal of Maryland delegate James McHenry, Powel asked Franklin: "Well Doctor, what have we got—a republic or a monarchy?"[121]

Born in Philadelphia and the daughter of the mayor, Powel was one of eleven children.[122] Beginning with the First Continental Congress in 1774, Powel and her husband Samuel opened their home to delegates and hosted frequent dinner parties and salons to discuss the issues of the day.[123] As a librarian at Mount Vernon (home to one of her frequent correspondents, George Washington), notes, "She was a political power player, in a time when women were not supposed to be involved with politics. Although she could not run for office, she used her home as her public stage, situating herself at the center of a robust network of powerful individuals. As her 1830 obituary would note, Powel had a 'mind cast in an unusual mold of strength and proportion,' which drew people to her home for conversation and entertainment."[124]

During the Revolutionary War, British soldiers commandeered her home.[125] The destruction of Philadelphia during the war appears to have left a lasting impression.[126] By the time of the Constitutional Convention, Powel had resumed her hosting duties, witnessing lengthy and weighty deliberations on what the newly independent states were to become in the lead-up to her climactic conversation with Franklin.[127]

By the final day of the Constitutional Convention in September 1787, it seems safe to conclude that Powel had been a deeply informed observer.[128] So it likewise seems safe to assume that the question she asked was truly what was on her mind—would this new country be a monarchy or a republic? Her question was about process. Her home having been seized during the war, she understood the stakes of sovereignty. Who would decide to what laws Americans would be

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[120] Cf. James Gibson, *Legitimacy Is for Losers: The Interconnections of Institutional Legitimacy, Performance Evaluations, and Symbols of Judicial Authority*, in MOTIVATING COOPERATION AND COMPLIANCE WITH AUTHORITY: THE ROLE OF INSTITUTIONAL TRUST, Brian Bornstein & Alan Tomkins (eds.), 81 (2015).

[121] James McHenry, *Diary: September 18, 1787*, LIBRARY OF CONGRESS (manuscript division), https://www.loc.gov/exhibits/creating-the-united-states/convention-and-ratification.html#obj8.

[122] *See* David W. Maxey, *A Portrait of Elizabeth Willing Powel*, 96 TRANSACTIONS OF THE AMERICAN PHILOSOPHICAL SOCIETY 3, 15–16 (2006).

[123] Samantha Snyder, *The Influencer*, 6 MOUNT VERNON MAGAZINE 18 (2020) https://magazine.mountvernon.org/2020/Winter/the-influencer.html.

[124] Id.

[125] Maxey, *supra* note 122, at 24–25.

[126] *Id.* at 25.

[127] *Id.* at 30.

[128] *See Elizabeth Willing Powel*, MOUNT VERNON DIGITAL ENCYCLOPEDIA, https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/elizabeth-willing-powel/ (citing *Elizabeth Willing Powel to Martha Hare, 25 April, 1814*, Powel Family Papers, Historical Society of Pennsylvania).

subject?[129] The people, through their elected representatives. The Constitution guaranteed that to her and to us—if only we keep it.

I hope you'll join us next March in Cambridge to discuss how we might.

[129] *Cf.* WALLACH, *supra* note 16, at 23 ("But again, their objections to 'a long train of abuses and usurpations' revolved as much around their insufficient protection through representation as around their objections to particular policies.")