INTRODUCTION

We are pleased to present the first issue of Volume 48 of the *Harvard Journal of Law & Public Policy*. This issue includes works that cut to the heart of the philosophy and original intent of the Framers, and a rigorous debate over the federal system that they authored.

In early 2024, the Harvard chapter of the Federalist Society was pleased to host the annual National Student Symposium for the Federalist Society. The theme of the event was "Why Separate Powers?", and speakers and panelists offered an incredible breadth of justifications (and critiques) for our fundamental constitutional understanding. Beyond being a triumph for the chapter and an excellent event, it has also produced a set of incisive essays on the subject of separation of powers that we are pleased to publish in the pages of this issue.

First, Professor Ernest Young offers an analysis of the critical role states continue to play in the separation of powers, as well as the impact that the New Deal had (and continues to have) on cooperative federalism. Moving to the Supreme Court's most recent term, Professor Jennifer Mascott and Eli Nachmany (the former Editor-in-Chief of this publication) contribute an original analysis of the primacy of the congressional role in lawmaking, importantly reaffirmed by the Court in its recent decisions in *Loper Bright*, *Corner Post*, and *Garland v. Cargill*.

The Court's consequential shift in administrative law and its import for statutory interpretation loomed large for other authors as well. Professor Jed Handelsman Shugerman, in his essay, encourages us all to "worry less, *Skidmore*," as he deciphers the importance of the Major Question Doctrine for the Supreme Court in a post-*Chevron* world.

Finally, three of our symposium authors grapple with the higher-order questions that separation of powers presents. On the judicial power, Professor Gary Lawson (in a modest essay entitled *Life, the Universe, and Judicial Power*) analyzes the surprisingly limited constitutional directives that indicate the powers of federal courts, and suggests the significance of background norms in understanding federal courts and the work they accomplish. On a similar theme, Professor Amanda Tyler submits that the Roberts Court has had an uneasy relationship with the legislative branches, one that could be read as an attempt to force Congress into deciding important political questions, or, as she suggests, *protecting* the interests of Congress from overreach by the Executive (or even the judiciary). Last, Professor Cass Sunstein challenges our received understanding of what "separation of powers" entails, arguing that rather than being a single constitutional value, it is best understood as a theory to govern six separate inter-branch relationships that each may be strongly defended in the interests of liberty.

Our primary article in this issue similarly tackles the Founding and the values that the Framers sought to enshrine in our written (and unwritten) Constitution. Jack Ferguson has contributed an immensely thoughtful and deeply-researched account of Cicero's impact on the Founders, serving as both an intellectual history of the Founding and an excavation of classical legal norms that have implicitly (or explicitly) shaped our Constitution today.

Picking up on this desire to understand the Founding, we publish here Professor Stephen Sachs's Vaughan Lecture, delivered at Harvard in 2023, which critiques the recent pessimism on the morality of the Founders and the value of their continued influence. We likewise publish Professor J. Joel Alicea's Vaughan Lecture, delivered at Harvard in 2024, which heralds a new era of constitutional interpretation, one in which natural law may be taken more seriously by courts. We also publish a response to this thesis by Professor Conor Casey, as well as a conversation between Professors Sachs and Alicea on the challenges that this development would present for originalism, textualism, and other currents of conservative legal thought.

In addition, we publish an excellent piece of student writing by our own Jonathan Meilaender. In his Note, Meilaender surveys the varying applications of the Major Questions Doctrine that different Justices have offered in recent years, especially Justice Barrett, and rigorously defends the Doctrine as part of the broader textualist project.

Finally, Professor Charles Fried passed away on January 23, 2024. Beyond being a beloved teacher to Harvard students and a giant within the legal profession as a whole, Professor Fried was a true and valued friend to the campus Federalist Society and to this Journal, serving as its faculty advisor since its founding in 1978 (a role Professor Adrian Vermeule has graciously assumed this last year). Two of Professor Fried's longtime colleagues, Professors Randall Kennedy and Richard Fallon Jr., offer touching tributes to Charles Fried as an advocate, as a scholar, and as a friend. We hope this will be a fitting tribute to a man who touched so many lives, and who so generously supported this Journal since its infancy.

As always, completing an issue is never the work of one man, and I am deeply indebted to our entire masthead for their diligence and encouragement. In particular, I want to thank Alexis Montouris Ciambotti, who spearheaded our efforts to memorialize Professor Fried in this issue, and Jack Lucas, who masterfully helmed the symposium articles and managed a team of excellent guest editors from Federalist Society chapters around the country. I am also profoundly appreciative for the work of my predecessors, Hayley Isenberg and Eric Bush, who did so much to make sure our Volume got off on a good footing. I also thank past Editors-in-Chief Mario Fiandeiro and Eli Nachmany for their invaluable input and continued investment in the success of JLPP. Happy reading!

Andrew Hayes
Editor-in-Chief, Volume 48

STATES IN THE SEPARATION OF POWERS

ERNEST A. YOUNG*

INTRODUCTION

Many American lawyers think of federalism and separation of powers as separate concepts—related, perhaps, but dealing with fundamentally different problems and generating distinct bodies of law. Our Founders understood, however, that the concepts were connected. James Madison explained, at the end of *Federalist No. 51*, that federalism and separation of powers provide a "double security . . . to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself."[1] Yet even Madison gave relatively few specifics about the relationship between federalism and separation of powers—or, if you will, between the vertical separation of powers between nation and states and the horizontal relationships between distinct branches at each level of government. Nor would it have been easy to do so. The Constitution that Madison defended in *The Federalist* left much of its institutional structure to be fleshed out through legislation and practice—for example, the executive departments, the internal organization of Congress, and the structure of the Federal Judiciary.[2] And the States, which Madison made clear would be key actors in this system, were undergoing changes of their own and

* Alston & Bird Distinguished Professor of Law, Duke Law School. This essay has grown out of remarks I gave at the Federalist Society's National Student Symposium, held at Harvard Law School on March 8–9, 2024. I am grateful to the Society for the opportunity to participate and to my fellow panelists for a lively discussion.

1. THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961).

2. *See generally* Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L. J. 408 (2007).

their relationship to the new national entity was yet to be established.

This essay argues that the role of states in the American separation of powers has changed over time in consequence of a general shift from one model of divided powers to another. From the beginning, American thinking about separation of powers has encompassed a tension between two organizing principles.[3] "Separated powers," on the one hand, views the branches of government as exercising entirely distinct powers—legislative, executive, and judicial—and tends to draw quite formal boundaries between those powers. "Checks and balances," on the other hand, sees the branches as operating in overlapping spheres wherein each has a hand in the others' business; this allows each branch to effectively check the other branches' exercise of power through devices like the presidential veto, legislative confirmation of executive and judicial officers, or judicial review of legislative and executive action. Both principles have been around from the beginning, but it is fair to say that separated powers predominated in the early years, while checks and balances dominates our modern institutional landscape.

This shift has fundamentally changed the role of the States as they relate to the national government. Federalism itself is no longer dominated by separated state and national jurisdiction. Cooperative federalism programs, in which state and federal agencies serve as partners implementing regulatory and benefits programs like the Clean Air Act or Medicaid, dominate much of the governance landscape. Even where state and federal institutions are formally separate and distinct—such as in criminal law enforcement, or the parallel systems of state and federal adjudication—state and federal actors generally operate hand in glove with one another. What is less appreciated is that cooperative federalism not only strips states of their traditional exclusive jurisdiction over many subjects but also makes them integral participants in the national political and administrative process. In an important sense, states have become

3. *See, e.g.*, M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000).

part of the horizontal separation of powers as well as the vertical. To a considerable extent, they realize their autonomy by their participation in national government.

Many scholars have celebrated cooperative federalism's departure from traditional understandings of American federalism, while others have worried whether it adequately guarantees the states' autonomy—especially over the long term.[4] I make no effort to resolve that debate here. Rather, I offer three observations. First, long-term changes in both the vertical separation of powers (federalism) and the horizontal relationships among the national branches can be understood as a shift from separated powers to checks and balances. Second, in an environment where national and state powers largely overlap, the horizontal checks and balances in the national lawmaking process become essential protections of state autonomy. Third, the States play a vital role in national politics by shaping, implementing, and sometimes resisting national policy. Crucially, when they do these things, states are not like just another federal agency or private interest group; rather, they are full-fledged governments in their own right, with their own processes of accountability and wells of democratic legitimacy.

The upshot is that state institutions and officers are quite different from the other actors in the federal governance process—federal agencies, private parties, public interest organizations, and the like—none of whom can claim public accountability and democratic legitimacy in the same way. It is time that separation of powers scholarship took more notice of federalism, just as federalism scholarship has in recent decades paid more attention to separation of powers.[5] This essay begins, in Part I, by showing how the

4. *Compare, e.g.*, Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 21 (1950) ("Cooperative Federalism has been, to date, a short expression for a constantly increasing concentration of power at Washington in the instigation and supervision of local policies."), *with* Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 37–44 (2010) (arguing that states can exercise "the power of the servant" within cooperative federalism structures).

5. *See, e.g.*, Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001).

transformation of federalism doctrine since the New Deal basically assimilated it to a checks and balances model of separation of powers. That model offers few formal protections to the States analogous to the old doctrine of limited and enumerated powers.[6] Part II then considers how state officers and institutions fit into the actual operation of national separation of powers, primarily in the context of cooperative federalism regimes established under federal regulatory statutes.

I. SEPARATED POWERS AND CHECKS AND BALANCES

American law has not one but two separation-of-powers traditions. The first rests, as Madison explained, on "the political maxim that the legislative, executive and judiciary departments ought to be separate and distinct."[7] "No political truth is certainly of greater intrinsic value," Madison said, "or is stamped with the authority of more enlightened patrons of liberty" than this notion of separated powers.[8] Invoking "the celebrated Montesquieu," Madison opined that "[t]he accumulation of all powers legislative, executive, and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny."[9] Subsequent jurisprudence in this tradition has focused on "determining whether the challenged branch action falls within the definition of that branch's constitutionally derived powers—executive, legislative or judicial."[10]

But despite Madison's praise for the separation principle, he acknowledged in *Federalist Nos. 47* and *48* that the Philadelphia Constitution combined governmental functions in many important

---

6. For that reason, I have argued elsewhere that the enumerated powers doctrine, even in its modern atrophied form, needs to be enforced. *See* Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1390–92 (2001).

7. THE FEDERALIST NO. 47 (James Madison), *supra* note 1, at 323.

8. *Id.* at 324.

9. *Id.*

10. MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 101 (1995); *see also* Bowsher v. Synar, 478 U.S. 714 (1986) (striking down budgetary statute because it vested executive power in a legislative officer); Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U.L. REV. 1377, 1390 (1994) ("[A]ny governmental power exercised in our system must be either legislative or executive or judicial.").

respects.[11] The President participated in legislation through the veto and in judging through the appointment power; Congress participated in execution of the laws and judging through confirmation of nominations; and the Judiciary participated in both execution and legislation through the interpretation of laws and judicial review of government actions. Citing the existing state constitutions, Madison explained that Montesquieu's separation principle should not be understood to insist that "departments ought to have no *partial agency* in, or no *controul* over the acts of each other."[12] He criticized efforts to ensure separation of functions through strict constitutional delimitation of powers as mere "parchment barriers" that were unlikely to sustain the division for long.[13] Instead, Madison insisted that "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others."[14] The most important of these "constitutional means" is the partial agency that each branch has in the other branches' functions. This is the theory of checks and balances. Blurring the lines of strict separation is not merely incidental, but crucial to the way the branches check one another.[15]

---

11. THE FEDERALIST NO. 47 (James Madison), *supra* note 1, at 329; THE FEDERALIST NO. 48 (James Madison), *supra* note 1, at 336–37.

12. THE FEDERALIST NO. 47 (James Madison), *supra* note 1, at 325.

13. THE FEDERALIST NO. 48 (James Madison), *supra* note 1, at 332–33.

14. THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 349.

15. These two models of separation of powers have spawned two arguably inconsistent lines of cases in the Supreme Court. A formalist line insists on strict separation, deciding cases largely by identifying the power that is being exercised and then determining whether the wrong branch is exercising it. *See Bowsher*, 478 U.S. at 730–32. A functionalist line of cases, on the other hand, emphasizes checks and balances by asking whether some alteration to the structure of government—such as the line-item veto or the independent counsel statute—upsets the rough balance of power among the branches. *See, e.g.*, Morrison v. Olson, 487 U.S. 654 (1988) (upholding the independent counsel statute because it did not fatally undermine the Executive's functions). But the steady erosion of strict separation in the Court's jurisprudence has not spelled the doom of formalism. It turns out that there are formalist versions of checks and balances too. For example, *INS v. Chadha*, 462 U.S. 919 (1983), struck down the legislative veto not

These two models of separation of powers find ready parallels in the constitutional theory of federalism, which is unsurprising given that federalism is simply the vertical aspect of the Constitution's general strategy of dividing powers among government institutions. On both the vertical and horizontal dimensions, strict separation has tended to lose out over time to a checks and balances model. This part briefly traces this development in the law of federalism, which has shifted from a dual federalist model to one of concurrent state and national jurisdiction. That shift, I argue, makes the horizontal checks and balances limiting national lawmaking critical to the vertical dimension of federalism.

A. Dual Federalism and Separate Spheres

When it came to federalism, the Founders emphasized separation over checks and balances. Here is Madison, for example, in *Federalist 45*:

> The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negociation, and foreign commerce . . . . The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.[16]

There are, to be sure, ways in which the Constitution makes the national government dependent on the States, particularly by way of state governments' roles in choosing presidential electors, determining the electorate for federal elections, and—prior to the Seventeenth Amendment—choosing each state's senators.[17] But the

---

because Congress had invaded another branch's province, but rather because it had acted without following Article I's requirements of bicameralism and presentment.

16. THE FEDERALIST NO. 45 (James Madison), *supra* note 1, at 313.

17. *See* U.S. CONST. art. I, § 2, cl. 1 (empowering states to determine who votes for members of Congress); *id.* art. I, § 3, cl. 1 (empowering state legislatures to choose the state's senators); THE FEDERALIST NO. 45 (James Madison), *supra* note 1, at 311 (noting

Federalists were wary of giving the States any sort of "partial agency" in the national government's exercise of its powers, based on bitter experience of state intransigence during the Revolutionary War and under the Articles of Confederation.[18] The Articles had left Congress dependent on the States to implement federal laws, and removing *that* sort of dependence was a central aim of the new Constitution.[19] The Tenth Amendment underscored the notion that powers were limited and divided between the national and state governments—and that each was supposed to stay in its lane.[20]

The federalism literature knows this separationist regime as "dual federalism." As Alpheus Mason described it, dual federalism contemplates "two mutually exclusive, reciprocally limiting fields of power—that of the national government and of the States. The two authorities confront each other as equals across a precise constitutional line, defining their respective jurisdictions."[21] This notion should be distinguished from "dual sovereignty," which simply refers to the principle that the American federal system divides government power between multiple levels of government, subject to the ultimate sovereignty of the People.[22] The principle of dual sovereignty means that this division is constitutionally entrenched, but "dual federalism" is only one of a variety of forms

---

that these features make the state governments "constituent and essential parts of the federal Government").

18. *See, e.g.*, James Madison, *Vices of the Political System of the United States, April 1787*, *reprinted in* JAMES MADISON: WRITINGS 69, 72–73 (Jack N. Rakove ed., 1999); *see generally* CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION (2005).

19. *See* Madison, *supra* note 18, at 72–73.

20. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

21. Alpheus Thomas Mason, *Federalism: The Role of the Court*, *in* FEDERALISM: INFINITE VARIETY IN THEORY AND PRACTICE 8, 24–25 (Valerie Earle ed., 1968); *see also* Ernest A. Young, *The Puzzling Persistence of Dual Federalism*, *in* FEDERALISM AND SUBSIDIARITY: NOMOS LV, at 34, 36–40 (James E. Fleming & Jacob T. Levy eds., 2014); ANTHONY J. BELLIA, JR., FEDERALISM 183 (2011) ("The *dual federalism* paradigm understands federal and state governments to operate in different spheres of authority.").

22. *See* Young, *Dual Federalism*, *supra* note 21, at 37–38.

that the division could take.[23] Like the separation of legislative, executive, and judicial authority, a constitution might seek to maintain the sovereignty of both states and nation through drawing boundaries *or* by providing each set of institutions with their own means of defense.[24]

The first option—dual federalism—was the strategy of choice for much of our history, from the Founding up until the New Deal revolution in the 1930s. In *Gibbons v. Ogden*,[25] Chief Justice Marshall acknowledged that national and state authorities might regulate in the same policy space—the ferry business on the Hudson River, for example—but insisted that they exercised quite different powers. Although Article I conferred power on Congress to regulate commerce "among the several states," it conferred no general police power over health and safety of the sort belonging to New York. "The enumeration presupposes something not enumerated."[26] Similarly, in *Cooley v. Board of Wardens*,[27] Chief Justice Taney had to determine whether a state law requiring ships entering or leaving the port of Philadelphia to hire a local pilot concerned subjects "in their nature national" and thus within the "exclusive" power of Congress.[28] As these cases illustrate, a dual federalism regime tasks the courts with drawing lines between national and state power—a job that became increasingly difficult over the course of the nineteenth and early-twentieth centuries as both states and nation began to flex their regulatory powers.[29] Court decisions limiting the

---

23. *See id.*

24. *See, e.g.*, *infra* text accompanying notes 68–72 (explaining how the anti-commandeering doctrine enables states to opt-out of implementing federal law).

25. 22 U.S. (9 Wheat.) 1 (1824).

26. *Id.* at 195.

27. 53 U.S. (12 How.) 299 (1851), *abrogated by* Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995).

28. *Id.* at 319.

29. *See* Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125; Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 258–59; *see also* Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137 (2011) (discussing how a federal division of authority empowers courts to determine the boundary).

Sherman Act and striking down a federal child labor law, for example, made the exercise of this function increasingly controversial.[30]

Dual federalism was not simply imposed by courts, however. President Herbert Hoover—the technocrat who had orchestrated massive public relief efforts in Europe after World War I—found his ability to take similar action to stave off the Depression limited not so much by courts as by the national government's lack of capacity in 1929 to assume power to direct and stabilize the national economy.[31] When Congress created the Federal Communications Commission in 1934, it explicitly limited its jurisdiction to long distance telephone calls to prevent the new agency from claiming the full jurisdiction that Supreme Court decisions would have allowed.[32] Herbert Wechsler argued as late as 1954 that Congress did not simply represent state constituencies but had also internalized dual-federalism-style scruples about the appropriateness of national action in areas traditionally allocated to the states.[33]

The separation of functions between national and state governments was always clearer in theory than in practice, and the Supreme Court's efforts to draw the line floundered under perceptions that the States were unequal to the task of dealing with the Depression and that the Court's doctrine was too indeterminate to be principled.[34] Similar criticisms have been leveled at the jurisprudence of separated powers—that is, that insistence on strict separation would prevent the government from dealing with modern

---

30. *See*, *e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 17 (1895) (holding that the Sherman Act did not reach a massive merger of sugar refiners because it impacted interstate commerce only "indirectly"); Hammer v. Dagenhart, 247 U.S. 251 (1918) (striking down a federal law restricting child labor on the ground that it regulated manufacturing rather than interstate commerce).

31. *See* DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945, at 55–56 (2001).

32. *See* La Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986) (construing 47 U.S.C. § 152(b)).

33. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544–45 (1954).

34. *See generally* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998); Lessig, *supra* note 29, at 154, 176-77.

problems and that the Court has never come up with a principled and consistent line dividing legislative from executive from judicial power.[35] In any event, it seems fair to say that notions of separated power had largely given way to checks and balances, in both separation of powers and federalism cases, by the middle of the twentieth century.

B. Concurrent Jurisdiction and Vertical Checks and Balances

Dual federalism officially died in 1937, when the Supreme Court executed its "switch in time" that accepted broad national power to regulate an integrated economy.[36] We now live in a world of largely overlapping federal and state regulatory jurisdiction, with states and the national government constantly operating in the same policy spaces. The vertical separation of powers in such a world no longer rests on separation of functions, but on checks and balances.[37] Three sorts of checks are crucial: (1) the horizontal separation of powers at the national level; (2) the law of preemption, by which courts identify and resolve conflicts between federal and state law; and (3) the autonomous participation of the states in administering and challenging federal law. I briefly discuss the first two of these checks, both of which are relatively familiar in the federalism literature, in the remainder of this section. I turn to the third in the next Part.

---

35. *See, e.g.*, M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 604 (2001) ("The effort to identify and separate governmental powers fails because, in the contested cases, there is no principled way to distinguish between the relevant powers.").

36. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the National Labor Relations Act's regulation of employers' practices in manufacturing); *see also* Wickard v. Filburn, 317 U.S. 111 (1942) (consolidating the Court's shift by upholding Congress's authority to regulate even small activities based on their aggregate effects on the interstate economy); Corwin, *supra* note 4, at 17 (observing that, after the New Deal revolution, "[t]his entire system of constitutional interpretation touching the Federal System is today in ruins"). Aspects of dual federalism persist in certain areas of the law, such as foreign affairs. *See* Young, *Dual Federalism*, *supra* note 21, at 57–60.

37. *See* Gerken, *supra* note 4, at 33–35 (arguing for a theory of federalism grounded in checks and balances).

The death of dual federalism—and with it, the notion that the enumeration of Congress's powers in Article I meaningfully constrains federal legislation—presented the alarming prospect that Congress might simply federalize the entire corpus of American law, leaving nothing to the States.[38] But that is not what happened. The New Deal revolution itself empowered the States to regulate the national economy by largely eliminating constraints imposed by the Due Process Clause and considerably easing those imposed by the dormant Commerce Clause; it was a revolution in favor of government at the expense of private ordering, not of federal power at the expense of the states.[39] And although federal law's coverage has expanded vis-à-vis state law over time, that expansion has been gradual and often partial. In many areas, it remains true that "[f]ederal law is generally interstitial in its nature," as Henry Hart and Herbert Wechsler put it seventy years ago, and that "Congress acts . . . against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation."[40]

The constraints on this expansion are composed not of subject-matter limits but of institutional checks and balances. These are both political and procedural in nature. The political check is that, as in the horizontal separation of powers, the national Constitution gives the states an agency in the exercise of Congress's powers. Because Congress is composed of persons elected to represent their states, under rules that the states still largely control, Madison expected members of Congress to "feel a dependence" on their states and to be guided by a "local spirit."[41] Much later, Professor

38. *See* Lessig, *supra* note 29, at 154 ("The flip [by the Supreme Court] essentially ended judicially enforceable limits in the most important federalism domains; it represents a collapse of judicial restraints.").

39. *See generally* Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483 (1997).

40. HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 435 (1953).

41 THE FEDERALIST NO. 45 (James Madison), *supra* note 1, at 311; THE FEDERALIST NO. 46 (James Madison), *supra* note 1, at 318.

Wechsler developed this observation into his influential argument about "the political safeguards of federalism."[42] The efficacy of the political safeguards remains contested; many members of Congress may be driven by loyalty to the national party or solicitous of interests within their states but not necessarily protective of state *government*'s institutional prerogatives.[43] But Congress is constrained not only by the loyalties of its members but also the procedures by which it acts. Article I creates an onerous lawmaking practice marked by multiple veto-gates, often rendering national lawmaking prohibitively difficult whether or not Congress's members feel particularly sympathetic to the states.[44]

The crucial point is that in a world of concurrent power, as Brad Clark has thoroughly explored, the horizontal separation of *national* lawmaking powers is "a safeguard of federalism."[45] And a primary threat to the federal balance arises when federal law is made *outside* the constitutionally authorized lawmaking process. Federal law made by executive decree or agency action, for example, circumvents both the political representation of the states in Congress and the onerous lawmaking procedure prescribed by Article I.[46] Likewise, federal common law generated when federal courts formulate rules of decision in areas not governed by specific federal enactments—rather than applying state law under the *Erie* doctrine[47]—

42. Wechsler, *supra* note 33; *see also* Clark, *supra* note 5, at 1342–46 (observing that the federal lawmaking process is composed of "entities structured to be sensitive to state prerogatives").

43. *See, e.g.*, Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L. J. 75, 112–17 (2001) (criticizing the political safeguards argument).

44. *See* Clark, *supra* note 5, at 1339 ("[E]ach procedure requires the participation and assent of multiple actors to adopt federal law. This creates the equivalent of a supermajority requirement and thus reinforces the burden of inertia against federal action, leaving states greater freedom to govern."); *see also* Schoolhouse Rock!, *I'm Just a Bill*, YOUTUBE (Aug. 14, 2018), https://www.youtube.com/watch?v=SZ8psP4S6BQ [https://perma.cc/T2JM-H2RE].

45. *See* Clark, *supra* note 5; *see also* Young, *Two Cheers*, *supra* note 6, at 1355–64.

46. *See* Clark, *supra* note 5, at 1374, 1433; Young, *Two Cheers*, *supra* note 6, at 1363–64.

47. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); *see also* Ernest A. Young, Erie *as a Way of Life*, 52 AKRON L. REV. 193, 203–08 (2018) (emphasizing this aspect of *Erie*).

likewise evades the federalism-protecting constraints on national lawmaking.[48] Vertical separation of powers depends on horizontal checks and balances—and, as I hope to show in Part II, *vice versa*.

The representation of the states in Congress and the need for legislation to overcome multiple veto-gates also affects the content of federal legislation that does get through. Sweeping proposals for extending federal law must often be tempered and limited in order to secure passage. Statutes empowering federal agencies to act and make law outside the Article I legislative process, like the Administrative Procedure Act,[49] thus incorporate procedural safeguards that—to at least some degree—serve to ensure deliberation and limit lawmaking. And when legislating substantively, Congress often stops far short of displacing state regulatory authority in a given area. A second crucial array of checks and balances protecting state autonomy within a world of concurrent jurisdiction thus consists in interpreting and enforcing the requirements and boundaries of federal legislation.[50]

To some extent, for example, statutory requirements in federal administrative law offset the erosion of constitutional limits that might otherwise have checked lawmaking outside the Article I process. As Cass Sunstein has observed, "[b]road delegations of power to regulatory agencies . . . have been allowed largely on the assumption that courts would be available to ensure agency fidelity to whatever statutory directives have been issued."[51] The major questions doctrine has strengthened this sort of judicial review by voiding executive-driven expansions of federal regulatory

48. *See* Ernest A. Young, *A General Defense of* Erie Railroad Co. v. Tompkins, 10 J.L. ECON. & POL'Y 17, 67–76 (2013); Clark, *supra* note 5, at 1418–19.

49. 5 U.S.C. §§ 551–559 (2018).

50. *See, e.g.*, Bond v. United States, 572 U.S. 844 (2014) (interpreting federal criminal statute narrowly to avoid intrusion into areas of primary state responsibility); Jones v. United States, 529 U.S. 848 (2000) (same); Gregory v. Ashcroft, 501 U.S. 452, 464 (1991) ("[I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress's Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise.").

51. CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 143 (1990).

authority that Congress is unlikely to have contemplated in the original delegation.[52] A variety of "nondelegation canons" play a similar role by instructing courts to construe delegations of authority to agencies narrowly when they intrude on sensitive areas, such as by significantly expanding federal regulatory authority vis-à-vis the states.[53] And although states lack a preferred position of access to the administrative process like that they enjoy in Congress, the Administrative Procedure Act does afford states opportunities to participate in agency lawmaking as well as grounds to attack its product when those opportunities are denied.[54]

The law of preemption affords an equally important set of checks on both state and national power. Preemption implements the Supremacy Clause, requiring that state law give way in the event of a conflict.[55] Federal statutory schemes are often complex, however, and the extent to which Congress intends to preempt state law is often ambiguous. Although they involve questions of statutory rather than constitutional law, how the courts resolve these interpretive questions is of immense practical importance.[56] Significantly, the Court has developed important doctrines in its preemption jurisprudence limiting the preemptive force of federal law—the longstanding presumption against preemption,[57] for example, as well as the rule that only agency actions with the force of law can

52. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2607–09 (2022); Gonzales v. Oregon, 546 U.S. 243, 274 (2006) ("[T]he background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power.").

53. *See* Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000).

54. *See, e.g.*, Texas v. United States, 809 F.3d 134, 149 (5th Cir. 2015) (enjoining the Obama Administration's "Deferred Action for Parents of Americans and Lawful Permanent Residents" program for failure to comply with the notice-and-comment requirement and inconsistency with the underlying statute), *aff'd by an equally divided Court*, 579 U.S. 547 (2016).

55. *See* U.S. CONST. art. VI, cl. 2.

56. *See* Young, *Two Cheers*, *supra* note 6, at 1384–86.

57. *See* Wyeth v. Levine, 555 U.S. 555, 565 (2009); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *see also* Young, *Preemption*, *supra* note 29, at 265–69 (discussing the role of the presumption against preemption in federalism doctrine).

preempt state law.[58] As Justice Breyer has said, "the true test of federalist principle may lie, not in the occasional effort to trim Congress' commerce power at its edges . . . but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law."[59]

All these mechanisms of the vertical separation of powers are relatively well understood, if often overlooked. The remainder of this Essay explores a different set of dynamics stemming from the Founders' decision to "preserve[] the states as separate sources of authority and organs of administration."[60] The separate existence of the states does not set the states apart as a jurisdictional matter, with separate functions from the federal government. Rather, it allows them to participate in national politics and governance as uniquely autonomous actors.

II. THE STATES WITHIN NATIONAL POLITICS

The post-New Deal regime of concurrent state and federal regulatory jurisdiction allows each level of government to act independently within the same regulatory space, but this is not the norm. More often, the regime is one of "cooperative federalism," involving "a sharing of regulatory authority between the federal government and the states that allows states to regulate within a framework delineated by federal law."[61] As Phil Weiser has explained, "modern regulatory programs put in place across a variety of fields ranging from nearly all environmental programs to telecommunications regulation to health care . . . all embrace a unified federal structure that includes a role for state implementation."[62]

---

58. *See* Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668, 1679–80 (2019).

59. Egelhoff v. Egelhoff, 532 U.S. 141, 160–61 (2001) (Breyer, J., dissenting) (citations omitted).

60. Wechsler, *supra* note 33, at 543.

61. Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001); *see also* JOHN D. NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING 170–71 (2009) (tracing the development of cooperative federalism).

62. Weiser, *supra* note 61; *see also* ROBIN KUNDIS CRAIG, THE CLEAN WATER ACT AND THE CONSTITUTION: LEGAL STRUCTURE AND THE PUBLIC'S RIGHT TO A CLEAN AND

Cooperative federalism is a phenomenon of both the executive and legislative branches; it requires complementary legislation (and funding) from both Congress and the state legislatures, and it creates interlocking federal and state bureaucracies to administer the program.[63] One might describe the contemporary relationship of federal and state courts in much the same way, however. Each set of courts hears cases involving both federal and state laws, individual cases routinely move back and forth from one system to the other, and judges in each jurisdiction hearing similar sorts of cases—such as in large multidistrict litigation settings—have developed both formal and informal methods of cooperation.[64]

Some of the most interesting recent work in the federalism field has concerned the ways in which states participate in cooperative federalism programs established by Congress and overseen by federal agencies. Heather Gerken and Jessica Bulman-Pozen's account of "uncooperative federalism" has demonstrated that state officials participating in federal programs like the Clean Air Act or Medicaid are anything but passive automatons reduced to carrying out national orders; rather, the federal agency's dependency on state implementation gives state officials leverage to shape the federal program from within.[65] And Bridget Fahey's more recent work has explored the processes, both formal and informal, by which federal and state officials come to agreement on the terms of their cooperation and even engage in a hybrid "coordinated rulemaking"

HEALTHY ENVIRONMENT 9–10 (2009) (describing the Clean Water Act's statutory commitment to preserve the states' regulatory role); Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL'Y 181, 182 (1998) ("In effect, state and local governments serve as a kind of 'fourth branch' of the federal government.").

63. *See, e.g.*, Bridget A. Fahey, *Coordinated Rulemaking and Cooperative Federalism's Administrative Law*, 132 YALE L. J. 1320 (2023) (discussing the coordination of federal and state governments in the administrative agency context).

64. *See, e.g.*, Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1703–06 (2017) (discussing issues in coordinating federal multi-district litigation with parallel state court actions).

65. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

process.[66] Because this work bridges the divide between constitutional law and administrative law and requires intimate knowledge not only of complicated federal statutory schemes but also varying state administrative processes, it is hardly surprising that the subject is just beginning to be thoroughly explored. But any assessment of the extent to which the states' roles in federal cooperative programs serves as a check and balance to federal encroachment on state prerogative will depend on this sort of institutional detail.[67]

My focus here is on the more fundamental qualities that states bring to their roles in national politics and governance, as well as the varied ways in which they participate. Much contemporary work on separation of powers seeks to expand the lens to consider actors beyond the national trinity of President, Congress, and Judiciary by considering political parties, the civil service, organizations in civil society, and the like.[68] One leading effort to recapture a vision of mixed government within the administrative state, for example, dismisses the significance of state governments in a couple of sentences.[69] But if we are to understand the contemporary system of checks and balances in national politics and governance, we must take stock of the states.

A. States as Governments and the Transformation of Sovereignty

The first key characteristic of states as participants in the national system of checks and balances is that—unlike other institutional players in the system—they are governments in their own right, not branches or agencies of governments, with their own claims to democratic legitimacy and some measure of sovereignty.[70] This has

66. *See* Fahey, *supra* note 63.

67. *See* Ernest A. Young, *A Research Agenda for Uncooperative Federalists*, 48 TULSA L. REV. 427, 437-38 (2013).

68. *See, e.g.*, Magill, *supra* note 35, at 605; Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515 (2015).

69. *See* Michaels, *supra* note 68, at 537 & n.83.

70. *See, e.g.*, Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1868) ("[T]here [can] be no loss of separate and independent autonomy to the States, through their union under the Constitution. . . . The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.").

several implications for their role in implementing federal law. One is that Congress must obtain states' consent before enlisting them in this role, and federal officials have limited ability to hire and fire state personnel charged with administering parts of their program. The second is that states' distinctive grounding in democratic legitimacy may both complicate and enhance federal programs' ability to secure popular support. Finally, states exist outside the federal separation of powers in the sense that they can do things that the usual federal entities cannot, and because certain federal constitutional structural requirements do not apply to them. As I will explain, this may actually increase Congress's flexibility in designing federal enforcement regimes.

At the outset, cooperative federalism presents students with a paradox: The anti-commandeering doctrine announces a bright-line rule that "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."[71] And yet most federal regulatory programs are implemented by the States.[72] The explanation, of course, is that Congress may enlist states in cooperative federalism if they consent.[73] What counts as truly voluntary consent is not obvious, and Congress has many levers to induce compliance.[74] But the principle is clear that a state's participation is up to the state. It follows that federal actors

---

71. Printz v. United States, 521 U.S. 898, 925 (1997); *see also* New York v. United States, 505 U.S. 144, 188 (1992).

72. *See* Ernest A. Young, *State Standing and Cooperative Federalism*, 94 NOTRE DAME L. REV. 1893, 1903–06 (2019); Fahey, *supra* note 63, at 1330–52 (discussing cooperative implementation of Medicaid and other examples); Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L. J. 557, 574–84 (2000) (tracing the historical growth of cooperative federalism).

73. *See, e.g.*, *Printz*, 521 U.S. at 906–11 (emphasizing the voluntary nature of early instances of state implementation of federal law); Hills, *supra* note 62, at 181 ("*Printz* protects non-federal governments' practical ability to bargain for . . . discretion by allowing them to decline to implement federal statutes unless Congress accedes to their terms.").

74. *Compare, e.g.*, South Dakota v. Dole, 483 U.S. 203 (1987) (upholding broad power under the Spending Clause to induce states to regulate according to Congress's wishes), *with* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (holding that the Affordable Care Act's Medicaid expansion crossed the line of coercing states to participate).

have a minimal say over which state officials are involved in implementing federal law. And although federal agencies can generally cut off federal funding to state agencies and even suspend the state's role in the program, state officials are ultimately accountable to the state government and the people of the state. As Professor Fahey has demonstrated, "the long shadow of the voluntariness principle"—enforced by the anti-commandeering doctrine—profoundly shapes the structure and practice of cooperative federalism in a variety of ways.[75]

This dynamic affords some insight into what "sovereignty" does and does not mean in contemporary American federalism. Early Americans believed that "there must reside somewhere in every political unit a single, undivided, final power, higher in legal authority than any other power, subject to no law, a law unto itself."[76] But as Timothy Zick points out, "[i]f *exclusive* dominion and control is in fact the sole basis for claims to sovereignty, then states surely cannot be deemed sovereign today."[77] As Professor Zick explains, however, sovereignty remains a useful term to the extent it captures some sense of ultimate separateness, permanence, and autonomy from national control.[78] Hence, when Justice O'Connor sought to express the states' "'residuary and inviolable sovereignty,'" she emphasized their institutional independence: "State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart."[79] State sovereignty may mean any number of other

75. Fahey, *supra* note 63, at 1364–66.

76. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 198 (1967); *see also* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 344–54 (1969) (discussing the founding generation's adaptation of English ideas about sovereignty).

77. Timothy Zick, *Are the States Sovereign?* 83 WASH. U. L.Q. 229, 234 (2005).

78. *See id.* at 332–33.

79. New York v. United States, 505 U.S. 144, 188 (1992) (quoting THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed.,1961)).

things as well,[80] but one central thing it means is that states and their officers simply do not work for the national government.[81]

The States ultimately derive their sovereignty from their independent connection to the people. In a nod to the traditional notion of sovereignty, our Founders viewed the people as sovereignty's true repository; because true sovereignty "resides in the PEOPLE, as the fountain of government," "[t]hey can distribute one portion of power to the . . . State governments: they can also furnish another proportion to the government of the United States."[82] State governments thus derive their legitimacy from state constitutions and state elections, not from federal delegations. This may result in instances of "uncooperative federalism," in which state officials choose to undermine or obstruct federal mandates in deference to local preferences.[83] But it also may mean that state officials can tailor the implementation of federal programs to be more sensitive to local conditions and mores—thereby enhancing the legitimacy of those programs on the ground.[84]

Because they have an independent connection to the people, States offer Congress a means to delegate power without either augmenting the authority of the federal executive or undermining the independence of enforcement from Congress itself. As Rick Hills has pointed out, state implementation tends to rely on a web of officials at the state and local levels, many of whom are directly elected, rather than a federal agency staffed by appointed experts

---

80. *Compare, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996) (holding that state sovereignty includes the principle of immunity from private suits for money damages), *with id.* at 153–54 (Souter, J., dissenting) (demonstrating that state immunity from suit under federal law is inconsistent with the Founders' theory of sovereignty).

81. *See* Ernest A. Young, *Marijuana, Nullification, and the Checks and Balances Model of Federalism*, *in* NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT 125, 138–44 (Sanford Levinson ed., 2016).

82. James Wilson, quoted in PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787–1788, at 302, 316 (John Bach McMaster & Frederick D. Stone eds., Lancaster, Inquirer Printing & Publ'g Co. 1888).

83. *See* Bulman-Pozen & Gerken, *supra* note 65, at 1271–74.

84. *See* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493–94 (1987).

and (distantly) accountable only through the elected President.[85] Professor Bulman-Pozen has likewise noted "a host of practical reasons" why Congress "often turns to the states":

> [B]ecause they have relevant expertise; because they have in place an administrative apparatus that the federal government lacks; because relying on states will be cheaper or will foster experimentation; because states can be "force multipliers" that amplify enforcement of federal law; because congressional delegations fight to protect existing state programs from federal preemption; [or] because of a more diffuse interest in devolution.[86]

Such delegations may, moreover, "foster[] the sort of vigorous, visible public debate about federal law that our horizontal system of checks and balances aspires to generate."[87]

The states' separate existence also opens up additional possibilities for institutional design of regulatory programs. The Clean Air Act, for example, requires the national Environmental Protection Agency to set air quality standards for each pollutant, but it authorizes the states to devise their own implementation plans ("SIPs") to reach those standards.[88] Depending on their preferences and diverse regulatory philosophies, some states may choose market-based solutions while others pursue more traditional command-and-control approaches.[89] Congress may also create a form of cooperative federalism by employing state courts to enforce federal law. In recent years, for example, the Supreme Court has held that

---

85. *See* Hills, *supra* note 62, at 186 ("The main distinction between the federal executive branch and non-federal governments is the greater density of elected politicians in the latter.").

86. Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 475 (2012).

87. *Id.* at 499.

88. *See, e.g.*, John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1193-95 (1995).

89. *See, e.g.*, Eric M. Patashnik, *The Clean Air Act's Use of Market Mechanisms*, in LESSONS FROM THE CLEAN AIR ACT: BUILDING DURABILITY AND ADAPTABILITY INTO US CLIMATE AND ENERGY POLICY 201, 205-08 (Ann Carlson & Dallas Burtraw, eds., 2019) (discussing some states' adoption of cap and trade systems to regulate emissions).

Article III limits Congress's ability to authorize private enforcement of federal consumer protection statutes in cases where the private plaintiffs have not yet sustained any actual injury.[90] But such private suits are a viable option in at least some state courts, which are not limited by Article III.[91]

More generally, cooperative federalism may allow Congress to check the President at a time when the notion of independent federal agencies has become increasingly controversial. Recently, the Supreme Court has invalidated aspects of the design of several federal agencies in which Congress sought to insulate agency officials from presidential removal,[92] and originalist scholars have argued for a strong unitary-executive principle requiring all federal executive officials to be removable the President's pleasure.[93] President Trump seems determined to test the constitutionality of federal independent agencies.[94] But state officials implementing federal law do so pursuant to agreements between their governments and the

---

90. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2208–13 (2021) (holding that plaintiffs lacking actual present injury lack standing to seek statutory damages under the Fair Credit Reporting Act); *see also* Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 48 F.4th 1236, 1245–49 (11th Cir. 2022) (rejecting standing under the Fair Debt Collection Practices Act where plaintiff had not sustained any actual injury).

91. *See* Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction Over Federal Claims*, 105 MINN. L. REV. 1211 (2021); Rebekah G. Strotman, Note, *No Harm, No Problem (In State Court): Why States Should Reject Injury in Fact*, 72 DUKE L. J. 1605, 1609–10 (2023).

92. *See* Collins v. Yellen, 141 S. Ct. 1761 (2021) (invalidating the for-cause removal provision governing the single director of the Federal Housing Finance Agency on the ground that it interferes with the President's removal power); Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020) (invalidating for-cause removal provision protecting the CFPB's single Director from presidential removal).

93. *See* Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756 (2023).

94. *See, e.g.*, Jonathan H. Adler, *Dellinger v. Bessent Disappears Allowing Wilcox v. Trump to Train Sights on Humphrey's Executor*, THE VOLOKH CONSPIRACY, March 6, 2025, at https://reason.com/volokh/2025/03/06/dellinger-v-bessent-disappears-allowing-wilcox-v-trump-to-train-sites-on-humphreys-executor/ [https://perma.cc/V58R-548E] ("[A] clear challenge to *Humphrey's Executor* is coming into focus."); *see also* Bamzai & Prakash, *supra* note 93, at 1759-60 (arguing that the Court "seems keen to prune (or root out) cases like *Humphrey's Executor v. United States*" and hold that independent agencies "are executive through and through").

federal government;[95] their power to execute these agreements stems from their state constitutions, not "the executive power" vested in the President under Article II.[96] Because they do not exercise the *federal* executive power, state officials are not subject to presidential appointment or removal—and they do not receive emails from Elon Musk's Department of Government Efficiency.[97] Congress can thus achieve more independence in the enforcement of federal law than the unitary-executive principle may permit, and perhaps insulate some aspects of enforcement from executive branch efforts to trim the bureaucracy, by shifting enforcement authority to state officials.[98] In this sense, the separateness of state governments adds to Congress's flexibility rather than restricting it.

Finally, the States are popularly accountable to a distinct electorate from the national one. Each state slices the American partisan divide differently,[99] with the result that states are less afflicted by the fifty-fifty gridlock that prevails at the national level. This may allow Congress, on some issues, to delegate around the hyper-polarized divisions at the national level; by leaving red, blue, and purple states discretion in implementing statutory mandates, national

95. *See* Fahey, *supra* note 63, at 1354–55.

96. U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

97. *See, e.g.*, Brian Schwartz & Scott Patterson, *Musk Says Federal Workers Must Detail 'What They Got Done'—or Risk Losing Job*, WALL ST. J. Feb. 23, 2025, at https://www.wsj.com/politics/policy/musk-says-federal-workers-must-detail-what-they-got-doneor-risk-losing-job-5eaba57a [https://perma.cc/9HT6-M9XE].

98. *See generally* Bulman-Pozen, *supra* note 86, at 486–98. In an oft-overlooked passage in *Printz v. United States*, Justice Scalia argued that the unitary executive principle "would be shattered . . . if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws." 521 U.S. 898, 923 (1996). The need to secure state consent does impose some check on this congressional option. *See* Hills, *supra* note 62, at 186. Moreover, state officials are subject to a democratic check on their actions—just not through the President. In any event, one suspects that the reason this passage in *Printz* is so often overlooked is that, taken seriously, it would require the Court to invalidate a vast array of well-established cooperative federalism programs. It would also call into question federal law's pervasive use of private attorneys general and citizen suits, which are also not generally subject to Presidential control.

99. *See generally* Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. Rev. 1077 (2014).

partisans can achieve at least partial victories and secure opportunities to implement their programs on the ground. This sort of devolution may also increase the legitimacy and effectiveness of national governance by taking certain particularly divisive issues off the federal table.[100]

B. Resources, Financial and Political

In many cases, it seems likely that state implementation will be less attractive to Congress than implementation by federal officials who *do* work for the national government. According to political scientists John DiIulio and Donald Kettl, "empirical research on intergovernmental affairs reveals that . . . [the states'] wide latitude in deciding how best to translate federal policies into action, or whether . . . to follow federal policies at all" causes "tremendous difficulty in executing even relatively straightforward [federal] policies."[101] One might ask, why does Congress put up with it? The short answer is that the difficulty of federalizing enforcement altogether will generally outstrip the inconvenience of tolerating state foot-dragging or dissent.

The problem is not a constitutional one, at least in the narrowest sense. It is hard to think of a federal cooperative federalism program that Congress would lack the enumerated power to implement directly, using federal officials and federal resources. And in fact the statutes creating these programs typically do allow the lead federal agency to re-federalize the program in a particular state if that state's implementation efforts fail to conform to federal requirements.[102] But "[i]n practice . . . the federal government rarely reassumes program control in this way, and sanctions such as

---

100. *See* Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 55 (2018) ("Federalism can operate as an important safety valve in polarized times, lowering the temperature on contentious national policy debates and creating opportunities for policymaking that may be impossible at the national level.").

101. JOHN J. DIIULIO, JR. & DONALD F. KETTL, FINE PRINT: THE CONTRACT WITH AMERICA, DEVOLUTION, AND THE ADMINISTRATIVE REALITIES OF AMERICAN FEDERALISM 18 (1995).

102. *See, e.g.*, Dwyer, *supra* note 88, at 1198.

withdrawing federal funds are also rare."[103] This is because federal agencies lack the resources to take sole responsibility for enforcement in most states. "In a very basic sense," political scientist John Nugent concludes, "the executive branch of the federal government simply cannot carry out all the tasks that Congress asks of it without help from subnational and private entities."[104]

National dependence on state enforcement extends to areas that are not formally part of cooperative federalism regimes. For example, federal and state law enforcement authorities share concurrent jurisdiction over a broad range of criminal matters, but both the statutory provisions they enforce and the structures of investigation, prosecution, and punishment are formally separate. In practice, there is a great deal of cooperation at each stage.[105] When a state decides to opt-out of a particular type of enforcement, however—by repealing state-law prohibitions on the recreational use of marijuana, for example—it becomes nearly impossible for federal authorities to maintain enforcement of a federal prohibition that remains on the books.[106] Generally speaking, the national government has a hard time enforcing federal law when state and local authorities are unwilling to assist.

---

103. NUGENT, *supra* note 61, at 178. For example, the EPA website's page listing all petitions to withdraw state authority to implement the National Pollutant Discharge Elimination System identifies no petitions that have been granted. *See NPDES State Program Withdrawal Petitions*, EPA, https://www.epa.gov/npdes/npdes-state-program-withdrawal-petitions [https://perma.cc/P6K9-4ATC] (last visited Sept. 9, 2024).

104. NUGENT, *supra* note 61, at 173; *see also* Samuel H. Beer, *The Adoption of General Revenue Sharing: A Case Study in Public Sector Politics*, 24 PUB. POL'Y 127, 162 (2000) ("As the federal government in the Great Society period extended its responsibilities by means of state and local governments, it also became dependent upon them for the successful discharge of those responsibilities."); Bulman-Pozen, *Separation of Powers*, *supra* note 86, at 462 ("The very growth of the federal administrative state has swept states up as necessary administrators of federal law.").

105. *See generally* Erin C. Blondel, *The Structure of Criminal Federalism*, 98 NOTRE DAME L. REV. 1037, 1041 (2023) (concluding that "cooperative federalism has triumphed" in federal criminal law).

106. *See* Young, *Marijuana*, *supra* note 81; Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421 (2009).

The availability of resources to governments at each level of government thus forms an important element of vertical checks and balances in a federal system.[107] One can see this in comparative perspective in the European Union. The EU is generally considered to be less centralized than the United States, despite the fact that its foundational treaties grant Brussels roughly equivalent enumerated powers to Congress, and the European Court of Justice has adopted the principle that European law displaces inconsistent law in the member states.[108] One primary reason is the considerably smaller governmental capacity of the EU, as reflected in its employment and budget.[109] The EU employs just over 60,000 persons, roughly equal to the State of North Carolina, and it spent €170.6 billion (approximately $180 billion) in 2022—about midway between the budgets of Texas and New York.[110] France, by contrast, spent €608.6 billion in the same year.[111] It's hard to be an

---

107. *See* Blondel, *supra* note 105, at 1044.

108. *See* Ernest A. Young, *A Comparative Perspective*, *in* OXFORD PRINCIPLES OF EUROPEAN UNION LAW 142, 177 (Robert Schutze & Takis Tridimas, eds., 2018); Andrew Moravcsik, *The European Constitutional Settlement*, *in* 8 MAKING HISTORY: EUROPEAN INTEGRATION AND INSTITUTIONAL CHANGE AT FIFTY 23, 25 (Sophie Meunier & Kathleen R. McNamara eds., 2007) ("The EU remains, despite a few federal elements, essentially a confederation of nation-states.").

109. *See* Young, *Comparative Perspective*, *supra* note 108, at 158; Moravcsik, *supra* note 108, at 34 ("[T]he EU does not (with a few exceptions) enjoy the power to coerce, administer, or tax.").

110. *See Jobs & traineeships in European Union institutions*, EUR. UNION, https://european-union.europa.eu/live-work-study/jobs-traineeships-eu-institutions_en [https://perma.cc/8JPV-6HLK] (last visited Sept. 9, 2024); *Current Employee Statistics*, N.C. OFF. OF STATE HUM. RES., https://oshr.nc.gov/work-nc/employee-statistics/current-state-employee-statistics [https://perma.cc/4AAJ-28E5] (visited Sept. 9, 2024) (reporting 56,556 employees in state agencies, with an additional 20,403 in the state universities, as of July 2024); *Budget of the European Union*, WIKIPEDIA, https://en.wikipedia.org/wiki/Budget_of_the_European_Union [https://perma.cc/C3NM-3C8F] (last visited Sept. 9, 2024); *List of U.S. state budgets*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_U.S._state_budgets [https://perma.cc/9A2X-UHXZ] (last visited Sept. 9, 2024).

111. Statista Research Department, *Total public spending in France form 2010 to 2022*, STATISTA (July 4, 2024), https://www.statista.com/statistics/463358/total-public-spending-france/ [https://perma.cc/D5UH-7MKM].

overweening central sovereign when your federation's subunits dwarf your governmental capacity.

The governmental capacity of the United States government is considerably greater, of course, but as already discussed it is not equal to the task of federalizing all the governance tasks currently entrusted to state implementation in cooperative federalism regimes. Congress could, in principle, alter these facts. No obvious constitutional principle requires the national government to transfer $1.2 trillion to state and local governments annually or forecloses it from preempting an even greater proportion of the revenue base for federal taxation.[112] But the existing structure—high federal taxes relative to state taxation, large grants-in-aid to states in return for implementation of most federal regulatory programs—was deemed necessary to secure broad political support for those programs and would surely be extremely difficult to radically alter.[113]

C. State Public Litigation

Litigation is an important part of our system of checks and balances because it enlists the judiciary to check unlawful behavior by the other branches. Although American law has embraced judicial review on behalf of private parties, it has generally been leery of allowing branches of the national government to sue one another in court.[114] Critics of inter-branch litigation have often argued that public institutions lack the kinds of personal injuries that enable private parties to sue, and they have urged that the political branches should use "political remedies" to settle disputes about the meaning of federal law.[115] States have seemed to occupy a

112. *See Staff Working Paper Series: State and Local Government Grants in the Federal Budget*, HOUSE BUDGET COMM. (Sept. 27, 2023), https://budget.house.gov/resources/staff-working-papers/staff-working-paper-series-state-and-local-government-grants-in-the-federal-budget [https://perma.cc/6BAD-Q9XX] (showing $ 1.193 trillion in federal grants to state and local governments in 2022).

113. *See, e.g.*, Beer, *supra* note 104, at 131 (discussing the political incentives to use state and local government to deliver welfare services).

114. *See, e.g.*, Raines v. Byrd, 521 U.S. 811 (1997) (rejecting standing of members of Congress to challenge the Line Item Veto Act).

115. *See, e.g.*, Walter Dellinger, *House Republicans' misguided Obamacare lawsuit*, WASH. POST (Aug. 16, 2015), https://www.washingtonpost.com/opinions/the-houses-

middle ground in this discussion. They lack many of the obvious political remedies against the national government that Congress might have in a dispute with the President; States can't retaliate against the executive by refusing to confirm appointments or raise the federal debt ceiling, for example. And it is often easier to identify traditional injuries attributable to the federal policies that states wish to challenge.[116]

State public law litigation challenging national policies has become considerably more common in recent years—and also more controversial. During the Obama Administration, Texas Attorney General (now Governor) Greg Abbott famously described his typical workday as, "I go into the office, I sue the federal government and I go home."[117] Blue state attorney generals have been equally active during Republican administrations.[118] In the first months of the new Trump Administration, for example, blue state attorneys general have brought a wide range of cases challenging the President's executive orders.[119] The partisan cast of many state

misguided-obamacare-lawsuit/2015/08/16/4d95e3ca-34a8-11e5-94ce-834ad8f5c50e_story. html (arguing that legal disputes between the political branches should be resolved by political means).

116. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497 (2007) (finding that Massachusetts had standing to challenge EPA's failure to make rules reducing greenhouse gases based in part on the threat that sea level rises attributable to climate change would flood public lands). The propensity of the federal government to file its own lawsuits against states also complicates any effort to argue that state vs. nation suits should be categorically nonjusticiable. *See, e.g.*, United States v. Abbott, 110 F.4th 700 (5th Cir. 2024) (en banc) (reversing grant of preliminary injunction in U.S.'s suit against Texas to prohibit installation of a floating barrier to prevent unlawful immigration across the Rio Grande).

117. Sue Owen, *Greg Abbott says he has sued Obama administration 25 times*, POLITIFACT (May 10, 2013), http://www.politifact.com/texas/statements/2013/may/10/greg-abbott/greg-abbott-says-he-has-sued-obama-administration-/ [https://perma.cc/NL3R-BRTW].

118. *See, e.g.*, Steve LeBlanc & Bob Salsberg, *Massachusetts' Maura Healey helping lead effort to litigate Trump*, BOSTON.COM (Dec. 18, 2017), https://www.boston.com/?post_type=post&p=6259485 [https://perma.cc/9M9BGA4X].

119. *See, e.g.*, David Zimmerman, *Blue States Sue Trump Administration over Executive Order Ending Birthright Citizenship*, NAT'L REV., Jan. 21, 2025, at https://www.nationalreview.com/news/blue-states-sue-trump-administration-over-executive-order-ending-birthright-citizenship/ [https://perma.cc/ZY3Y-YKFU]; *Democratic states sue Trump*

challenges to federal policy, as well as their sheer volume,[120] had already prompted a rising chorus of criticism of state-driven public litigation even before the current wave of litigation.[121]

Maggie Lemos and I have argued elsewhere that much state-led public law litigation would occur anyway, at the behest of private individuals and non-governmental organizations like the Institute for Justice or the American Civil Liberties Union, even if states were somehow disabled from bringing such lawsuits.[122] And state governments compare quite favorably—in terms of expertise and accountability—to private plaintiffs.[123] The important point for present purposes, however, is that it is precisely the states' role as integral institutional players within the system of national governance that gives rise to their role as public litigants. When state officials work hand in glove with federal regulators within a cooperative federalism regime, and even when they are performing public functions within the same policy space as federal regulators, states are much more likely to be adversely affected by a change in federal policy than most persons.[124]

Consider Texas's challenge to the Obama Administration's action conferring lawful presence on several million undocumented aliens. Although no private individual was likely to assert a plausible injury that could establish standing to challenge the conferral of lawful status on another person, states were differently situated. A

---

administration over order to halt funding for gender-affirming care, ASSOCIATED PRESS, Feb. 7, 2025, at https://www.nbcnews.com/nbc-out/out-politics-and-policy/democratic-states-sue-trump-administration-order-halt-funding-gender-a-rcna191257.

120. *See Litigation Tracker*, JUST SECURITY, at https://www.justsecurity.org/107087/tracker-litigation-legal-challenges-trump-administration/ [https://perma.cc/FD9Q-PX2J] (visited March 7, 2025) (tracking 106 challenges to executive actions by the Trump Administration).

121. *See, e.g.*, Ann Woolhandler & Michael G. Collins, *Reining in State Standing*, 94 NOTRE DAME L. REV. 2015, 2031 (2019) ("Article III courts do not exist to resolve the policy disputes between governments."). *But see* Daniel Francis, *Litigation as a Political Safeguard of Federalism*, 49 ARIZ. ST. L.J. 1023 (2017) (praising state suits as an aspect of the vertical separation of powers).

122. *See* Lemos & Young, *supra* note 100, at 106–09.

123. *See id.* at 113–17.

124. *See generally* Young, *State Standing*, *supra* note 72.

state has legal obligations to protect, educate, and provide certain other services—such as issuing a driver's license, in Texas—to all persons lawfully within its territory.[125] The Administration's allegedly unlawful expansion of that category of persons thus imposed costs on Texas that sufficed to establish injury for purposes of Article III standing.[126] Acknowledging that injury required no "special solicitude" for state plaintiffs, but rather a simple recognition that states have a broad range of responsibilities that may give rise to injuries when the legal environment changes.[127]

For good or ill, litigation has long been a part of our constitutional system of checks and balances. Congress has enacted statutes—such as the Klu Klux Klan Act and the Voting Rights Act—authorizing lawsuits by both the Justice Department and private individuals to check the unlawful exercise of state authority.[128] Suits under these provisions vindicate not only the voting rights of particular individuals but also the federal interest in fair voting procedures and the supremacy of federal law. Congress did not entrust these constitutional values to "political remedies" simply because the suits targeted the unlawful acts of institutional defendants. It is hard to think of a reason why converse suits, instituted by state governments to check unlawful *national* action, should be foreclosed where states can meet the ordinary requirements for standing and a cause of action.[129] In an era of congressional gridlock and increasingly adventurous exercises of executive authority by administrations of both parties, the role of state governments in enforcing the separation of powers has never been more vital.

---

125. *See, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982) (holding that the Fourteenth Amendment obligated Texas to provide public schooling to the children of undocumented immigrants).

126. *See* Texas v. United States, 809 F.3d 134, 155–62 (5th Cir. 2015), *aff'd by an equally-divided Court*, 579 U.S. 547 (2016).

127. *See id.* at 1900–02; *see also* Katherine Mims-Crocker, *Not-So-Special Solicitude*, 109 MINN. L. REV. 815 (2024) (demonstrating that courts frequently ignore any notion of "special solicitude" in state standing cases and, even when they purport to apply it, it never makes a dispositive difference).

128. *See* 42 U.S.C. § 1983; 52 U.S.C. § 10308(d).

129. *See* Young, *State Standing*, *supra* note 72, at 1910–21.

CONCLUSION

Perhaps in a world of strictly separated powers, horizontal separation among the branches of government could be kept separate from vertical separation between the nation and the states. But if that vision ever worked in practice, it has long since been overtaken by the development of governance at both levels. Madison anticipated that development by articulating a different vision of overlapping and mutually limiting institutions, and he included the states in that vision by emphasizing their agency in constituting the national government.

This essay has offered an account of how the demise of dual federalism in the mid-twentieth century brought states firmly into a world of concurrent federal and state jurisdiction in which checks and balances—not separation—define both horizontal and vertical separation of powers. In that world, horizontal separation of powers at the national level helps preserve vertical separation between the nation and the states, and the states likewise participate in the system of checks and balances at the national level. They participate, however, not as another branch or agency but as separate and complete governments, with their own constitutional structure and unique claims to democratic legitimacy. That separate and indefeasible existence, not any exclusive claim to some particular kernel of regulatory authority, is the core meaning of "state sovereignty" in our contemporary federal system. But because the states' governmental character makes them particularly effective participants in our pluralist system, the states' sovereignty enhances the stability of the system as a whole.

ANSWERED BY TEXT

JENNIFER L. MASCOTT* & ELI NACHMANY†

This Essay takes stock of a pivotal moment at the Court: statutory interpretation at center stage in administrative law. The U.S. Supreme Court's most recent Term saw numerous landscape-shifting administrative law decisions. The most widely discussed was the Court's elimination of 40-year-old Chevron *deference in* Loper Bright Enterprises v. Raimondo. *The Court's decisions also effected significant change in the scope of Seventh Amendment jury trial rights and the length of time that individuals, businesses, and associations have to challenge agency actions.*

But taken together, the Court's decisions did not radically restructure the administrative state on constitutional grounds. Despite the substantial mindset shift in conceptions of how courts should review agency legal determinations and conduct enforcement actions, the Court rejected or failed to reach several constitutional law challenges. Instead, the Court's leading cases tended to resolve on carefully measured statutory grounds, at times with Justice alignments that transcended typical ideological or jurisprudential lines. Also, last Term's most significant administrative law decisions may give important predictive clues about how the Court will apply statutory constraints to free-ranging administrative claims to vast regulatory power in future years.

---

* Associate Professor of Law and Founder of the Separation of Powers Institute, Columbus School of Law, The Catholic University of America.

† Associate, Covington & Burling LLP. This Essay is written in connection with the 2024 Federalist Society Student Symposium, at which Nachmany spoke on a panel (entitled "The Executive Power, the Legislative Power, and the Administrative State"). Nachmany notes that the views expressed in this Essay do not necessarily reflect those of his employer or its clients. The authors thank the editors of the *Harvard Journal of Law & Public Policy* for their meticulous review of this Essay.

INTRODUCTION

This Essay takes stock of a pivotal moment at the Court: statutory interpretation at center stage in administrative law. Last Term, the Court turned away several significant federal appeals court conclusions that agencies had violated constitutional requirements—on issues ranging from congressional delegation of power to the executive, presidential supervision, and the proper method for Congress to appropriate funds to executive agencies. Notably, several of those separation of powers issues are already front and center in the new Administration's executive orders and efforts to assert effective management over the heretofore unwieldy administrative state. The question whether—and to what extent—the Court will weigh in on these issues remains one to watch.

October Term 2023 at the Supreme Court featured several highly significant administrative law decisions—including the Court's departure from *Chevron* deference in *Loper Bright Enterprises v. Raimondo*. The Court resolved the substantial majority of its administrative law cases from the last Term on statutory grounds. That was true even when parties presented a companion constitutional claim, like the contention in *Loper Bright Enterprises v. Raimondo* that judicial deference to agency legal interpretations abdicates the judiciary's constitutional responsibility for interpreting law in the resolution of cases and controversies.

These decisions resulted from the Court applying longstanding principles of statutory interpretation to police the enacted bounds of governmental authority. In so doing, the Court kicked contested issues back to Congress and, ultimately, to the democratic process.

Escaping this trend, the Court's most impactful administrative law decision this past Term may prove to be the Court's reinvigoration of longstanding common-law jury rights under the Seventh Amendment in *Jarkesy v. Securities and Exchange Commission*. But even there, the Court simply took the case in the posture in which it found it. If the lower court decision had remained in place, the SEC's fraud enforcement proceedings would have been held unconstitutional on three constitutional grounds, rather than just for

lack of a jury trial. The Fifth Circuit's holdings that agency choice between intra-agency or federal court enforcement unconstitutionally manifests legislative power and that agency adjudicators, constitutionally, must be fireable at will would have had far-reaching implications for multiple agencies. The U.S. Supreme Court, at least for now, declined to reach either issue.

Aside from the notable exception of *Jarkesy's* jury-trial determination, the Court centered statutory interpretation in the majority of the remaining administrative law decisions in which it found legal deficiencies. In the *Loper Bright* decision itself, the Court resolved the appropriate deference to agency legal determinations by interpreting the terms of the Administrative Procedure Act. The Court declined to reach broader, more trenchant versions of the *Chevron* challenge, focused on the contours of Article III judicial power—despite those questions being fully briefed.

In this and other cases from the latest Term, the Court manifested the primacy of the congressional role in lawmaking. The practical upshot of the Court's decisions is that Congress will have the space, and responsibility, to act. Even where the Court declines to find a constitutional violation lurking in statutory text, the legal and policy concerns motivating the original constitutional challenge remain within congressional control through the political statutory enactment process. In such instances, Congress can resolve thorny questions of transparency, procedural rights, and accountability by reexamining the authority that it assigns to agencies and the supervisory power that it maintains in place for the President.[1]

Although the Court rested its administrative law decisions on constitutional grounds when absolutely necessary, such as in *Jarkesy*, such cases were the exception and not the rule. From the

1. One such example is the opportunity that Congress has to rework agency adjudication in light of *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024). *See* Jennifer L. Mascott, *Adjudicating in the Shadows*, NOTRE DAME L. REV. (forthcoming 2025), https://perma.cc/ZM49-FNAN; Will Yeatman & Keelyn Gallagher, *The Rise of Money Sanctions in Federal Agency Adjudication*, 76 ADMIN. L. REV. 857 (2024), https://perma.cc/KM7Z-Z28Y; *Reining in the Administrative State: Agency Adjudication and Other Agency Action: Hearing Before the H. Comm. on the Judiciary*, 118th Cong. (2024), https://perma.cc/46FN-2EVQ (statement of Jennifer Mascott).

most to the least far-reaching administrative law opinions, the Court generally reached its answers through the application of familiar statutory interpretation principles.

Three cases are the principal focus of this Essay: *Loper Bright*; *Corner Post, Inc. v. Board of Governors of the Federal Reserve*; and *Garland v. Cargill*. In *Loper Bright*, the Court interpreted Section 706 of the Administrative Procedure Act (APA) to require that courts review agencies' interpretations of law without deference to those agencies' views. In *Corner Post*, the Court interpreted the statute of limitations for APA challenges to agency rules to begin for each regulated party when the rule injures that party—not when the agency promulgates the rule. And in *Cargill*, the Court rejected an agency's interpretation that a bump stock is a "machinegun" within the meaning of the National Firearms Act of 1934.

This Essay proceeds in two parts. Part I reviews the Court's decisions in *Loper Bright*, *Corner Post*, and *Cargill*. These three cases demonstrate the central role of statutory interpretation in the Court's administrative law jurisprudence from October Term 2023. Part II considers two benefits of the Court's focus on statutory interpretation as opposed to reaching for constitutional cases and constitutional holdings. First, a focus on statutory text has the effect of confining judicial debates to a narrow range of possible outcomes. Thus, Congress can obviate a great deal of confusion by speaking clearly. Second, and relatedly, the Court's decisions should have the effect of shifting the lawmaking spotlight to where it belongs: Congress.

Difficult constitutional questions remain open after the 2023 Term. One example is the extent to which agency enforcement actions—beyond securities fraud claims and in agencies other than the Securities and Exchange Commission—require initial adjudication in Article III courts with the protection of jury trial rights. In time, the Court may say more on that issue and others. But this last Term, the Court focused on the limitations that *statutes* impose on the executive branch—beyond the constitutional tensions in current administrative agency structures and powers.

And beyond its more modest approach of holding agencies to

underlying statutory limits on their power rather than making trenchant constitutional pronouncements, the Court's statutory cases this Term also enjoyed several majority lineups crossing jurisprudential lines. Such cases transcended the administrative law docket, including criminal and more politically charged cases like *Fischer v. United States* and *Pulsifer v. United States*. In *Fischer*, Justice Jackson joined a six-Justice majority to hold that a federal criminal obstruction statute did not encompass certain offenses charged in the January 6th prosecutions (with Justice Barrett in dissent). And in *Pulsifer*, Justice Kagan wrote a majority for herself and five of her more conservative colleagues that interpreted federal sentencing law strictly—with Justice Gorsuch joining Justices Sotomayor and Jackson in dissent. Across the ideological spectrum, the Justices appear to have adopted a formalist approach to statutory interpretation that manifests in a variety of cases

In recent years, administrative agencies have frequently attempted to exercise power beyond the terms of authority granted by Congress. The Court's focus on statutory interpretation is above and beyond any potential constitutional conflicts. This focus demonstrates that statutory terms still themselves provide meaningful limits.[2] Furthermore, the Court's approach is indicative of the judiciary's respect for time-honored principles of interpretation that—in the long run—bring stability to our law.

I. THREE ILLUSTRATIVE CASES

For administrative law enthusiasts, the Supreme Court's 2023 Term was one of its most significant in recent memory. That is largely because the Court, in *Loper Bright Enterprises v. Raimondo*,[3] departed from so-called "*Chevron* deference."[4] A couple of other

2. *Cf.* John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 748 (2017) (describing textualism as checking judicial discretion in statutory interpretation).

3. 144 S. Ct. 2244 (2024).

4. *Chevron* deference was a doctrine named for the Supreme Court's opinion in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), *abrogated by Loper Bright*, 144 S. Ct. 2244.

cases—*SEC v. Jarkesy*[5] and *Corner Post, Inc. v. Board of Governors of the Federal Reserve*[6]—also involved headline-grabbing administrative law issues: respectively, the constitutionality of agency adjudication of securities fraud claims and the statute of limitations for challenges to agency regulations. Additionally, several more cases—such as *Cargill v. Garland*,[7] *Harrow v. Department of Defense*,[8] and *Rudisill v. McDonough*[9]—turned on particular questions of statutory interpretation in the administrative law context. This Part focuses on *Loper Bright*, *Corner Post*, and *Cargill*.

A. Loper Bright *and the Formal End to* Chevron *Deference*

In *Loper Bright*, the Court reestablished the traditional standard of review for judicial interpretation of questions of law under the APA up through 1984. The Court had declined to apply *Chevron* deference in a number of statutory interpretation cases reviewing regulatory actions over the past decade, but it formally held for the first time this Term that the *Chevron* deference framework was inconsistent with the APA-mandated judicial review scheme. Against the backdrop of a fishing-industry regulatory statute, the Court clarified its departure from the *Chevron* doctrine. Stemming from a Reagan Administration-era Court decision, the doctrine had defined the judicial branch's review of agency interpretations of statutes for decades. In justifying its departure from *Chevron*'s framework, the Court had two potential paths: statutory interpretation and constitutional law. Choosing the path of statutory interpretation, the Court adopted an approach that gives Congress an opportunity to respond. The Court's decision also gives guidance to the lower courts about how to move forward under the APA rather than leaving the standard-of-review issue unaddressed, as the Court had done in numerous cases over the past decade. In those prior cases, the Court interpreted a statute's plain terms and context

5. 144 S. Ct. 2117 (2024).
6. 144 S. Ct. 2440 (2024).
7. 144 S. Ct. 1613 (2024).
8. 144 S. Ct. 1178 (2024).
9. 144 S. Ct. 294 (2024).

while declining to explain the status of the *Chevron* deference scheme.[10]

Loper Bright involved a challenge to a National Marine Fisheries Service regulation that demanded payment from fishermen for government monitors on their boats.[11] The Service's asserted statutory authority for the regulation was tenuous. The Magnuson-Stevens Act—which established the monitoring scheme—was silent on the question of whether fishermen or the government itself had to pay for the government officials on the fishing boats. In three other places, the Act explicitly required that fishermen in other, specific contexts (*e.g.*, foreign-flagged vessels) pay for the monitors.[12] But on the general point, the law did not address payment for the officials.[13]

The government treated this silence, or absence of authority, as an ambiguity triggering *Chevron* deference and exploited it to shift the cost of the monitors onto industry.[14] The government's interpretation played right into much of the criticism directed over the years at the *Chevron* doctrine, which had turned a framework applied in *Chevron v. NRDC* from 1984 into an interpretive methodology giving the benefit of the doubt to administrative agency interpretations of purportedly ambiguous statutes that the agencies administer.

Two anti-*Chevron* arguments headlined the skepticism and informed the challenges raised against the *Chevron* doctrine in *Loper Bright*. First, several in the administrative law community had charged over the years that deferring to agency interpretations

10. *See, e.g.*, Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Alito, J., dissenting) ("I can only conclude that the Court, for whatever reason, is simply ignoring *Chevron*.").

11. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2254–56 (2024).

12. *See id.* at 2255.

13. *See id.*

14. *See id.* at 2255–56; *see also* Caroline Cecot, *The Meaning of "Silence"*, 31 GEO. MASON L. REV. 515, 517 (2024) (describing the history of the rule in question); Brief for Appellees at 19, Loper Bright Enters. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022) (No. 21-5166), 2021 WL 5982672 (arguing to the D.C. Circuit that "[e]ven if the Court concludes that the Fisheries Service's authority is ambiguous, the Court should defer to the agency's reasonable construction of its own statute under the familiar *Chevron* framework").

contravened Section 706 of the Administrative Procedure Act (APA).[15] Section 706 provides that courts "shall decide all relevant questions of law" when a party brings an APA challenge to an agency action.[16] In a landmark historical review in the *Yale Law Journal* in 2017, Aditya Bamzai shed important light on the disparity between the modern *Chevron* framework and the historical, original understanding of the APA's statutorily directed mode of reviewing questions of law for decades prior to the *Chevron* decision. Bamzai explained that courts traditionally respected an agency's understanding of a statutory standard or term when made contemporaneous with the enactment of the statute and when consistent with long-held understandings of that term.[17] But blanket deference to any agency interpretation, even on the conditions that the statutory text was ambiguous and the agency's view was permissible, could not be squared with the historical understanding of Section 706.[18] And Justice Kavanaugh, while serving on a federal appeals court several years before he would go on the Supreme Court bench, generally called into question interpretive deference schemes triggered by "ambiguity." He noted that our system of interpretation includes no agreed-upon standard for even assessing the threshold of uncertainty that is required before deeming a statutory concept to be ambiguous.[19]

Second, some jurists and scholars had argued over the years that *Chevron* deference contravened Article III of the Constitution and the Due Process Clause. On Article III: Because "the Judicial Power

15. *See* Michael B. Rappaport, Chevron *and Originalism: Why* Chevron *Deference Cannot Be Grounded in the Original Meaning of the Administrative Procedure Act*, 57 WAKE FOREST L. REV. 1281, 1291–92 (2022); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 1001 (2017); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 193–96 (1998). *But see* Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125, 183–85 (2021); Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1642 (2019).

16. 5 U.S.C. § 706.

17. *See* Bamzai, *supra* note 15, at 916.

18. *See id.* at 1000–01.

19. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2137–38 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

of the United States"[20] contemplates interpretive supremacy in individual cases and controversies, deference to an administrative agency's view would improperly intrude on the role of the Article III judiciary in interpreting law.[21] On due process: *Chevron* biased the judicial process in commanding that one litigant's interpretation of the law received deference over another.[22]

The Court had all of these arguments before it in *Loper Bright*. The case had been consolidated with another that raised the same issue: *Relentless, Inc. v. Department of Commerce*.[23] The petitioners in each case raised both the statutory and constitutional issues. The *Loper Bright* petitioners raised the Article III point and the due process point before arguing that "*Chevron* is also egregiously wrong as a matter of statutory construction"—citing Section 706.[24] The same was true for the *Relentless* petitioners.[25]

But the Court rested its decision in *Loper Bright* exclusively on the meaning of Section 706 of the APA. Chief Justice Roberts's opinion pointed to the "all relevant questions of law" language of the APA, concluding that Section 706 "makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference."[26] For that reason, "[t]he deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA."[27] The Court's opinion referenced Article III in its analysis, but it based its holding on an interpretation of the

20. U.S. CONST. art III, § 1.

21. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring); Michigan v. EPA, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) ("*Chevron* deference raises serious separation-of-powers questions."); *see also* Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833, 864–67 (2001) (surveying the literature).

22. *See generally* Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187 (2016).

23. *See* Eli Nachmany, *With a Cert Grant in* Relentless, Inc. v. Department of Commerce, Loper Bright *Gets Some Company*, YALE J. ON REGUL.: NOTICE & COMMENT (Oct. 13, 2023), https://perma.cc/FVR5-UZ6D.

24. Brief for Petitioners at 28, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024), (No. 22-451), 2023 WL 4666165.

25. Brief for Petitioners at 24–25, Relentless, Inc. v. Dep't of Com., 144 S. Ct. 2244 (2024), (No. 22-1219), 2023 WL 8237503.

26. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2261 (2024).

27. *Id.* at 2263.

APA.[28] Justice Thomas concurred "to underscore a more fundamental problem: *Chevron* deference also violates our Constitution's separation of powers."[29] The Court's opinion did not disagree with this view, but neither did it endorse the concern.

In confining its decision to the statutory text (as opposed to reaching a constitutional holding), the Court did not tie Congress's hands. That is consistent with several other recent landmark cases in which the Court gave Congress space to clarify the meaning of statutory text.[30] Often, such cases come to the Court with a statutory challenge and a constitutional challenge. And in choosing to resolve the case on statutory grounds, the Court can check administrative overreach without concluding that the legislature transgressed the constitutional guardrails. Moreover, legislative amendment of statutes in response to Supreme Court decisions is a long-running phenomenon.[31] Sometimes the question before the Court will demand a constitutional resolution.[32] But October Term 2023 did not reflect a strong desire on the part of the Court to reach for such constitutional resolutions when a judgment was already warranted because administrative action had extended beyond the bounds of statutory text.

A couple of other aspects of the Court's opinion in *Loper Bright* merit mention. To start, the Court allowed that the best reading of a statute may well be "that it delegates discretionary authority to

28. *Id.* at 2257–58.

29. *Id.* at 2274 (Thomas, J., concurring).

30. *See infra* Part II.A. Indeed, Congress is now considering bills that would restore *Chevron*'s framework, see Stop Corporate Capture Act, S. 4749, 118th Cong. (July 23, 2024), or enshrine the new standard of de novo review, see Separation of Powers Restoration Act, S. 4527, 118th Cong. (June 12, 2024). Senator Elizabeth Warren is the leading sponsor of the Stop Corporate Capture Act, while Senator Eric Schmitt is the leading sponsor of the Separation of Powers Restoration Act.

31. *See infra* Part II.B.

32. *See, e.g.*, *infra* Part I.D; *see also* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (disallowing statutory interpretations that avoid constitutional holdings if "such construction is plainly contrary to the intent of Congress").

an agency."[33] In such cases, the Court observed, "the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits."[34] Moreover, the Court analyzed the *stare decisis* considerations that weighed in the *Chevron* doctrine's favor.[35] Although it still decided to move away from *Chevron* deference, the Court did "not call into question prior cases that relied on the *Chevron* framework."[36] In so doing, the Court appears to have prevented the reopening of scores of *Chevron*-reliant rulings in *Loper Bright*'s wake.

Loper Bright was a landmark decision. But in *Loper Bright*, the Court declined to rely on Article III. Instead, the Court's opinion interpreted the APA—which Congress can change if it wants. And given the Court's recognition of Congress's ability to delegate policymaking space to agencies, *Loper Bright* preserves the legislature's flexibility. Deference to agency determinations of fact[37] and policy also remain undisturbed by the *Loper Bright* decision. The APA's

33. *Loper Bright*, 144 S. Ct. at 2263. Adrian Vermeule arguably predicted this aspect of the Court's opinion in recent scholarly work. *See* Adrian Vermeule, *The Deference Dilemma*, 31 GEO. MASON L. REV. 619, 620 (2024) ("[T]he Court will . . . say that de novo interpretation might of course yield the conclusion that, in a given statute, Congress has delegated primary responsibility to agencies to fill in statutory gaps or ambiguities, subject to judicial review to ensure that agencies have remained within the scope of the delegation and chosen policy on reasonable grounds."); *see also* Adrian Vermeule, Chevron *by Any Other Name*, THE NEW DIGEST (June 28, 2024), https://perma.cc/T38C-HDD8 ("When judges identify the 'best reading' of the statute, that best reading might itself just be that an explicit or implicit congressional delegation of such authority to the agency has occurred."). For all of the debate over Section 706, this reading of the Court's opinion is consistent with Cass Sunstein's argument that *Chevron* was consistent with the APA because, in such instances, "the law means what the agency says it means." Sunstein, *supra* note 15, at 1642.

34. *Loper Bright*, 144 S. Ct. at 2263.

35. *Id.* at 2270–73. Two of the leading voices in favor of retaining *Chevron* as a matter of stare decisis, Kent Barnett and Chris Walker, see generally Kent Barnett & Christopher J. Walker, Chevron *and Stare Decisis*, 31 GEO. MASON L. REV. 475 (2024), had filed a brief in *Loper Bright* to this effect. *See* Brief of Law Professors Kent Barnett and Christopher J. Walker as Amici Curiae in Support of Neither Party, *Loper Bright*, 144 S. Ct. 2244 (2024) (No. 22-451), 2023 WL 4824944.

36. *Loper Bright*, 144 S. Ct. at 2273.

37. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951); 5 U.S.C. § 706(2)(E).

standard for judicial correction of agency policymaking when that policy is "arbitrary" or "capricious" preserves quite a bit of deference to agencies.[38] And the breadth of that discretion turns simply on the breadth, or narrowness, of the statutory term or standard that Congress has inserted into the agency's authorizing statute. Questions may remain about the extent to which Congress can delegate power to agencies (within what the Court described as "constitutional limits"[39]). But in grounding its opinion in the APA as opposed to Article III, leaving space for some delegation, and keeping in place prior opinions that relied on *Chevron*, the *Loper Bright* Court delivered a measured opinion that displayed consideration for both stability and the congressional role. These considerations are separate and apart from any additional constitutional concerns that might exist related to agency structure and jurisdiction.

Over this Term and several preceding it, Supreme Court decisions have revealed that much of administrative overreach flows from misinterpretations of underlying statutory authorities.[40] Arguably, the Court's decisions holding agency feet to the fire, within their statutory authority, are even more trenchant in terms of limiting agencies because they suggest that an agency action is unlawful regardless of any additional constitutional questions that might be in play. The Court's stringent review of agency overreach ideally should incentivize agencies to consult governing statutory terms and context with more care before acting. With the Court enforcing the confines of statutory terms with increased vigor, Congress may also have more incentive to draft statutory terms that directly and decisively address key policy issues before agencies. Such an approach would help to defuse the tendency of agencies to shoehorn ever-expanding claims of authority into outdated statutes that do not readily address the policy proposals at hand.[41] In addition,

38. *See* 5 U.S.C. § 706(2)(A).

39. *Loper Bright*, 144 S. Ct. at 2273.

40. *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355 (2023); West Virginia v. EPA, 142 S. Ct. 2587 (2022); Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661 (2022).

41. *See* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L.

Congress can more routinely exercise its oversight, authorization, and appropriations to hold agencies to accurate interpretations of their statutory power. Judicial enforcement of statutory terms and structure increases the effectiveness of Congress answering this call.

B. The Straightforwardness of Corner Post

Loper Bright garnered a substantial amount of attention. Yet the Court's opinion in *Corner Post* also has far-reaching import. *Corner Post* concerned the proper application of a federal statute of limitations provision against the backdrop of the judicial review chapter of the APA, also at issue in *Loper Bright*. In *Corner Post*, the Court held that the statute of limitations for challenging an agency rule begins to run once a party has been impacted by the rule, not at the time of the rule's creation.

The litigation in *Corner Post* involved a challenge to a Federal Reserve Board regulation setting a maximum interchange fee on debit card transactions.[42] Corner Post is a truck stop and convenience store that accepts debit cards as a form of payment.[43] Although Corner Post "is not a bank regulated by the rule," it "must pay the fees charged by the banks who are regulated by the rule."[44]

The Board had issued the challenged regulation in 2011. Corner Post started business operations in 2018.[45] Because the regulation harmed Corner Post, the company wanted to challenge the rule under the APA. Just one problem: litigants suing the United States must generally sue "within six years after the right of action first accrues."[46] Thus, if the right of action to challenge the Board regulation accrued when the Board promulgated it in 2011, then Corner Post was out of luck. Corner Post would not have been able to

---

REV. 1, 3 (2014); *see also, e.g.*, *West Virginia*, 142 S. Ct. at 2610 (describing the government's efforts to employ a long-extant but rarely used statutory provision "to substantially restructure the American energy market").

42. *Id.* at 2448 (majority opinion).

43. *Id.*

44. *Id.* at 2460 (Kavanaugh, J., concurring).

45. *Id.* at 2448 (majority opinion).

46. 28 U.S.C. § 2401(a).

challenge the regulation under that reading of the relevant statute of limitations even if the regulation was harming its operations. Indeed, no new business established after 2017, yet subject to the still-ongoing and effective regulation, would have been able to assert a challenge to the regulation's legality.

In contrast to that improbable interpretation, the Court instead concluded that "[a] claim accrues when the plaintiff has the right to assert it in court."[47] In cases with claims arising under section 704 of the APA, that is when the plaintiff is injured by final agency action."

This interpretation has significant consequences; in theory, every regulation is perpetually vulnerable to challenge by a newly created regulated entity. But Justice Barrett's majority opinion for the Court did not focus on pragmatism and these consequences. Rather, the opinion focused on the structure and text of the APA as well as the ordinary meaning of the term "accrue" in 1948, when Congress and the President originally enacted the federal statute of limitations.

The Court cited dictionaries that were contemporaneous with the statute of limitations' enactment in 1948, two years after enactment of the APA, to ascertain the "well-settled meaning" of the term "accrue" at that time. The Court also relied on precedents "embod[ying] the plaintiff-centric traditional rule that a statute of limitations begins to run only when the plaintiff has a complete and present cause of action."[48] Consequently, the Court determined that the relevant point of time necessarily is when the "APA plaintiff . . . suffers an injury from final agency action," not the earlier date on which the agency finalized its action.[49]

The result flows from the ordinary meaning of the term "accrue" in the general statute of limitations provision applicable to suits against the government as that term applies to injuries from APA final agency actions. Specifically, the provision in 28 U.S.C. § 2401(a) provides that litigants must file complaints in actions

47. *Corner Post*, 144 S. Ct. at 2448.

48. *Id.* at 2452.

49. *Id.* at 2450.

against the United States "within six years after the right of action first accrues."[50] Section 702 within the APA's chapter on judicial review in turn provides that a person suffering "or aggrieved by agency action . . . is entitled to judicial review."[51] Section 704 specifies that such reviewable actions must be "final agency action[s]."[52] Like *Loper Bright*, *Corner Post* reflects—in spite of the case's significant consequences—an unexceptional judicial exercise in statutory interpretation.

In a concurrence that may over time prove to highlight the most important aspect of the *Corner Post* opinion, Justice Kavanaugh offered a related observation with implications for the separate question of what remedy the APA provides when a regulation is unlawful. As highlighted by Justice Kavanaugh's opinion, Corner Post's right to sue is a result of the APA's authorization of the vacatur of rules.[53]

Staking a position in the ongoing administrative law debate about the scope of federal court remedial power under the APA, Justice Kavanaugh noted that vacatur offered the only opportunity for Corner Post to obtain relief in the litigation.[54] The vacatur question asks whether a court can get rid of an unlawful agency rule entirely—or whether Section 706 simply authorizes the setting aside of the rule as to a particular party.

By its terms, Section 706 authorizes courts to "hold unlawful and *set aside* agency action."[55] Some have advanced the view that this language merely empowers courts to set aside a given agency *action*—thereby limiting relief to the party before the Court.[56] The Solicitor General urged this position at oral argument in *United States*

50. 28 U.S.C. § 2401(a).
51. 5 U.S.C. § 702.
52. 5 U.S.C. § 704.
53. *Id.* at 2460. (Kavanaugh, J., concurring).
54. *Id.*
55. 5 U.S.C. § 706(2) (emphasis added).
56. *See, e.g.*, John Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, 40 YALE J. ON REGUL.: BULL. 119 (2023).

v. Texas,[57] and Justice Gorsuch (joined by Justices Thomas and Barrett) adopted the view in a concurrence in the case.[58] As Justice Gorsuch put it, "set aside" is merely "a command to disregard an unlawful rule in the decisional process," not a remedial authority.[59] This concurrence teed up the issue for future discussion.

Citing the scholarly work of Mila Sohoni, Justice Kavanaugh took a different tack in *Corner Post*.[60] In his view, the APA endows courts with the power to erase an unlawful rule altogether—a remedy that would inure to the benefit of all parties affected by the rule, even if they are not before the court and even if the statutes of limitations on their respective causes of action have run.[61] The vacatur debate is a question of statutory interpretation, but it is closely related to an ongoing constitutional law debate: whether Congress *could* authorize vacatur of a rule, given the remedial limits of Article III.[62] Justice Kavanaugh's concurrence did not wade into that issue. Instead, his concurrence stands as the strongest statement from a member of the current Supreme Court on the statutory question; doubtless, litigants will cite this concurrence when urging vacatur. Continuing with the general theme, the APA-authorizes-vacatur view preserves space for Congress to change the law if it wants to check courts' remedial powers in regulatory litigation.

As Justice Kavanaugh saw it, Corner Post's right to relief turned on the vacatur question because Corner Post had not been

57. Transcript of Oral Argument at 4–5, United States v. Texas, 143 S. Ct. 1964 (2023) (No. 22-58).

58. *See* United States v. Texas, 143 S. Ct. at 1981 (Gorsuch, J., joined by Thomas and Barrett, JJ., concurring in the judgment).

59. *Id.* at 1982.

60. Corner Post, Inc. v. Bd. of Govs. of Fed. Rsrv. Sys., 144 S. Ct. 2440, 2467 (2024) (Kavanaugh, J., concurring) (citing Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121 (2020)).

61. *Id.* at 2461–62.

62. Indeed, these two questions were the subjects of the 2023 Ames Moot Court Competition at Harvard Law School, which a team of editors of this very journal—competing as the Judge Laurence H. Silberman Team—won. *See 2023 Ames Moot Court Competition*, HARV. L. SCH. (Nov. 15, 2023, 7:30 PM), https://hls.harvard.edu/ames-moot-court/ames-moot-court-competition-archive/2023-ames-moot-court-competition [https://perma.cc/P7W4-GBSH].

regulated by the rule but merely faced downstream adverse consequences from its implementation.[63] Because "an injunction barring the agency from enforcing the rule against the plaintiff would not help the plaintiff," Corner Post would require the full-bodied remedy of vacatur if it was to enjoy relief.[64]

In sorting through whether such relief was structurally available under the APA, Justice Kavanaugh analyzed "[l]ongstanding precedent" alongside "[t]he text and history of the APA."[65] Justice Kavanaugh's concurrence noted that the Supreme "Court has affirmed countless decisions that vacated agency actions, including agency rules."[66] He also cited multiple dictionaries for the proposition that "[w]hen Congress enacted the APA in 1946, the phrase 'set aside' meant 'cancel, annul, or revoke,'" and he pointed to contemporaneous judicial practice and other, pre-APA statutes to bolster this conclusion.[67]

It may well be the case that—as Justice Jackson's dissent claims—the "far-reaching results of the Court's ruling in this case are staggering."[68] The dissent lamented that the Court's interpretation "means that there is effectively no longer any limitations period for lawsuits that challenge agency regulations on their face."[69] But the Court's ruling is not the end of the story; at least, it does not have to be. If Congress is uncomfortable with the upshot of the APA's plain meaning, it can amend the statute.[70] This ready-made solution

63. *Corner Post*, 144 S. Ct. at 2460 (Kavanaugh, J., concurring).

64. *See id.* at 2462.

65. *Id.*

66. *Id.* at 2463 (citing Dep't of Homeland Sec. v. Regents of Univ. of Cal., 591 U.S. 1, 36 & n. 7 (2020); then citing Whitman v. Am. Trucking Assns., Inc., 531 U.S. 457, 486 (2001); and then citing Bd. of Govs. of Fed. Rsrv. Sys. v. Dimension Fin. Corp., 474 U.S. 361, 364–65 (1986)).

67. *Id.*

68. *Id.* at 2470 (Jackson, J., dissenting).

69. *Id.*

70. *See* Agency Stability Restoration Act of 2024, S. 4751, 118th Cong. (July 23, 2024). Shortly after the Court decided *Corner Post*, John Duffy—a member of the Administrative Conference of the United States (ACUS)—commented that ACUS was considering a recommendation to Congress to overturn *Corner Post* via statute. *See* The Federalist

to a disfavored statutory interpretation ruling is central to our system of separated powers. The courts interpret the laws, but Congress makes them (and can change them).

C. Pure Statutory Interpretation in Cargill

Another, more particularized decision demonstrates the point as well. The Court's opinion in *Garland v. Cargill* involved a hotly contested issue—guns—but came down to traditional statutory interpretation.[71] In issuing its ruling, the Court emphasized the importance of Congress and the President's role in lawmaking vis-à-vis the distinct role of agencies in carrying out or executing that legal authority. Moreover, as a concurrence by Justice Alito pointed out, the Court's opinion left space for Congress and the President to enact a desired statutory change if they are uncomfortable with the Court's ruling.[72] *Cargill* is another example of the Court in OT23 elevating Congress and the President's respective roles in the legislative process and concomitantly constraining agency power. The Supreme Court's enforcement of statutory bounds underscores that administrative agencies cannot make new law. When agencies promulgate regulations or issue enforcement orders transgressing textual and structural statutory limits, agencies are effectively attempting to do just that. And today's Supreme Court will call them on it.

Society, *Courthouse Steps Decision:* Corner Post, Inc. v. Board of Governors of the Federal Reserve System, YOUTUBE, at 58:20 (July 9, 2024), https://www.youtube.com/watch?v=4e3tafXXOIg [https://perma.cc/JU5Q-DJA4]; *see also id.* at 55:36 ("One of the things that the majority and dissent [in *Corner Post*] agreed upon was that the ball is in Congress's court." (remarks of John Duffy)). And the Court itself noted that if observing the traditional rule for statutes of limitations "is a poor fit for modern APA litigation, the solution is for Congress to enact a distinct statute of limitations for the APA." *Corner Post*, 144 S. Ct. at 2460 (majority opinion).

71. 144 S. Ct. 1613 (2024). While *Cargill* was not about the Second Amendment, the Court did decide a Second Amendment case this last Term: *United States v. Rahimi*. There, the Court reviewed the constitutionality of "[a] federal statute prohibit[ing] an individual subject to a domestic violence restraining order from possessing a firearm" upon a finding that the person presented a danger to an intimate partner or that person's child. United States v. Rahimi, 144 S. Ct. 1889, 1894 (2024). In this case, the Court upheld the statute as constitutional. *See id.* at 1896–97.

72. *Cargill*, 144 S. Ct. at 1627 (Alito, J., concurring).

The events leading to the decision in *Cargill* were tragic. In October 2017, in the midst of a country music festival in Las Vegas, a gunman armed with a semiautomatic rifle opened fire from his hotel room on the crowd of festivalgoers.[73] The gunman had outfitted his firearm with a device called a "bump stock," which facilitates a practice called "bump firing."[74] As the Court explained, "[a] shooter who bump fires a rifle uses the firearm's recoil to help rapidly manipulate the trigger."[75] Because the bump stock allowed the gunman to shoot his semiautomatic rifle at a higher rate of speed, the device allowed the gunman to kill and wound with efficiency. In the end, he killed fifty-eight people and wounded over five hundred more.[76]

Immediately after the shooting, Congress moved to ban bump stocks. But these efforts did not achieve consensus. Horrified by the mass shooting, multiple members of Congress introduced legislation that would proscribe "bump stocks and other devices 'designed . . . to accelerate the rate of fire of a semiautomatic rifle.'"[77] These bills stalled and, ultimately, did not become law.[78] While some members of Congress urged passage of a bump stock ban, others expressed concern about gun rights and individual liberty.[79]

Not content with Congress's inaction, the Bureau of Alcohol, Tobacco, and Firearms (ATF)—an administrative agency—decided to take initiative and issue a regulation banning bump stocks.[80] The statutory authority on which the ATF relied was the National Firearms Act of 1934. The Act restricts access to "machinegun[s]"—a statutory term that Congress defined to include "any part designed

73. *Id.* at 1618 (majority opinion).

74. *Id.* at 1617–18.

75. *Id.* at 1617.

76. *See id.* at 1618.

77. *Id.* (quoting S. 1916, 115th Cong. § 2 (2017)); *see also* H.R. 3947, 115th Cong. § 2 (2017); H.R. 3999, 115th Cong. § 1 (2017).

78. *See Cargill*, 144 S. Ct. at 1618.

79. *See* Amber Phillips et al., *A bump stock ban may have enough support to pass the House*, WASH. POST (Oct. 11, 2017), https://www.washingtonpost.com/graphics/2017/politics/bump-stock-ban-whip-count (collecting statements from "concerned or opposed" legislators (capitalization adapted)).

80. *Cargill*, 144 S. Ct. at 1618.

and intended . . . for use in converting a weapon into a machinegun."[81] A "machinegun," in turn, is a weapon that "shoots, is designed to shoot, or can readily be restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger."[82] Thus, "[w]ith a machinegun, a shooter can fire multiple times, or even continuously, by engaging the trigger only once."[83] Meanwhile, with a semiautomatic rifle, a shooter must "release and reengage the trigger between shots"—regardless of how fast that release and reengagement happens.[84]

The Court noted the distinction between a bump stock-outfitted semiautomatic rifle and a statutorily defined machinegun. Using a bump stock, a shooter can fire a semiautomatic rifle more rapidly. But no matter how fast she bump fires a rifle, a shooter cannot fire more than one shot by a single function of the trigger. For this reason, even congressional advocates of more stringent restrictions (such as Senator Dianne Feinstein) doubted the ATF's authority to issue the regulation.[85] Naturally, challenges to the regulation made their way into the courts, and the one underlying *Cargill* made it all the way to the Supreme Court. Consistent with its rulings in a host of cases from recent years,[86] the Court rejected the agency's attempt to stretch statutory text in support of a regulatory program.[87]

The Court analyzed the statutory text in detail. It began with the exact nature of a single function of the trigger of a firearm. The Court described the "premise that there is a difference between a shooter flexing his finger to pull the trigger and a shooter pushing the firearm forward to bump the trigger against his stationary finger" as "mistaken."[88] The Court further observed that "[e]ven if a semiautomatic rifle with a bump stock could fire more than one shot 'by a single function of the trigger,' it would not do so

81. 26 U.S.C. § 5845(b).
82. *Id.*
83. *Cargill*, 144 S. Ct. at 1617.
84. *Id.*
85. *See id.* at 1618.
86. *See infra* Part II.A.
87. *See Cargill*, 144 S. Ct. at 1624.
88. *Id.* at 1623.

'automatically.'"[89] Justice Sotomayor's dissent focused on the text as well, arguing that "[a] bump-stock-equipped semiautomatic rifle is a machinegun because (1) with a single pull of the trigger, a shooter can (2) fire continuous shots without any human input beyond maintaining forward pressure."[90] The dissent also invoked the presumption against statutory ineffectiveness—the idea that courts should not read a statute in a way that "enable[s] offenders to elude its provisions in the most easy manner."[91] But the majority responded that "[a] law is not useless merely because it draws a line more narrowly than one of its conceivable statutory purposes might suggest."[92] Against the backdrop of a highly charged issue, the debate in *Cargill* was confined to the text of the law—and hemmed in by the statute's express language.

Justice Alito penned a short concurrence to distinguish policy concerns about the limits of the National Firearms Act from the role of the Court in a case like *Cargill*. He emphasized the nature of the dispute before the Court, writing that "there is simply no other way to read the statutory language" than the way that the majority read it.[93] Still, he opined "that the Congress that enacted [the National Firearms Act] would not have seen any material difference between a machinegun and a semiautomatic rifle equipped with a bump stock. But the statutory text is clear, and [the Court] must follow it."[94] In a nod to those concerned about gun violence, Justice Alito acknowledged that the mass shooting "strengthened the case for amending [the Act]."[95] But he concluded that "an event that highlights the need to amend a law does not itself change the law's meaning."[96]

An enterprising member of Congress—seeking to break the partisan logjam—could see and cite Justice Alito's concurrence as a call

89. *Id.* at 1624.
90. *Id.* at 1630 (Sotomayor, J., dissenting).
91. *Id.* at 1634 (quoting The Emily, 22 U.S. (9 Wheat.) 381, 389–90 (1824)).
92. *Id.* at 1626 (majority opinion).
93. *Id.* at 1627 (Alito, J., concurring).
94. *Id.*
95. *Id.*
96. *Id.*

to action. But no matter how urgent, no matter how convenient, administrative agencies cannot change or add to the laws enacted by Congress and the President. As Justice Alito explained in his concurrence, "[t]he horrible shooting spree in Las Vegas in 2017 did not change the statutory text or its meaning."[97] Moreover, Justice Alito's concurrence pointed out that the agency's decision to circumvent the legislative process—and ban bump stocks through a regulation based on a 1934 law—may have prevented Congress from stepping in.[98] In the end, the Court's opinion in *Cargill* used statutory interpretation to demonstrate the centrality of Congress and the President, not implementing agencies, in the lawmaking process.

D. A Word on Jarkesy

Any discussion of the OT23 administrative law docket would be incomplete without mentioning *SEC v. Jarkesy*.[99] On its face, *Jarkesy* appears to complicate this Essay's main thesis that the Court's most recent Term centered statutory interpretation in administrative law. Rather than statutory interpretation, *Jarkesy* involved a series of constitutional challenges to the administrative adjudication scheme that Congress established for securities fraud enforcement. The Fifth Circuit had essentially forced the Court's hand to consider

---

97. *Id.*

98. *See id.* During Congress's consideration of a bump stock ban, some Republicans opposed to new legislation had taken the position that ATF already had the authority to regulate bump stocks. *See* Mike DeBonis, *House Republicans shy away from action on 'bump stocks,' hoping the ATF deals with it*, WASH. POST (Oct. 11, 2017), https://perma.cc/WJ5E-2Z52. Naturally, this position would have allowed legislators to avoid the political consequences of either supporting or outright opposing a ban. At the time, Republican Representative Thomas Massie issued a statement in which he argued that pursuing a bump stock ban to the exclusion of other legislative goals (at the time, repeal of Obamacare and tax cuts) was "a perversion of the GOP agenda" that he thought his "colleagues recognize . . . , which is why they're hoping the ATF will do it." *Id.*; *see also* Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1479 (2015) ("Legislators can avoid disputes by passing the buck and leaving the agency to resolve conflicts between interest groups. In addition, members can benefit from delegation when their constituents' interests are divided, because the agency will make the ultimate decision.").

99. 114 S. Ct. 2117 (2024).

the case by declaring a federal statutory provision unconstitutional on several grounds. But the Court's minimalist resolution of the constitutional conflict reflected a measured approach that rested on historically accepted principles of individual rights—without laying the groundwork to declare "most of Government . . . unconstitutional."[100] Additionally, the Court's opinion largely preserved statutory authority to prosecute securities fraud. It insisted only that the prosecutions be carried out with the accountability of Article III judicial consideration and the Seventh Amendment jury trial rights applicable by the constitutional text to "suits at common law."[101]

Starting in 2010, Congress had authorized the Securities and Exchange Commission (SEC) to choose between prosecuting securities fraud in federal court (consistent with historical tradition) or within its own in-house agency tribunals.[102] The SEC has the option of bringing its case in federal court in the usual course of order; here, an alleged fraudster would enjoy the various procedural protections that the Constitution guarantees—including a right to a trial by jury and a decision by an Article III judge.[103] Alternatively, the 2010 Dodd-Frank Act had authorized the SEC to bring a securities fraud enforcement action in its own, in-house tribunal.[104] There, the subject of the enforcement action would not enjoy the right to a jury, and the proceeding would be overseen by an administrative law judge (ALJ)—ostensibly an executive official but currently statutorily constrained from at-will presidential removal.[105] The statute gave no guidance to the SEC, and provided no legal standards, for

100. *Cf.* Gundy v. United States, 139 S. Ct. 2116, 2130 (2019) (describing the implications of applying a robust version of the nondelegation doctrine, similar to the one endorsed by the Fifth Circuit).

101. U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.").

102. *Jarkesy*, 144 S. Ct. at 2125.

103. *See id.*

104. *Id.*

105. *See id.* at 2125–26.

how the agency should choose between going to court or staying in-house.[106] Remaining in-house would free the prosecution from the supervision or input of any federal judge until an initial determination of liability had been made, any penalties had been imposed, and appellate review had been conducted within the agency itself.

The SEC had demonstrated a preference for bringing enforcement actions within its own tribunals.[107] There, the SEC could maintain control over issuing new regulations interpreting and applying its perceived regulatory authority, investigating its suspicions of violations of those regulations, and adjudicating consequent guilt or innocence—all within the commission. Given the relaxed procedural protections, these proceedings enabled the SEC to issue subpoenas for records and enter settlement proceedings without contemporaneous external Article III judicial supervision.[108] The SEC's win rate within its in-house tribunal was staggeringly high.[109] Unsurprisingly. So the SEC's choice to bring an in-house securities fraud action against George Jarkesy was par for the course within the post-Dodd Frank SEC. Sure, Jarkesy could seek review in a federal court. But instead of basing its review on facts found by a jury, the court would need to defer to the agency's findings of fact from the jury-less in-house proceeding.[110]

Instead of assenting to this procedure, Jarkesy brought several challenges to the constitutionality of the statute underlying it. He found a receptive audience at the Fifth Circuit, which ruled in his

---

106. *See* Jarkesy v. SEC, 34 F.4th 446, 461 (5th Cir. 2022), *aff'd* SEC v. Jarkesy, 144 S. Ct. 2117 (2024).

107. *See* Jean Eaglesham, *SEC Wins With In-House Judges*, WALL ST. J. (May 7, 2015), https://perma.cc/PM3N-FDCS; *see also* Joseph A. Grundfest, *Fair or Foul? SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation*, 85 FORDHAM L. REV. 1143, 1151–52 (2016) ("In fiscal years 2014 and 2015, the percentage of actions filed against publicly traded issuers in the administrative forum had more than doubled [from 2013] to 75 percent.").

108. *See* Elizabeth Wang, Comment, Lucia v. SEC*: The Debate and Decision Concerning the Constitutionality of SEC Administrative Proceedings*, 50 LOY. L.A. L. REV. 867, 870 (2017); Urska Velikonja, *Securities Settlements in the Shadows*, 126 YALE L.J.F. 124 (2016).

109. *See* Eaglesham, *supra* note 107.

110. *See* 15 U.S.C. § 78y(a)(4).

favor and declared the relevant statutory provisions unconstitutional on three grounds.[111] First, the court held that the in-house proceeding unconstitutionally deprived Jarkesy of his Seventh Amendment right to a trial by jury in certain suits at common law.[112] Second, the court ruled that Congress had unconstitutionally insulated SEC ALJs from presidential removal in violation of Article II of the Constitution.[113] Third, the court determined that allowing the SEC to choose between going to federal court and staying in-house was a violation of the nondelegation doctrine because it delegated legislative power to the SEC without providing an intelligible principle to guide the agency's exercise of discretion.[114]

The government appealed to the Supreme Court, which granted certiorari to review the Fifth Circuit's declaration that a federal statute was unconstitutional.[115] Judicial review of the kind in which the Fifth Circuit engaged is profound—presenting a "counter-majoritarian difficulty" in which a court applies its constitutional interpretation to override a law enacted by the people's elected representatives in Congress and the President.[116]

But to rule for the government in *Jarkesy*, the Court would have had to disagree with the Fifth Circuit on the Seventh Amendment, nondelegation, *and* removal. An adverse holding on one of these constitutional issues would force a decision on another. And while the Seventh Amendment issue presented an interesting question about jury trial rights in administrative enforcement actions, the nondelegation issue threatened to open a far more consequential can of worms. The Court has not relied on the nondelegation doctrine—at least the Article I nondelegation doctrine[117]—to declare a

111. *See generally Jarkesy*, 34 F.4th 446.

112. *Id.* at 451.

113. *Id.* at 463.

114. *Id.* at 461.

115. *See* SEC v. Jarkesy, 143 S. Ct. 2688 (2023) (mem.) (granting certiorari).

116. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962).

117. *See* Eli Nachmany, *Bill of Rights Nondelegation*, 49 BYU L. REV. 513, 516 (2023) (distinguishing the Article I nondelegation doctrine—which enforces the Vesting Clause of Article I—from other nondelegation doctrines).

federal statute unconstitutional since the 1930s, when it cited the doctrine while striking blows to the very heart of the administrative state in several New Deal-era cases.[118] A majority of the Justices on the Court appear to support the revival of the Article I nondelegation doctrine.[119] Still, the doctrine's actual invocation would be a significant event, providing a modern roadmap for challenging the constitutionality of a host of statutes.

From the outset, however, the Court appeared uninterested in reaching the nondelegation issue. The oral argument in the case centered on the Seventh Amendment issue,[120] and the Court in its opinion affirmed the Fifth Circuit on that point only.[121]

As the Court explained, securities fraud actions are akin to common law fraud suits.[122] The remedy of civil monetary penalties is the kind of remedy that a court of law—as opposed to a court of equity—could award at common law.[123] Therefore, the Court held that the lack of a jury for securities fraud actions violated the Seventh Amendment.[124]

Significantly for the practical import of the Court's ruling, the Court's opinion still allows prosecution of securities fraud. The SEC just needs to do so under the more immediate supervision of a federal court, in line with the constitutional tradition of separated powers requiring alignment between multiple branches of

---

118. *See* Jennifer L. Mascott, Gundy v. United States*: Reflections on the Court and the State of the Nondelegation Doctrine*, 26 GEO. MASON L. REV. 1, 2 (2018) (discussing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)).

119. *See* Allstates Refractory Contractors, LLC v. Su, 144 S. Ct. 2490, 2491 (2024) (mem.) (Thomas, J., dissenting from denial of certiorari) ("At least five Justices have already expressed an interest in reconsidering this Court's approach to Congress's delegations of legislative power.").

120. *See* Zach Schonfeld, *Supreme Court's conservatives voice concerns about SEC's in-house enforcement*, THE HILL (Nov. 29, 2023), https://perma.cc/F9QB-L6QX ("In more than two hours of arguments, the justices spent much of their time on [the question of] whether the SEC's in-house system deprives individuals of their Seventh Amendment right to a jury trial.").

121. SEC v. Jarkesy, 144 S. Ct. 2117, 2127–28 (2024).

122. *See id.* at 2130.

123. *See id.* at 2129.

124. *Id.* at 2139.

government to impose liability or adjudicate guilt.

Jarkesy reflects a tailored approach, providing precise review of the relevant and dispositive components of a federal appellate court's multi-holding constitutional ruling. Similarly, the Court rejected an Appropriations Clause challenge to the CFPB's funding structure in *Consumer Financial Protection Bureau v. Community Financial Services Association of America*.[125] And it held in multiple cases that plaintiffs did not have Article III standing to challenge certain executive branch actions.[126] The Court did indeed apply a robust version of procedural review in *Ohio v. EPA* to stay the enforcement of an Environmental Protection Agency federal implementation plan.[127] But overall, while OT23 saw the Court end *Chevron* deference, declare SEC in-house adjudications of securities fraud unconstitutional, and open up agency actions to potentially perpetual challenge, the full sweep of the Term saw a number of instances where the Court turned back constitutional challenges to particular administrative practices.[128]

II. STATUTORY INTERPRETATION AT CENTER STAGE

In recent years, scholars have criticized the Supreme Court for frustrating the operation of government.[129] Properly understood, however, the Court's recent administrative law and structural

125. *See* 144 S. Ct. 1474, 1479 (2024). Mascott notes that she filed an amicus brief in this case.

126. *See* Murthy v. Missouri, 144 S. Ct. 1972, 1981 (2024); FDA v. All. for Hippocratic Med., 144 S. Ct. 1540, 1552 (2024).

127. *See* 144 S. Ct. 2040, 2054 (2024).

128. The Court's Term further vindicates Kristin Hickman's thesis about "the Roberts Court's structural incrementalism" in administrative law cases. *See generally* Kristin E. Hickman, *The Roberts Court's Structural Incrementalism*, 136 HARV. L. REV. F. 75 (2022) (capitalization adapted); *see also* Thomas A. Koenig & Benjamin R. Pontz, Note, *The Roberts Court's Functionalist Turn in Administrative Law*, 46 HARV. J.L. & PUB. POL'Y 221, 222–23 (2023) (describing "the Roberts Court's broader commitment to methodologically constrained judging that takes a minimalist approach to reining in exercises of power that overstep constitutional boundaries").

129. *See, e.g.*, Blake Emerson, *The Existential Challenge to the Administrative State*, 113 GEO. L.J. (forthcoming 2025); Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

constitutional decisions have *facilitated* the proper operation of government under our system of separated powers.

In October Term 2023, the Court used statutory interpretation to resolve highly salient conflicts involving deference to administrative agencies, the statute of limitations for APA suits, and the regulation of bump stocks. These decisions—along with other key rulings from OT23—demonstrate the centrality of statutory interpretation to administrative law at the Court. That centrality is in harmony with key cases from the last several Supreme Court terms. And in focusing so strongly on statutory interpretation, the Court is giving Congress an opportunity to enter the fray. This manifestation of respect for the role of the legislature is a worthwhile judicial endeavor.

A. The Limiting Function of Statutory Interpretation

When Congress enacts a statute, only the Constitution can supersede the text of the law. The text, therefore, establishes the boundaries of argumentation in a given case.

If Congress, for example, enacted a law that explicitly banned ownership of bump stocks, one might grumble about policy disagreements or even assert a constitutional challenge to the statute. But no one could quibble with an ATF regulation that implemented the ban—at least not on the grounds that it conflicted with the underlying statute. Against the backdrop of this statutory text, the Court could not have ruled the way that it did in *Cargill*. But *Cargill*, like many other significant administrative law cases in recent years, arose because an agency attempted to go beyond the boundaries that Congress and the President had established by enacted statute. The Court's rejection of these attempts—an increasing trend, saying perhaps more about the modern administrative behemoth than the modern Supreme Court—reinforces the rule of law.

Time and again, when interpreting statutes, the Court explains that it must "start with the text."[130] This textualist methodology narrows the range of materials available to a jurist in a statutory

130. *See, e.g.*, Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1218 (2023); Babb v. Wilkie, 140 S. Ct. 1168, 1172 (2020).

interpretation case.[131] Text is not the only relevant consideration. Context, precedent, and canons of interpretation also figure into the analysis. A good textualist will use all of the tools at her disposal—within the limits of the methodology—when interpreting a statute. But when practiced properly, textualism omits policy preferences from the interpretive task and greatly narrows the range of possible disagreements in a statutory interpretation case.

Textualism as a theory continues to work itself pure. Leading textualists regularly debate the appropriateness of certain interpretive canons. Consider the conversation between Justice Kagan's dissent in *West Virginia v. EPA* and Justice Barrett's concurrence in *Biden v. Nebraska*. In *West Virginia*, the Court formally recognized the "major questions doctrine"—a canon of interpretation that requires a clear statement from Congress before a court will assume that Congress meant to confer sweeping regulatory authority, of an economically and politically significant nature, in an ancillary provision of a long-extant statute.[132] Dissenting in the case, Justice Kagan described the doctrine as giving courts a "get-out-of-text-free card[]."[133] In a later case, *Biden v. Nebraska*, Justice Barrett wrote that she took "seriously the charge that the [major questions] doctrine is inconsistent with textualism" before explaining that she conceived of the doctrine as a way of "emphasiz[ing] the importance of *context* when a court interprets a delegation to an administrative agency."[134]

Debates over canons of interpretation were on display—both explicitly and implicitly—this latest Term at the Court as well. Consider Justice Kavanaugh's concurrence in *Rudisill v. McDonough*. The Court decided *Rudisill*, a case about veterans benefits, in favor

131. The Supreme Court's embrace of textualism is largely attributable to the influence of Justice Scalia on the Court. *See* Diarmuid O'Scannlain, *"We Are All Textualists Now": The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303, 306 (2017).

132. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2608–09 (2022).

133. *Id.* at 2641 (Kagan, J., dissenting); *see also* Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463, 468 (2021) (questioning the consistency of the major questions doctrine with textualism).

134. 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring).

of a veteran claiming entitlement to certain educational benefits.[135]

The Court resolved *Rudisill* based on the plain meaning of the post-9/11 education-benefits law, but it observed at the end that "[i]f the statute were ambiguous, the pro-veteran canon would favor [the claimant]."[136] The canon counsels courts to resolve ambiguities in veterans benefits statutes in favor of veterans, who have put their lives on the line for the country.[137] Justice Kavanaugh (joined by Justice Barrett) concurred to cast doubt on the appropriateness of applying the canon.[138]

By contrast, the Court's opinion in *Harrow v. Department of Defense* applied a clear statement rule of statutory interpretation, requiring Congress to speak clearly if it means to assign jurisdictional consequences to a statutory deadline.[139] At oral argument, several Justices questioned the foundations of this jurisdictional clear statement rule.[140] But the Court's opinion in *Harrow* applied the presumption without fanfare (and without any separate concurrences or dissents), suggesting that this clear statement rule is not terribly controversial among the Justices.[141] Moreover, to the extent that clear statement rules merely restate a standard rule of language, such as that a statutory text needs to effectively communicate the existence of a given authority to empower federal action, clear statement rules are just shorthand for statements about how language operates. One other way to understand clear statement presumptions is that they are principles that embody constitutional structure—*e.g.*, if the federal government lacks power to act outside

135. *See* Rudisill v. McDonough, 144 S. Ct. 945, 958–59 (2024).

136. *Id.* at 958.

137. *See* Chadwick Harper, *Give Veterans the Benefit of the Doubt:* Chevron*,* Auer*, and the Veteran's Canon*, 42 HARV. J.L. & PUB. POL'Y 931, 946–49 (2019).

138. *See Rudisill*, 144 S. Ct. at 961 (Kavanaugh, J., concurring).

139. *See* Harrow v. Dep't of Def., 144 S. Ct. 1178, 1183 (2024). Nachmany notes that he was part of a Covington team that filed an amicus brief in *Harrow*.

140. *See* Eli Nachmany, *The Supreme Court Applies an Uncontroversial Clear Statement Rule*, YALE J. ON REGUL.: NOTICE & COMMENT (June 6, 2024), https://www.yalejreg.com/nc/the-supreme-court-applies-an-uncontroversial-clear-statement-rule-by-eli-nachmany/ [https://perma.cc/U26P-8HJR] (describing the oral argument).

141. *See id.*

the existence of a source of positive law, then the presumption should be the absence of federal authority unless the statute crosses the threshold of clearly demonstrating a grant of power.

Finally, although it did not appear to figure into the administrative law cases, a debate about the rule of lenity permeated several other statutory interpretation cases over the course of the Term.[142] The rule of lenity is consistent with inherent structural constitutional presumptions in that it simply clarifies that absent a demonstrated federal enactment criminalizing behavior, the presumption is that an enacted statute has not changed once-lawful activity into criminal action.

Moving forward, coalescence around the proper conception of the rule of lenity may heighten in importance, given that several of the Justices have hinted that the rule of lenity may be applicable in civil regulatory cases involving statutory interpretation.[143] Further, Justices along the full range of the jurisprudential spectrum raised the rule's potential application in decisions before them last Term. For example, in *Snyder v. United States*, the Court interpreted an anti-bribery statute not to criminalize state and local officials' acceptance of gratuities for their past acts.[144] The Court grounded its reasoning in ordinary statutory interpretation. But Justice Gorsuch concurred to state that lenity was at work, if "unnamed," in the Court's reasoning.[145]

Dissenting in another case from the last Term, Justice Gorsuch urged the application of lenity—and, in a lineup that might strike some less-than-careful Court watchers as ideologically curious, he was joined by Justices Sotomayor and Jackson.[146] Moreover, in perhaps one of the most interesting lineups of the Term, Justice Jackson joined five of the Court's "conservative" Justices in the majority in

142. The rule of lenity refers to "[t]he maxim that penal statutes should be narrowly construed." Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 128 (2010).

143. *See* Eli Nachmany, *The Civil-Criminal Convergence*, 59 WAKE FOREST L. REV. 693, 733–34, 750 & n.357 (2024).

144. 144 S. Ct. 1947, 1959–60 (2024).

145. *Id.* at 1960 (Gorsuch, J., concurring).

146. Pulsifer v. United States, 144 S. Ct. 718, 738 (2024) (Gorsuch, J., dissenting).

Fischer v. United States, while Justice Barrett wrote a dissent that was joined by two of the Court's "liberal" Justices, in a case involving the narrow construction of a criminal statute that the government had used to prosecute defendants in connection with the events of January 6, 2021.[147]

Back to the major questions cases: *West Virginia v. EPA* and *Biden v. Nebraska* are significant for another reason. They—along with *Sackett v. EPA*,[148] *NFIB v. OSHA*,[149] and *Alabama Association of Realtors v. HHS*[150]— represent recent, pre-OT23 statutory interpretation cases holding that the Biden Administration had strayed beyond the statutory text to establish a desired regulatory program. The Court's grounding of its rulings in statutory interpretation was especially important in cases like *West Virginia v. EPA* and *Sackett*, as it staved off the need to decide whether the statutes at issue violated the nondelegation doctrine or the Commerce Clause, respectively.[151]

Several of these recent cases involved the application of what the Court now has labeled the "major questions" doctrine. But the principles underlying the doctrine are not a new innovation. Rather, one scholarly analysis, by Louis Capozzi (affiliated with Penn Carey Law School), traces the origins of the canon from nearly as long ago as the late 19th century.[152] That history dates at least to 1897, when the Court held that the Interstate Commerce Commission, often described as the first multimember agency of the modern era, did not have an expansive ratemaking power because

147. Fischer v. United States, 144 S. Ct. 2176 (2024).

148. 143 S. Ct. 1322 (2023).

149. 142 S. Ct. 661 (2022).

150. 141 S. Ct. 2485 (2021).

151. *See* Brief for Petitioners at 44, West Virginia v. EPA, 142 S. Ct. 2587 (2022), 2021 WL 5921627 ("The Court should construe Section 111 [of the Clean Air Act] to avoid substantial non-delegation questions." (capitalization adapted)); *Sackett*, 143 S. Ct. at 1358 (Thomas, J., concurring) (suggesting that the statute at issue in the case may violate the Commerce Clause).

152. *See* Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 197 (2023).

Congress had not "expressly given" such a power to the agency.[153]

One might argue that the Court is getting these cases wrong as a matter of statutory interpretation.[154] But that debate, for each individual case, must occur within the actual textual and structural confines of the statute at issue in the case under review. Statutory interpretation is a technical exercise that occurs within the confines of the text before the court.[155] And when Congress speaks clearly, no canon of interpretation can supersede a court's mandate to "give effect to the unambiguously expressed intent of Congress."[156] Essentially, the major questions doctrine simply can be understood as the principle that enacted statutes have to demonstrate by their own terms and structure that a particular range of government activity is authorized. Otherwise, no positive source of law permits the federal government's assertion of authority over otherwise-unregulated private or local and state activity.

---

153. Interstate Com. Comm'n v. Cincinnati, N.O. & T.P.R. Co., 167 U.S. 479, 500 (1897); *see also* Capozzi, *supra* note 152, at 203 (discussing the case); *but cf.* Squitieri, *Who Determines Majorness?*, *supra* note 133, at 473 (suggesting that the Court "first invoked" the major questions doctrine in 1994). Multimember commissions existed as early as 1789 enacted by legislation in the First Federal Congress, such as commissions continuing on Articles of Confederation-era initiatives like war debt repayment. *See* Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1291 (2006).

154. *Cf.* Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 401 (2015) (suggesting that certain D.C. Circuit administrative law decisions were motivated by libertarian policy preferences and went "beyond the boundaries of appropriate interpretation of the law as it now stands").

155. Mila Sohoni deconstructs the major questions cases as "separation of powers cases in the guise of disputes over statutory interpretation." Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 262–63 (2022). Yet some contend that the major questions principle is more properly thought of as a context-driven canon of interpretation that has little to do with constitutional values. *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring); *see also* Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. 909, 916 (2024) (explaining that the importance of the question provides context for a statute's linguistic meaning). Moreover, a defender of substantive canons of interpretation could take the position that—for the purpose of judicial interpretation of statutory text—the background principle of separation of powers informs the meaning of the statute. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2616–17 (2022) (Gorsuch, J., concurring).

156. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984), *abrogated by Loper Bright*, 144 S. Ct. 2244.

As discussed at the beginning of this Part, *Cargill* would have been a far different case—and the ATF's regulatory initiative would have been on far sturdier ground—if the National Firearms Act had explicitly banned firearms or if Congress had acted after the mass shooting in Las Vegas. The same is true in *Loper Bright*, which never would have made it to the Supreme Court if the Magnuson-Stevens Act had explicitly provided that fishermen had to pay for government monitors on their boats.

Consider also the statutory framework at issue in *Corner Post*. If Congress had eschewed the usual, pro-plaintiff presumption and explicitly provided that the APA cause of action accrues when a rule is finalized, no one could have disputed the issue. Some will argue, in support of *Chevron* deference and in criticism of the nondelegation doctrine, that Congress and the President cannot possibly legislate every detail. But banning bump stocks, establishing a funding mechanism for the regulatory scheme of having government monitors on fishing boats, and specifying when an APA right of action accrues are not questions that involve great detail. They are exactly the kinds of questions that Congress has the ability to answer in a straightforward manner.

B. Legislative Primacy in Law

The Constitution separates powers. The Court's leading administrative law decisions last Term reflected a profound respect for this principle and for the legislature's central role in formulating law. Whatever the law Congress enacts, the President then is to have complete supervisory power, and responsibility, over exercises of authority under it.[157]

In practice, the trajectory of Court decisions over the past half-century has demonstrated reluctance to enforce separated powers through judicial review. The Court frequently instead opts to cure constitutional issues through statutory interpretation. In so doing, the Court preserves space for Congress to respond, and act, if

157. *See, e.g.*, Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477 (2010); Myers v. United States, 272 U.S. 52 (1926); *see also* Jennifer L. Mascott, *Who Are Officers of the United States?*, 73 STAN. L. REV. 443 (2018).

Congress disagrees with the Court's interpretation of its enacted laws. This call-and-response has also put Congress, the executive, and the public on notice: if Congress squarely presents a constitutional question, the Court will answer it. But until then, the Court will strictly enforce the textual and structural boundaries of the laws Congress and the President have enacted—regardless of the creativity with which administrative agencies might attempt free-wheeling updates to the text outside of responsible and accountable executive supervision.

In reality, a judicial pronouncement on a statute's meaning can become the last word quite easily. Congress, by original design, often is collectively slow to act. But when it does, the separately required majorities of both the House and Senate reflect granular, concrete interests of distinct geographic regions across the nation in a way that no other elected body in our system can.[158] Congress has at times proven responsive to policy or constitutional concerns even when the Court has explicitly declined to assert them. An emblematic example is the aftermath of *Morrison v. Olson*, which saw Congress allow the pernicious independent counsel statute to lapse in 1999 even after eight Justices bowed to it over a strong dissent from Justice Scalia.[159] And, historically, the need to gather majority support for statutes has helped fend off the broadest assertions of federal power by Congress.

Loper Bright did not originate from a vapor. For years, significant agency regulatory positions flip-flopped from presidential administration to presidential administration—despite no change in the underlying statutory text from which those positions purportedly derived.[160] Along with these regulatory shifts, agencies in recent

158. *See* Jennifer L. Mascott, *Early Customs Law and Delegation*, 87 GEO. WASH. L. REV. 1388 (2020).

159. *See* 487 U.S. 654 (1988); Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1462 (2009) (describing the independent counsel statute as "a major mistake" and observing that "Congress itself came to that conclusion in 1999 when it declined to reauthorize the statute").

160. *See, e.g.*, Eugene Scalia, Chevron *Deference Was Fun While It Lasted*, WALL ST. J. (Jan. 9, 2024), https://www.wsj.com/articles/chevron-deference-was-fun-while-it-

years made increasingly bold assertions of power on the basis of questionable statutory authority.[161] To the extent that *Chevron* deference ever made sense as a policy matter, the bench and bar had come to question its wisdom in recent years. Regulations had become further unmoored from statutory text as more decades passed since the Court handed down *Chevron*.[162] Deferring to administrative interpretations of statutes became a less desirable and less tenable practice.[163]

But *Loper Bright* did not end the conversation. To the contrary, the Court has acknowledged the possibility of Congress delegating a window of *policymaking* authority to an executive agency—even though the *law* interpretation function is that of the courts in particular cases. Congress just has to have delegated concretely, to the administrative entity, the policy authority being claimed under a statute. For example, the timing standard under *Corner Post* is susceptible of a straightforward legislative fix if Congress ever were interested in tightening the timeframe within which one may challenge agency action. And the same is true of *Cargill*, in which one of the most conservative Justices on the Court even noted in a concurrence that Congress could look into restricting access to bump stocks. Once the Court has performed its function, Congress has room to do its job as well.

Congressional response to Supreme Court decisionmaking is

---

lasted-legal-scotus-partisan-regulation-changes-bddbfe27; Aaron L. Nielson, *Deconstruction (Not Destruction)*, DAEDALUS, Summer 2021, at 148–49.

161. *See* Jennifer L. Mascott & Eli Nachmany, *The Supreme Court reminds the executive branch: Congress makes the laws*, WASH. POST (July 1, 2022), https://www.washingtonpost.com/opinions/2022/07/01/west-virginia-epa-supreme-court-ruling-carbon-emissions-congress-laws/.

162. *See, e.g.*, Richard W. Murphy, *Abandon* Chevron *and Modernize* Stare Decisis *for the Administrative State*, 69 ALA. L. REV. 1, 37–38 (2017).

163. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587 (2022); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (determining that the EPA had acted unreasonably by asserting "an enormous and transformative expansion in [its] regulatory authority without clear congressional authorization"); *see also* Biden v. Nebraska, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring) (noting that the major questions doctrine embodies the principle that enacted statutes are to be interpreted in line with what their text and structure actually provides).

nothing new. Two recent examples are illustrative.[164] *First*, Congress enacted the supplemental jurisdiction statute, 28 U.S.C. § 1367, to respond to a 1989 holding in *Finley v. United States* that federal courts could not assert pendent jurisdiction over federal tort claims against parties other than the United States without an independent basis of federal jurisdiction.[165] Within a year of that decision, Congress and the President had enacted the statutory change.[166] *Second*, consider the Court's ruling in *Ledbetter v. Goodyear Tire & Rubber Co.*, in which the Court interpreted the statute of limitations for Title VII pay discrimination claims to extend only 180 days after the original pay determination.[167] The House of Representatives passed a bill that year to reverse the Court's ruling, but the Senate declined to adopt it.[168] During the 2008 election cycle, Democrats campaigned on their support of the bill,[169] and after the Democrats captured both houses of Congress and the White House, Congress enacted the Lilly Ledbetter Fair Pay Act of 2009 to amend the statute of limitations.[170] In a way, *Corner Post* is a reverse *Ledbetter*—and Congress's power to change course on the statute of

164. Other examples abound. Consider the Wheeler-Lea Act of 1938, in which Congress gave the (then relatively new) Federal Trade Commission the power to investigate unfair or deceptive practices. *See* Pub. L. No. 75–447, 52 Stat. 111 (1938). Congress enacted this provision after the Supreme Court ruled in *FTC v. Raladam Co.*, 283 U.S. 643 (1931), that an "unfair methods of competition" violation under the statute required harm (or prospective harm) to competitors. *See id.* at 649. The amendment responded to *Raladam* by establishing that the Commission could act to prevent FTC Act violations without meeting this requirement. *See* Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 HARV. J. ON LEGIS. 1, 12 n.68 (2006) ("Congress superseded *Raladam* with the Wheeler-Lea Amendment."). For more recent instances, see generally Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions*, 92 TEX. L. REV. 1317 (2014).

165. *See* 490 U.S. 545, 552–53 (1989).

166. *See* Jonathan Remy Nash, *Courts Creating Courts: Problems of Judicial Institutional Self-Design*, 73 ALA. L. REV. 1, 44 n.233 (2021).

167. *See* 550 U.S. 618, 621 (2007).

168. *See Democrats' Secret Weapon: Lilly Ledbetter*, N.Y. TIMES (Aug. 28, 2008), https://archive.nytimes.com/campaignstops.blogs.nytimes.com/2008/08/28/the-democrats-secret-weapon-lilly-ledbetter/ [https://nyti.ms/3Tuu34o].

169. *See id.*

170. *See* Pub. L. No. 111–2, 123 Stat. 5 (2009).

limitations issue in light of the decision is the same.

Congress can narrow the range of possible judicial interpretations by being clear. If the legislature passed a law banning vehicles in a park, jurists may debate the reach of the provision to bicycles and airplanes.[171] But the provision plainly forbids automobiles; a judge would be hard-pressed to interpret the law in such a way as to allow a car in the park.[172] And although a "no vehicles in the park" ordinance may be ambiguous as to bicycles, the legislature can clear that up easily. A judge may be able to interpret "vehicles" not to encompass bicycles. But assume that the legislature enacts an amendment to the law and states clearly the following: "A bicycle constitutes a vehicle." The specificity of the new statute (and of the legislature's clear statement about bicycles) constrains the judge's interpretive discretion. Similarly, in administrative law, "[o]ne legislative tool that can cut against an agency using its general authority is to create a specific statute."[173]

The idea that Congress can just change the law is not entirely satisfying to some.[174] So it goes. Difficulty with getting Congress to enact one's policy preferences is a familiar problem for those who go to Washington, but it is part of the constitutional design. The rigorous requirements of bicameralism and presentment raise the bar for congressional action.[175] And congressional capacity to legislate has declined.[176] Moreover, one commentator has warned that

171. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

172. *See id.* ("Plainly this [rule] forbids an automobile.").

173. Joel Thayer, *If You're Worried About Lina Khan, Then Support Specific Authority Bills*, 27 HARV. J.L. & PUB. POL'Y PER CURIAM 5 (2024).

174. *See* Kenneth R. Berman, *Exceptions*, 48 LITIG. 56 (No. 2, Winter 2022) ("It's not satisfactory to say that, if it wants to, Congress can amend the statute to undo the Court's handiwork. Such congressional action takes effort, hearings, investigations, research, debate, coalition building, and compromise. It's unrealistic to expect that Congress can so easily react to and undo what a court can so easily create. It would instead be better for courts simply to identify the purported statutory flaw and defer to Congress to fix it.").

175. *See* John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2D 191, 198 (2007).

176. *See* Steven J. Menashi & Daniel Z. Epstein, *Congressional Incentives and the Administrative State*, 17 NYU J.L. & LIBERTY 172, 176–77 (2024).

Congress's quick response to *West Virginia v. EPA*—in the form of the Inflation Reduction Act—"should not be mistaken as a sign of a new congressional quick response capability," given that the Act "was an exception, enacted using the reconciliation process that allows one budgetary bill per year to pass the U.S. Senate on a simple majority rather than 60 votes."[177] But even this statement presupposes the necessity of a legislative response to the decision.

It may well be the case that Congress does not need, or desire, to fix a statutory interpretation decision with which some disagree on policy grounds. Congress could decide that the decisions in *Corner Post* and *Cargill*, for example, are just fine. The choice not to legislate deserves respect, too.[178] Moreover, short-term concerns about congressional capacity cannot justify a long-term erosion of the separation of powers, which plays a central, defining role in our constitutional structure.

Still, the Court's opinions—both from OT23 and from other recent terms—have created the conditions for Congress to act.[179] Justice Alito's *Cargill* concurrence suggests that Congress's failure to act in recent years, at least on bump stocks, may be the result of administrative agency interference with the legislative process.[180] But even as the Court kicks issues to Congress, it has articulated clear constitutional guardrails.[181] In applying canons of interpretation like the major questions doctrine, the Court has deferred constitutional conflict over such issues as nondelegation. A reckoning on such issues may be forthcoming—and if it does, no one who has followed the Court can say that he was caught off guard by it. But at least in OT23, statutory interpretation took a central role in

177. David D. Doniger, West Virginia v. EPA, *the Inflation Reduction Act, and the Future of Climate Policy*, 53 ENV'T L. REP. 10553, 10554 (2023).

178. *See* Manning, *supra* note 175, at 198.

179. *See* Chad Squitieri, *A* Loper Bright *Future for Statutory Interpretation*, L. & LIBERTY (July 3, 2024), https://lawliberty.org/a-loper-bright-future-for-statutory-interpretation/ [https://perma.cc/9NNS-4FP7].

180. *See* Garland v. Cargill, 144 S. Ct. 1613, 1627 (2024) (Alito, J., concurring).

181. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024); *see also* Gundy v. United States, 139 S. Ct. 2116, 2135–37 (2019) (Gorsuch, J., dissenting) (laying out a test for nondelegation).

administrative law, and the Court's opinions reflected both cautiousness in adjudication and an appreciation of legislative primacy in the arena of lawmaking.

CONCLUSION

October Term 2023 was a blockbuster for administrative law. But the Supreme Court did not meet this moment by reaching for constitutional rulings. Instead, the Court resolved many of the Term's leading administrative law cases on statutory grounds. The Court's decisions have left space for Congress to act. If Congress disagrees with the Court's rulings, it can change the law—a feature of statutory interpretation decisions. This back and forth between Congress and the Court is a longstanding part of the American legal tradition, and its next chapter is already on display: Congress is currently considering bills that respond to the Court's OT23 administrative law opinions. Although the Court has preserved the possibility of issuing bold constitutional rulings in the years to come, its OT23 cases largely reflected a close focus on statutory interpretation.

THE MAJOR QUESTIONS DOCTRINE, POST-*CHEVRON*?: *SKIDMORE*, *LOPER-BRIGHT*, AND A GOOD-FAITH EMERGENCY QUESTION DOCTRINE

JED HANDELSMAN SHUGERMAN†

INTRODUCTION

When my friends, students, and colleagues have fretted about *Chevron*'s[1] fate, I have said, "Worry less. *Skid-more*."[2]

As we now know from the Roberts Court in *Loper Bright*,[3] they agree: No more *Chevron* deference. More *Skidmore* "weight" or "respect,"[4] to the extent that weight or respect is due. Roberts returned to *Skidmore*'s factors for judges to consider when interpreting a statute: an agency's contemporaneity and consistency, "agency expertise,"[5] and "the agency's 'body of experience and informed judgment.'"[6]

After *Chevron*, one question is: *Quo vadis* major questions doctrine?[7] Where are you going, major questions doctrine?

One answer is that, even after *Chevron* deference is gone, courts still have to decide how much weight or respect to give the agency's interpretation, and the major questions doctrine will play a similar

---

† Professor, Boston University School of Law. Thanks to Kaylyn Ling for research assistance; and to Danya Handelsman for her quick thinking and wisdom in any emergency.

1. Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
2. Skidmore v. Swift & Co., 323 U.S. 134 (1944).
3. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).
4. *Id.* at 2257–59.
5. *Id.* at 2262 (quoting *Skidmore*, 323 U.S. at 140).
6. *Id.* at 2267 (quoting *Skidmore*, 323 U.S. at 140).
7. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

role: Instead of majorness as an exception to *Chevron* deference, majorness should be a reason to give less *Skidmore* weight to the agency's interpretation. And in the domain of emergencies, when the statutory texts are open-ended for good reason, majorness means less deference to simple and fast textualism, and more time for courts to engage in deeper purposivism to make sure those emergency powers are being used as intended. Giving less deference or weight to the agency, this hard work to investigate purposes would allow appropriate good-faith emergency measures consistent with those purposes, and it would disallow abuses of those emergency powers.

If the major questions doctrine had been simply a "step zero"[8] exception to *Chevron*, then not much would be left to discuss. However, the major questions doctrine always was more than a Step Zero exception-exit ramp, and it became so much more over the past four years, especially post-Covid.

This short essay first offers "three cheers" for the major questions doctrine, but unfortunately there are four questions. Three out of four is not bad, but the fourth is a big problem for both textualists and pragmatists. Second, in that review of the "three out of four cheers," I will review two less-obvious practical reasons for *Chevron*, which also explain the practical reasons for *Skidmore* respect and weight returning as robust substitutes with similar results, but only when an agency deserves that respect and weight, relative to respect for Congress and the weight of judicial expertise. Third, this essay will argue that the major questions doctrine should continue to function *mostly* similarly to its role under *Chevron*:

> (1) Not as an "exception" to deference, but a reason to give less weight, because "majorness" is:

8. Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001); *see also* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006).

(a) Triage: less of a reason for "judicial triage" under a mountain of mid-to-minor-questions.[9] There is a reason *Chevron* has been, by far, the most cited case by American courts, because they are inundated with so many administrative law cases with statutory interpretation questions;[10]

(b) Less of a gap in comparative expertise: less of a reason to defer to agency expertise, when "majorness" puts judges on a similar level of knowledge as agency experts.[11] (For example, major emergency measures deserve more attention.)

(2) The major questions doctrine emphasized "purpose" over "text,"[12] for similar reasons: Majorness justified the effort to go beyond the text and dig into purposes in order to

---

9. *See* Eli Nachmany, *There Are Three Major Questions Doctrines*, YALE J. ON REGUL.: NOTICE & COMMENT (July 16, 2022), https://www.yalejreg.com/nc/three-major-questions-doctrines/ [https:// perma.cc/7SFK-MPBT] (interpreting Justice Kavanaugh's statement respecting the denial of certiorari in *Paul v. United States* as a major questions "triage rule": "Apply the nondelegation doctrine to statutes involving major policy questions, but not to provisions of law that are 'less-major' or that permit an agency to fill up the details of a statutory scheme."); *see generally* Michael Reaves, *Major Questions (and Answers): A Call to Quiet the Quartet*, 44 J. NAT'L ASS'N ADMIN. L. JUD. 187, 227 (2023); Matthew B. Lawrence, *Medicare "Bankruptcy"*, 63 B.C. L. REV. 1658, 1686 (2022).

10. Christopher J. Walker, *Most Cited Supreme Court Administrative Law Decisions*, YALE J. ON REGUL.: NOTICE & COMMENT (Oct. 9, 2014), https://www.yalejreg.com/nc/most-cited-supreme-court-administrative-law-decisions-by-chris-walker/ [https://perma.cc/7BJH-82FB].

11. *See* Cass R. Sunstein, Chevron *As Law*, 107 GEO. L.J. 1613, 1625 (2019); Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 805 (2010) ("Linguistically, the doctrine is presented, constructed, and elaborated as a method of review for questions of statutory interpretation focusing on statutory meaning, but in many of the cases the real question is whether the agency has employed its delegated power wisely, and one reason offered for deference is agency policy expertise."); s*ee also* Note, *The Two Faces of* Chevron, 120 HARV. L. REV. 1562, 1564 (2007) (describing *Chevron* as a shift away from the expertise-driven *Skidmore* approach, toward a jurisprudence focused on separation of powers); Emily Hammond, *Finding a Place for Expertise After* Loper Bright, 31 GEO. MASON L. REV. 559, 565 (2024) (discussing ways to retain deference to expertise post-*Chevron*).

12. *West Virginia*, *supra* note 7, at 761.

> set limits on the agency; and the context of majorness means the question had more public salience, and thus judges have access to public purposes. (For example, judges are often in a relatively good position to evaluate major emergency measures.)
>
> (3) The major questions doctrine should continue to apply Scalia's common sense: Congress does not "hide elephants in mouseholes."[13] Major questions are elephants. Congress must intend an elephant hole, not a mouse hole (or a giraffe hole or a whale hole). There must be a purposive fit between Congress's statutory purpose and the agency's policy, even when both the statutory language and the policy are big. (For example, broad emergency statutes must fit major emergency measures.)
>
> (4) However, the Roberts Court has mistakenly turned the major questions doctrine into a rule of "no more elephant holes, only specified elephants," a rule that Congress must specify the policy, and cannot purposely write an open-ended statute to delegate flexibility to agencies with broad powers. This is a substantive canon of constitutional avoidance against broad delegation, rather than textualism or purposivism.

This essay applies this fourth problematic aspect of the major questions doctrine to the problem of emergencies, using the Biden student debt case[14] as a case study. Emergency powers are a double-edged sword: The nature of unpredictable emergencies means that Congress needs to delegate flexible open-ended powers to the executive branch to tackle surprises, and thus, ambiguity is necessary. On the other hand, emergency powers are among the most likely tools for executive abuse of power, as Levitsky and Ziblatt

13. *See* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001).

14. Biden v. Nebraska, 143 S. Ct. 2355 (2023) (referred to interchangeably as "the Biden student debt case").

documented in *How Democracies Die*.[15] This essay provides examples of salient emergency statutes as frequently relying on textual ambiguities that an executive can exploit through convenient textualism (and even "bad faith" textualism). But purposivism can be an interpretive method to check against those abuses and a check on bad-faith pretexts to invoke those ambiguous emergency powers.

The majority opinion in *Biden v. Nebraska* checked all four boxes. I argue that it should have checked just three (1. Less deference for triage and relative expertise; 2. Purposivism; 3. No elephants in mouseholes), but not the fourth (Congress can enact no more elephant holes, and implicitly no more flexible, open-ended, broad emergency powers).

This essay proposes an "Emergency Question Doctrine" as a particular application of the major questions doctrine, as a way to balance the importance of emergency powers versus the danger of abuses. A solution relies on (2) purposivism, and (3) fit, but not (4) a non-delegation constitutional-avoidance rule against "major" ambiguity, a rule that would hobble the executive's ability to manage emergencies.

On the possibilities of an "Emergency Questions Doctrine," it is worth noting that Justice Brett Kavanaugh, in oral argument, referred to an amicus brief (to be clear, my amicus brief)[16] and asked, "[A] professor says this is a case study in abuse of executive emergency powers. . . . And I want to get your assessment . . . of how we should think about our role in assertion of presidential emergency power given the Court's history."[17] None of the opinions in the case adopted this approach, but it caught Justice Kavanaugh's attention, and it is a way to return to the three cheers of the MQD, while avoiding the dangers of the fourth.

---

15. STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 17, 92–96, 109, 130 (2018).

16. *See* Jed Handelsman Shugerman, *Major Questions and an Emergency Question Doctrine*, (Fordham L. Legal Stud. Research Paper No. 4345019, 2023).

17. Transcript of Oral Argument at 60–61, *Biden v. Nebraska*, 143 S. Ct. 2355 (2023) (No. 22-505).

I. THREE CHEERS FOR THE MAJOR QUESTIONS DOCTRINE (BUT JUST 3 OUT OF 4)

Here is the hand-out I provided during our panel on the separation of powers:

> (1) No *Chevron* deference
>
> Two rationales for *Chevron* (and maybe these rationales are not as accepted as I had thought?) are not as relevant in Major Cases:[18]
>
> > (a) Triage: Deference yields a more efficient process for garden-variety but complicated technical cases of interpretation. But major questions are more like the heart-attack case deserving more attention, and there is more time for those cases as the less significant questions get triaged.[19] ✅
> >
> > (b) Comparative Expertise: *Chevron* assumes agencies generally have greater expertise in their technical/specified/esoteric fields, relative to generalist judges. This is generally true, but the gap approaches zero as the question has more general public salience and was more publicly debated. ✅

---

18. This explanation is similar to but more functional than Sunstein's interpretation of the "weak" Major Question Doctrine: Chevron deference applied when Congress implicitly delegates statutory interpretation to the agency, but when Congress addresses "major questions," it does not implicitly delegate statutory interpretation to agencies (or courts do not infer delegation). Cass Sunstein, *There Are Two 'Major Questions' Doctrines*, 73 ADMIN. L. REV. 175, 177–78 (2021). The "triage" and "comparative expertise" factors that I identify here are explanations for why Congress would not implicitly delegate, and why courts should not infer delegation.

19. *See* Nachmany, *supra* note 9. Triage (in the sense of "sorting items according to quality") derives from the French *trier*, meaning "separate out." In World War I, the term came to be used for the military system of assessing the wounded on the battlefield. "The original concepts of triage were primarily focused on mass casualty situations. Many of the original concepts of triage, the sorting into immediate, urgent, and non-urgent . . . remain valid today in mass casualty and warfare situations." Iain Robertson-Steel, *Evolution of Triage Systems*, 23 EMERGENCY MED. J. 154, 154 (2006).

(2) Purposivism, not textualism (sorry, Justice Barrett) ✅

(3) "No elephants in mouseholes" ✅

Common-sense purposivist reading of statutes.[20]

Did Congress clearly delegate this major policy to the agency? (extension of *Chevron* Step Zero)

(4) "No more elephant holes" ❌

If Congress wants an elephant, it needs to specify the elephant.

Did Congress clearly *and specifically* delegate this major policy?

Clear statement rule (substantive canon of constitutional avoidance of the non-delegation problem)[21]

Let's return to Step 1 above: After *Chevron* and *Loper Bright*, courts should often (but not always) give more *Skidmore* weight for these same factors of "triage" (to process more cases by giving weight to the agency) and "comparative expertise" (to recognize areas where the agency has more expertise than the courts). But when the question is major, give less weight to the agency interpretation.

The major questions doctrine tries to address one problem, the Imperial Executive, by escalating another, the Imperial Judiciary. This article proposes a solution, with the Biden student debt case as a case study: An "emergency question" doctrine would apply when the executive branch relies on a statutory emergency clause or invokes an emergency in its application of a statutory provision. First, if the emergency clause is open-ended, interpreters should

20. *See e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (the ambiguous text "drug" and "device" were too broad, but purposes made sense of limiting the statute so it did not apply to tobacco); King v. Burwell, 576 U.S. 473 (2015) (purposivism allowed the Court to override the apparent plain meaning of "state" in favor of a purpose of "federal" exchanges).

21. This is the strong form of the Major Question doctrine identified by Sunstein, and indeed, too strong. Sunstein, *supra* note 18.

emphasize context and purposes to give intelligible meaning and scope to the clause; and second, the means must fit the emergency ends.

This approach would serve as a solution to both problems: First, it solves a longstanding problem in the interpretation of statutory emergency clauses and the executive branch invoking them for major policies. A textual argument based on the word "emergency" gives too much latitude to the executive branch; a purposive approach gives meaningful context for the word "emergency," allowing a broad application when consistent with the underlying purpose of the statute, but also setting limits on executive power when the policy strays beyond those purposes. Second, it would provide a meaningful category of cases where the logic of the major questions doctrine should apply, and it would provide a way to cabin and set important limits on the major questions doctrine.

I suggest that this solution has already emerged from the recent major questions cases, one of three stages of the major questions doctrine:

MQD 1.0, the Good Purposive MQD (2000–2015), establishes a common-sense exception to *Chevron* deference and narrow textualism in favor of purposivism.[22]

MQD 2.0, a Good Emergency MQD (2021–2022) can be understood best as an emergency question doctrine, a check against the overbroad use, the pretextual use, or abuse of the Covid emergency, primarily on excessive substance (elephants in mouseholes or elephants in giraffe holes), but also on circumventing process. The emergency policy needs to fit the emergency clause's purposes and context to have a limiting principle against the long-term problem of abusing emergencies as pretexts.[23]

---

22. *See, e.g.*, *Brown & Williamson*, *supra* note 20 and accompanying text; Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014) (holding that the EPA exceeded its statutory authority when it interpreted the Clean Air Act to apply certain permitting requirements for stationary sources based on their greenhouse-gas emissions); *Burwell*, *supra* note 20 and accompanying text.

23. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021) (per curiam) (stating that Congress must speak clearly when authorizing agency

MQD 3.0, the Bad Anti-Major Canon MQD (2022–active), creates the requirement of a super-clear statement for any "major" policy—effectively a substantive canon creating a presumption against significant executive actions. This selective approach allows for "finding friends at a party," cherry-picking post-ratification evidence like "anti-novelty" and tradition, opening a backdoor for a sloppy kind of pseudo-*Chevron* deference to old agency interpretations, but not the recently elected, current administration's agency. Gorsuch described this approach as a kind of Non-Delegation-Lite in his *Gundy* dissent,[24] and it was applied most clearly in *West Virginia v. EPA*.[25]

I do not agree with this recent turn in *West Virginia v. EPA* or this approach in *Biden v. Nebraska*,[26] although I think *Biden v. Nebraska* should have come out the same way against student debt cancellation—just on purposive grounds.

The Biden student debt case fits as MQD 2.0, to limit the pretextual and overbroad use of emergencies powers. This case represented an opportunity to turn back from the extremism of MQD 3.0, in favor of a more legitimate, more limited, more coherent approach, closer to the best reasons for the major questions doctrine as a common-sense exception to thin textualism and as a check against the abuse of executive power. Unfortunately, the Roberts Court's ruling went beyond the good MQD 2.0 and expanded the bad MQD 3.0, otherwise known as reason (4) above: non-textual substantive canons, the rule that Congress cannot legislate "elephant holes."

---

powers of vast economic and political significance, especially when applied to traditional domains of state law, such as the landlord-tenant relationship); Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661 (2022) (per curiam) (denying agency power to mandate vaccination for 84 million Americans under a Congressionally delegated power to set occupational safety and health standards).

24. Gundy v. United States, 139 S. Ct. 2116, 2141–42 (2019) (Gorsuch, J., dissenting).

25. 142 S. Ct. 2587, 2609 (2022) ("in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent" counsel against broad delegations).

26. *Supra* note 14.

The Biden administration asked for such a broad interpretation of the word "emergency" that it renders emergency powers dangerously unlimited in scope or timeframe. The invocation of emergencies for broad and attenuated policies is a persistent bipartisan and growing problem, escalating an imperial executive. Emergency powers clauses often have no textual limitation on their scope. A better solution here would be *an emergency questions doctrine*, which already has emerged as a coherent set of precedents, such as *Alabama Association of Realtors* and *NFIB v. OSHA*. Under an emergency questions doctrine, interpreters should turn to the whole act, the purposes, and the context to make the text (an open-ended "emergency" clause) legally intelligible; and they should focus on the means-ends fit, whether the government policy fits the claimed emergency, to avoid overreaches and pretextual abuses of the word "emergency."

In this case, the Higher Education Act of 1965 (HEA) was the appropriate fit for the publicly stated purposes of long-term education access and for the broad policy. The statute required a long and challenging process—a choice by Congress to balance the interests and to value public notice and comment. The Government wanted to move faster, so it cited the Covid emergency as a pretext to circumvent the negotiated regulation under the HEA.

If the government's student debt waiver were a Covid emergency measure, it is both arbitrarily overbroad *and* capriciously over-narrowed. As the government conceded, the statute requires a causal nexus to the emergency, but this policy lacks even a basic step to show mere Covid correlation. Considering this ends-means mismatch and President Biden's public statements, the true motivation is to address long-term structural problems with education finance. The emergency is a pretext, likely to circumvent the regular administrative process required by Congress in a statute with a better fit. The policy does not fit as a HEROES Act "emergency," it is arbitrary and capricious, and it is not "faithful execution" of the laws. This case is an important moment for this Court to set limits to the abuse of executive power, while also clarifying and limiting the scope of the major questions doctrine.

II. THE EMERGENCY PROBLEM: THE OVERREACTIONS AND PRETEXTUAL USES OF EMERGENCY POWERS LEAD TO AN IMPERIAL EXECUTIVE

History teaches us to be wary of open-ended invitations to executive power, either as excessive responses to real emergencies or a pretextual basis for a pre-existing policy goal or political agenda. As political scientists Steven Levitsky and Daniel Ziblatt wrote, "National emergencies can threaten the constitutional balance . . . they can be fatal under would-be autocrats, for they provide a seemingly legitimate (and often popular) justification for concentrating power and eviscerating rights."[27] They note the problem of judicial deference to the executive, "[f]earful of putting national security at risk."[28]

One can identify two categories of abuses: over-reaction abuses, and pretextual abuses of the executive seizing on "emergencies" to pursue a pre-existing policy goal or to consolidate power. While emergencies require immediate and often imprecise reactions, they also create the risk of both over-reactions and pretextual manipulations. "Never let a crisis go to waste" has become a motto during modern emergencies.

This case arises from the executive's exercise of an emergency power based on a broad interpretation of an open-ended emergency clause in an act of Congress with an apparently more limited context and purpose. This case is unfortunately not an isolated legal problem. Many statutes delegate emergency powers to the President or the Executive Branch with little guidance about the scope of those powers. Presidents from both parties exercise emergency powers in increasingly aggressive ways, with less clarity that Congress delegated such powers. Congressionally delegated emergency powers are vital to allow decisive executive action with

27. Steven Levitsky & Daniel Ziblatt, *Why Autocrats Love Emergencies*, N.Y. TIMES (Jan. 12, 2019), https://www.nytimes.com/2019/01/12/opinion/sunday/trump-national-emergency-wall.html.

28. *Id.*

speed and flexibility in the face of sudden crises.[29] On the other hand, open-ended delegations create a risk of abuse of executive power.

Statutes authorizing the executive to act in emergencies are often more open-ended and lack textual constraints on the scope and nature of the emergency relative to other types of statutory delegations.[30] This open-endedness is in the nature of emergencies and emergency delegations. Congress cannot anticipate specifics of future emergencies, their effects, and their remedies. As such, these statutes and emergency clauses present a greater potential for abuse relative to more conventional statutes focused on more specific problems, where Congress can more easily anticipate circumstances and address them in the text.

Recent invocations of presidential emergency powers provide examples of abuses that run contrary to statutory purpose. Most recently, the Biden Administration invoked a statute intended for student debt waiver "in connection with a war or other military operation or national emergency" to advance a student loan forgiveness plan during the COVID-19 pandemic even though there was no war, no military operation, and no genuine national emergency.[31] In other words, Biden tried to shoehorn a policy move through the emergency powers available to him without seriously considering what goals the law was intended to serve.

A few years ago, President Trump did the same. He declared a national emergency to fund a wall at the southern border of the United States,[32] leaning on a statute that allowed reallocation of funds for "military construction" projects. The Military Construction Codification Act of 1982 delegates open-ended emergency

29. THE FEDERALIST NO. 70 (Alexander Hamilton) ("necessity of an energetic executive"); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

30. *See* JENNIFER K. ELSEA ET AL., CONG. RESEARCH SERV., R46379, EMERGENCY AUTHORITIES UNDER THE NATIONAL EMERGENCIES ACT, STAFFORD ACT, AND PUBLIC HEALTH SERVICE ACT 1 (2020), https://crsreports.congress.gov/product/pdf/R/R46379 [https://perma.cc/5JR2-MVXG] ("Congress has historically given the President robust powers to act in times of crisis.").

31. *See Biden*, *supra* note 17, at 485 (2023).

32. Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019).

powers. When the President declares a national emergency that requires use of the armed forces, the Secretary of Defense "may undertake military construction projects . . . not otherwise authorized by law that are necessary to support such use of the armed forces."[33] The purpose to fund military construction that would 'support' ongoing military efforts.[34] In contrast, "[t]he term 'military construction' as used in this chapter or any other provision of law includes any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road . . . ."[35] Of course, there are many valid uses of these powers. The more major the emergency power, the more appropriate it is for judges not to defer, but to make sure the executive branch is acting consistent with Congress's purposes. And of course, many major emergency military construction projects would fit Congress's purposes.

However, the border wall is the opposite example. Not only was the national emergency manufactured—because there was no need for immediate action at the border—but President Trump's invocation of the statute did not match up with its purpose. The Military Construction Act of 1982 codified a number of laws relating to military construction and military family housing, aiming to support the unique needs of the armed forces.[36] When passing this statute, Congress never imagined, much less intended, for this law to be a loophole in which Trump could push forward a project of immigration policy.

Here are some additional examples of ambiguous emergency statutes, sometimes leading to long-running emergency powers,

33. *See* 10 U.S.C. § 2808(a).

34. *Id.*

35. 10 U.S.C. § 2801(a); *see also* MICHAEL J. VASSALOTTI & BRENDAN W. MCGARRY, CONG. RESEARCH SERV., IN11017, MILITARY CONSTRUCTION FUNDING IN THE EVENT OF A NATIONAL EMERGENCY (2019), https://sgp.fas.org/crs/natsec/IN11017.pdf [https://perma.cc/5BPF-Q3D8].

36. *See* 10 U.S.C. § 2808(b) (Such projects "may be undertaken only within the total amount of funds that have been appropriated for military construction, excluding funds appropriated for family housing" that have not been "obligated.").

without congressional approval, even if for good policy reasons. The Insurrection Act was worded to be flexible, given the nature of insurrections and emergencies.[37] The statute does not define "insurrection" or "rebellion."[38] This flexibility is important, but it is also risky. This statute leads to major questions about the risk of abuse. One can point to legitimate and illegitimate uses of such powers. The text is unclear and ripe for abuse if courts turn to textualism plus deference or weighting of the executive branch's interpretation. Instead of text-plus-weight, the better approach for such a major response is to look at the statute's context and purpose, without deference or weighting the agency interpretation. That approach allows courts to differentiate between the Southern secessions of 1861 and abuses of such emergency powers against more common protest movements, even when some of those protests have become violent.

Similarly, the emergency clause in the post-9/11 HEROES Act is open-ended, if one reads the clause in isolation.[39] If one relies on textualism-plus-deference or weight in favor of agencies, then it delegates too much power and discretion to assert such emergency powers. How can courts distinguish between the legitimate use (e.g., debt waivers for members of the military mobilized during a war or national security crisis) versus other uses with a potential for abuse?

Textualism offers a partial solution: By applying textualism's common-sense whole act canon, the congressional findings offer a clarifying context and scope for the emergency clause. In this case, the HEROES Act, in the aftermath of 9/11, provided a revealing "findings" section, with repeated references to military "active service" or "active duty."[40] The emergency delegation is arguably broader than a military context, but these textual findings and

37. *See* 18 U.S.C. § 2383.

38. *Id.*

39. Higher Education Relief Opportunities for Students Act of 2003, Pub. L. No. 108-76, 117 Stat. 904 (2003).

40. *Id.*

contexts indicate scope limited to an active emergency and applicable only to claimants concretely affected by the emergency.[41]

A recurring problem, evident in the COVID cases but long preceding them, is administrations invoking emergencies to evade or truncate regular administrative process. The Administrative Procedures Act (APA) provides for a "good cause" exception to section 553's notice-and-comment requirements.[42] Courts have expressed concerns about straining the good cause exception for weak claims of emergencies.[43]

III. A PARALLEL MAJOR PROBLEM: AN IMPERIAL MAJOR QUESTIONS DOCTRINE

The longstanding approach for "questions of vast economic and political importance" began as a narrow common-sense exception to *Chevron* deference. It was a doctrine invoked in special cases for relying on purposes over textualism when a major statute was so historic and widely debated on a national scale that its purposes were sufficiently salient, that it was an appropriate use of judicial resources to examine congressional purposes, when the specialized expertise gap between courts and agencies is de minimis, and where a single word or line may be relatively less reliable out of context.[44]

However, the Court should be wary of the major questions doctrine ballooning into an open invitation for the federal judiciary to substitute its own policy preferences for the executive branch.[45] Unless clarified, the doctrine becomes a novel substantive canon of anti-major policy, "loading the dice," in Justice Scalia's terms, for

41. *See infra* Section V.C.

42. 5 U.S.C. § 553(b)(B).

43. *See, e.g.*, Sorenson Commc'ns Inc. v. FCC, 755 F.3d 702, 706–07 (D.C. Cir. 2014).

44. *See Brown & Williamson*, *supra* note 20 (considering "the manner in which Congress is likely to delegate a policy decision" of vast "economic and political magnitude," such as regulating tobacco); *Burwell*, *supra* note 20 (hesitating to find an implicit delegation where the result would affect "billions of dollars in spending" and "the price of health insurance for millions of people"); *see also Ala. Ass'n of Realtors*, *supra* note 23; *NFIB*, *supra* note 23.

45. *See West Virginia*, *supra* note 7, at 2587 (2022).

preferred outcomes.[46] Every time the Court finds an agency action of "vast political or economic significance,"—i.e., most salient administrative law cases—the Court has a tool to strike it down. It is the non-delegation doctrine "by another name."[47]

While the major questions doctrine can be used to check executive overreach, it also invites judicial overreach,[48] unless it is focused on special areas of overbroad delegations and executive abuses. Auspiciously, a recent subset of "major questions" cases forms a coherent, limited, and crucial body of precedents: an emergency questions doctrine, where courts heretofore had been too deferential. These emergency questions serve as common-sense exceptions to both of *Chevron*'s rationales: (1) the purposes during emergencies are more salient to the public and generalist judges, reducing the need to rely on agency comparative expertise and experience in the domain of statutory interpretation (as opposed to complex policies to address emergencies); and (2) emergency cases are a manageable number of cases, so there is far less need for judicial economy and case management to triage by deference. Emergency questions have vast economic or political significance, and distinguishable dangers, such that they are an appropriate use of additional judicial resources to investigate context and purposes.

IV. A DOUBLE SOLUTION: AN EMERGENCY QUESTIONS DOCTRINE

A. By properly construing emergency statutes, courts can provide an important check against executive abuse of emergency powers, while not substituting their policy preferences for the choices of the democratically elected branches

An "emergency question" doctrine would apply when the Executive Branch relies on a statutory emergency clause or invokes an emergency in its application of a statutory provision. First, if the

46. ANTONIN SCALIA, A MATTER OF INTERPRETATION 27 (Amy Gutmann ed., 1997).
47. *Gundy*, *supra* note 24.
48. Mark Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97 (2022).

emergency clause is open-ended, interpreters should emphasize context and purposes to give intelligible meaning and scope to the clause; and second, the means must fit the emergency ends. Congress expects emergency powers to be invoked when immediate action from the President is necessary to effectively respond to a disaster or crisis reached by the statute; Congress never intended emergency power provisions to aggrandize the reach of presidential power past the intended reach of a statute. Thus, when an emergency power is invoked, it should typically be permissible only if it does not conflict with statutory purpose. When a President invokes a statute to support action that does not align with—or runs directly contrary to—statutory purpose, that is evidence of an abuse of power. The language, legislative history, and historical context of a statute may shed light on its purpose.

This approach would serve as a solution to both problems: First, it solves a longstanding problem in the interpretation of statutory emergency clauses and the executive branch invoking them for major policies. A textual argument based on the word "emergency" gives too much latitude to the executive branch; a purposive approach gives meaningful context for the word "emergency," allowing a broad application when consistent with the underlying purpose of the statute, while also setting limits on executive power when the policy strays beyond those purposes.

Second, it would provide a meaningful category of cases where the logic of the major questions doctrine should apply, and it would provide a way to cabin the major questions doctrine. Otherwise, if a key rationale for the major questions doctrine is to check executive aggrandizement, the major questions doctrine also risks *judicial* aggrandizement. A solution is to treat "major questions" as a question (or conceptual category) rather than a broad doctrine, and to start to create more limited and coherent "doctrines" as answers to that question. An emergency question doctrine has developed in recent cases: When the executive invokes an emergency power delegated by Congress for a policy of vast economic or political significance, the judiciary should go beyond the textual reference to an emergency and should investigate the congressional intent,

purpose, and context, and the judiciary should ask whether the means fit the stated emergency purpose.

The broad and undefined texts of emergency clauses themselves often provide little-to-no constraint on the power. Thus, narrow textual interpretations too often lead to expansive executive power and abuses of emergency powers. An examination of context and purpose provides meaningful guidance for the appropriate scope and application of such provisions.

Specific emergency powers granted by the HEROES Act were not unlimited grants of emergency powers; they had a specific context with paradigmatic cases and invitations for extensions from those specific purposes, based on reasoning from analogy. When the executive invokes vague emergency clauses at their edges—within penumbras or beyond them—the President acts in the "zone of twilight."[49] According to Justice Jackson, judges consider a range of factors: the "imperatives of events and contemporary imponderables."[50] But when pondering whether Congress had delegated powers to confront the imponderable, an investigation into congressional context, intent, and purpose helps resolve that twilight of ambiguity.

The problem of ambiguous emergency clauses and their abuse warrants an "emergency actions doctrine" as a special case for investigating congressional intent and purposes to give context, to allow flexible executive action where Congress had delegated such emergency powers, but also to limit executive action when it does not fit those purposes and contexts.

B. Recent COVID decisions form a coherent Emergency Question Doctrine

On this foundation of administrative law and statutory interpretation principles, recent Supreme Court cases reflect a coherent approach to emergencies by focusing on the match between congressional purposes for the delegation of an emergency power and the

49. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952).
50. *Id.*

executive branch's invocation and application of the emergency power.

In the eviction moratorium case, *Alabama Association of Realtors v. HHS*, the Court also identified the core concern of unbounded textualist emergency interpretations: "Indeed, the Government's read of § 361(a) would give the CDC a breathtaking amount of authority. It is hard to see what measures this interpretation would place outside the CDC's reach."[51]

The vaccine-or-test mandate, *NFIB v. OSHA*, was similar, based on a more explicit "emergency" provision: OSHA relied on a statutory exception to ordinary notice-and-comment procedures for "emergency temporary standards" with immediate effect.[52] The Court discussed the textual limits, but also went beyond textualism to discuss the context, purposes, and the post-enactment application of these exceptions.[53] The Court also raised a concern that open-ended textual interpretations create a risk of using the emergency for a policy goal beyond the statute's purpose: "OSHA's indiscriminate approach fails to account for this crucial distinction—between occupational risk and risk more generally—and accordingly the mandate takes on the character of a general public health measure, rather than an 'occupational safety or health standard.' "[54] The decisions on Covid religious gatherings reflect a similar balance on emergency powers. Initially, the courts deferred and allowed broad applications of emergency powers in the face of uncertain danger.[55] But as the emergency was better understood, and as judges were in a position to assess the specific risks against individual liberties, the courts required more narrow tailoring, a closer fit between means and ends, and more balancing to protect those

51. 141 S. Ct. 2485, 2489 (2021).
52. 29 U.S.C. § 655(c)(1).
53. *NFIB*, *supra* note 23.
54. *Id*. at 666.
55. S. Bay Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020).

rights.[56] Some Justices have also raised questions about fit in cases about border policy.[57]

V. THE COVID EMERGENCY AS PRETEXT: A MEANS-ENDS MISMATCH

A. Constitutional law and administrative law require good faith reasons and "faithful execution," and they reject pretextual reasons to excuse the misuse of power.

Pretextual execution of powers and bad faith to circumvent the law have been suspect and invalid since the early years of this Court's jurisprudence. "[S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government[,] it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land."[58] All the more is true of the President, who must "take Care that the laws be faithfully executed" and who takes an oath to faithfully execute the office.[59] "Faithful execution" of the laws requires giving good-faith reasons when invoking statutory powers, not pretexts. Here, under the pretext of an emergency, the Biden administration enacted a policy not entrusted or delegated to it by the HEROES Act.

Consistent with Article II of the Constitution, the Administrative Procedure Act and major administrative law precedents also require the executive branch to give its real basis for its actions, not the "arbitrary and capricious" *post hoc* and *ad hoc* reasons.[60]

This Court recently set forth a foundation of "settled propositions": "First, in order to permit meaningful judicial review, an

56. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020); Tandon v. Newsom, 141 S. Ct. 1294 (2021).

57. Arizona v. Mayorkas, 143 S. Ct. 478, 479 (2022) (Gorsuch, J., dissenting) ("But the current border crisis is not a COVID crisis.").

58. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).

59. U.S. CONST. art. 2, § 3.

60. 5 U.S.C. § 706(2)(A).

agency must 'disclose the basis' of its action."[61] "[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."[62] "Considering only contemporaneous explanations for agency action … instills confidence that the reasons given are not simply 'convenient litigating position[s].'"[63]

In *Department of Commerce v. New York*, this Court struck down a citizenship question on the census because the Court assessed that the Trump administration's publicly stated reason was pretext for partisan advantage.[64] Even though there is a world of difference between the Trump administration's motives and the motives of this policy, nevertheless administrative law requires that an agency's policy not be "arbitrary and capricious."[65]

This Court found an "incongruence" and a "disconnect" between "the decision made and the explanation given."[66] "The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise."[67] "Our review is deferential, but we are 'not required to exhibit a naiveté from which ordinary citizens are free.' "[68] "If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case."[69]

---

61. Dep't of Com. v. New York, 139 S. Ct. 2551, 2573 (2019); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167–69 (1962).

62. SEC v. Chenery Corp., 318 U.S. 80, 94 (1943).

63. DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1909 (2020).

64. *Department of Commerce*, 139 S. Ct. at 2574.

65. *See id.* at 2575–76.

66. *Id.* at 2575.

67. *Id.* at 2575–76; *see also* Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 420 (1971).

68. *Id.* (citing United States v. Stanchich, 550 F. 2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)).

69. *Id.* at 2575; *see also* CASS SUNSTEIN & ADRIAN VERMEULE, LAW AND LEVIATHAN 140 (2020) (citing Lon Fuller's example of "failing legality" of "a failure of congruence

Justice Gorsuch, dissenting in the Title 42 case *Arizona v. Mayorkas*, raised a similar concern about invoking an unrelated crisis when addressing another: "But the current border crisis is not a COVID crisis. And courts should not be in the business of perpetuating administrative edicts designed for one emergency only because elected officials have failed to address a different emergency." When the executive branch relies on an emergency clause, it is a proper judicial role to make sure the administration's policy means fit the claimed ends of addressing an emergency.[70]

B. In earlier Covid "emergency" cases, the Court found the mismatch of means to emergency ends as evidence of executive misuse and statutory misfit.

NFIB v. OSHA identified this problem one year ago on a mismatch between the problem (the Covid emergency) and an overbroad solution (a vaccine-or-test mandate even for lower risk workplaces), indicating a broader unstated policy goal of greater political and economic significance. After noting that the vaccine-or-test mandate would apply to outdoor employees, such as landscapers, groundskeepers, and outdoor lifeguards, the Court observed:

> Where the virus poses a special danger because of the particular features of an employee's job or workplace, *targeted regulations are plainly permissible*. We do not doubt, for example, that OSHA could regulate researchers who work with the COVID–19 virus. So too could OSHA regulate risks associated with working in particularly crowded or cramped environments. But the danger present in such workplaces differs in both degree and kind from the everyday risk of contracting COVID–19 that all face. OSHA's *indiscriminate approach* fails to account for this crucial distinction—between occupational risk and risk more generally—and

between the rules as announced and their actual administration"); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006).

70. In the Title 42 case, the Protect Democracy amicus brief raises parallel concerns about emergency powers, and it proposes a similar solution for reining in their abuse. *See* Brief Amicus Curiae the Protect Democracy Project in Support of Respondent, Arizona v. Mayorkas, 143 S. Ct. 478 (No. 22-592).

> accordingly the mandate *takes on the character of a general public health measure*, rather than an "*occupational* safety or health standard."[71]

The Biden announcement of the vaccine mandate was one point of a five-point plan for increasing a national vaccination rate, unrelated to workplace safety.[72]

The vaccine requirement's breadth and absence of tailoring to workplace risk was a mismatch to the ostensible purpose. The Government's goal was to use employment as a lever to increase vaccination, more than a goal of using vaccination to increase workplace safety. The *per curiam* focused on this mismatch: "President Biden announced 'a new plan to require more Americans to be vaccinated'"—as opposed to a plan to make workplaces safer, the purpose of the statute.[73] Of course, there was a significant overlap of the two priorities, but the overbreadth of the policy for outdoor employees indicated that the broader public health goal was the real purpose.

So too in this case, where the Covid emergency had created a specific harm to many student debt-holders, a targeted waiver would have been more permissible. But the Department of Education's "indiscriminate approach" fails to focus on these specific harms and a causal nexus to the emergency, and accordingly the waiver program takes on the character of a general debt waiver based on means-testing and long-term structural problems, rather than the short-term emergency (a likely pretext).

---

71. 142 S. Ct. 661, 665–66 (2022) (emphasis added).

72. *Remarks by President Biden on the COVID-19 Response and Vaccination Program*, THE WHITE HOUSE (Sept. 9, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/06/02/remarks-by-president-biden-on-the-covid-19-response-and-vaccination-program/.

73. *NFIB*, *supra* note 23, at 663.

C. *Pretext and a Means-Ends Mismatch*

1. Context and purposes to give legal intelligibility to an emergency clause, and here, the text and purposes of the post-9/11 HEROES Act – and the Government's own lawyers – indicate that concrete impact and causation are necessary.

A crucial question in administrative law: How close is the *nexus* between the purpose and the policy? The hard look doctrine has, in part, addressed this question, to make sure an agency carefully examined means and ends.[74]

An emergency questions doctrine would ask a similar question: When an emergency clause seems open-ended, do other parts of the statute and its purposes offer helpful context and contours to set legally legible limits to those powers?

In this case, the HEROES Act included a "findings" preamble that offered constraining contexts. The text allows the Secretary of Education to make major changes to policy if "a national emergency" caused student borrowers to be "placed in a worse position financially." The HEROES Act provided its own textual basis for its context and purposes with a consistent section on "findings." The list of six findings were entirely focused on military contexts, with multiple references to "active service."[75] Even if one can extend the purposes from a military context to a pandemic, the context suggests the emergency powers would be analogous from "active service" to the active pandemic, and a more direct causal impact on the individual, with the emergency having a concrete impact on their education or economic circumstances.

---

74. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (holding that administrative agencies must articulate a reasoned, contemporaneous justification for their actions, thereby adding a layer of review under the Administrative Procedure Act known as "hard look" review); DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1909 (2020) (stating that an agency "must defend its actions based on the reasons it gave when it acted").

75. 20 U.S.C § 1098aa(b)(1)–(6) (listing four references to active service or "active duty," as well as reference to members of the military "put[ting] their lives on hold").

The Office of Legal Counsel and the Department of Education's lawyers agreed that there had to be a causal nexus between the emergency and the final program. The OLC memo concludes, "Thus, to invoke the HEROES Act in the context of COVID-19, the Secretary would need to determine that the COVID-19 pandemic *was a but-for cause of the financial harm to be addressed by the waiver or modification*."[76]

The Department of Education agreed: "The Secretary's determinations regarding the amount of relief, and the categories of borrowers for whom relief is necessary, should be informed by evidence regarding the financial harms that borrowers have experienced, or will likely experience, *because of* the COVID-19 pandemic."[77]

However, the Department of Education adopted a policy that did not heed those lawyers' interpretations. It did not create categories taking Covid into account. The program included means-testing for income, but generalized means-testing is not the same thing as asking if Covid had a particular role in reducing income. Not all workers were negatively impacted by Covid. The department could have adopted a simple approach to ask about Covid's effects, or it could have switched to a statute that matched the breadth and purpose of this program. But it did not.[78]

The Biden debt waiver is a case study for the Executive Branch's tendency to exploit emergency powers. A department saw an emergency, saw the word "emergency" in a statute, and latched onto it for a broader policy goal far beyond the timing of the emergency—

---

76. Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans, Op. O.L.C. 18 (Aug. 23, 2022) (slip op.) (emphasis added); https://www.justice.gov/olc/opinion/use-heroes-act-2003-cancel-principal-amounts-student-loans [https://perma.cc/6AUG-JKY5].

77. *Id.*

78. Elizabeth Goitein, *Biden used 'emergency powers' to forgive student debt? That's a slippery slope*, THE WASHINGTON POST (Sept. 1, 2022), https://www.washingtonpost.com/opinions/2022/09/01/biden-student-debt-emergency-powers-are-slippery-slope/; Jed Shugerman, *Biden's Student-Debt Rescue Plan Is a Legal Mess*, THE ATLANTIC (Sept. 4, 2022) https://www.theatlantic.com/ideas/archive/2022/09/biden-student-debt-forgiveness-covid-relief-legal/671329/ [https://perma.cc/WFA3-CLZ6].

originating long before, and continuing long after. The department adopted its preferred policy on this emergency pretext, without analyzing the rest of the statutory text or context. The OLC and the Department of Education both ignored the recent Covid-era major questions cases, and they interpreted the word "emergency" was a wide open invitation, assuming simplistic textualism plus deference. The OLC memo did not cite *FDA v. Brown & Williamson*; nor *King v. Burwell*; nor even the Covid cases *Alabama Association of Realtors* (the eviction moratorium) and *NFIB v. OSHA* (the vaccine-or-test mandate) or other "major" major questions decisions.

The OLC wrote a 25-page memo that included less than one page on the HEROES Act's purpose and legislative history. The OLC overlooked the statute's findings section that identified a narrower purpose: active emergencies and direct impacts, emphasizing military "active duty," "active" emergencies, and active direct impact on claimants.

Of course, COVID had been a national emergency, but by August 2022, it was no longer an "emergency" comparable to the post-9/11 context of the statute. It is unclear whether the COVID emergency – especially at such a late stage as the emergency had faded – after many rounds of vaccines, the stabilization of the economy, and a return to social normalcy – fits the context and purpose of the post-9/11 HEROES Act. Even if it had been, the emergency had lessened by summer of 2022 so that there was less urgency for administrative speed to skip the statutory steps of establishing causality from Covid to the waivers or to avoid any more specific categories correlated with Covid harms.

The final debt relief program required no basic indicia of causation or even correlation with the Covid emergency. A one-time income threshold does not indicate being "in worse financial position" because of the emergency. Surely many middle-class Americans with student loans are worse off, but many are not. Some sectors of the economy improved during COVID, and *some improved because of* COVID (e.g., one can imagine that many in the pharmaceutical industry, remote communications technology, information technology, or food and grocery delivery services fared

well). It would have been feasible to create categories along these lines or, even simpler, to ask for a single pre-Covid tax return to compare to the already-required mid-Covid tax return to indicate a worse financial position.

Thus the program's overbreadth and its reliance on categories unrelated to Covid indicate a Covid pretext. The Biden administration could have tailored the program to COVID causation on the basis of this statutory provision, or if it wanted a policy broader than COVID, it could have relied on a broader structural non-emergency statutory provision in the Higher Education Act of 1965.

2. A Pretext Timeline

This timeline of public statements is evidence of the pretext:

> *August 25, 2022*: Soon after the administration announced it would start the administrative process for a waiver program, President Biden gave a speech emphasizing the waiver to serve non-emergency long-term purposes, mentioning the Covid emergency just once.[79]
>
> *September 19, 2022*: Biden on "60 Minutes": "The pandemic is over."[80]
>
> *Oct. 12, 2022*: The Department of Education finalizes and publishes the program, less than a month before Election Day.[81]
>
> *January 31, 2023*: A day after an announcement that the administration would extend the emergency declarations to May 15 and end them thereafter, President Biden answered a press question about the reason for this timing: "We've

79. *Remarks by President Biden Announcing Student Loan Debt Relief Plan*, THE WHITE HOUSE (Aug. 25, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/08/25/remarks-by-president-biden-announcing-student-loan-debt-relief-plan/ [https://perma.cc/GZP6-QDYT].

80. *Biden says COVID-19 pandemic is "over" in U.S.*, CBS NEWS (Sept. 19, 2022), https://www.cbsnews.com/news/biden-covid-pandemic-over/ [https://perma.cc/FF7Y-PZ2D].

81. *See* 87 Fed. Reg. 61512, 61514 (Oct. 12, 2022).

> extended it to May the 15th to make sure we get everything done. That's all."[82]

Getting policy done should not be the reason for saying whether or not there is an emergency. A debt relief program might be valid as a post-emergency measure, but an ongoing emergency would be the only excuse for finalizing such a broad program with no process for asking if there was a causal nexus to the emergency. If the emergency is over, there is no good excuse for ignoring causation.

3. The emergency was a pretext to evade process.

In the vaccine-or-test mandate cases, the government cited the Covid emergency to bypass regular process.[83] In this case, the Government again invoked emergency powers to bypass administrative process: the Higher Education Act of 1965 had a textual basis for issuing waivers, but it also required a longer process for rescinding regulations from the Obama administration and a year of notice-and-comment process to issue new regulations. Instead of relying on the statute with the better fit and a longer process, the Government invoked an emergency for the misfit statute and an emergency track.

This is a key reason for this Court to grant relief to the petitioners: The executive branch should not be able to cite emergency powers as a pretext for evading regular administrative process. Because the emergency was a pretext to bypass the appropriate administrative process, and because this program is broader and beyond the scope of the HEROES Act, this Court should invalidate the program.

4. The emergency was a pretext for broader policy.

As the Roberts Court had already observed of the Vaccine-or-Test mandate, President Biden's announcement of plans for the vaccine

---

82. *Remarks by President Biden Before Marine One Departure*, THE WHITE HOUSE (Jan. 31, 2023), https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/01/31/remarks-by-president-biden-before-marine-one-departure-28/ [https://perma.cc/JEX3-RVK4].

83. *NFIB*, *supra* note 23, at 663 (an emergency exception to "ordinary notice-and-comment procedures"); *cf. Ala. Ass'n of Realtors*, *supra* note 23, at 2487.

mandate in September 2021 revealed a broader policy purpose (leveraging a higher national vaccination rate) beyond the statutory basis (workplace safety). The student debt waiver was similar: between announcing the policy through finalizing it, the Biden administration did not discuss a causal link between Covid and applicants' "financial position."[84] The Biden Department of Education did not demonstrate any hard look at causation that would have applied the OLC opinion or its own departmental lawyers' analysis that the HEROES statute required Covid causation.

"Never let a crisis go to waste." This quotation has been invoked by administration allies. It has also been misattributed to historical figures on the left and the right, but it has been used often in the context of Covid. Rahm Emanuel used the aphorism during the Obama administration and during the 2020 campaign about Covid.[85] The phrase has been used repeatedly in other Covid contexts. A crisis can mobilize support for a solution. But sometimes a crisis is merely a pretext for achieving a pre-existing policy goal. Pretexts are a problem that administrative law is supposed to address by requiring reasons – real reasons plus fit. If the crisis is the sincere motivation for a new policy, then the policy must fit the crisis.

VI. BIDEN V. NEBRASKA: A PURPOSIVE DECISION

Chief Justice Roberts seemed to adopt a purposivist approach in *Biden v. Nebraska*.[86] Justice Scalia had frequently warned against finding "elephants in mouseholes,"[87] suggesting a purposive approach to text and context: even if a formally textual reading could lead to a major result, if Congress's purpose was narrow, an administration should not go beyond that purpose to adopt a broad sweeping policy. It is more about the appropriate fit, large or small,

84. *See* Biden v. Nebraska at 2372.

85. Rahm Emanuel, *Let's make sure this crisis doesn't go to waste*, WASH. POST (Mar. 25, 2020), https://www.washingtonpost.com/opinions/2020/03/25/lets-make-sure-this-crisis-doesnt-go-waste/ [https://perma.cc/65TR-4C4A].

86. *See supra* note 14.

87. *Whitman*, *supra* note 13.

rather than a nondelegation rule against largeness. The metaphor implies that Congress may enact elephant-sized holes: broad delegations. I am suggesting that there would be a problem if agencies try to pull giraffes or whales out of those elephant-holes, which is why purposivism is a helpful limitation on such stretches. But if Congress builds a whale hole for whale-sized emergency, as long as the statute has an intelligible whale-shaped principle, then the agency can adopt a whale to address the problem.

Chief Justice Roberts rarely uses the metaphor, but he used a similar reference in *Biden v. Nebraska*: the Biden administration relied on "a wafer-thin reed on which to rest such sweeping power."[88] Roberts then emphasized congressional purpose, parrying the dissenters' purposivist moves with his own purposivist interpretation of the statute. Roberts responded to the dissenters by what powers Congress had "in mind."[89] He concluded with purposivism: "All this leads us to conclude that '[t]he basic and consequential tradeoffs' inherent in a mass debt cancellation program 'are ones that Congress would likely have intended for itself.'"[90]

In an earlier essay, I critiqued Justice Barrett's concurrence—despite being intended to be a defense of the opinion as consistent with textualism—as actually proving that it is not textualism, but anti-textual constitutional avoidance.[91]

But there is another way, a more balanced approach to emergencies. In oral argument, Justice Kavanaugh asked a question that started with a reference to my amicus brief:

> Broadening it out and thinking about, you mentioned emergencies, the history of this Court with respect to executive assertions of emergencies. Some of the biggest mistakes in the Court's history were deferring to assertions of executive emergency power. Some of the finest moments in the Court's history were pushing back against presidential assertions of

88. *See supra* note 14, at 2371.

89. *Id.* at 2374.

90. *Id.* at 2375.

91. Jed Handelsman Shugerman, Biden v. Nebraska*: The New State Standing and the (Old) Purposive Major Questions Doctrine*, 2023 CATO SUP. CT. REV. 209, 233–38 (2023).

> emergency power. And that's continued not just in the Korean War but post-9/11 in some of the cases there. So, given that history, there's a concern, I suppose, that I feel at least about how to handle an emergency assertion. You know, some of the amicus briefs, one of them from a professor says this is a case study in abuse of executive emergency powers. I'm not saying I agree with that. I'm just saying that's the assertion. And I want to get your assessment – this is a big-picture question, so I'll give you a little time—of how we should think about our role in assertion of presidential emergency power given the Court's history.[92]

The Solicitor General did not answer this question and instead pivoted. None of the Justices discussed it in their final opinions.

The majority offers one bad outcome on emergencies, and the dissenters offered a bad outcome on the other side. Congress has enacted many deliberately open-ended statutes delegating broad emergency powers. The majority would hobble future administrations in their response to emergencies. However, the dissenters would open the door to future abuses like the Biden administration's student-debt waiver, to give pretexts for their policy goals and to exploit such open-ended statutory texts.

These recent precedents would lead to the invalidation of many emergency policies An alternative is an emergency questions doctrine, following the wise parts of the major questions doctrine (no deference, plus purposivism) granting an appropriate range of flexibility during emergencies. However, in adopting the non-delegation-doctrine-lite,[93] the Roberts Court's decisions leave too many open questions and too much confusion.

92. *Supra* note 17.

93. *See supra* note 21.

CONCLUSION

> "The pandemic is over."
>
> "We've extended it to May the 15th to make sure we get everything done. That's all."
>
> "Never let an emergency go to waste."

The Government offered on the Covid emergency as a pretext for a broader pre-existing policy agenda, as reflected in President Biden's own public statements; and it offered the Covid emergency as a pretext to evade the appropriate statute's procedural requirements. The Waiver program lacks a basic causal nexus to the ostensible emergency purpose under the statute. Longstanding precedents bar *post hoc* rationales as litigation strategy, limiting judicial review to the reasons given for a policy when those decisions were made. Recent Supreme Court decisions also scrutinize and reject *ad hoc* rationales and mismatches between the statutory basis (and the stated goals) and a broader policy. The Biden student debt case is such a case.

But it is not the only case, and it surely will not be the last. In mid-level administrative law cases, when an agency has demonstrated specialized expertise and careful deliberation, courts should give the agency interpretation significant weight and respect under *Skidmore* and *Loper-Bright*. That approach is consistent with the pragmatic explanations for *Chevron* on triage and expertise, but without over-extending those rationales to an overbroad deference rule.

Meanwhile in "major questions" cases, especially major emergency powers questions based so often on ambiguous texts, the combination of the major questions doctrine plus *Skidmore* and *Loper-Bright* lead to a better approach as a matter of statutory construction of the APA and of the separation of powers. First: Don't defer to the executive branch, because such deference creates a risk of abuse of emergency powers. Second: Don't let an administration take advantage of a crisis as a pretext to pull an elephant out of a mousehole or a whale out of an elephant hole. However, Congress still needs to build elephant holes precisely because emergencies

are the unknown, and the executive branch needs latitude to respond to the unknown, as long as the policy is in good faith. Emergencies mean that Congress needs to build an elephant hole so that, when necessary, the executive branch can pull out a necessary elephant. The crucial third step is an appropriate method of interpretation to make sure the executive branch pulled out an elephant from Congress's elephant hole, an open-ended emergency statute: that longstanding "major questions doctrine" test is purposivism, not textualism. These steps are a more balanced form of checks and balances than the non-delegation direction of some of Justices in the majority, a direction that would overextend judicial power over Congress by eliminating elephant holes – and by hobbling the executive branch's ability to address emergencies in good faith.

Post-*Chevron*, let's look to the *Loper-Bright* side: If presidents continue to exploit emergencies *Relentless*-ly, the Major Questions doctrine and a related Emergency Question Doctrine can continue to be purposive checks against pretextual textualism.

As emergency powers are abused more and more, worry more – and use *Skid… more*: Judges should not defer to bad-faith agency interpretations, but still give some weight to agency interpretations as they tackle emergencies in good faith.

LIFE, THE UNIVERSE, AND THE JUDICIAL POWER

GARY LAWSON*

INTRODUCTION

In figuring out the role of the federal courts in the constitutional structure, the obvious place to start is with the Constitution. But what does the Constitution tell us about the federal courts and the judicial power vested in them?

Surprisingly little—perhaps even shockingly little—when one reflects on it. The "judicial Power" is one of the three governmental powers regarded by the founding generation as having "an unalterable foundation in nature."[1] The Constitution, however, does not define that power, instead taking for granted that everyone will simply know what "judicial Power" involves. History has proven that assumption to be false. There remain competing conceptions of what "judicial Power" entails, and those competing conceptions profoundly affect how one views the role of the federal courts in the constitutional structure.

---

* Levin, Mabie & Levin Professor of Law, University of Florida Levin College of Law. This article is based on a panel presentation at the Federalist Society's 2024 National Student Symposium held March 8–9, 2024, at Harvard Law School on "Why Separate Powers?" I am grateful to my then-employer Boston University School of Law and Dean Angela Onwuachi-Willig for unfailingly supporting the scholarship that led to this article. I am also grateful to my fellow panelists Judge Benjamin Beaton, John Harrison, Jeannie Suk Gersen, and Amanda Tyler for thoughtful commentary. I am solely responsible for what follows.

1. John Adams, A Defence of the Constitutions of Government of the United States of America, Against the Attack of M. Turgot, in His Letter to Dr. Price, Dated the Twenty-Second Day of March, 1778, *in* 4 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 579 (Charles Francis Adams ed., 1851).

My modest contributions in this short article are twofold. First, I will set out the sparse provisions in the Constitution dealing with the federal courts to illustrate just how little they directly specify about the judicial function. Second, I will explain how that missing specification comes from background norms regarding what courts are and what they do. There are competing models of courts. On one view, courts exist principally to resolve disputes, with law declaration an incident of that principal function. On another view, the case-deciding function of courts is an incident to a more fundamental principal power "to say what the law is."[2] Very different roles for courts emerge from these models. As an illustration of the difference, I will briefly consider the modern controversy over so-called "universal" or "nationwide" injunctions. If, as I argue, the case-deciding function is the principal defining feature of the "judicial Power," with law declaration serving as an incident that helps carry out that principal function, injunctions extending to non-parties to a case look deeply problematic.

I. THE SILENCE OF THE ARTICLES

The Constitution does not say much about the functions of federal judges. Article III vests something called "[t]he judicial Power of the United States" in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[3] Those federal judges "shall hold their Offices during good Behaviour" and cannot have their salaries reduced while in office.[4] As civil officers of the United States, they must be commissioned by the President[5] and are subject to impeachment and removal by the House and Senate.[6] Supreme Court justices must be appointed by the President with the advice and consent of the Senate.[7] The same

2. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
3. U.S. CONST. art. III, § 1.
4. *Id.*
5. *See id.* art. II, § 3.
6. *See id.* art. II, § 4; art. I, § 2, cl. 5.
7. *Id.* art. II, § 2, cl. 2.

is likely true of lower court judges as well, though that depends on potentially tricky questions about what makes an officer "inferior."[8]

The Constitution thus says some important things about who can exercise the "judicial Power." But with respect to the content of that "judicial Power," we are left with the question posed so eloquently by Douglas Adams about the ultimate question of life, the universe, and everything: "Yes . . . but what actually *is* it?"[9]

The Constitution does not say. The subset of the category of "legislative Powers"[10] possessed by Congress are identified with particularity, but the Constitution simply gives the entirety of the "executive Power"[11] to the President and the whole of the "judicial Power" to the federal courts.[12] While the grants of executive and judicial power are naked and categorical, in the case of the executive power there are some clarifications and qualifications to that power that give some clues about what the power involves.[13] With the judicial power, however, all we get is that the power extends to certain "Cases" and "Controversies"[14] that involve questions of "Law and Fact"[15] (though conspicuously not "Policy"), that there shall be such things as "Trial[s],"[16] and that there are certain procedural and substantive constraints on some of those trials.[17] Subsequent amendments add to those procedural and substantive

---

8. *See id.* For the Court's latest ramblings on the distinction between superior and inferior officers, see *United States v. Arthrex, Inc.*, 141 S.Ct. 1970 (2021). For my latest ramblings, which suggest that all lower federal court judges are indeed superior officers, see Steven G. Calabresi & Gary Lawson, *Why Robert Mueller's Appointment as Special Counsel Was Unlawful*, 95 NOTRE DAME L. REV. 87, 135–49 (2019).

9. DOUGLAS ADAMS, THE HITCHHIKER'S GUIDE TO THE GALAXY 136 (1979).

10. U.S. CONST. art. I, § 1.

11. *Id.* art. II, § 1, cl. 1.

12. *Id.* art. III, § 1.

13. *See id.* art. II, §§ 2–3. For an account of those provisions that illustrates how they clarify and qualify but do not directly define the "executive Power," see Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 22–41.

14. U.S. CONST. art. III, § 2., cl. 1.

15. *Id.* art. III, § 2, cl. 2.

16. *Id.* art. III, § 2, cl. 3.

17. *See id.* art. III, § 2, cl. 3 (defining venue for criminal trials); *id.* art. III, § 3, cl. 1 (defining treason and the forms of proof needed for conviction).

constraints[18] but do not further define the "judicial Power." This is all pretty thin stuff.

Perhaps, one might think, the Constitution did not define the judicial power because the concept was so well understood that no definition was necessary. There is one large problem with this hypothesis: It appears to be rather blatantly false. By the time of the founding, there were long traditions regarding the essences of the legislative and executive powers: The powers of the purse and the sword, respectively. [19] These essences were merely starting points for the founders. Congress received only a portion of what might count as legislative powers[20]—but that portion included not only the power of the purse,[21] but also a decent percentage of the power of the sword.[22] The centuries-long tradition of the executive power was more a warning than a model.[23] But at least those traditions provided some analytic content to categories that fundamentally define the constitutional framework. The tradition of the "judicial Power," by contrast, was considerably shorter and less developed. For most of English legal history before the founding, there was no established category of "judicial Power." Judges were arms of the executive, and their power was executive power.[24] English judges did not have tenure beyond the life of the monarch who appointed them until 1701, and they had nothing resembling life tenure until

18. *See id.* amends. 5–8.

19. THE FEDERALIST No. 78 (Alexander Hamilton).

20. *See* U.S. CONST. art. I, § 1 (granting to Congress those legislative powers "herein granted").

21. *See id.* art. I, § 9, cl. 7.

22. *See id.* art. I, § 8, cls. 11–16.

23. *See* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION (2020); SAIKRISHNA BANGALORE PRAKASH, THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS (2020).

24. *See* MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 103–06 (1995); Suri Ratnapla, *John Locke's Doctrine of the Separation of Powers: A Re-evaluation*, 38 AM. J. JURIS. 189, 204–05 (1993).

1761[25]—barely a quarter-century before the founding. Early courts were akin to what today we would call administrative agencies.

The founding generation was well aware of these problems of defining the governmental powers vested by the Constitution's first three articles. James Madison famously observed:

> Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces the legislative, executive, and judiciary . . . . Questions daily occur in the course of practice, which prove the obscurity which reins in these subjects, and which puzzle the greatest adepts in political science.[26]

Nonetheless, by the time one gets to the 1780s, people—including the author of the previous passage—could talk about governmental powers as "*in their nature* . . . legislative, executive, or judiciary."[27] John Adams declared the Constitution's three governmental powers to have "an unalterable foundation in nature."[28] State constitutions routinely divided governmental powers into legislative, executive, and judicial categories, with no attempt at definition.[29] Between 1760 and 1788, judicial power had gone from being an aspect of executive power to being a distinct power with "an unalterable foundation in nature."

The founding generation took that "unalterable foundation" as a given, requiring no explanation:

> Consider the Judiciary Act of 1789. It went into considerable detail about the jurisdiction of the various federal courts that it established but said considerably less about the manner in which

---

25. *See* STEVEN G. CALABRESI & GARY LAWSON, THE U.S. CONSTITUTION: CREATION, RECONSTRUCTION, THE PROGRESSIVES, AND THE MODERN ERA 171–72 (2020).

26. THE FEDERALIST NO. 37 (James Madison).

27. THE FEDERALIST NO. 48 (James Madison) (emphasis added).

28. WORKS OF JOHN ADAMS, *supra* note 1.

29. *See, e.g.*, MASS. CONST. of 1780, pt. 1, art. XXX ("In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.").

> that jurisdiction would be exercised. Rather, it incorporated existing and well-understood practices as part of the background content of the judicial power. Federal courts were authorized to issue writs "agreeable to the principles and usages of law." They could demand the production of evidence "by the ordinary rules of processes in chancery." The forms of proof and evidence were to be "as of actions at common law." And an immediately succeeding statute said that equity and admiralty processes were to be "according to the course of the civil law." In the founding era, there was no need to specify in detail precisely how federal courts were to carry out their constitutionally vested function. Everyone knew what a judicial process looked like.[30]

In other words, as far as the Constitution is concerned, "judicial Power" is just the sorts of things that courts ordinarily do and are expected to do.

If one is looking for a formal definition of "judicial Power" that informs the Constitution, the best is surely James Wilson's account, which is strikingly similar to the account provided earlier in this conference by Justice Sarah Campbell during the panel on "Federalism and the Separation of Powers." Wilson wrote: "The judicial authority consists in applying, according to the principles of right and justice, the constitution and laws to facts and transactions in cases, in which the manner or principles of this application are disputed by the parties interested in them."[31] If there is a more detailed account of the "judicial Power" from the founding era, I have never found it.[32]

---

30. Gary Lawson, *Take the Fifth . . . Please!: The Original Insignificance of the Fifth Amendment's Due Process of Law Clause,* 2017 BYU L. REV. 611, 630 (footnotes omitted).

31. James Wilson, Government, Lectures on Law, *in* 1 THE WORKS OF JAMES WILSON 296 (Robert Green McCloskey ed., 1967).

32. It is not for lack of trying. Thirty years ago, I set out with a terrific student, Christopher D. Moore, to uncover the founding era conception of judicial power. We found so little that we gave up and wrote about executive power instead. *See* Gary Lawson & Christoher D. Moore, *The Executive Power of Constitutional Interpretation,* 81 IOWA L. REV. 1267 (1996). A more or less contemporaneous independent study also did not turn up much. *See* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696 (1998).

If one is to give content to the Constitution's notion of "judicial Power," one must turn to background norms that inform the original understanding of the judicial function. As it happens, those norms are implicit in James Wilson's pithy account of "judicial Power," provided that one looks at that account through the proper lens. There is more than one lens available, so picking the right one makes a difference.

II. A TALE OF TWO MODELS

One possible lens for understanding "judicial Power" was elegantly identified during this conference by Judge Raymond Kethledge during his engaging colloquy with Professor Cass Sunstein on "Why Separate Powers? A Conceptual Introduction." Judge Kethledge posed the key question regarding the judicial power: what are the principal features of such power and what are the incidental features that help carry those principal features into effect? Is the principal feature the resolution of disputes (the last clause of Wilson's account), with the determination of law and fact an incidental aspect necessary for carrying out the principal function, or is deciding matters of law and fact the principal aspect of judicial power, with the resolution of disputes an incidental byproduct?

Judge Kethledge answered with the former, and he had powerful authority to support him: Chief Justice John Marshall. Chief Justice Marshall is oft quoted as saying that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[33] One less often sees the sentence that immediately follows: "Those who apply the rule to particular cases, must of necessity expound and interpret that rule."[34] For Marshall, the determination of law was an *incident* to the principal judicial function of deciding cases. Courts interpret to decide, not vice versa.[35] This mirrors Wilson's

33. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

34. *Id.*

35. *See* Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 805 ("any power to answer questions must be incidental to the judicial duty to decide cases"); *id.* at 858 ("No originalist account can simply ignore the

account. Legal and factual issues arise only when and because parties dispute them. Courts must then address those legal and factual matters *in order* to resolve the dispute before them. Dispute resolution is the principal function; interpretation of law and ascertainment of fact are the incidents. I have explained at great length elsewhere why I agree with Judge Kethledge's, and Chief Justice Marshall's and James Wilson's, account of the judicial function.[36]

The fact that Judge Kethledge thought it necessary to set forth and defend a dispute-resolution model of the judicial power indicates that there is a competing model at hand. An alternative account reverses the order of priority: law declaration and fact ascertainment come first, and dispute resolution comes second. Put in the language of principals and incidents, which was a favorite language of the founding generation,[37] one might think that dispute resolution is an incident to the principal judicial function of pronouncing the law. Advocates of this interpretation-as-principal/dispute-resolution-as-incident approach can invoke authority of their own. To some, that authority will be even more formidable than Chief Justice John Marshall, James Wilson, or even Judge Kethledge or myself: Yale Law School Sterling Professor Emeritus Owen Fiss.

More than four decades ago, in two enormously powerful articles published in 1979 and 1984, Professor Fiss clearly and forcefully articulated a view of courts under which "the *function* of the judge . . . is not to resolve disputes, but to give the proper meaning to our public values"[38] and the judge's job "is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them."[39] The first article has garnered more than 1,100 Westlaw citations in secondary sources, while the second

---

historical understanding that the power to answer questions is derivative of the obligation to decide cases.").

36. *See* GARY LAWSON, EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS 177–92 (2017).

37. *See* GARY S. LAWSON & GUY I. SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017).

38. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 30 (1979).

39. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

has generated more than 1,700 such citations. Those raw numbers, as impressive as they are, do not, I believe, reflect the depth of Professor Fiss's influence on legal discourse. Thirty-five years in the academy, and attendance at countless faculty workshops, confirms for me that Professor Fiss's views are widely held, even by people who do not credit him for the idea and who perhaps do not even articulate their position as straightforwardly as he did. One might also suspect (I do) that Professor Fiss accurately describes the views of many judges. Stay tuned on that.

So who has the better of the argument: Chief Justice Marshall et al. or Professor Fiss? That is something that depends to some extent on what exactly the argument concerns. If one is asking which view better reflects the conception of "judicial Power" referenced in Article III, I would choose, as I have already noted,[40] Marshall, Wilson, and Kethledge. Courts did not come into existence to explicate public values. They came into existence to resolve disputes, so that alternatives to court resolution, such as duels, would be left primarily to the stuff of Broadway musicals and episodes of *Firefly* and *Star Trek* rather than everyday life. Courts are keepers of the sovereign's peace, which is why for centuries they were understood to be exercising executive power. Once courts are brought into existence to resolve disputes, they must decide how those disputes will be resolved. Providing, given the constraints of time and resources, as accurate an account as possible of the law and facts seems in hindsight a better method than trials by ordeal or ruling for which party offers the largest bribe or has the largest private army. But providing that hopefully accurate account of law and fact is an incident. The principal component of the "judicial Power" is the resolution of disputes. That is why the Constitution extends the judicial power only to "Cases" and "Controversies." Absent a case or controversy, there is no occasion for the judicial power to act. A judge cannot just wake up in the morning with an insight—even a brilliant one—about the meaning of the Fourth Amendment and fire off an

40. *See supra* note 36; Gary Lawson, *"The Game" (or How I Learned to Stop Worrying and Love the Major Questions Doctrine)*, 2024 HARV. J.L. & PUB. POL'Y PER CURIAM 14.

opinion. The judge has to wait for a case that presents the issue and then resolve that case using the brilliant insight.

On the other hand, if the question is which view of the judicial function better describes the mainstream of actual legal practice, Professor Fiss could be forgiven for taking a few victory laps, as his interpret-first/decide-second approach has enormous descriptive power. It is so descriptively accurate that people may be adopting it without realizing it. A prime example from the October 2023 Supreme Court term makes this clear.

One of the most anticipated decisions of the term concerned the consolidated cases of *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce*.[41] As far as the parties were concerned, the cases involved the rather important question whether the federal government could make owners of fishing boats pay for government monitors who would check compliance with federal fishery management plans. The livelihoods of any number of fishermen were on the line here. Two circuit courts ruled for the government,[42] two sets of fishermen filed petitions for certiorari, and the Supreme Court agreed to hear the cases.

The chief question presented by Loper Bright was, unsurprisingly, "Whether, under a proper application of *Chevron*, the MSA [Magnuson–Stevens Act] implicitly grants NMFS [National Marine Fisheries Service] the power to force domestic vessels to pay the salaries of the monitors they must carry."[43] Loper Bright wanted to make sure that it did not have to fork over twenty percent of its net income for government monitors, so it asked the Court to resolve the dispute with the government in Loper Bright's favor. But just in case the *Chevron* doctrine, which the lower court relied on in ruling for the government, was going to hurt its case, Loper Bright added as a second question: "Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial

41. 144 S. Ct. 2244 (2024).

42. *See* Loper Bright Enters. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022); Relentless, Inc. v. Dep't of Com., 62 F.4th 621 (1st Cir. 2023).

43. Petition for Writ of Certiorari at i, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (No. 22-451).

powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."[44] In the language of principals and incidents, Loper Bright urged the Court principally to resolve the dispute and incidentally to select a decision process that would help resolve that dispute in Loper Bright's favor.

Relentless, in its parallel petition for certiorari, presented essentially the same two questions to the Court, but in reverse order:

> 1. Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.
>
> 2. Whether the phrase "necessary and appropriate" in the MSA augments agency power to force domestic fishing vessels to contract with and pay the salaries of federal observers they must carry.[45]

Obviously, it is Queston 2 that determines whether Relentless has to pay the money. As Relentless framed the case, the decision process was the principal concern and case resolution was the incident.

The Court took the cases, but only with respect to Loper Bright's second question[46] and Relentless's first question.[47] To put it simply, the Court agreed to decide only an abstract legal question about interpretative methodology. It did not agree to decide whether the government could force fishermen to pay for federal monitors; that issue remains to be decided by the lower courts. As far as it concerns the matter on which the Court granted certiorari, the Court could have been deciding whether Cass Sunstein or Jack Beermann had made

---

44. *Id.* at i–ii.

45. Petition for Writ of Certiorari at i–ii, Relentless Inc., v. Dep't of Com., 144 S. Ct. 2244 (2024) (No. 22-1219).

46. Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023) (mem.) ("Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted limited to Question 2 presented by the petition.").

47. Relentless, Inc. v. Dep't of Com., 144 S. Ct. 325 (2023) (mem.) ("Petition for writ of certiorari to the United States Court of Appeals for the First Circuit granted limited to Question 1 presented by the petition.").

better cases for and against *Chevron,* respectively.[48] Loper Bright and Relentless, and their particular disputes with the government, were no more legally relevant to the Court than were either of those esteemed law professors.

The very routineness of this practice, in which the appellate court decides only an abstract legal question and does not actually decide anything about the application of that legal question to the case, shows how deeply the Fissian conception of judicial power penetrates the legal system.[49] It is one thing if the application of a legal standard requires fact-finding in order to resolve a dispute. Appellate courts are not equipped to find facts, so it makes sense to return cases to trial courts to ascertain the facts and, at least in the first instance, how those facts map onto the relevant law. But Loper Bright and Relentless were not arguing with the federal government about facts. They were arguing about whether statutes did or did not authorize the government to charge them money. The Supreme Court said nothing about that ultimate question. It merely gave instructions to the lower courts about how to go about solving that ultimate question. I have a hard time seeing how that is consistent with a dispute-resolution conception of judicial power. Once the Court says that the proper method is to figure out the best meaning of the relevant statutes, why not figure out the best meaning of the relevant statutes and declare a winner? Unless the Court plans to defer to the views of lower courts on statutory meaning, there is no obvious reason not to decide the cases before it, except perhaps for a conception of the Court's role as a law declarer first and dispute resolver second.

To be sure, matters are (unsurprisingly) more complicated than I have let on thus far. Article III vests power in *all* of the judges who are properly appointed to the federal judiciary. In essence, it vests

---

48. *Compare* Cass R. Sunstein, *Zombie* Chevron*: A Celebration*, 82 OHIO ST. L.J. 565 (2021), *with* Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010).

49. For the history of how this practice evolved, often in direct contravention of established traditions and statutory provisions contemplating full appellate review of all aspects of lower-court decisions, see Johnson, *supra* note 35.

the "judicial Power" in the Article III judiciary as a whole.[50] It is less clear that it speaks to how that power must be allocated among the various Article III judges. Perhaps the notion of a "case" or "controversy" can include a multi-layered decision process in which one segment of the Article III judiciary handles facts and another handles law, and as long as the Article III judiciary as a whole resolves the entire case, it does not really matter how that machinery operates before the judgment emerges from the black box. Perhaps structuring that internal decision process is precisely what Congress is authorized to do via laws "necessary and proper for carrying into Execution"[51] the judicial power.[52]

On the other hand, Article III does not, by its literal text, vest power in the federal judiciary as a whole. It vests power in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The relevant objects are *courts*, not a unitary *judiciary*. Perhaps that means that each distinct *court* – each level of a judicial hierarchy if Congress chooses to construct one – must resolve cases rather than proclaim law. That is something that I leave to federal courts scholars, of whom I am not one.[53]

It is almost anticlimactic to note that it is not clear where the Court thinks it gets the power to give orders to lower courts about how to decide cases.[54] The Court can reverse or vacate any decision by a lower court that it does not like or that employs an interpretative methodology that differs from that favored by the Court, but that does not translate into a power to prescribe, as a binding legal matter, interpretative methodologies. Could the Court order all lower courts

---

50. *See* Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution,* 102 YALE L.J. 255, 273 (1992) ("the judicial power is plurally possessed by the judges of the Supreme and inferior federal courts").

51. U.S. CONST. art. I, § 8, cl. 18.

52. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 210 (2005).

53. For an interesting take on the problem, which suggests, based on historical practice, that pure law resolution can sometimes be appropriate for lower federal courts, but only when it helps another federal court resolve a case *and* the other federal court has asked for the help, see Benjamin B. Johnson, *May Federal Courts Answer Questions When Not Deciding Cases?* (manuscript on file with author).

54. *See generally* Aaron-Andrew P. Bruhl, *Eager to Follow: Methodological Precedent in Statutory Interpretation*, 99 N.C. L. REV. 101 (2020).

to decide constitutional cases using Lawson's version of originalism? I don't see how. Being "inferior" obliges a lower court to obey the precedents of the Supreme Court,[55] but those precedents consist of judgments that fix the meanings of statutes or constitutional provisions. They do not include the methodologies used to reach those judgments. As proof, consider what happens if the Supreme Court decides a case without issuing any opinions. The judgment will still stand as a precedent binding on lower courts, even if no one knows what methodology produced that precedent. The judgment and the reasoning process that yielded the judgment are quite different things.

In any event, even if the Court somehow has the power to prescribe methodologies, it is noteworthy that is *all* that the Court purported to do in *Loper Bright/Relentless*. In Fissian language, it announced public values but did not actually resolve a dispute. The dispute was simply a vehicle for performance of what the Court clearly regarded as its primary function: Declaring the law.

Fiss 1, Marshall/Wilson/Kethledge/Lawson 0. And that score will get lopsided in a hurry as one looks at more cases. Many things about *Loper Bright/Relentless* have been and will prove to be controversial, but the resolution of an abstract legal question apart from the case(s) that generated it is so routine that it generally escapes notice. The Constitution may be Marshallian, but contemporary legal practice is decidedly Fissian.

There are additional, if not necessarily deeper, consequences to treating law declaration as the primary function of courts and dispute resolution as a secondary incident. I have elsewhere traced at some length some of those consequences for things like stipulations of law.[56] There are many other consequences of this debate for both legal theory and legal practice. I have space here only to identify one such consequence—and to treat it much more superficially than it deserves.

---

55. *See* Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1015–25 (2007).

56. *See* Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191 (2011).

A hot issue has become the propriety of what are sometimes called "nationwide" or "universal" injunctions, in which a district judge enters an order that purports to bind government officials in all cases similar to the case before the court. The consequence of such an injunction is sometimes to order a government-wide shutdown of a program. A number of Supreme Court justices have expressed doubts about the practice.[57] The terminology used to describe it is in some respects unfortunate, because terms like "nationwide" and "universal" draw focus to the *geographic scope* of judicial orders—the wrong object of focus.[58] The geographic scope of the order is not the real issue. The real issue is whether a court can decide more than the case before it. Can a court issue an injunction that extends beyond the parties to the case? So that a government defendant in Case A can be held in criminal contempt for enforcing the same statute in Case B? After all, the penalty for violating an injunction is possible prosecution for contempt. The possible effect of a universal injunction (since I presently have no better term for it) is to make it a criminal offense to enforce a statute in the face of such an order.

Under a law-declaration theory of courts, the answer is probably yes, courts can do this. After all, once the law is declared, what does it matter whether the occasion for law declaration involved one party or one million parties? The declaration of law stands, and if it is the principal item and the dispute in which the declaration was made is just the incident, it is hard to see why the court should not be able to enforce its declaration wherever and whenever it is relevant.

Under a dispute resolution model of courts, however, the problems with injunctions that go beyond the immediate parties seem just as great as awarding damages remedies to or against non-parties. Non-

57. *See, e.g.*, Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2415 (2024) (Thomas, J., concurring); Labrador v. Poe *ex rel*. Poe, 144 S. Ct. 921, 921–23, 926–27 (2024) (Gorsuch, J., concurring in the grant of stay); United States v. Texas, 143 S. Ct. 1964, 1980–81 (2023) (Gorsuch, J. concurring in judgment). Justices Alito and Barrett joined at least some of these opinions, making four justices who have expressed some measure of concern over so-called universal injunctions.

58. *See* Portia Pedro, *The Myth of the "Nationwide Injunction"*, 84 OHIO ST. L.J. 677 (2023); Portia Pedro, *Toward Establishing a Pre-Extinction Definition of "Nationwide Injunctions"*, 91 U. COLO. L. REV. 847 (2010).

parties are non-parties, and while non-parties can gain certain procedural benefits from the litigation efforts of others, in the form of precedent, preclusion, or estoppel, the court's judgment still extends only to the case before it. The *reasons* for that judgment may have broader applications, but the judgment itself does not. Accordingly, some scholars who share the dispute-resolution model of courts have said that the "judicial Power" is fundamentally "a power to decide a case for a particular claimant"[59] or "[the] power to decide cases or controversies for particular parties to a particular legal dispute."[60] The judicial power expires once the case is resolved.

Perhaps the court issuing a universal injunction in a case involving X and Y is convinced that Y, the defendant, is sure to lose in any future case that comes up. That still does not justify granting an injunction that purports to bind Y, on pain of criminal penalties, in future cases involving other parties. Perhaps the next case involving Y will be a spectacularly easy case and Y will lose. Y might even have most of its arguments wiped out by preclusion. But on a dispute resolution model, there must be a next case.[61]

Nor is it obvious that the next case will always be easy or a foregone conclusion, even if the case involves the same defendant who the judge just enjoined. A different judge might disagree with the first judge who issued the "universal" injunction. The same judge might even change his or her mind. Perhaps the second case presents different and better arguments than did the first one. Maybe not. But in any event, the second case is a case, and it has to be decided. The judge cannot decide the case in advance.[62] Deciding cases that have

---

59. Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 471 (2017).

60. Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335, 359 (2018).

61. Hence, it is irrelevant (even though true) that "[a] nationwide injunction essentially accomplishes the same end," Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 73 (2019), as preclusion doctrines. Preclusion requires that a case be brought and decided. Preclusion makes the decision easier, but there must still be a case brought.

62. Does this mean that there cannot be "facial" challenges to statutes? Justice Thomas thinks so. *See Moody*, 144 S. Ct. at 2415 (Thomas, J., concurring). And on a dispute resolution model, he is right.

not yet been presented is more akin to legislative power than judicial power.[63]

The modern practice, of course, does not follow the dispute-resolution model in the context of injunctions any more than it follows the model more generally. Huge swathes of practice demonstrate, as Alan Trammell aptly puts it, that "the Supreme Court no longer adheres slavishly to the dispute-resolution model."[64] Or as Professor Ben Johnson even more bluntly observes: "The Supreme Court no longer decides cases."[65] Professor Fiss smiles.

In a conference devoted to separation of powers, the choice between models of judicial power is crucial. On a dispute resolution model, the "judicial Power" is not a power to decide what powers other governmental actors have or do not have. It is a power to decide cases and resolve disputes. If resolving the dispute requires making judgments about the powers of other actors, so be it. But it is not the *job* of courts to police other actors. It is the job of courts to decide cases in accordance with governing law. To borrow a phrase from another participant at this conference, the judicial power is to decide one case at a time.[66] A court committed to constitutionalism should consider acting like a court.[67]

---

63. Mila Sohoni has valiantly tried to defend universal injunctions on originalist grounds. *See* Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920 (2020). She would be correct if the original meaning of the Constitution was fixed in the early 1900s. Apart from the conceptual problems involved in such a notion, the early 1900s was not an era noted for its fidelity to original meaning.

64. Trammell, *supra* note 61, at 82. For a catalogue of ways in which modern judicial practice does not conform to the dispute-resolution model, see *id.* at 89–90; Alan M. Trammell, *The Constitutionality of Nationwide Injunctions*, 91 U. COLO. L. REV. 977, 987–89 (2020).

65. Johnson, *supra* note 35, at 864.

66. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

67. *See* Benjamin B. Johnson, *The Supreme Court, Question-Selection, Legitimacy, and Reform: Three Theorems and One Suggestion,* 67 ST. LOUIS U. L.J. 625, 633 (2023).

JUDICIAL REVIEW OF THE LEGISLATIVE POWER IN THE ROBERTS COURT

AMANDA L. TYLER*

INTRODUCTION

The Supreme Court of late has been much focused on the legislative process. To that end, the Roberts Court has taken up a number of cases in multiple contexts in which it has engaged with how Congress carries out the legislative function and what role, if any, the administrative state should play in the calculus. Specifically, the Roberts Court has addressed, among other things, the so-called "major questions" doctrine, *Chevron* deference, the nondelegation doctrine, the use of non-Article III tribunals, and standing doctrine. By way of example, recent Terms have witnessed blockbuster decisions holding unlawful agency actions said to go beyond what Congress could have ever meant to delegate in terms of authority.[1] And just this past Term, the Court ushered in the demise of the judicial deference sometimes owed to administrative regulations under the now-interred *Chevron* doctrine.[2]

---

* Thomas David & Judith Swope Clark Professor of Constitutional Law, University of California, Berkeley School of Law. Many thanks go to my fellow panelists at the 2024 Federalist Society Student Symposium at Harvard Law School and to Sarah Isgur for helpful conversation on these topics.

1. *See*, *e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) ("[The major questions doctrine] refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.").

2. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2272 (2024).

Surveying the work of the Roberts Court, there are two different accounts one could offer to describe what is happening in these contexts. On one account, the Court is seeking to force Congress to decide important questions within the scope of their Article I powers rather than "pass the buck," so to speak, to the administrative state. A different, though complementary, account views these decisions as seeking to protect Congress's prerogatives from infringement by the executive branch, and possibly—though I will suggest one might come to question this proposition as we proceed—from the judiciary as well.

This essay will first discuss the cases exemplifying these trends that I have in mind. It then will raise some important questions about their implications. Finally, the essay will flag what I will call a "puzzlement" raised by these recent developments when studied alongside other areas of the Court's jurisprudence—most specifically, its standing jurisprudence.[3] Specifically, as one puts these different jurisprudential developments in conversation with one another, a disconnect appears to emerge. On the one hand, we see a Court that is increasingly protective of ensuring the legislative process detailed in Article I, Section 7, of the Constitution controls the setting of national policy. Thus, for example, the Court has said that Congress—not the administrative state—must make all decisions of "economic and political significance."[4] Yet, in several standing cases of late—in particular, *Spokeo, Inc. v. Robins*[5] and *TransUnion LLC v. Ramirez*[6]—the Court has disregarded congressional directives establishing national policy. Specifically, the Court has held that Congress may not create rights through the exercise of its Article I powers and concomitantly provide that they shall be judicially enforceable without a preexisting common law analogous

3. I use the term "puzzlement" as a tribute to my former professor, David Shapiro, who liked to use the term. *See, e.g.*, David L. Shapiro, *Justice Ginsburg's First Decade: Some Thoughts About Her Contributions in the Fields of Procedure and Jurisdiction*, 104 COLUM. L. REV. 21, 28 (2004).

4. *West Virginia*, 142 S. Ct. at 2608 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

5. 578 U.S. 330 (2016).

6. 141 S. Ct. 2190 (2021).

cause of action.[7] In so doing, the Court has thrown up roadblocks to would-be litigants instead of permitting their access to the federal courts. Thus, while in one context the Court has been protecting the legislative process from executive incursions, it has in the standing context been more than willing to second-guess the legislative process itself. This essay concludes by asking whether this disconnect warrants a reassessment of the Court's modern standing jurisprudence to align instead with the simple idea, as recently expressed by one federal judge, that "an Article III 'Case' [and therefore standing] exists whenever the plaintiff has a cause of action";[8] that is, whenever Congress *says* the plaintiff has a cause of action.

In the end, readers may draw their own conclusions as to the correct approach to standing doctrine, though the essay will join camp with those who have argued that Congress should be able to provide for judicial enforcement of rights it creates within the valid scope of its Article I powers. But, if nothing else, this essay aims to show that there is great tension between the Court's treatment of these different areas of jurisprudence respecting the legislative power.

I.

Let us begin with an historic example that helps set the stage for some of the recent developments in the Roberts Court—specifically, the Court's decision in the famous 1952 "Steel Seizure Case," *Youngstown Sheet & Tube Co. v. Sawyer*.[9] In the lead up to the Court's decision, President Truman had seized the steel mills to keep them running at the height of the Korean War in reaction to a likely impending strike by steel workers or lockout by steel management.[10] The President declared that stopping the production of steel would have devastating consequences on the war effort and, more

7. *Spokeo*, 578 U.S. at 340; *TransUnion*, 141 S. Ct. at 2204.
8. Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1126 (11th Cir. 2021).
9. 343 U.S. 579 (1952).
10. *See id.* at 582–83.

specifically, would directly endanger the lives of the thousands of American soldiers in harm's way in Korea.[11]

The Court decided the case on an expedited basis with multiple opinions resulting. The Court members announced their decision in a series of statements totaling two and a half hours.[12] The lead opinion for the Court was written by Justice Black. His opinion flatly rejected Truman's assertion of unilateral power to seize the steel factories, along the way also specifically rejecting the President's argument that his authority to do so could be implied from the range of executive powers assigned to him by Article II of the Constitution.[13] Surveying the justices' opinions, one finds that it was important to some members of the Court that Congress had not declared war.[14] Of importance to all of the justices in the majority, Congress had not more specifically authorized the seizure, and indeed, some members of the Court understood Congress actually to have indicated its opposition to the action.[15]

The Court, as we all know, rejected Truman's actions as unconstitutional. Justice Black's lead opinion put it bluntly: "This is a job for the Nation's lawmakers, not for its military authorities."[16] For its part, Justice Jackson's famous concurring opinion declared, "Nothing in our Constitution is plainer than that declaration of war is entrusted only to Congress."[17] This, he continued, means that the compact "lays upon Congress primary responsibility for supplying the armed forces."[18]

Reduced to its essence, then, the Court's holding was predicated on the idea that Congress needed to decide the important issue at

---

11. *See id.* at 590–91.

12. *See* Joseph A. Loftus, *Black Gives Ruling; President Cannot Make Law in Good or Bad Times, Majority Says*, N.Y. TIMES, June 3, 1952, at 1, 23.

13. *Youngstown*, 343 U.S. at 587–88.

14. *See, id.* at 613 (Frankfurter, J., concurring); *id.* at 642 (Jackson, J., concurring).

15. *See id.* at 586.

16. *Id.* at 587.

17. *Id.* at 642 (Jackson, J., concurring).

18. *Id.* at 634; *see also id.* at 634 (discussing the "enduring consequences upon the balanced power structure of our Republic").

stake, and the Constitution did not permit the President to get out ahead of Congress and order the seizure himself.

II.

Some of the Court's recent decisions appear to have been driven by similar separation of powers considerations. To begin, consider the rise of the major questions doctrine in recent Terms. To be sure, the doctrine has roots predating the Roberts Court,[19] but it seems to have garnered new traction of late.[20] Take the 2022 decision in *West Virginia v. EPA*.[21] Writing for the Court, Chief Justice Roberts held that the EPA did not have the requisite authority to adopt its Clean Power Plan, which by capping greenhouse gas emissions would aggressively force power plants to transition to cleaner methods to generate electricity.[22] The agency had claimed the authority to implement the plan under the Clean Air Act, which authorizes the agency "to regulate power plants by setting a 'standard of performance' for their emission of certain pollutants into the air."[23]

Studying the Clean Air Act for itself, the Court concluded that the agency had moved beyond any clear delegation of authority

---

19. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 155–56 (2000) (holding FDA could not regulate or ban tobacco products pursuant to its authority over "drugs" and "devices"); *id.* at 160 (deeming FDA's interpretation an "expansive construction of the statute" and observing that "Congress could not have intended to delegate" such authority "in so cryptic a fashion"); *cf.* Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001) (observing that Congress does not usually "hide elephants in mouseholes").

20. *See, e.g.*, King v. Burwell, 576 U.S. 473, 486 (2015) (positing that *Chevron* should not apply where the question before the court is one of "deep 'economic and political significance'" (quoting *Brown & Williamson*, 529 U.S. at 160)).

21. 142 S. Ct. 2587 (2022).

22. *Id.* at 2604, 2616.

23. *Id.* at 2599 (quoting 42 U.S.C. § 7411(a)(1)). As the Court described the agency's position,

"On EPA's view of Section 111(d), Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy. EPA decides, for instance, how much of a switch from coal to natural gas is practically feasible by 2020, 2025, and 2030 before the grid collapses, and how high energy prices can go as a result before they become unreasonably 'exorbitant.'" *Id.* at 2612.

granted by Congress, particularly in light of the substantial policy implications wrought by the changes inherent in its Clean Power Plan. As the Chief Justice put it:

> [I]n certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. . . . To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.[24]

This is because, the Court wrote, "there are 'extraordinary cases' that call for a different approach—cases in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[25] For good measure, the Court emphasized that Congress had itself rejected such a policy course on more than one occasion.[26] In the end, the Court concluded, "[a] decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[27]

The Court reached a similar conclusion in a case involving claimed authority by the Centers for Disease Control and Prevention to impose eviction moratoria during the COVID-19 pandemic.[28] And likewise during the pandemic, the Court rejected the

---

24. *Id.* at 2609 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)); *see also Utility Air*, 573 U.S. at 324 (observing that the Court "typically greet[s]" assertions of "extravagant statutory power over the national economy" with "skepticism").

25. *Id.* at 2608 (quoting *Brown & Williamson*, 529 U.S. at 159–60).

26. *See id.* at 2614 ("we cannot ignore that [EPA's position] conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions "had become well known, Congress considered and rejected'" multiple times." (quoting *Brown & Williamson*, 529 U.S. at 144).

27. *Id.* at 2616.

28. *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2486–90 (2021) (per curiam) (holding CDC did not have authority to impose nationwide eviction moratorium pursuant to statute's grant of authority to implement measures "necessary to prevent the . . . spread of" disease, emphasizing "the sheer scope of the CDC's

Occupational Safety and Health Administration's vaccination mandate that would have required "84 million Americans . . . either [to] obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense."[29] As the Court emphasized in *West Virginia v. EPA*, the basic idea animating each of these decisions was simple: "We presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'"[30]

Justice Gorsuch has echoed similar themes in several of his separate opinions both invoking the major questions doctrine and the nondelegation doctrine. Take his dissent in the 2019 case of *Gundy v. United States*,[31] where he was joined by Chief Justice Roberts and Justice Thomas.[32] There, he wrote, "we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency."[33] A few years later, Justice Gorsuch suggested during the COVID-19 pandemic that vaccination policy was a major question that likely could not be delegated by Congress to an agency under any terms.[34] As he explained in that case, *National Federation of Independent Business v. Department of Labor*, the major

---

claimed authority" and its "unprecedented" nature along with the fact that Congress declined to extend a moratorium).

29. Nat' Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 665 (2022) (per curiam) (halting emergency regulations issued by OSHA applicable to most employers with 100 or more employees that would have required COVID-19 vaccination of covered employees or else weekly testing combined with mask-wearing in the workplace); *id.* at 666 (deeming it "telling that OSHA, in its half century of existence" had never done anything comparable).

30. 142 S. Ct. at 2609 (quoting U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)).

31. 139 S. Ct. 2116 (2019).

32. *See id.* at 2131 (Gorsuch, J., dissenting).

33. *Id.* at 2142 (Gorsuch, J., dissenting).

34. *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 668–70 (Gorsuch, J., concurring) (invoking both the major questions doctrine and the nondelegation doctrine and noting that both doctrines "protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands"). On the nondelegation front, Justice Gorsuch wrote that "if the statutory subsection the agency cites really *did* endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority." *Id.* at 669.

questions doctrine "ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives. If administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress."[35]

These cases exemplify a Court highly trained on the legislative process. They likewise provide fodder for the two possible accounts of what the Court is doing in these cases. On one account, the Court is prodding Congress to stop passing the buck to the administrative state and take responsibility for important decisions about national policy. On another account, what the Court is doing is protecting Congress's powers from slipping away—or, to put it slightly differently, being improperly appropriated by the administrative state.

On this latter point, one cannot help but recall here Justice Jackson's line in *Youngstown* that "[w]e may say the power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers."[36] The Court, it seems, no longer believes that the responsibility of protecting the legislative prerogative is solely Congress's to bear.

III.

Another example of an area in which the Court has been stricter in policing the boundaries of the administrative state as they intersect with the legislative power is of course found in its recent revisitation of the *Chevron* doctrine.[37] As every law student who has taken administrative law knows, the *Chevron* doctrine provides that where a statute passed by Congress is ambiguous, courts should defer to an agency's interpretation of that statute so long as that

35. *Id.* at 668; see also *id.* at 669 (emphasizing the importance of ensuring that Congress does not "hand off all its legislative powers to unelected agency officials").

36. 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

37. The doctrine is so named for the case that launched it, *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

interpretation is reasonable.[38] More specifically, as the Court recently described it, *Chevron* involves two steps:

> After determining that a case satisfies the various preconditions we have set for *Chevron* to apply, a reviewing court must first assess "whether Congress has directly spoken to the precise question at issue." If, and only if, congressional intent is "clear," that is the end of the inquiry. But if the court determines that "the statute is silent or ambiguous with respect to the specific issue" at hand, the court must, at Chevron's second step, defer to the agency's interpretation if it "is based on a permissible construction of the statute."[39]

This past Term, in two cases, *Loper Bright Enterprises v. Raimondo*,[40] consolidated with *Relentless v. Department of Commerce*, the Supreme Court took up the question whether *Chevron* should be overruled.

In a blockbuster decision, the Court held that indeed *Chevron* should be overruled as "fundamentally misguided."[41] The Chief Justice authored the majority opinion and opened by relying heavily on the Administrative Procedure Act (APA) of 1946,[42] positing that the APA requires courts to "decide all relevant questions of law"—including those normally falling within under *Chevron*'s sweep. He further questioned *Chevron*'s premise that statutory gaps and ambiguities should be treated as conscious delegations by Congress to agencies to carry on its legislative work.

Much of the Chief Justice's discussion of the separation of powers problems with the *Chevron* doctrine emphasized how it undermined the exercise of "independent judgment" by the courts

---

38. Will administrative law courses now still teach *Chevron*, or will it only be taught in legal history courses?

39. Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 2254 (2024) (quoting *Chevron*, 467 U.S. at 842, 843).

40. 144 S. Ct. 2244 (2024).

41. *Id.* at 2270.

42. 5 U. S. C. § 551 *et seq.*; *see id.* § 706 (positing that in reviewing agency action "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action" and requiring courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law").

insofar as it calls on courts to defer to interpretations of statutory schemes rendered by agencies.[43] He further emphasized that the touchstone of any interpretive inquiry related to legislation is "to effectuate the will of Congress."[44] Thus, it is one thing if Congress expressly "delegates discretionary authority to an agency,"[45] but, the Chief Justice wrote, *Chevron*'s assumption that ambiguity equates with delegation was misguided.[46] Continuing, he observed,

> As *Chevron* itself noted, ambiguities may result from an inability on the part of Congress to squarely answer the question at hand, or from a failure to even "consider the question" with the requisite precision. In neither case does an ambiguity necessarily reflect a congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question. And many or perhaps most statutory ambiguities may be unintentional.[47]

In the end, he concluded, "statutes . . . no matter how impenetrable, do—in fact, must—have a single, best meaning."[48]

But, the Chief Justice concluded, there are additional separation of powers problems with the *Chevron* doctrine—specifically, it permits agencies to usurp decisions that are the proper province of the legislature:

> Under *Chevron*, a statutory ambiguity, no matter why it is there, becomes a license authorizing an agency to change positions as much as it likes, with "[u]nexplained inconsistency" being "at most . . . a reason for holding an interpretation to be . . . arbitrary and capricious." But statutory ambiguity, as we have explained, is not a reliable indicator of actual delegation of discretionary

---

43. *Loper Bright*, 144 S. Ct. at 2273; *see also id.* at 2261 (citing *Marbury* for the proposition that "courts decide legal questions by applying their own judgment").

44. *Id.* at 2263.

45. *Id.*

46. *See id.* at 2265–66 (citing Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 445 (1989)); *see also id.* at 2269 ("'[e]xtraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]"'") (quoting Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001)).

47. *Id.* at 2265–66 (citing *Chevron*, 467 U.S. at 865).

48. *Id.* at 2266.

> authority to agencies. *Chevron* thus allows agencies to change course even when Congress has given them no power to do so.[49]

Concurring in *Loper Bright*, Justice Thomas was even more direct on this score. In his view, not only does the *Chevron* doctrine result in judges giving up their constitutional power to exercise independent judgment in interpreting legislative directives, it "permits the Executive Branch to exercise powers not given to it."[50] As he described things, *Chevron* permits agencies to usurp the judicial interpretive power and alternatively the legislative power. Specifically, he wrote, if defended as permitting agencies to fashion policy, *Chevron* would thereby permit agencies to "unconstitutionally exercise 'legislative powers' vested in Congress." [51] In short, "[b]y 'giv[ing] the force of law to agency pronouncements on matters of private conduct as to which Congress did not actually have an intent,' *Chevron* 'permit[s] a body other than Congress to perform a function that requires an exercise of legislative power.'"[52]

In both opinions, one finds evidence that the Court's decision to discard *Chevron* was driven by a deep concern over ensuring the formulation of national policy occurs in the legislative arena. And, once again we find support for both accounts sketched above: first, the Court may have been driven by the belief that Congress should

---

49. *Id.* at 2272 (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005)). All this being said, the Court did suggest that Congress could still delegate some decisions—it just must be clear when it is doing so. For this and other reasons, Justice Kagan has suggested the impact of *Loper Bright* may be more limited that some alarmists are making it out to be. *See* Comments of Justice Kagan, Ninth Circuit Conference (July 25, 2024), https://www.c-span.org/video/?537234-1/justice-elena-kagan-speaks-us-court-appeals-ninth-circuit-conference (calling *Loper Bright* "a statutory decision, not a constitutional one"). Dissenting in *Loper Bright*, she accused the Court majority of embodying a "hubris squared" mentality by assuming that courts are better situated to fill in policy gaps left by Congress. *See* 144 S. Ct. at 2295 (Kagan, J., dissenting).

50. *Id.* at 2274 (Thomas, J., concurring) ("*Chevron* deference compromises th[e] separation of powers in two ways. It curbs the judicial power afforded to courts, and simultaneously expands agencies' executive power beyond constitutional limits.").

51. *Id.* (citations omitted).

52. *Id.* (quoting Michigan v. EPA, 576 U.S. 743, 762 (2015) (opinion of Thomas, J.)).

take greater responsibility in deciding important aspects of its legislative directives rather than leaving the formation of national policy to unelected bureaucrats; in addition or in the alternative, the Court may have been influenced by a belief that the Court should protect the legislative power from usurpation by the administrative state. Whichever account is correct, there is no denying that the Roberts Court is much more active in policing and protecting Congress's lawmaking role than we have seen in some time (although to be sure, as *Youngstown* shows, the idea is not altogether new).

IV.

These developments all lead to a number of important questions that will need to be worked out going forward. Are there other areas that warrant the Court's attention to the role of Congress in the separation of powers? For example, as Justice Gorsuch has urged, should the Court revisit the nondelegation doctrine?[53] And, within the above areas where the Court has taken up scrutiny of the legislative process, there are numerous follow-on issues to tackle. For example, what is a major question and what is a minor question? How will the Court distinguish the two? Going forward, will all major questions require clear congressional directives on point? Further, in the *Chevron* context, how will courts distinguish between when statutory text is clear and when it is ambiguous? At least one prominent judge has said that he has never seen an ambiguous statute, and yet the *Chevron* doctrine was alive and well in the lower courts before *Loper Bright* (even if the doctrine hadn't expressly been invoked by the Court in sixteen years).[54] More

53. *See, e.g.*, *supra* text accompanying notes 31–34.

54. *See* Raymond M. Kethledge, *Ambiguities and the Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 323 (2017). For a general assessment of *Chevron* in the lower courts leading up to *Loper Bright*, *see* TODD D. RAKOFF, GILLIAN E. METZGER, DAVID J. BARRON, ANNE JOSEPH O'CONNELL, & ELOISE PASACHOFF, GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 1205 (13th ed. 2023) (noting that as of 2023, "the Court has not overruled *Chevron*. Thus, litigants continue to invoke it, and lower courts continue to rely on it, although *Chevron* has come under heavy fire from some lower court judges, including ones who have since become Justices on the Supreme Court").

importantly post-*Loper Bright*, what is the appropriate course of action once a statute is deemed ambiguous? Will courts give it a more limited reading to prod Congress to revisit the issue and provide greater clarity (a là the major questions doctrine)?[55]

Consider the context with which this essay started—war and emergency powers. A broad definition of major questions and/or a revival of the nondelegation doctrine could have significant bite with respect to such matters. Take the War Powers Act, which, among other things, lets the President commit troops for sixty days without Congress deciding whether we should go to war.[56] Of course, the Constitution assigns Congress the decision whether to wage war,[57] establishing a framework that the Founding generation believed was the right one—even if clunky—because having lived through war, that generation did not want the new Republic to venture into similar terrain lightly.[58] If the Court of late is concerned about the executive trampling on the legislative power and ensuring Congress decides "major questions" within its assigned legislative powers, what would it say about the War Powers Act regime?[59]

Consider as well the fact that over one hundred provisions give the President emergency powers of various stripes once the

---

55. *Cf.* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544, 544–51 (1983) (contending that courts should always read ambiguous statutory language to achieve as little change as possible: "unless the statute plainly hands courts the power to create and revise a form of common law, the domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process"); Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162 (2002) (arguing that when faced with ambiguous statutory language and unable to determine prevailing legislative preferences, the judiciary should adopt a construction aimed at eliciting a legislative reaction—namely, aim to spur the legislature to take up and resolve the otherwise indeterminate statutory question).

56. 50 U.S.C. § 1541 *et seq.*

57. U.S. CONST. art I, § 8, cl. 11.

58. For discussion, see JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 3–11 (1993).

59. This question has particular bite in light of court decisions suggesting it is hard if not impossible for Congress to claw back the War Powers regime delegations within the framework it created in that statute. *See* Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000); *see id.* at 25 (Silberman, J., concurring) (arguing that the problem presents a classic political question).

President declares a state of national emergency.[60] Under the framework of the National Emergencies Act, Congress can only override and end the invocation of such emergency powers by passing veto-proof legislation rebuking the President.[61] And although the law says Congress should meet every six months to debate whether an emergency should continue, during the forty years we have lived within this framework, Congress has for the most part eschewed its responsibility to debate whether to end ongoing national emergency declarations.

In light of the Court's recent decisions, will we see renewed attention given to this approach to warmaking and emergencies? After all, a whole lot of what traditionally we understood to be legislative power is being exercised by the executive under these frameworks. Time will tell.

V.

This brings us at long last to the puzzle raised by the Court's recent attention to the legislative process.

I am intrigued by what follows if we put the Court's major questions doctrine and related cases in conversation with the Court's public and private rights caselaw (more specifically, its jurisprudence on non-Article III tribunals) as well as its most recent standing jurisprudence.

Let us start with the Court's approach to the matter of when Congress may assign enforcement of claims and rights to non-Article III tribunals.

To be sure, calling the Court's jurisprudence in this area unclear is a bit like saying Pelé was a decent soccer player. The Court's decisions are a mess. That being said, the Court's inquiry has long turned on the oft-invoked distinction between public and private

---

60. *See* Elizabeth Goitein, *The Alarming Scope of the President's Emergency Powers*, THE ATLANTIC (Jan./Feb. 2019). If you want to frighten your teenage children, point out that among other powers, the President might arguably claim the emergency authority to take over the internet. *See id.*

61. *See* 50 U.S.C. § 1601 *et seq.*

rights.[62] And over the last few decades, the Court has often held that if Congress creates a right, it gets to decide the venue in which it will be enforced. Take the 1978 decision in *Santa Clara Pueblo v. Martinez*.[63] In that case, the Court upheld a scheme by which newly-created rights under the Indian Civil Rights Act could only be advanced in tribal courts, and not Article III courts.[64]

Or consider the Court's later holding in *CFTC v. Schor*.[65] There is a lot going on in that case, to be sure, but it bears emphasizing that there were two claims at issue in the case being advanced by the plaintiff before the non-Article III Commodities Futures Trading Commission: one grounded in the Commodities Exchange Act and one grounded in the common law.[66] Although the Justices divided closely over whether the Commission could adjudicate the common law claim, all nine agreed it could adjudicate the claim under the Commodities Exchange Act that Congress had created between a client and broker.[67]

Conversely and increasingly, the Court has said that limits on Congress's power to assign the adjudication of rights outside the Article III courts turns largely on the source of the right—or at least that was the thrust of Chief Justice Roberts's opinion for the Court in *Stern v. Marshall* as I read it.[68] In *Stern*, the Court declined to allow a bankruptcy court staffed with non-life tenured Article III judges to resolve what it deemed to be a common law claim outside the

62. *See, e.g.*, Crowell v. Benson, 285 U.S. 22 (1932).

63. 436 U.S. 49 (1978).

64. *See id.*

65. 478 U.S. 833 (1986).

66. *See id.*

67. *See id.*

68. 564 U.S. 462, 490, 493 (2011) (distinguishing between "public rights" created by Congress and "private" or common law rights and observing that the former embody "cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency's authority" and distinguishing as the latter "claim is instead one under state common law between two private parties" that "does not 'depend[-] upon the will of congress'"). To be sure, this distinction was assigned much significance by the *Schor* majority, which allowed the common law claim in that case to proceed before the Commission, albeit at least in part based on the proposition that a party can waive one's right to an Article III tribunal.

core of the relevant bankruptcy proceedings; at the same time, the Court did not call into question the bankruptcy court's ability to resolve core bankruptcy claims.

Even well before *Stern*, as Justice Brennan articulated in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[69] the proposition that has often controlled posits that:

> [W]hen Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right. Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress's power to define the right that it has created. No comparable justification exists, however, when the right being adjudicated is not of congressional creation.[70]

In other words, the source of the right is super important. If Congress acts within the scope of its Article I powers and creates a right—subject to limited caveats: most especially, as recently emphasized by the Court, the Seventh Amendment[71]—it gets to decide how that right is enforced. To this end, Chief Justice Roberts in *Stern* relied on *Thomas v. Union Carbide Agricultural Products Company*,[72] in which the Court upheld a data-sharing scheme created by federal statute that sent disputes over compensation between private companies to arbitration, emphasizing that "[a]ny right to compensation" under the scheme in question "results from [the statute] and does not depend on or replace a right to such compensation under

69. 458 U.S. 50 (1982).

70. *Id.* at 83–84 (Brennan, J., delivering the judgment of the Court).

71. *See SEC v. Jarkesy*, 144 S. Ct. 2117, 2136 (2024) (holding the Seventh Amendment violated where the SEC sought to impose administrative fines for securities fraud without providing an Article III judge and jury to defendant); *see id.* at 2131 (opining that the claim at issue bore relation to common law fraud and observing that "[u]nder th[e public rights] exception, Congress may assign the matter for decision to an agency without a jury, consistent with the Seventh Amendment. But this case does not fall within the exception, so Congress may not avoid a jury trial by preventing the case from being heard before an Article III tribunal").

72. 473 U.S. 568 (1985).

state law."[73] The key point is this: Although the outer limits of this power are still very much contested and uncertain in light of the Court's most recent decisions in this area,[74] there exists a substantial body of precedent recognizing broad authority on the part of Congress to assign adjudication of rights it creates to non-Article III tribunals, which in turns suggests a recognition of the breadth of the legislative power to create rights and dictate the terms of their enforcement.

All of this underscores a puzzle that arises when one studies the Court's standing jurisprudence against the backdrop of each of these separate areas of Court decisions. Put most simply, if Congress gets broad latitude to define how a right it creates is enforced, and can even at least in some contexts send adjudication of that right to an agency subject only to limited Article III review,[75] *and* if the Court increasingly is "encouraging" Congress to take the primary role in legislating down to the gritty details (see, *e.g.*, the major questions doctrine and the demise of *Chevron*), what explains the Roberts Court's standing doctrine in recent cases like *Spokeo, Inc. v. Robins*[76] and *TransUnion LLC v. Ramirez*,[77] which can be said to undermine Congress's efforts when it does in fact set national policy in great detail?

Put another way, in *Spokeo* and *TransUnion*, why does the Court call into question Congress's power to create a right, declare an infringement of that right equates with legal injury, and provide an

---

73. *Stern*, 564 U.S. at 491 (quoting *Union Carbide*, 473 U.S. at 584); *see also* 473 U.S. at 589 (observing that "Congress has the power, under Article I, to authorize an agency administering a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program without providing an Article III adjudication. It also has the power to condition issuance of registrations or licenses on compliance with agency procedures").

74. *See, e.g.*, *Jarkesy*, 144 S. Ct. 2117.

75. *See* Crowell v. Benson, 285 U.S. 22 (1932) (setting forth the classic model of agency review by Article III courts whereby Article III review of questions of law and mixed questions of law and fact are *de novo* and factual determinations are reviewed under a deferential standard).

76. 578 U.S. 330 (2016).

77. 141 S. Ct. 2190 (2021).

enforcement scheme pursuant to which the rights-holder gets to pursue relief in an Article III Court?

Consider *TransUnion*. The case involved a class action advanced on behalf of 8,185 individuals against one of the three leading credit reporting agencies. The plaintiffs sued under the Fair Credit Reporting Act, claiming that TransUnion had violated the Act by failing to employ reasonable procedures necessary to ensure that the plaintiffs' credit files were accurate. Indeed, the plaintiffs alleged that some of their files erroneously labeled them to be on terrorist watch lists or as drug traffickers. Of those in the class, some 1,853 of the class members claimed that TransUnion had provided their erroneous credit reports to third parties. The other 6,332 members of the class could not show that their credit reports had been provided to third parties during the relevant period.

Writing for the majority, Justice Kavanaugh concluded that only those plaintiffs in the first category may proceed in federal court to advance their claims created by the Fair Credit Reporting Act.[78] Specifically, the majority held that Article III courts may not adjudicate rights created in the Act, despite Congress's directive that plaintiffs be able to do so, where the relevant claims do not have a common law analogue.[79] So, in the case, the Court held that for those plaintiffs whose erroneous credit reports were circulated to third parties, because their claims looked like the traditional tort of reputational harm, it followed that they had standing to advance said claims in federal court.[80] By contrast, the majority held, for those whose credit reports erroneously said they were on a terrorist

78. *See TransUnion*, 141 S. Ct. at 2209; *see also* 15 U.S.C. § 1681 *et seq.* As the Court said in *Spokeo*, the Fair Credit Reporting Act "imposes a host of requirements concerning the creation and use of consumer reports." 578 U.S. at 335. These include procedural requirements aimed at ensuring accuracy of reports, an obligation to provide reports to individuals, and an obligation to provide a summary of their rights to consumers.

79. *See TransUnion*, 141 S. Ct. at 2200 (positing that the inquiry asks "whether the asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts—such as physical harm, monetary harm, or various intangible harms including (as relevant here) reputational harm") (citing *Spokeo*, 578 U.S. at 340–41).

80. *Id.* at 2208–09.

watch list—even though Congress declared that to be a legal injury and provided for a right of action to seek damages in federal court—that was insufficient because the claim did not mirror any traditional common law claim. The short answer for those plaintiffs: no standing.[81]

In all of this, the Court declined to defer to Congress's determination in the Fair Credit Reporting Act that violations of the Act caused harm to consumers along with its parallel directive that in such cases consumers could proceed in federal court for damages, the latter being an important component to the entire regulatory scheme Congress had created to encourage accurate credit reporting.[82] Specifically, the Act provides: "Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer" for actual damages or for statutory damages ranging from $100 to $1,000, as well as, where relevant, punitive damages and attorney's fees.[83] The majority emphasized, however, that what mattered was the state of traditional tort causes of action, not what Congress said in creating the statutory scheme while acting well within its Article I legislative powers.

Thus, in distinguishing the two categories of plaintiffs, the Court built on what it had said in *Spokeo* and held that to be deemed a "concrete" injury sufficient to come into an Article III court, the

---

81. *See id.* at 2210.

82. Specifically, in *Spokeo*, the Court rejected the idea that "a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right," holding instead that "Article III standing requires a concrete injury even in the context of a statutory violation." 578 U.S. at 341. The Court reaffirmed this idea in *TransUnion*:

> For standing purposes, therefore, an important difference exists between (i) a plaintiff's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiff's suffering concrete harm because of the defendant's violation of federal law. Congress may enact legal prohibitions and obligations. And Congress may create causes of action for plaintiffs to sue defendants who violate those legal prohibitions or obligations. But under Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue that private defendant over that violation in federal court.

141 S. Ct. at 2205.

83. 15 U.S.C. § 1681n(a).

"plaintiffs [must] identif[y] a close historical or common-law analogue for their asserted injury."[84] And even though "Congress's views" should be afforded "due respect," Justice Kavanaugh wrote in *TransUnion*, Congress "may not simply enact an injury into existence."[85] It follows that a statutory violation is alone insufficient under this test.

Justice Thomas concurred in part and dissented in relevant part, saying in effect that this is (just about) all wrong. In particular, he wrote (with a caveat noted in the footnote) that legal injury—for example, Congress saying in a law that you are injured—is enough to warrant standing.[86] End of story.

For Justice Thomas, then, the inquiry was actually quite simple: "courts for centuries held that injury in law to a private right was enough to create a case or controversy."[87] "Legal injury," he wrote, created within the scope of Congress's Article I powers, equals access to federal court under 28 U.S.C. § 1331.[88] He concluded, "this

84. 141 S. Ct. at 2204.

85. *Id.* at 2205.

86. Justice Thomas defined the rights at stake in *TransUnion* as "private rights." He contrasted these with "public rights," which in his view "refers to duties owed collectively to the community." *Id.* at 2217 n.2 (Thomas, J., dissenting). Justice Thomas gave as an example the fact that "Congress owes a duty to all Americans to legislate within its constitutional confines." "But," he wrote, "not every single American can sue over Congress' failure to do so. Only individuals who, at a minimum, establish harm beyond the mere violation of that constitutional duty can sue." *Id.* Space limitations require leaving for another day discussion of this distinction between the two categories of rights for standing purposes.

87. *Id.* at 2218.

88. *Id.* at 2222. Justice Thomas supported his position with some pretty powerful historical precedents, including the fact that "[t]he First Congress enacted a law defining copyrights and gave copyright holders the right to sue infringing persons in order to recover statutory damages, even if the holder 'could not show monetary loss.'" *Id.* at 2217 (quoting Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917, 972 (11th Cir. 2020) (Jordan, J., dissenting) (citing Act of May 31, 1790, § 2, 1 Stat. 124–25)). He also relied on Justice Story, who concluded while riding circuit: "'[W]here the law gives an action for a particular act, the doing of that act imports of itself a damage to the party' because '[e]very violation of a right imports some damage.'" *Id.* (quoting Whittemore v. Cutter, 29 F. Cas. 1120, 1121 (No. 17,600) (C.C. Mass. 1813)). In short, Justice Thomas argued, "[s]o long as a 'statute fixes a minimum of recovery . . . there would seem to be no doubt of the right of one who establishes a technical ground of action to recover this minimum

understanding accords proper respect for the power of Congress and other legislatures to define legal rights."[89]

Notably, this approach sketched out by Justice Thomas bears much in common with the approach to standing advocated by Judge Fletcher years ago. It likewise sounds an awful lot like the approach to standing now being promoted by Judge Newsom on the Eleventh Circuit. As then-Professor and now-Judge Fletcher wrote in his 1988 seminal article *The Structure of Standing*: "If a duty is statutory, Congress should have essentially unlimited power to define the class of persons entitled to enforce that duty, for congressional power to create the duty should include the power to define those who have standing to enforce it."[90] If anything, Judge Newsom has simplified the inquiry even more. In his words, "an Article III 'Case' exists whenever the plaintiff has a cause of action."[91] He could have added, "Period." The inquiry focuses singularly on whether the plaintiff has a cause of action created by Congress. (Justice Thomas's *TransUnion* opinion actually quoted Judge Newsom.[92]) The problem with the Court's approach to standing today is the same as Judge Fletcher highlighted decades ago—the Court is "superimposing an 'injury in fact' test upon an inquiry into the meaning of a statute" as "a way for the Court to enlarge its powers at the expense of Congress."[93]

---

sum without any specific showing of loss.'" *Id.* at 2218 (quoting THOMAS M. COOLEY, LAW OF TORTS *271 (Chicago, Callaghan & Co. 1879)).

89. *Id.* at 2218. Justice Thomas added, "never before has this Court declared that legislatures are constitutionally precluded from creating legal rights enforceable in federal court if those rights deviate too far from their common-law roots." *Id.* at 2221.

90. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223–24 (1988). He added, "If a duty is constitutional, the constitutional clause should be seen not only as the source of the duty, but also as the primary description of those entitled to enforce it." *Id.* at 224.

91. Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1126 (11th Cir. 2021) (Newsom, J., concurring).

92. *See* 141 S. Ct. at 2219 (Thomas, J., dissenting).

93. Fletcher, *supra* note 90, at 233. Judge Fletcher continued to suggest that the Court's "injury in fact" test may actually be a form of substantive due process. He added: "For the Court to limit the power of Congress to create statutory rights enforceable by certain groups of people—to limit, in other words, the power of Congress to create standing—

This has long struck me as a right approach to standing. It is straightforward,[94] easy to apply, and acknowledges what everyone knows but won't say out loud: namely, that standing is all about the merits—*as it should be*.[95] But regardless of whether one joins camp on this score, my larger point is this: It is hard to understand why this approach does not control in the standing jurisprudence in light of the major questions doctrine, the demise of the *Chevron* doctrine, and the Court's approach to public and private rights and non-Article III tribunals.

The puzzle raised by putting these different lines of jurisprudence into conversation with one another reduces to this point: If the Court purports to be protecting Congress's prerogatives and/or wanting to force Congress to do its job, all while developing a body of law that defers extensively to Congress as to how rights it creates should be enforced, there is a powerful argument to be made that the Court should respect Congress's decisions when it is clear in establishing federal rights and how they are to be enforced. Take *TransUnion*. Congress determined that every American should have a right to fair credit reporting by the private for-profit

---

is to limit the power of Congress to define and protect against certain kinds of injury that the Court thinks it improper to protect against." *Id.*

94. One certainly cannot describe existing standing doctrine this way. Indeed, it's hard to improve, even decades later, on Judge Fletcher's reference in 1988 to the "apparent lawlessness of many standing cases" and their "wildly vacillating results." Fletcher, *supra* note 90, at 223.

95. *See* Fletcher, *supra* note 90, at 223 ("I propose that we abandon the attempt to capture the question of who should be able to enforce legal rights in a single formula, abandon the idea that standing is a preliminary jurisdictional issue, and abandon the idea that Article III requires a showing of 'injury in fact.' Instead, standing should simply be a question on the merits of plaintiff's claim."). For a powerful descriptive account of how connected standing doctrine is to the merits as well as a critique of its regrettable current state, *see* Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061 (2015) (surveying a host of areas in which standing appears to turn on the subject matter). For a classic example of how such an approach to standing can and should work, see *Flast v. Cohen*, 392 U.S. 83, 114 (1968) (Stewart, J., concurring) (arguing that standing was appropriate in that case challenging government spending in support of religion under the Establishment Clause because of the underlying protections afforded by the Clause and its intended broad coverage: "Because that clause plainly prohibits taxing and spending in aid of religion, every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution").

companies that control the market, and acting well within its Article I powers, Congress legislated a scheme to incentivize those companies to exercise their important responsibilities with care. As part of that scheme—again, a scheme created well within its Article I powers—Congress further legislated that one key means of enforcing its directives would be for individuals whose sensitive financial information is mishandled by said companies to be able to sue for damages in federal court. How does the Court respect Congress's role in the separation of powers by saying that this is insufficient to warrant the exercise of federal court jurisdiction?[96]

If, as would seem to be the case given the rise of the major questions doctrine along with the demise of *Chevron*, the Court wants Congress to take greater responsibility over the legislative process and legislate more clearly, then when Congress actually does so within the proper scope of its Article I powers—as it did in passing the Fair Credit Reporting Act—due respect for the separation of powers seems to warrant honoring those legislative directives as they are set out. In other words, beyond the powerful "common sense" argument Justice Thomas advanced in his *TransUnion* opinion,[97] if Congress creates a right not be called a terrorist in your credit report and provides for a cause of action to enforce that right, that should be enough to open the federal courthouse door. The Court disrespects the legislative prerogative by saying otherwise.

---

96. I will borrow again here from Judge Fletcher's earlier work: "So long as the substantive rule is constitutionally permissible, Congress should have plenary power to create statutory duties and to provide enforcement mechanisms for them." Fletcher, *supra* note 90, at 251.

97. *See* 141 S. Ct. at 2223 (Thomas, J., dissenting) (underscoring what any person on the street would conclude: "one need only tap into common sense to know that receiving a letter identifying you as a potential drug trafficker or terrorist is harmful. All the more so when the information comes in the context of a credit report, the entire purpose of which is to demonstrate that a person can be trusted").

THE SEPARATION OF POWERS IS A THEY, NOT AN IT

CASS R. SUNSTEIN*

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with this accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system."

—James Madison[1]

INTRODUCTION

Judges and lawyers refer to "the" separation of powers, but the term is an umbrella concept, referring to six different propositions, or six separations of powers. (1) The legislature may not exercise the executive power. (2) The legislature may not exercise the judicial power. (3) The executive may not exercise the legislative power. (4) The executive may not exercise the judicial power. (5) The courts may not exercise the legislative power. (6) The courts may not exercise the executive power. None of these propositions is without

* Robert Walmsley University Professor, Harvard University. I am grateful to Saikrishna Prakash and Lawrence Solum for valuable comments and to Andy Gu for valuable comments and excellent research assistance. My title is adapted, with gratitude, from two superb papers. *See* Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992); Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549 (2005). This is the preliminary basis of the Dewey Lecture, to be delivered at the University of Chicago Law School in January 2025.

1. THE FEDERALIST NO. 47, at 298 (James Madison) (Clinton Rossiter ed., 2003).

ambiguity and all of them must be qualified, but each can be understood to have a core of both meaning and truth. If the goal is to protect liberty or self-government, every one of the six propositions can be strongly defended. Still, they raise different considerations, and they must be analyzed separately. None of them is a logical truth; all of them rest on empirical judgments, involving the likely capacities and performance of various institutions, that are more than plausible but that may or may not be correct.

I. LIBERTY AND DELIBERATIVE DEMOCRACY

It is March 27, 1933. Here is a headline in the *New York Times*: "Hitler Is Supreme Under Enabling Act."[2] Under that headline: "Chancellor, Pre-eminent Over Cabinet, Is Now Practically the German Government."[3] Under that: "All Legislative Powers Have Been Transferred to Regime, Free to Refashion National Life."[4]

How might that transfer of powers be justified? Is there a theory? To say the least, that is a complicated question, but for a glimpse, turn to the justification by the legal theorist Carl Schmitt[5] of what happened in Germany on June 30, 1934. That was the Night of the Long Knives,[6] in which Hitler ordered his elite guards to murder hundreds of people, including the leaders of the paramilitary Sturmabteilung (SA). Liberalism was Schmitt's central target. He announced, "The real Führer is always a judge. Out of Führerdom flows judgeship."[7] Schmitt added, "One who wants to separate the two from each other or puts them in opposition to each other would have the judge be either the leader of the opposition or the tool of

2. Guido Enderis, *Hitler Is Supreme Under Enabling Act*, N.Y. TIMES (Mar. 27, 1933), https://www.nytimes.com/1933/03/27/archives/hitler-is-supreme-under-enabling-act-chancellor-preeminent-over.html [https://www.nytimes.com/1933/03/27/archives/hitler-is-supreme-under-enabling-act-chancellor-preeminent-over.html?smid=url-share].

3. *Id.*

4. *Id.*

5. Detlev Vagts, *Carl Schmitt's Ultimate Emergency: The Night of the Long Knives*, 87 GERMANIC REV. 203, 206 (2012).

6. *See generally* PHIL CARRADICE, NIGHT OF THE LONG KNIVES: HITLER'S EXCISION OF ROHM'S SA BROWNSHIRTS, 30 JUNE–2 JULY 1934 (2018).

7. Vagts, *supra* note 5, at 206.

the opposition and is trying to unhinge the state with the help of the judiciary."[8]

It is worth pausing over these claims. "Out of Führerdom flows judgeship." Separation between leadership and judgeship creates a "leader of the opposition," and it unhinges the State. Thus Schmitt insisted that it "was characteristic of the blindness about justice of the liberal way of thinking about law that it sought to make out of criminal law a great liberating charter, the 'Magna Carta of the criminal.'"[9] So much for "the liberal way of thinking about law." In Schmitt's view, "the Führer's action was true judging. It is not subject to law but is in itself the highest justice."[10] This is a horror movie, but it is also real, and what was being said in the 1930s can be found, in various forms, today.

The U.S. Constitution, an emphatically liberal document, is meant to prevent tyranny. It is designed to "secure the Blessings of Liberty to ourselves and our Posterity."[11] But what are those blessings? Consistent with a prominent strand in liberal thought, we should take them to include a private realm of immunity from the power of the government—a realm in which people need not worry about public coercion.[12] On one view, the separation of powers essentially *is* a Bill of Rights. The private realm of immunity certainly includes freedom of speech, freedom of religion, and protection of private property against takings without just compensation. It might extend far more broadly. It might include a private sphere of protection against official incursion.[13] It might include the rule of law,[14] which is easily taken to include an independent judiciary and

8. *Id.*

9. *Id.*

10. *Id.*

11. U.S. CONST. pmbl.

12. For versions of this view, see F.A. HAYEK, THE CONSTITUTION OF LIBERTY (1960); RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995).

13. *See id.*

14. *See* LON L. FULLER, THE MORALITY OF LAW (rev. ed. 1969); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979); John Tasioulas, *The Rule of Law*, *in* THE CAMBRIDGE COMPANION TO THE PHILOSOPHY OF LAW 117 (2020).

thus to unhinge the State, on principle. Whatever its precise content, the blessings of liberty allow people to be something like sovereigns over their own lives. The separation of powers might be taken to be a way to secure those blessings.

But as the Constitution was designed, the blessings of liberty were broader than that. They included the right to republican self-government.[15] Rejecting the monarchical heritage, the founding generation abolished titles of nobility and insisted on a principle of equality, which entailed at least a kind of popular sovereignty.[16] Adverting to the founding, Abraham Lincoln said this in 1854:

> [I]f the negro *is* a man, is it not to that extent, a total destruction of self-government, to say that he too shall not govern *himself*? When the white man governs himself that is self-government; but when he governs himself, and also governs *another* man, that is *more* than self-government—that is despotism . . . [N]o man is good enough to govern another man, *without that other's consent*. I say this is the leading principle—the sheet anchor of American republicanism.[17]

In a few daring sentences, Lincoln connected the antislavery movement, calling for a right to self-government in individual lives, with the right to self-government in politics. Lincoln was keenly aware that, consistent with the founding conception of republicanism, the Constitution aimed to create a deliberative democracy—one that combined accountability with reason-giving in the public domain.[18] In a deliberative democracy, the people certainly rule, in the sense that they control the operations of the government.[19] But in a deliberative democracy, institutions are designed to increase the likelihood that decisions would be based on

---

15. *See generally* JOSEPH M. BESSETTE, THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT (1994).

16. *See generally* GORDON WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1992).

17. Abraham Lincoln, *Speech on the Kansas-Nebraska Act at Peoria, Illinois*, *in* Abraham Lincoln: Speeches and Writings 1832–1858, at 307, 328 (1989) (emphasis added).

18. *See generally* Bessette, *supra* note 15; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); DELIBERATIVE DEMOCRACY (Jon Elster ed., 1998).

19. *See generally* BESSETTE, *supra* note 15.

the force of the better argument.[20] Public power is not supposed to be exercised only on the ground that those in a position of authority think that it should be so exercised. They must justify themselves.[21] This too is a prominent part of the liberal tradition.

Self-government is opposed to tyranny. Now consider Madison's remarkable sentence, drawing on and helping to build the relevant tradition: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[22] On its face, the Constitution aims to forbid the accumulation of all powers in the same hands. Article I, section 1 of the Constitution says this: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[23] Article II, section 1 of the Constitution says this: "The executive Power shall be vested in a President of the United States of America."[24] Article III, section 1 of the Constitution says this: "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."[25]

These provisions establish the separation of powers. We might want to emphasize the word "all" in Article I and the word "the" in Articles II and III. The Constitution seems to contemplate that there is something called "*the* executive power" and "*the* judicial power," and that they are vested in particular institutions. And if "*all*" legislative powers are vested in Congress, then they would seem to be vested nowhere else.

---

20. *See generally* AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? (2004).

21. *See generally* JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT (2018).

22. THE FEDERALIST NO. 47 (James Madison), *supra* note 1, at 269.

23. U.S. CONST. art. I, § 1.

24. U.S. CONST. art. II, § 1.

25. U.S. CONST. art. III, § 1.

II. SIX, NOT ONE

The separation of powers, it is called, but we should immediately be able to see that the term is too undifferentiated. It is a misnomer. The separation of powers is a *they*, not an *it*. It is an umbrella concept, and it seems to include six separations of powers.

(1) The legislature may not exercise the executive power.
(2) The legislature may not exercise the judicial power.
(3) The executive may not exercise the legislative power.
(4) The executive may not exercise the judicial power.
(5) The judiciary may not exercise the legislative power.
(6) The judiciary may not exercise the executive power.

The six separations can be taken to include three sets of prohibitions. There are two things that the legislature cannot do; two things that the executive branch cannot do; and two things that the judiciary cannot do.

To be sure, and importantly, the six propositions are mere inferences. They are not semantically mandated by the constitutional text. The vesting of some power in some institution does not *necessarily* mean that some other institution may not exercise that power. But the relevant inferences are certainly plausible, and perhaps more than that. From the vesting of "all legislative powers" (herein granted) in Congress, we might well be inclined to infer that the executive and the judiciary do not have, and may not exercise, legislative powers. From the vesting of "the executive power" in the President, we might infer that Congress and the judiciary do not have, and may not exercise, executive power. From the vesting of "the judicial power" in federal courts, we might infer that Congress and the executive do not have, and may not exercise, judicial power.

Some of these inferences may not be entirely secure. It would be possible, for example, to agree that Article III vests the judicial power in courts, but also to insist that the executive may sometimes

exercise judicial power.[26] The text is not without ambiguity. Still, the inferences seem reasonable. If *all* legislative powers are vested in Congress, it would be puzzling to say that the executive may exercise some such powers. At least as a textual matter, then, we might be inclined to endorse the six propositions. Still, it is true that public meaning originalists would want to investigate the original public meaning,[27] and a careful historical investigation might yield plenty of surprises.[28] Perhaps one or more of the six propositions is inconsistent with the original public meaning. Some people would also insist on asking about historical traditions and longstanding practices, which may or may not support the six propositions.[29] If they do not, one or another of the propositions might be rejected. These various possibilities raise fundamental questions about constitutional interpretation.[30]

At times, I will be putting some pressures on every one of the six propositions. But for purposes of discussion, let us start with the assumption that they are generally or broadly right, and that they capture the separation of powers as the Constitution understands it.

Understood in terms of these six propositions, the separation of powers has nothing to do with checks and balances.[31] It is genuinely about *separation as such*. So understood, it is under-descriptive of the U.S. Constitution, which mixes separation of powers with

---

26. For a possible example, see Crowell v. Benson, 285 U.S. 22 (1932). The law has taken many twists and turns here. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986); Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568 (1985); SEC v. Jarkesy, 144 S. Ct. 2117 (2024).

27. *See e.g.*, Lawrence Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953 (2021).

28. *See, e.g.*, Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753 (2023); JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012). On some big surprises, *see generally* JONATHAN GIENAPP, AGAINST ORIGINALISM: A HISTORICAL CRITIQUE (2024) (arguing, among other things, that "the Constitution" was not understood, at the founding period, to be limited to the text).

29. *See, e.g.*, NLRB v. Noel Canning, 573 U.S. 513 (2014).

30. For various views, see United States v. Rahimi, 144 S. Ct. 1889 (2024).

31. For a defining treatment, see M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (2d ed. 1998).

checks and balances.[32] It follows that, even if each of the six propositions remains a plausible reading of that Constitution, the constitutional text and current doctrine require important qualifications. For example, Congress exercises the judicial power insofar as the Senate conducts trials in the aftermath of impeachment in the House of Representatives. In addition, the executive branch does, in fact, exercise judicial power—a great deal of it.[33] And in some respects, the judicial branch might be thought to exercise legislative power.[34] I will have a few things to say about these points.

I will be covering a great deal of ground in a relatively short space, and it will be useful to keep two general propositions in mind. First, each of the six propositions rests on reasonable judgments about various institutions and their likely performance, capacities, and incentives. Above all, protection of liberty is an overriding goal, and protection of deliberative democracy is equally central. Second, those reasonable judgments are based on empirical projections, involving the capacities and likely performance of various institutions; though reasonable, the projections may not be right. We can readily imagine one or another time and place in which one or another of the six propositions might be rejected. I do not believe that the time is now or that the place is here; but still. Here as elsewhere, Schmitt's rejection of the separation of powers, and the experience of fascism under Hitler, offer the right warnings. The six separations of powers lie at the core of liberalism, rightly conceived.

---

32. *See* THE FEDERALIST NO. 47 (James Madison), *supra* note 1, at 299 ("From these facts, by which Montesquieu was guided, it may clearly be inferred that in saying 'There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates,' or, 'if the power of judging be not separated from the legislative and executive powers,' he did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other.").

33. *See supra* note 26 (collecting examples).

34. *See generally* Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1 (2011).

III. THE LEGISLATURE MAY NOT EXERCISE THE EXECUTIVE POWER

A. Two Layers, and Liberty

Suppose that Congress enacts a law making something a crime. After enactment of that law, the decision whether to prosecute people for that crime is made by another branch of government, not by Congress itself. That is an important safeguard of liberty. The executive branch, with its own incentives and traditions, is required to make a separate decision about enforcement. It might decline to proceed at all. In this way, citizens have the protection that comes from the need for concurrence from two layers of government, not just one.[35] Prosecutorial discretion, prominently including the discretion not to act, is a crucial safeguard of freedom.[36] Imagine a system in which each and every crime was prosecuted, or in which the national legislature were put in a position to decide which crimes to prosecute. Liberty would be in grave danger.

Something similar can be said about regulations. Congress might authorize the Department of Health and Human Services to issue regulations governing some sector of the economy. But the Department has discretion to set priorities, and it might well have discretion not to issue those regulations at all.[37] The Department might say, "not now." It might even say, "not ever." Here too, there is a potential safeguard of liberty. The regulatory enterprise might be an unjustified burden on the relevant sector; it might squelch freedom. And Congress itself might be aware of that. It might be counting on the second layer to ensure against excessive intrusiveness.

B. Complications

This argument is fundamentally right. Note, however, that it buries some contestable premises, and on certain assumptions, the two layers are a cure that is worse than the disease. Let us assume that the executive branch is lazy, corrupt, or otherwise ill-motivated. Let

35. *See* INS v. Chadha, 462 U.S. 919 (1983); Bowsher v. Synar, 478 U.S. 714 (1986).

36. *See* Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUD. SOC'Y 18 (1940).

37. Cass R. Sunstein & Adrian Vermeule, *The Law of "Not Now": When Agencies Defer Decisions*, 103 GEO. L.J. 157 (2014).

us assume that it does not want to enforce the law when the law really should be enforced, or that it has a bad or perverse agenda. Perhaps it is in thrall to well-organized private groups. Perhaps it does not much care about occupational safety and health. Perhaps it does not care about clean air. If so, we might well be better off if the legislature could exercise executive power. Whether two layers are a salutary protection of liberty, or instead a form of overkill, depends on judgments about how executive power is likely to be exercised. If the legislature would exercise executive power well, or if the executive is wrongheaded or arbitrary, the two layers would be nothing to celebrate.[38]

There are underlying disputes here about the right conception of liberty.[39] You might believe that liberty requires immunity from government intrusion ("private liberty"), or you might also or instead believe that liberty requires government help or protection. Suppose that we agree that while private liberty is exceedingly important, liberty is also compromised if people are subject to unsafe working conditions, dirty air, dirty water, and discrimination. If we believe that the New Deal had something like the right conception of liberty,[40] or at least had something to add, we might think that the executive branch's discretion, and its ability to say "not now" or "never," is a threat to liberty, properly conceived. That thought helps explain some of the shifts in the understandings of the separation of powers that occurred during the New Deal, with an increase in the discretionary policymaking authority of the executive branch and with the rise in the policymaking authority of independent regulatory commissions.[41]

Consider in this light continuing debates about judicial review of agency inaction.[42] On one view, agency inaction is in an altogether different category from agency action, because it does not involve

38. *See* Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973).

39. *See generally* ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY (1990).

40. *See* CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION (2004).

41. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987).

42. *Id.*

the exercise of coercive authority over citizens.[43] That view is controversial. On a competing view, agency inaction is not different, in principle, from agency action; if an agency fails to act, it fails to protect people from harm (and threatens their liberty, properly conceived).[44]

These are important debates. But let us not lose sight of the central point. The requirement of concurrence from the executive, before the weight of government might be brought to bear, is a crucial safeguard of at least one form of liberty.

IV. THE LEGISLATURE MAY NOT EXERCISE THE JUDICIAL POWER

A. The Central Idea

What does it mean to say that the legislature may not exercise the judicial power? What is "the judicial power"?

On one view, the answer is simple: *The judicial power is the power to adjudicate disputes, and Congress may not adjudicate disputes*.[45] That is also an important safeguard of liberty. If there is a dispute between Jones and Smith, it should be resolved by a real court, with the traditional characteristics, practices, traditions, and norms of the judiciary, not by a political body. So too if there is a dispute between Jones and the Environmental Protection Agency. If Congress is resolving that dispute, the electoral connection might well distort the process of adjudication. The central point holds even if judges are themselves elected. Judges have their own traditions and constraints, and those traditions and constraints are well-suited to the process of adjudication (real rather than Potemkin).[46]

---

43. *See* Heckler v. Chaney, 470 U.S. 821 (1985); Dunlop v. Bachowski, 421 U.S. 560 (1975).

44. *See Heckler*, 470 U.S. at 840 (Marshall, J., concurring in the judgment); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657 (2004). For a vivid example, see Massachusetts v. EPA, 549 U.S. 497 (2007).

45. INS v. Chadha, 462 U.S. 919 (1983).

46. An exception of course is impeachment (in the House) and trial and possibly conviction (in the Senate). *See* U.S. CONST. art. I, §§ 2–3.

On another view, the judicial power centrally involves the (authoritative) interpretation of what the law is,[47] and here things get a bit more complicated. Suppose that Congress enacts a law of uncertain constitutionality. If Congress is entitled to resolve the constitutional issue, we cannot exactly expect an impartial judgment. Congress is most unlikely to think that (a) a statute for which it has voted is an excellent idea and (b) that very statute is unconstitutional. An independent tribunal, assessing the constitutional objection, seems far better. Hamilton put it this way:

> If it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority.[48]

Hamilton does not quite spell out the logic here. Why, exactly, is that "more rational to suppose"? The answer must be that with respect to the meaning of the Constitution, courts are relatively impartial, and that "an intermediate body" is better situated to keep the legislature within the bounds of its authority. For reasons just sketched, that is an eminently plausible answer.[49]

---

47. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (noting in particular these well-known words: "It is emphatically the province and duty of the judicial department to say what the law is.").

48. THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

49. There are counterarguments. *See* Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2095 (2022) ("A constitutional discourse based on legal entitlements risks crowding out . . . nonlegal considerations, even in contexts where the legal claim itself is deeply contested, and the moral or policy considerations are especially weighty. It provides a 'limited menu of argument types . . . expected to provide definitive answers' precisely where the goal should be more multifaceted contestation and a more provisional understanding of settlement.").

B. Complications

Here as well, the various judgments are empirical speculations, not logical truths. Of course it is true that Congress has an obligation to follow the Constitution, which means that it must assess the relevant legal issues, even if its assessment is not authoritative.[50] It has an independent obligation to interpret the law so as to ensure that it remains faithful to it, which means that it exercises some kind of judicial power, even if its exercise of that power is not binding or authoritative.[51]

More fundamentally, we could imagine institutional judgments that would cut hard the other way.[52] Suppose, for example, that legislatures took their constitutional responsibilities exceedingly seriously, and would be most unlikely to act in ways that violated the founding document. Suppose too that courts had agendas of their own, and that they would interpret the Constitution in a way that reflected their own judgments of policy and principle.[53] Under such assumptions, a prohibition on the exercise of judicial authority[54] by legislatures would produce less, rather than more, in the way of fidelity to the Constitution. Fair enough.[55] Still, we might reasonably think that the contrary assumptions are more reasonable, simply because of the likely motivations of the two institutions.[56]

There is another complication. To assess Hamilton's argument, *we need a theory of constitutional interpretation*. His argument might

---

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

51. Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

52. *See* Thayer, *supra* note 50.

53. This is not, of course, an especially adventurous assumption.

54. The term is admittedly ambiguous in this context. I am taking it to mean authoritative or presumptively authoritative interpretations of the Constitution.

55. Indeed, some people have thought, in some periods, that judicial fidelity to the Constitution is (let us say) merely occasional. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

56. *See* Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981). I realize that my conclusion here is, well, conclusory.

seem to work best if we are public meaning originalists.[57] In ascertaining the original public meaning, we might suppose that courts are likely to be more impartial than legislatures, though for reasons just stated, that is not inevitable. But imagine that judges embrace a different theory. Suppose that they are moral readers,[58] seeking to give the founding document the best imaginable moral reading. If so, the case for forbidding legislators to exercise judicial power might seem to be greatly strengthened—or greatly weakened. Things get complicated here, and in a hurry. Suppose we think that moral readings are illegitimate,[59] and that legislators will follow the original public meaning and are competent public meaning originalists. If so, we might well want legislators to exercise judicial authority. And if *both* legislators and courts are moral readers, the question is which will produce the better moral readings. There is no abstract answer to that question.[60] Political accountability might be a virtue; it might be a vice.

Or suppose that judges believe in representation-reinforcing judicial review, seeking to improve the operation of the democratic process.[61] If they are very good indeed at that, and if we think that representation-reinforcing judicial review is a very good idea, we might want to forbid legislators from exercising judicial power, at least in the sense that we will want to insist that they do not get the final say on the meaning of constitutional provisions. But there are two big *ifs* there.

---

57. *See* Lawrence B. Solum, *The Unity of Interpretation*, 90 B.U. L. REV. 551, 572 (2010).

58. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996).

59. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989).

60. An argument in favor of judicial superiority can be found in ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); *see also* Ronald Dworkin, *supra* note 56.

61. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

C. Beyond Constitutional Interpretation

Let us bracket the complexities here and assume that Hamilton is broadly right. If so, the principle does not apply only to judicial review for constitutionality. Consider (authoritative) interpretation of statutes. If we are committed to the rule of law,[62] we will be wary of a situation in which those who enact the law are also charged with its interpretation. To be sure, the legislature may be in a privileged (epistemic) position with respect to intended meaning.[63] But if the question is *what a statute means to ordinary readers*,[64] courts might well be in a better position.[65] And from the standpoint of the rule of law, that is indeed the question. Focused on the natural or ordinary meaning of texts, judges might be in a superior position to those who voted for legislation. Of course, there is no obvious conclusion here on who is likely to perform best. We could easily imagine a judiciary that would be highly reliable; we could easily imagine a judiciary, armed with its own convictions and willing to deploy them, that would not be reliable at all.

Apart from judicial review for constitutionality, courts might use canons of interpretation that have deep roots in traditions or constitutional principles, but that legislatures might not endorse or apply in particular cases. These canons might be important. Consider the rule of lenity; the avoidance canon[66]; the canon against retroactivity[67]; the canon against extraterritorial application of national

---

62. *See generally* LON L. FULLER, THE MORALITY OF LAW (Yale Univ. Press, rev. ed. 1969) (1964); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979); John Tasioulas, *The Rule of Law*, *in* THE CAMBRIDGE COMPANION TO THE PHILOSOPHY OF LAW 117 (John Tasioulas ed., 2020).

63. Time might matter. The legislature of 2024 might know the intended meaning in 2023. The legislature of 2024 might not know the intended meaning in 1964.

64. Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 351–57 (2013).

65. Again, this is not clear in the abstract. Everything depends on the competence and good faith of the relevant institutions. If judges are not competent in assessing the original public meaning, or if their own judgments of principle and policy are playing a large role, we might not be so enthusiastic about the idea that judges alone exercise the judicial power.

66. Kent v. Dulles, 357 U.S. 116, 128–29 (1958).

67. *See, e.g.*, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules

law.[68] Judges might wield these canons, very much for the better; legislators might be indifferent or hostile to them.

Here is Hamilton again, and what he says is full of implications for the separation of powers:

> But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts.[69]

This is a striking passage insofar as it emphasizes "mitigating the severity and confining the operation of" law. (It is instructive to compare Hamilton to Schmitt; let us stand with Hamilton.) Here again, liberty is a defining value. On plausible (if optimistic) assumptions about how courts work, it is right to endorse the idea that legislators cannot exercise judicial authority, because they would act in a way that would undermine the rule of law, properly understood. Of course it is true that some of the concerns raised about judicial review of statutes for constitutionality apply here as well.

---

will not be construed to have retroactive effect unless their language requires this result.").

68. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) ("We assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is 'the affirmative intention of the Congress clearly expressed,' we must presume it 'is primarily concerned with domestic conditions.'") (citations omitted).

69. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 48, at 469.

V. THE EXECUTIVE MAY NOT EXERCISE THE JUDICIAL POWER

The initial question, once more, is the meaning of the term "the judicial power." Let us begin by assuming that the term refers to authoritative interpretation of the meaning of federal law. And in this context, we confront Schmitt directly: "The real Führer is always a judge. Out of Führerdom flows judgeship."[70] Not so. In a system of separation of powers, both of these statements are anathema.

A. Interpretation

Suppose that the Environmental Protection Agency (EPA) is issuing some regulation under the Clean Air Act (CAA). The regulation might involve particulate matter, ozone, or greenhouse gases. In a standard case, the regulation might be challenged on the ground that it is inconsistent with the CAA and is also arbitrary and capricious. If the executive could exercise judicial power, the rule of law would be at serious risk.[71] The executive has every incentive to resolve difficult issues (and perhaps not-so-difficult issues) in its own favor. Liberty might well be in jeopardy.[72]

We do have to be careful here. A well-functioning executive will be keenly alert to its obligations under the Take Care Clause, and it will investigate the legal issues with care and conscientiousness.[73] We could imagine a continuum of possibilities here, from an executive that is highly scrupulous with respect to the legal issues to one that is careless or excruciatingly self-serving. There is another point. If the question is the meaning of a term like "diagnosis," or "source," or "calendar," one view or another is not necessarily, or perhaps in any sense, in the executive's favor, which means that it is often implausible to say that one or another view is self-serving. Still, it is true that an executive branch that exercises judicial power

---

70. Vagts, *supra* note 5, at 206.

71. For what seems to me an excessively strong statement of this view, see Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187 (2016).

72. *See id.*

73. *See supra* note 44.

is often acting as judge in its own cause, at least insofar as it is deciding on the legality of its own regulation. That is a reason to separate execution of the law from interpretation of the law.

Similar things might be said about constitutional issues. The executive branch should be expected to give careful consideration to the question of whether its regulations, or its actions more broadly, violate the founding document.[74] But there is an inevitable risk that its judgments will ultimately be self-serving. As they say, foxes should not guard henhouses—a point about both liberty and the rule of law.[75]

The analysis must be different if the executive is seeking to decide whether acts of Congress are inconsistent with the Constitution. We might think that in such circumstances, the risk of bias is reduced, because the executive is not assessing itself. But again, the executive does not have the traditions and constraints of courts. Its members are not protected by tenure and salary guarantees. It is reasonable to think that its constitutional judgments will be imperfectly reliable. The same is true for courts, of course, and there are no logical proofs here. But if we are to choose which institution will exercise the judicial power, it makes sense to say, with Hamilton: courts.

Consider in this light the longstanding debate over *Chevron v. NRDC*,[76] which held that courts should defer to reasonable agency interpretations of ambiguous statutes.[77] In *Loper Bright Enterprises v. Raimondo*,[78] the Court overruled *Chevron* on the ground that it was inconsistent with the Administrative Procedure Act (APA). But there are fundamental questions, constitutional in nature, in both the background and the foreground. Thus the *Loper Bright* Court began this way, with a separation-of-powers principle:

---

74. That is one of the jobs of the Office of Legal Counsel within the Department of Justice, and general counsels within agencies, and those who work for them, explore constitutional questions essentially every day.

75. As they also say, or at least should say: Who is the fox? I will return to that question.

76. 467 U.S. 837 (1984).

77. For discussion, see Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613 (2019).

78. 144 S. Ct. 2244 (2024).

> Article III of the Constitution assigns to the Federal Judiciary the responsibility and power to adjudicate "Cases" and "Controversies"—concrete disputes with consequences for the parties involved . . . . The Framers also envisioned that the final "interpretation of the laws" would be "the proper and peculiar province of the courts." [The Federalist] No. 78, at 525 (A. Hamilton). Unlike the political branches, the courts would by design exercise "neither Force nor Will, but merely judgment." To ensure the "steady, upright and impartial administration of the laws," the Framers structured the Constitution to allow judges to exercise that judgment independent of influence from the political branches.[79]

On one view, *Chevron* grants judicial authority to the executive branch, and thus violates a core principle of the separation of powers.[80] Whether this objection is convincing depends on what, exactly, *Chevron* is understood to entail. In *Loper Bright*, the Court understood *Chevron* to call for much more than "due respect to Executive Branch interpretations of federal statutes."[81] That call was, in the Court's view, illegitimate, for historical practice suggested that "[t]he views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it."[82] Thus the Court embraced the "traditional understanding that questions of law were for courts to decide, exercising independent judgment."[83]

As the *Loper Bright* Court had it, the APA "codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to Marbury: that courts decide legal questions by applying their own judgment."[84] The Court emphasized that the APA "incorporates the traditional understanding of the judicial function, under which courts must exercise independ-

79. *Id.* at 2254–57 (citations omitted).
80. Hamburger, *supra* note 71.
81. *Loper Bright*, 144 S. Ct. at 2247.
82. *Id.* at 2258.
83. *Id.*
84. *Id.* at 2244, 2261.

ent judgment in determining the meaning of statutory provisions."[85] The Court put that understanding in the context of foundational matters: "Indeed, the Framers crafted the Constitution to ensure that federal judges could exercise judgment free from the influence of the political branches."[86]

The Court insisted on independent judicial review of legal questions under the APA; that is the central theme of *Loper Bright*. At the same time, the Court noted "that the informed judgment of the Executive Branch—especially in the form of an interpretation issued contemporaneously with the enactment of the statute—could be entitled to 'great weight.'"[87] It warmly embraced *Skidmore v. Swift & Co.*,[88] which calls not for deference, but for respectful attention to the views of the relevant agency. There the question was what counted as "waiting time" and what counted as "working time."[89] The *Skidmore* Court said this:

> We consider that the rulings, interpretations, and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with

85. *Id.* at 2262.

86. *Id.* at 2268. Note that Justice Thomas offered a detailed explanation of his view that *Chevron* is inconsistent with the separation of powers. *See id.* at 2273–75 (Thomas, J., concurring). As he put it, *Chevron* "curbs the judicial power afforded to courts, and simultaneously expands agencies' executive power beyond constitutional limits." *Id.* at 2274. Justice Gorsuch spoke in similar terms. *See id.* at 2275–94 (Gorsuch, J., concurring), and in particular this statement: "*Chevron* deference runs against mainstream currents in our law regarding the separation of powers, due process, and centuries-old interpretive rules that fortify those constitutional commitments." *Id.* at 2281. As noted in the text, the Court rejected this view; it made it clear that Congress can delegate interpretive authority to agencies.

87. *Id.* at 2259 (citation omitted).

88. 323 U.S. 134 (1944).

89. *Id.*

> earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[90]

The Court ended up accepting the interpretation of the Administrator, not because it was binding or should be given deference, but because it deserved to be given weight. After *Loper Bright*, it is safe to predict that this passage will be increasingly important (and often quoted). Consider in this light *Chevron* itself, where the EPA defined "source" to include a plantwide "bubble."[91] Under *Loper Bright*, the court is in the driver's seat, but it might give "great weight" to the agency's view, and so uphold it.[92] Is that the likely course for the future? Will *Chevron* cases be *Skidmore* cases, and come out favorably to the agency much of the time? The answer might well be "yes," at least where technical issues are involved. But even if that is so, interpretation is ultimately for courts, nor for the executive – and hence the separation of powers is preserved.

Even more fundamentally, the *Loper Bright* Court also made clear that Congress may have explicitly or implicitly granted interpretive authority to the agency—and that courts should respect that

90. *Id.* at 140.

91. Chevron v. NRDC, 467 U.S. 837, 861 (1984).

92. There is a question about consistency over time. *Chevron* allowed departures. *See id.*; Nat'l Cable & Telecomm. Ass'n v. Brand X, 545 U.S. 967 (2005). It is much less clear that *Loper Bright* will allow departures, except perhaps in cases in which Congress has explicitly or implicitly given agencies discretion, as with terms like "appropriate" or "reasonable" (or "source"?).

grant.[93] In so saying, the Court firmly rejected the view that Congress lacks the constitutional authority to grant interpretive[94] authority to agencies.[95] The Court said this:

> In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes "expressly delegate[]" to an agency the authority to give meaning to a particular statutory term. Others empower an agency to prescribe rules to "fill up the details" of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that "leaves agencies with flexibility," such as "appropriate" or "reasonable." When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations . . . .[96]

There is a lot there. The Court should not be taken to be restoring *Chevron* through another route. But it *is* saying that certain terms, such as "reasonable," can be taken to be a delegation of authority to the agency.

A great deal might be said about whether the Court rightly interpreted the APA.[97] And it would be possible to argue that *Chevron*

---

93. See the brilliant discussion in Adrian Vermeule, Chevron *By Any Other Name: From "*Chevron *Deference" to "*Loper Bright *Delegation,"* THE NEW DIGEST (June 28, 2024), https://thenewdigest.substack.com/p/chevron-by-any-other-name?r=18b35&utm_medium=ios&triedRedirect=true [https://perma.cc/T6UR-3C4S].

94. We can quibble over the word. Perhaps the Court is best understood to say that in deciding the meaning of a term like "reasonable" or "appropriate," the agency is given the authority to make policy. Fine. That is good enough. Note also that the Court recognized that there are constitutional constraints on Congress's power of delegation. Those constraints should be understood to be those of Article I (the nondelegation doctrine), not Article III; if they were the latter, the whole discussion would make no sense.

95. That view is expressed in *Loper Bright* by Justice Thomas, *see* 144 S. Ct. at 2274 (Thomas, J., concurring), and also Justice Gorsuch, *see* 144 S. Ct. at 2277–79 (Gorsuch, J., concurring), and is elaborated by Hamburger, *supra* note 71.

96. *Loper Bright*, 144 S. Ct. at 2263 (citations omitted).

97. And the present author has said a great deal. *See* Sunstein, *supra* note 77.

itself was consistent with the separation of powers insofar as it ensured judicial primacy at Step 1 and rested on an understanding that Congress had delegated a degree of interpretive authority to agencies.[98] But let us not lose the forest for the trees. (There are a ton of trees here.) No one should doubt that a world of independent judicial interpretation of law, of the sort set out in *Loper Bright*, is entirely consistent with the principle that the executive may not exercise judicial power. Similar things might be said about executive interpretations of regulations issued by the executive; there as well, courts should be in charge, even if agencies get to resolve genuine ambiguities.[99]

B. Don't Think of an Elephant

There is an elephant in the room. It will be noticed that every day, the executive does exercise judicial power, *in the sense that it engages in adjudication*.[100] This area of law is unusually complex, and there do not appear to be clear rules. But after *Crowell v. Benson*,[101] it is clear that some adjudicatory action by executive agencies does not offend Article III. Does this mean that the executive may, in fact, exercise judicial authority?

The short answer is yes! The longer answer is that the executive may exercise judicial authority, but only if it is sufficiently constrained and supervised by Article III courts.[102] The relevant set of constraints and supervisions is meant to protect liberty.[103] The many twists and turns, and the instability of current law, need not detain us here. Some people are skeptical of *Crowell v. Benson* and think that it gravely undermines the separation of powers. Other people think that the decision, and the exercise of some adjudicatory power by executive agencies, is consistent with longstanding separation-of-powers traditions and maintains fidelity with Article

98. *See Loper Bright*, 144 S. Ct. at 2294–2311 (Kagan, J., dissenting).

99. *See* Kisor v. Wilkie, 588 U.S. 558 (2019).

100. See, for example, the Social Security Administration.

101. 285 U.S. 22 (1932); *see also* CFTC v. Schor, 478 U.S. 833 (1986).

102. *See id.* For the best discussion, see Richard H. Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988).

103. *See id.* at 963.

III *so long as Article III judges are available to maintain fidelity to law, and also to ensure that agency factfinding has a sufficient basis in law*. For what it is worth, I tend to agree with the latter view. For present purposes, the key point is that however heated, these are ultimately disputes among most-of-the-time friends, both committed to maintaining separation between executive and adjudicatory authority.

C. Concerns and Qualms

Suppose that judicial interpretation of law turned out to be highly unreliable. Perhaps judicial interpretation of statutes is uninformed; perhaps it is driven by policy considerations; perhaps judges have the wrong theory of interpretation. In the context of statutes, perhaps judges are wooden textualists (and let us suppose they are wrong to be that). Or perhaps they are purposivists (and let us suppose they are wrong to be that). Suppose too that by contrast, the executive branch follows the right theory of interpretation, and that it is both honest and excellent in following that theory. If so, we might not be so enthusiastic about forbidding the executive from exercising the judicial power.

Here as elsewhere, the best response relies on the most likely assumptions about incentives and capacities. By virtue of its distinctive role, the executive is not likely to be the most reliable interpreter of the law. Because they are judges, judges are likely to be better. Of course there are no guarantees here. But Schmitt's view offers a cautionary note, one that strongly supports the view that the executive may not exercise the judicial power. Unhinging the State, to adopt Schmitt's view, can be a terrific idea.

VI. THE EXECUTIVE MAY NOT EXERCISE THE LEGISLATIVE POWER

What are "all legislative powers"? What is "legislative power"? Let us start very simply, by understanding the term to refer to lawmaking as Article I understands and specifies it. The executive cannot "make law." To be sure, it can issue binding rules, at least under

current law—but if and only if Congress authorizes it to do so.[104] When we say that the executive cannot exercise the legislative power, then, what are we forbidding?

A. Necessary Permission Slip

Here is the central answer. To act, the executive generally needs a permission slip, in the form of authorizing legislation. So the Court ruled in 1952 in *Youngstown Sheet & Steel Tube Co.*,[105] which might be the most important separation-of-powers decision in U.S. history. It follows that the executive cannot address climate change, immigration, or highway safety on its own. The basic idea here is that the national legislature, with its distinctive form of accountability,[106] must authorize the executive branch to act. We can (and should) associate that idea with the goal of ensuring a deliberative democracy,[107] specified in the composition of the House and Senate, the requirement of bicameralism, and the opportunity for presidential signature or veto. The requirement of legislative authorization should also be seen as a check on group polarization, the process by which like-minded people, engaged in discussion with one another, sometimes go to extremes.[108]

The prohibition on exercise of legislative authority by the executive branch should also be associated with the protection of liberty: Needing legislative permission, the executive cannot go after citizens, or their liberty, on its own.[109] Insofar as we are seeking to understand the ban on the exercise of legislative power by the executive branch, that might be the most important justification of all. If

---

104. *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 482–83 (2002).

105. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

106. Gundy v. United States, 588 U.S. 128, 149 (2019) (Gorsuch, J., dissenting).

107. *See* Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, *in* HOW DEMOCRATIC IS THE CONSTITUTION? 102 (Robert A. Goldwin & William A. Schambra eds., 1980); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); DELIBERATIVE DEMOCRACY (Jon Elster ed., 1983).

108. *See* CASS R. SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE (2009).

109. Enderis, *supra* note 2.

we had to choose just one separation-of-powers principle, as the first among equals, this one would be a strong candidate.

B. Complications

Still, there is a counterargument. Suppose that national problems are serious and numerous. Suppose that by virtue of its composition and processes, the national legislature is simply unable to handle those problems.[110] The problem might be gridlock. The problem might be sheer complexity. In that light, we could imagine situations in which exercise of legislative power by the executive branch is absolutely essential; if the executive branch is unable to exercise legislative power, serious and perhaps catastrophic problems will go unsolved.[111]

This might be, and I think should be, dismissed as an unacceptably Schmittian point. But under American law, it is a fair cautionary note, and it has implications for several sets of current controversies. The first involves the nondelegation doctrine.[112] What kinds of constraints does Article I, section 1 impose on a grant of discretionary authority to the executive branch?[113] If the executive branch is exercising broad discretion, is it exercising legislative authority? Some people think so; in their view, very broad discretionary authority just *is* legislative authority.[114] Other people think not; in their view, even very broad discretionary authority counts as executive authority *if it is exercised under and pursuant to a legislative grant of discretion*.[115]

There is an intense debate about the historical pedigree, or not, of the nondelegation doctrine, understood as a restriction on the grant

---

110. *See* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014).

111. For relevant discussion, see Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607 (2016).

112. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 539 (1935).

113. *See* Keith E. Whittington & Jason Iuliano, *The Myth of The Nondelegation Doctrine*, 165 U. PA. L. REV. 379 (2017).

114. Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

115. *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

of discretionary authority to the executive.[116] It now appears that historical support for that doctrine, so understood, is quite weak.[117] There is an equally intense debate about whether and to what extent aggressive judicial enforcement of the nondelegation doctrine would well serve the American people.[118] On one view, such enforcement would protect, at once, liberty and deliberative democracy (or self-government).[119] On another view, such enforcement would disable Congress from acting in such a way as to allow real problems to be solved.[120] In my view, aggressive enforcement of the nondelegation doctrine would be a terrible idea.[121] But one might accept that view while also insisting that the executive may not exercise legislative power, in the sense that it may not make law (and perhaps also in the sense that the most open-ended exercises of discretion are a violation of Article I, section 1).

There is also an intense debate about whether the executive has "emergency power."[122] In the area of foreign affairs, it is generally agreed that the President may act unilaterally to repel a sudden attack.[123] Suppose, however, that there is some kind of domestic crisis, involving (say) a pandemic, an internal rebellion, or potentially

---

116. For a sampling, see, e.g., Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding: A Response to Critics*, 122 COLUM. L. REV. 2323 (2022); Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 NOTRE DAME L. REV. 243, 248 (2021); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81, 87–88 (2021); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence From the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1302 (2021); Whittington & Iuliano, *supra* note 113.

117. *See* Cass R. Sunstein, *Epistemic Communities in American Public Law*, 1 POL. PHIL. 181 (2024).

118. *See* DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS (1999).

119. *See, e.g.*, *Gundy*, 588 U.S. at 149 (Gorsuch, J., dissenting).

120. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

121. *See id.*

122. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

123. *See* H. Jefferson Powell, *The President's Duty to Defend Against Cyber-Attacks*, HARV. L. REV. BLOG (Feb. 22, 2018), https://harvardlawreview.org/blog/2018/02/the-presidents-duty-to-defend-against-cyber-attacks/ [https://perma.cc/8LX6-TP37].

catastrophic environmental harm. May the President act on his own?[124] The general view is that he may not,[125] but the door is not quite shut. There are unresolved questions of history and principle here.[126] (I say, keep that door shut.)

VII. THE JUDICIARY MAY NOT EXERCISE THE LEGISLATIVE POWER

A. Easy

This principle might be the most intuitive of all. Courts are not legislatures, and they are not entitled to legislate. One reason for this principle is that judges lack the right kind of accountability. Consider the kinds of judgments that are involved in questions about (say) clean air, road safety, and immigration. Those judgments require democratic accountability, which judges lack. A system of deliberative democracy cannot tolerate lawmaking by judges. Another reason, and an important one, is that judges do not have the requisite information: Lawmaking calls for acquisition of a lot of knowledge, and the adversarial process, well-suited to the resolution of disputes, is not well-suited to the development of legislation.[127] Call this the epistemic argument for the ban on the exercise of legislative authority by judges.

B. Complications

Judges have long had common law authority, and even in the aftermath of *Erie*,[128] something like the common law tradition is alive and well in American law.[129] Is the common law a form of legisla-

---

124. *See* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385 (1989).

125. *Youngstown*, 343 U.S. at 579.

126. *See* Saikrishna Bangalore Prakash, *The Imbecilic Executive*, 99 VA. L. REV. 1361, 1363–65 (2013) (articulating various positions over the scope of the executive's emergency powers).

127. This is one way of reading Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915). *See* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–03 (1942).

128. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1937).

129. *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

tion? Not technically and not formally in the sense of Article I, section 1—but it does involve what might well be described as the making of law. To take an important contemporary example, administrative law is, in significant part, common law; *Vermont Yankee*[130] is in this respect administrative law's *Erie*.[131] We can have learned discussions of the similarity between legislation, as such, and lawmaking through the common law. Still, the differences are real. In creating common law, courts may not always act incrementally, but they cannot produce a Clean Air Act, an Affordable Care Act, or an Inflation Reduction Act. The fact that they cannot exercise the legislative power is exceedingly important.

VIII. THE JUDICIARY MAY NOT EXERCISE THE EXECUTIVE POWER

Judges may not bring enforcement proceedings; they may not make regulations. As in the case of the immediately preceding principle, one reason is of course accountability. The executive is subject to We the People, which is an important safeguard. Another is epistemic, particularly in the context of regulations. Development and issuance of regulations involving (say) carcinogens calls for a great deal of knowledge, which judges lack.

We could introduce some complications, but they do not have much force, so let's not.

IX. THEY, NOT IT

Is the accumulation of all powers—legislative, executive, and judiciary—in the same hands rightly described as the very definition of tyranny? The arc of human history so suggests. We should unhinge the State, with the aid of the judiciary. We should do that in the name of liberty. We should also do so in the name of deliberative democracy.

---

130. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978).

131. This sentence is cryptic, I know. In short: *Vermont Yankee* tried and kind of failed to stop judge-made common law in the domain of administrative law; *Erie* kind of failed to stop judge-made common law more broadly.

The six separation-of-powers principles are critically important, but as the American constitutional order lives and breathes them, they have different degrees of firmness. We can raise a series of empirical and conceptual challenges to each of the principles. For example, the executive branch exercises broad discretion and creates binding rules.[132] Still, it cannot produce actual legislation. The legislature may not exercise judicial power, and courts may not prosecute anyone.[133] But the executive branch does adjudicate (a lot), and in that sense it exercises judicial power. It would be possible to explore, in far more detail than I have managed to do here, the precise content of each of the six principles and how they might be qualified.

I have attempted to sketch the underlying justifications for each of the six principles. All of them have a great deal to do with liberty. If the legislature cannot exercise executive authority, citizens have two levels of protection, not one. (And the courts make for three.) If the executive cannot exercise legislative authority, citizens are protected against a kind of absolutism.[134] Even if Congress is allowed to grant the executive broad discretionary authority, it much matters that executive authority *must always be granted, not asserted*. If the executive cannot exercise judicial authority in the sense of issuing binding interpretations of the Constitution, federal statutes, and federal regulations, we can secure important features of the rule of law. All of the separation-of-powers principles also have a great deal to do with self-government and in particular with the idea of deliberative democracy.

At the same time, I have identified some complications. If legislators were perfectly reliable in their understanding of the meaning of legal texts, and if judges were likely to go off on larks of their own, we might be a lot more enthusiastic about legislative exercise of judicial authority. If the legislature were blocked and unable to address serious social problems, we might be prepared to welcome

---

132. *See* Merrill & Watts, *supra* note 104.

133. Note, however, that judges may hold people in contempt of court.

134. Roscoe Pound, *The Place of the Judiciary in a Democratic Polity*, 27 A.B.A. J. 133, 133 (1941).

a little, or perhaps a lot, in the way of executive exercise of legislative authority. Institutional judgments are not a matter of logic or arithmetic.

In some times and places, one or more of the six propositions discussed here might be rejected.[135] But suppose that we care, as we should, about liberty and deliberative democracy. In most times and places, each and every one of the six propositions is a terrific bet.[136]

135. For example, it will have been noticed that I have not discussed parliamentary systems.

136. For vivid evidence, see Enderis, *supra* note 2.

THE CICERONIAN ORIGINS OF AMERICAN LAW AND CONSTITUTIONALISM

JACK FERGUSON*

"As all the ages of the world have not produced a greater statesman and philosopher united than Cicero, his authority should have great weight."
—John Adams[1]

"Cicero [was] as great a master in the art of government as in eloquence and philosophy."
—Emer de Vattel[2]

INTRODUCTION

In the summer of 1792, Secretary of State Thomas Jefferson sought to turn President George Washington against Treasury Secretary Alexander Hamilton. After months of newspaper attacks on the administration (orchestrated by Jefferson), Jefferson wrote Washington a letter with various charges against Hamilton.[3] The letter criticized Hamilton's system of public credit and insinuated that he was conspiring to change "the present republican form of government

* Law Clerk, U.S. Court of Appeals for the Sixth Circuit; J.D., Notre Dame Law School. I thank Joel Alicea, A.J. Bellia, Caitlin Ferguson, Rick Garnett, Matthew Mehan, Walter Nicgorski, Jeff Pojanowski, Nathaniel Schetter, and Candace Terman for helpful comments and conversations.

1. 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA xxii (John Stockdale, Picadilly 1794) (1787–1788).

2. EMER DE VATTEL, THE LAW OF NATIONS 19 (Béla Kapossy & Richard Whatmore eds., 2008) (1758).

3. *See* FORREST MCDONALD, ALEXANDER HAMILTON 250–51 (1979).

to that of a monarchy."[4] The President forwarded the message to Hamilton to request his response.

In a lengthy reply, Hamilton refuted the accusations point by point. To answer the charge of subverting the government, he turned it back on his rival. Comparing Jeffersonian populism to the revolutionary populism of ancient Rome, Hamilton wrote:

> *Cato* was the Tory—*Caesar* the whig of his day. The former frequently resisted—the latter always flattered the follies of the people. Yet the former perished with the Republic[;] the latter destroyed it.
>
> No popular government was ever without its Catalines & its Caesars. These are its true enemies.[5]

By invoking Catiline—the leader of a failed coup against the Roman Republic whose name became synonymous with insurrection—and Julius Caesar, Hamilton drew a parallel between himself and the Roman statesman-philosopher Cicero. As the foremost political leader of his day, Cicero had defeated Catiline's conspiracy and fought Caesar's rise to power. If no republic lacked its Catilines and Caesars, Hamilton seemed to suggest, then no republic was without need for a Cicero.

This Article considers the Founding generation's intellectual debt to Cicero. Philosopher, statesman, lawyer, and rhetorician, Cicero was a frequently invoked classical authority in the Anglo-American legal tradition.

Part I situates the reception of Cicero in Enlightenment thought. The eighteenth-century world held him in great esteem for his writings and his political accomplishments. In one sense, there were two Ciceros. Cicero the politician held Rome's highest office, navigated the republic through civil crisis, and defended its constitution

---

4. Thomas Jefferson to George Washington (May 23, 1792), *in* 23 THE PAPERS OF THOMAS JEFFERSON 535, 537 (Charles T. Cullen ed. 1990) [JEFFERSON PAPERS].

5. Alexander Hamilton to George Washington—Enclosure: Objections and Answers Respecting the Administration of the Government (Aug. 18, 1792), *in* 12 THE PAPERS OF ALEXANDER HAMILTON 228, 252 (Harold C. Syrett ed., 1962) [HAMILTON PAPERS]. Hamilton spelled the name "Cataline" in contrast to the traditional "Catiline."

against Catiline, Julius Caesar, and Mark Antony. Cicero the philosopher, meanwhile, wrote some of the most enduring works of ancient thought, including *De Officiis* ("On Duties"), *De Legibus* ("On the Laws"), and *De Re Publica* ("On the Republic").

But in another sense, there was really only one Cicero. His ideas and his actions informed each other in a lifelong feedback loop. As John Dickinson put it in his *Letters from a Farmer in Pennsylvania*, "this great and excellent man['s] vast abilities, and the calamities of his country . . . enabled him, by mournful experience, to form a just judgment on the conduct of the friends and enemies of liberty."[6] It was this legacy that the likes of John Adams, Alexander Hamilton, James Wilson, Joseph Story, and others found so attractive, and they accorded Cicero special authority to comment on law and government.

This Article then considers three aspects of early American law and constitutionalism. Part II studies Cicero's principles of natural law and how they defined natural law theory into the seventeenth and eighteenth centuries. These principles also laid the groundwork for the law of nations, or general law, in early modern legal systems. General law crossed the Atlantic with the common law and served as a backdrop to the adoption of the U.S. Constitution. As a case study, Part II looks at Hamilton's argument for judicial review in *Federalist No. 78* and how he derived it from Cicero and the law of nations.

Part III examines Cicero's republicanism, which shaped American republicanism in three areas—popular sovereignty, institutional structure, and the rule of law. His writings provided source material for early American conceptions of consent-based government, separated or divided power, checks and balances, and constitutionalism. Those who framed the U.S. Constitution and its chief model, the Massachusetts Constitution, had frequent recourse to classical constitutional theory and incorporated Ciceronian principles in their work.

---

6. *See* Letter XI, Letters from a Farmer in Pennsylvania, *in* EMPIRE AND NATION 68, 71 (Forrest McDonald ed., 2d ed. 1999).

Part IV zeroes in on one branch of divided power—executive power. Cicero's political thought and his historical example leading Rome through crisis influenced how some members of the Founding generation conceived of presidential authority. At the level of theory, Cicero provided arguments for the virtues of an energetic executive and the structural advantages of unitary administration. And at the level of practice, his political example was invoked by Hamilton in his response to the Whiskey Rebellion of 1794, a response that set the first post-ratification precedent on the domestic use of military force.

An impressive body of scholarship has already studied the influence that the classical world had on the American Founding.[7] These scholarly accounts tend to survey many classical figures and focus on philosophy or politics. But most accounts give only a passing nod to Cicero and his distinctly legal thought.[8] This Article gives Cicero full-length treatment and considers his unique contributions to American law and constitutionalism, reconstructing his thought as the Founders understood it.

Recovering the Founders' reception of Cicero would enrich the ongoing recovery of an older way of thinking about our law, alternatively called the "general law" approach or the "classical legal tradition." This approach has experienced a remarkable renaissance in recent years.[9] But to fully grasp eighteenth-century general

---

7. This scholarship mostly comes from the disciplines of history, philosophy, and political theory. *See, e.g.*, RICHARD M. GUMMERE, THE AMERICAN COLONIAL MIND AND THE CLASSICAL TRADITION (1963); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 22–28 (1967); Walter Nicgorski, *The Non-Lockean Heritage of the Declaration of Independence*, 21 AM. J. JURIS. 156 (1976); CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS (1994); DAVID J. BEDERMAN, THE CLASSICAL FOUNDATIONS OF THE AMERICAN CONSTITUTION (2008); THOMAS JEFFERSON, THE CLASSICAL WORLD, AND EARLY AMERICA (Peter S. Onuf & Nichole P. Cole eds., 2013); KODY W. COOPER & JUSTIN BUCKLEY DYER, THE CLASSICAL AND CHRISTIAN ORIGINS OF AMERICAN POLITICS (2023).

8. For two recent exceptions, see J. Joel Alicea, *Constitutional Theory and the Problems of Disagreement*, 173 U. PA. L. REV. 321 (2025); MICHAEL C. HAWLEY, NATURAL LAW REPUBLICANISM (2021).

9. *See, e.g.*, William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185 (2024)); William Baude & Robert Leider,

law, we should appreciate the sources from which it arose. As Jud Campbell has written, "accurately understanding the content of law at some point in the past requires appreciating [its] imbedded assumptions" and "then considering whether those assumptions were themselves part of the law."[10] Cicero's work was a common resource for lawyers in the general law tradition, from Grotius and Vattel to Wilson and Story. By reading what they read, we can better understand their sometimes-foreign modes of thinking and lawyering.[11]

Reexamination of Cicero also reveals many conceptual continuities between classical and Anglo-American legal thought. When Founding-era lawyers spoke about things like natural law, general principles of law, "right reason," and natural justice,[12] they were speaking in a Ciceronian dialect. The same goes for their debates over republicanism and forms of government. Tracing the jurisprudential and political commitments that American lawyers shared with Cicero lets us push back against those who cast the early constitutional project as more of a break from the past.[13] As constitutional scholarship experiences what Joel Alicea calls a "natural law

---

The General Law Right to Bear Arms, 99 NOTRE DAME L. REV. 1465 (2024); Danielle D'Onfro & Daniel Epps, *The Fourth Amendment and General Law*, 132 YALE L.J. 910 (2023); William Baude, *Beyond Textualism?*, 46 HARV. J.L. & PUB. POL'Y 1331 (2023); Anthony J. Bellia, Jr. & Bradford R. Clark, *The Constitutional Law of Interpretation*, 98 NOTRE DAME L. REV. 519 (2022); Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 247 (2017); ANTHONY J. BELLIA, JR. & BRADFORD R. CLARK, THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION (2017).

10. Jud Campbell, *Natural Rights, Positive Rights, and the Right to Keep and Bear Arms*, 83 LAW & CONTEMP. PROBS. 31 (2020); *see also* William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 809–10 (2019) ("Tracing a chain of title or a chain of legal authority . . . into the past is normal lawyers' work.").

11. *See* Campbell, *supra* note 9, at 251–53 (discussing the challenges posed by understanding Founding-era constitutional discourse); Jonathan Gienapp, *The Foreign Founding: Rights, Fixity, and the Original Constitution*, 97 TEX. L. REV. ONLINE 115, 115 (2019) ("By our lights, [the Founding] is a foreign world.").

12. *See* Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 LAW & HIST. REV. 321, 339–46 (2021).

13. *Contra, e.g.*, PATRICK J. DENEEN, WHY LIBERALISM FAILED 22–24 (2018) (concluding that the English Enlightenment was a "wholesale rejection of its precedents," including classical thought, and "redefin[ed] shared words and concepts").

moment," it is worth revisiting old "insights and arguments that have lain dormant for . . . many years."[14]

At the same time, it's worth recognizing the limits of what Cicero's thought could offer the Founders. Things like natural law and principles of reason were particular tools used by lawyers in a particular manner. They had limits. They worked in tandem with sources of law like the common law and written law. First principles were important, but not everything, and we should care about the parochial ways in which the Founders adapted them to our legal order.[15]

A note on methodology. Attributing "influence" to this or that writer has its dangers. As one historian puts it, "[w]hen interpreting the elusive processes of intellect and will, [we] rarely have enough evidence to move convincingly from *post hoc* to *propter hoc*."[16] And when dealing with ancient sources, language barriers pose another pitfall. Nonspecialists can easily mishandle Latin and Greek works in translation.[17] This Article treads carefully around such traps.

---

14. *See* J. Joel Alicea, *The Natural Law Moment in Constitutional Theory*, 48 HARV. J.L. & PUB. POL'Y 307, 327 (2025).

15. As Judge Neomi Rao writes, while "the terrain of our law includes the foundational political theory animating the Constitution, not to mention roots resting in the common law and natural law," our law has incorporated these sources in unique ways and "reference to [them] must be bounded by our constitutional system of government." Neomi Rao, *The Province of the Law*, 46 HARV. J.L. & PUB. POL'Y 87, 88, 98 (2023). The natural law itself requires respect for the fixed determinations made by constitution-makers, determinations which can include limits on the power of a legislator or judge. *Id.* at 98.

16. Stephen Botein, *Cicero as Role Model for Early American Lawyers: A Case Study in Classical "Influence"*, 73 CLASSICAL J. 313, 313 (1978).

17. As an example, consider the recent body of scholarship on "fiduciary constitutionalism" claiming that the Constitution imposes fiduciary duties on federal officials, including the President. This scholarship purports to locate the origins of fiduciary constitutionalism in Plato, Aristotle, and Cicero. *See, e.g.*, Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1099–1101 (2004); Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820, 1822 & n.2 (2015); Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2119 (2019). But as Samuel Bray and Paul Miller have demonstrated, this work misreads the classical sources, deriving legal meaning from

First, this Article uses English translations for the convenience of the reader but includes Cicero's Latin where he employed crucial or contested terms.[18] Where available, it notes eighteenth-century writers' own translations of Cicero. When writers or cases quote him in Latin, this Article gives both the original Latin and English translation.

Second, this Article's discussion of Cicero's thought (mostly) centers around works and passages that were extant in the 1700s. This is largely relevant for *De Re Publica*. We have much of the dialogue today after an archival discovery in 1819, but the Founding generation had only fragments. This Article traces which fragments early Americans had, noting how they were preserved by writers from late antiquity through the Renaissance.

Third, direct citation is stronger than inference. This Article grounds its claims about "influence" in precise passages or lines of Cicero's cited in eighteenth-century writings. Taking the "Founders' bookshelf" approach,[19] it asks how the likes of Adams, Hamilton, Wilson, Story, and others would have read and understood Cicero as a legal authority, constitutional theorist, and historical figure.

Of course, in many instances where English or American lawyers cited Cicero, they probably would have made the same claim even without Cicero. Blackstone, for example, cited Cicero in arguing against ex post facto laws.[20] Blackstone and Cicero were, in turn,

---

English translations where the original Latin or Greek language bore no such meaning. *See* Samuel L. Bray & Paul B. Miller, *Against Fiduciary Constitutionalism*, 106 VA. L. REV. 1479, 1484–91 (2020).

18. This Article uses the Loeb Classical Library editions of Cicero, which are valuable for their side-by-side facing Latin and English translation.

19. *See* Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1188 (2019); *see also* David Lundberg & Henry F. May, *The Enlightened Reader in America*, 28 AM. Q. 262 (1976) (cataloguing the contents of Founding-era libraries).

20. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 46 & n.e (1753).

invoked on this point during ratification of the U.S. Constitution.[21] In all likelihood, the Founding generation would have disliked ex post facto laws even without Blackstone, and Blackstone would have disliked ex post facto laws even without Cicero.

But *A* still may have "influenced" *B* even if *A*'s belief were not the but-for cause of *B*'s belief. Sources were more than window dressing. The Founders' legal and political culture was one in which writers relied on authorities to situate claims within existing traditions and to maximize rhetorical effect. And on a deeper level—if we think about the young Adams or the young Story in school—their views on law and government came from *somewhere*. Cicero's work, like that of Blackstone or Aristotle, would have been among their first encounters with the most basic and enduring questions of law, government, and human nature.

Scholars have not always taken the rosiest view of Cicero. One states that his "writings may be faulted for only being derivative of the earlier Greek historians," and that his "constitutional narrative is . . . blinded by his political grudges and predilections."[22] Another contends that "Cicero's thought does not have any coherent philosophical system."[23] Yet another writes that *De Re Publica* was "unphilosophical" and "only rhetoric."[24]

Others have doubted that Cicero had any serious influence on American law and constitutionalism. One writes that "Enlightenment readers took inspiration from Cicero, but they did not as a rule think of him as the inaugurator of a theoretical vision that

---

21. *See An Impartial Citizen VI*, PETERSBURG VIRGINIA GAZETTE (Mar. 13, 1788), *in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 492, 493 (John P. Kaminski et al. eds.) [DOCUMENTARY HISTORY] ("*Ex post facto* laws are universally allowed to be the most dangerous ingredients of any government. . . . The learned Judge Blackstone . . . quotes Cicero, the most learned, and perhaps the wisest of the ancient Romans, who expresses his detestation of such laws in the most nervous and energetic language.").

22. BEDERMAN, *supra* note 7, at 70.

23. Matthew Fox, *Cicero During the Enlightenment*, *in* THE CAMBRIDGE COMPANION TO CICERO 318, 319 (Catherine Steel ed., 2013).

24. MOSES FINLEY, POLITICS IN THE ANCIENT WORLD 128 (1983).

could be taken as more than a vague foundation for their own endeavors. . . . [I]t is a fallacy to imagine that Cicero played a particularly prominent role in the founding values of the American constitution."[25] Another scholar agrees that Cicero "had little to contribute" by 1787.[26]

The Founding generation would not have shared any of those assessments. Adams, Hamilton, Wilson, Story, and others made Cicero an express intellectual anchor of their work. So did their European predecessors, from Grotius and Vattel to Coke, Locke, Mansfield, and Blackstone. Cicero had much to teach them. To the extent their law and constitutionalism is ours today, his relevance endures.

I. CICERO: PHILOSOPHER AND STATESMAN

Because Cicero took part in public life, he stands apart from those like Plato or Aristotle whose biography had little connection to their philosophy. Some historical background will help set the stage for how the Founding generation understood him.

A. Cicero's Life and Times

Born in 106 B.C., Marcus Tullius Cicero came from provincial origins.[27] His upper middle class family lived some 70 miles south of Rome and was "undistinguished and unknown to the Roman people."[28] The Roman historian Plutarch tells us that the Cicero family name was thought to come from *cicer*, Latin for "chickpea" or "legume."[29] When the young Marcus first entered politics, Plutarch wrote, his friends urged him to change his name and find something more respectable. He refused and replied that he would make

25. Fox, *supra* note 23, at 319–20.

26. David S. Weisen, *Cicero's Image in America and the Discovery of* De Republica, 2 HIST. CLASSICAL SCHOL. 159, 164 (Stanley M. Burstein ed. 2020).

27. The biographical and historical material in Part I.A is drawn from ANTHONY EVERITT, CICERO (2003) and ANDREW LINTOTT, THE CONSTITUTION OF THE ROMAN REPUBLIC (1999). Direct quotations have individual footnotes in this subsection.

28. Catherine Tracy, *Cicero's* Constantia *in Theory and Practice*, *in* CICERO'S PRACTICAL PHILOSOPHY 79, 107 (Walter Nicgorski ed., 2012).

29. 2 PLUTARCH, LIVES 408–09 (Arthur Hugh Clough ed., 2001) (second century A.D.).

his name "more glorious than that of the Scauri or Catuli," two prominent political families.[30]

Cicero went to Rome for his studies. He learned rhetoric, law, and philosophy with leading scholars of the day and spent time in military service. Then, as a young professional, he began practicing law and attracted notice for his rhetorical abilities.

He entered Roman society in a period of political turbulence. Animosity between the two classes, the patricians and plebeians, threatened the stability of the Roman state, as did years of civil war. Two generals, Marius and Sulla, spent several years (during Cicero's twenties) chasing each other around the Italian peninsula and terrorizing the public. Sulla was notorious for his proscriptions, which condemned many of Marius's supporters (and indiscriminate others) to death and confiscated their property. Cicero gained in his early years an appreciation for political stability, the rule of law, and limits on governmental power.

Rome had an unwritten constitution. In the Roman Republic, the city's aristocrats held great sway over government, but the people had a voice as well. Elections took place in various assemblies, or *comitia*, as did votes on proposed legislation, declarations of war, and other matters. Administrative authority, or *potestas*, resided in a number of elected magistracies. These magistracies were sequentially ordered in the *cursus honorum*; one had to hold lower office before ascending to higher office.

The highest office was the consulship. Rome elected two consuls annually; they wielded *imperium*, or supreme power, the highest form of *potestas*. They commanded the Roman army in battle, convened popular assemblies to propose and pass legislation, and acted as chairs of the Senate. The Roman Senate was a standing deliberative body composed of hundreds of patricians and ex-magistrates. The Senate exercised an advisory power called *auctoritas*, and the Senate's approval was expected before policy could go into effect. The Senate and the consuls could appoint a dictator out of

30. *Id.* at 409.

necessity in military emergencies. Dictators exercised broad power but only for short terms.

With the end of the civil war, Cicero's legal career took off. He gained renown for his trial skills and won an acquittal as defense counsel in a high-profile capital case. In 76 B.C., he ran for the position of Quaestor (treasury official, first on the *cursus honorum*) and won. He served in a Sicilian province, where Plutarch reported that after the people "had experience of his care, justice, and clemency, they honored him more than ever they did any of their governors before."[31]

Cicero successfully scaled the *cursus honorum*, serving as Aedile (public works administrator) in 69 B.C. and Praetor (judicial official) in 66 B.C. At age 42, he was elected consul. For a *novus homo*, or "new man" lacking patrician heritage, this was a remarkable feat. As one biographer puts it, "[i]n less than twenty years, Cicero had risen from being a little-known lawyer from the provinces to being joint head of state of the greatest empire in the known world."[32] His fellow consul, Gaius Antonius Hybrida, was unimpressive and content to let Cicero govern unilaterally during the year 63 B.C.

Cicero's signature accomplishment as consul was suppressing an insurrection led by Lucius Sergius Catiline. Catiline had run for consul against Cicero, and when he lost he began to flirt with alternative methods of gaining power. Catiline came from an aristocratic family but caucused with the *populares*, or populist faction. He opposed the status quo more from a desire for personal gain, however, than from sympathy for the people. The Roman historian Sallust wrote that Catiline "had been assailed by the greatest passion for seizing control of the government, and he did not consider it at all important by what means he achieved his objective."[33]

After his consular ambitions stalled, Catiline had allies gather an army north of Rome. He and a ring of conspirators then planned to

31. PLUTARCH, *supra* note 29, at 412.

32. EVERITT, *supra* note 27, at 94.

33. SALLUST, BELLUM CATILINAE 27 (J.C. Rolfe trans., Loeb Classical Library 2013) (c. 40 B.C.).

assassinate Cicero and many leading Senators. With the government decapitated, he could then march his army into the city and seize power.

Cicero had long been wary of Catiline's revolutionary tendencies and kept watch on him through informers. He soon learned of the planned coup and let the Senate know. This was as direct a threat the republic had faced since the civil war of Marius and Sulla decades before. The Senate sent troops out to confront Catiline's army.

Trying to save face, Catiline remained in the city rather than flee to his men. In the next session of the Senate, with Catiline present, Cicero delivered the first of a series of orations, *In Catalinam* ("Against Catiline"), denouncing the revolutionary and his conspirators. Unmasked, Catiline left Rome to join his forces. Cicero had the other conspirators arrested and summarily executed. The legality of this measure was uncertain, since Roman law ordinarily prohibited the execution of citizens without trial. But Cicero justified it under the emergency powers the Senate had granted him to combat the insurrection. Catiline later died in battle against the Roman army.

If Cicero was famous before his election as consul, he was now the greatest Roman of his day. His decisive action had put down a serious threat to the state, even if he later presented it as a closer call than it might have been. The Catilinarian affair cemented his legacy as an effective statesman, unmatched rhetorician, and defender of the constitutional order.

Cicero's post-consulship career proved more of a mixed bag. As a former magistrate, he sat in the Senate and attempted a reconciliation between the patricians and plebeians. He himself was neither. As a *novus homo*, he had never been truly accepted by the senatorial class, but he disliked radical plebeian reformers who, in his view, sought more change than the republic could accommodate. His pride alienated some who might otherwise have been his allies. According to Plutarch, Cicero "offended very many, not by any evil action, but because he was always lauding and magnifying him-

self . . . neither Senate nor assembly of the people, nor court of judicature could meet, in which he was not heard to talk of Catiline."[34] Humility was never his strong suit.

Subsequent years saw the rise and fall of the First Triumvirate and the assassination of Julius Caesar. After Caesar's death, Cicero experienced a brief and intense revival in popularity for his opposition to Mark Antony. Now an elder statesman, Cicero delivered a series of orations, the *Philippics*, against Antony for which he received great acclaim.

Cicero tried to recruit the young Gaius Octavian, Caesar's adopted son, to the republican side. But Octavian and Antony made common cause, and with Marcus Lepidus formed the Second Triumvirate in 43 B.C. Proscriptions followed. Antony added Cicero's name to the list of the condemned over Octavian's objections.[35] A centurion and his men found Cicero as he was departing the country and executed him.

Rome ceased to be a republic. Octavian, restyled as Caesar Augustus, became emperor. Plutarch reported that later in life, Augustus once found his grandson reading one of Cicero's works. The boy tried to hide it out of fear, but the emperor told him: "My child, this was a learned man, and a lover of his country."[36]

Cicero's political career would have been legacy enough. But he was a prolific writer as well, leaving behind works on philosophy, ethics, politics, law, and rhetoric. Many of his speeches and letters also remain with us.

Three of his works rank among the most influential of classical thought. First, his *De Re Publica* ("On the Republic").[37] Composed in the early 50s B.C., *De Re Publica* set out Cicero's reflections on Roman constitutionalism and good government. For the Latin

34. PLUTARCH, *supra* note 29, at 424.

35. *Id.* at 439 ("Caesar, it is said, contended earnestly for Cicero the first two days; but on the third day he yielded and gave him up.").

36. *Id.* at 441.

37. CICERO, De Re Publica, *in* DE RE PUBLICA, DE LEGIBUS (Clinton W. Keyes trans., Loeb Classical Library 1928) (c. 54–51 B.C.) [hereinafter DE RE PUBLICA].

West, Cicero laid the foundation of the idea of republicanism. Cicero combined historical analysis of the Roman constitution with an argument for its structure—a mixed constitution—as the best practically available form for a state. The work also considered natural law's role in grounding government. It concluded with the *Somnium Scipionis* ("Scipio's Dream"), a mystical vision of the cosmos recounted by the dialogue's protagonist, Scipio.

Although the dialogue's complete text was lost, many passages survived through quotation and commentary in the works of Latin writers like Lactantius, Augustine, Macrobius, and Nonius.[38] Through these surviving pieces, the dialogue's general arguments were well known even though the precise text was not always available. In 1819, Cardinal Angelo Mai discovered much of the lost text on a palimpsest in the Vatican libraries and had it published a few years later.[39]

Second, Cicero's *De Legibus* ("On the Laws") investigated the nature and origins of law.[40] He wrote it as a sequel to *De Re Publica*, but never finished it. *De Legibus* probed the relationships between law and religion, law and reason, and natural law and civil law. He outlined a legal code for his ideal constitutional republic and proposed a system of administrators.

De Re Publica and *De Legibus* are dialogues, and dialogues always pose a hermeneutical problem. The arguments of one speaker cannot be automatically attributed to Cicero himself. Cicero's classical skepticism led him to test opposing views by subjecting them to Socratic debate (and as a lawyer, he was keenly aware of the truth-finding capacity of the adversarial process). As Martha Nussbaum suggests, classical dialogues are an invitation to philosophize—a stimulant as much as a lecture—and should be read "not as a tradi-

38. *See* PAUL MACKENDRICK, THE PHILOSOPHICAL BOOKS OF CICERO 258–60 (1989).

39. *See* Weisen, *supra* note 26, at 167–68.

40. CICERO, De Legibus, *in* DE RE PUBLICA, DE LEGIBUS, *supra* note 37 (unfinished, but written 50s and 40s B.C.) [hereinafter DE LEGIBUS].

tion of positions, but as a tradition of argument and counter-argument."[41] This Article considers an argument to be Cicero's only when, as Jed Atkins writes, "the dialogue as a whole endorses [it]."[42]

Third, Cicero's *De Officiis* ("On Duties") dealt with ethics.[43] Writing in the Stoic tradition, he argued that the moral or just course of action is also always the most useful or practical one. He rejected any divergence between morality and utility. The work drew on the full range of Cicero's professional experience and touched on oratory, statesmanship, public administration, the law of war, piracy, economics, trade, public credit, property law, and poetry. Written in Cicero's final years as the republic collapsed, *De Officiis* survived as a classical guidebook on the virtuous human life. It was one of the first books printed on Gutenberg's press, a testament to its enduring salience.[44]

B. The Reception of Cicero

Cicero was immediately a popular subject for commentators and historians. Sallust began writing his history of the Catilinarian conspiracy before Cicero had died. A century later, Plutarch wrote a colorful biography of Cicero comparing him to the Greek orator Demosthenes. In the fifth century, the Roman writer Macrobius wrote a monograph on Scipio's Dream from *De Re Publica*.[45] Thanks to Macrobius, Scipio's Dream was the longest extant part of the text until 1819.

Christian authors embraced Cicero. Lactantius, an early Christian writer and advisor to the emperor Constantine, deemed Cicero "at

41. Martha C. Nussbaum, Comment, *Symposium on Classical Philosophy and the American Constitutional Order*, 66 CHI.-KENT L. REV. 213, 213 (1990).

42. JED ATKINS, CICERO ON POLITICS AND THE LIMITS OF REASON 44 (2013).

43. CICERO, DE OFFICIIS (Walter Miller trans., Loeb Classical Library 1913) (44 B.C.).

44. HAWLEY, *supra* note 8, at 90.

45. MACROBIUS, COMMENTARY ON THE DREAM OF SCIPIO (William Harris Stahl trans., Columbia University Press 1990) (c. 430).

once perfect orator and supreme philosopher."[46] Lactantius preserved key parts of *De Re Publica* in his treatise *Divine Institutes* by block-quoting and commenting on them.[47] In his *Confessions*, Augustine credited Cicero's work with orienting him toward the study of philosophy and initiating his conversion to Christianity.[48] Augustine's *City of God* engaged extensively with Cicero's thought and cited him over one hundred times.[49] Jerome, the translator of the Vulgate, wrote that he read so much Cicero that he was accused by God in a dream of being a Ciceronian rather than a Christian.[50]

Medieval scholastics, concerned as they were with the baptism of classical philosophers, believed that Cicero's works contained universal truths accessible by reason.[51] Macrobius's commentary on Scipio's Dream became a key source for the scholastic Neoplatonist revival.[52] Thomas Aquinas's *Summa Theologica* cited Cicero over one hundred times on natural law, virtue, and other subjects. Cicero featured heavily across disciplines, in the work of academics like John of Salisbury and political writers like Marsilius of Padua.[53] Medieval European law was also indebted to Cicero. Jurists like Huguccio of Pisa drew on Cicero in well-circulated legal commentaries,[54] and Dante's writings on legal interpretation cited Cicero.[55]

Cicero's popularity reached new heights in the fourteenth century, largely thanks to the archival discovery of many of his letters

---

46. LACTANTIUS, DIVINE INSTITUTES 191 (Anthony Bowen & Peter Garnsey trans., Liverpool University Press 2004) (c. 300).

47. *See id.* at 346 (quoting Cicero's formulation of natural law).

48. AUGUSTINE, CONFESSIONS 38–39 (F.J. Sheed trans., Hackett Publishing Co. 1993) (c. 400).

49. *See* MACKENDRICK, *supra* note 38, at 259.

50. *See* Jerome, Letter 22 (To Eustochium), *in* SELECT LETTERS OF ST. JEROME 53, 125–27 (F.A. Wright trans., Loeb Classical Library 1954) (fifth century).

51. BART WAUTERS & MARCO DE BENITO, THE HISTORY OF LAW IN EUROPE 49 (2017).

52. *See* Caroline Bishop, *Roman Plato or Roman Demosthenes? The Bifurcation of Cicero in Ancient Scholarship*, *in* BRILL'S COMPANION TO THE RECEPTION OF CICERO 283, 302–304 (William H.F. Altman ed., 2015).

53. *See generally* CARY J. NEDERMAN, THE BONDS OF HUMANITY: CICERO'S LEGACIES IN EUROPEAN SOCIAL AND POLITICAL THOUGHT CA. 1100–CA. 1550 (2020).

54. *See* WAUTERS & DE BENITO, *supra* note 51, at 61–62.

55. *See* DANTE ALIGHIERI, DE MONARCHIA 89 (Aurelia Henry trans., Houghton Mifflin & Co. 1904) (1313).

by Petrarch.[56] In the sixteenth century, humanist scholar Carlo Sigonio compiled Cicero's fragmentary writings in a single volume.[57] His compilation confirms that certain parts of *De Re Publica* were still around, despite the loss of the whole.

Early modern thought continued to hold Cicero in high esteem. On the continent, international law jurists like Hugo Grotius, Samuel von Pufendorf, and Emer de Vattel considered Cicero a foundational writer on the law of nature and the law of nations.[58] Grotius, Pufendorf, and Vattel drew on Cicero and the classical concept of *foedera* ("treaties") in work which influenced the American Founders' ideas of federalism.[59] Montesquieu wrote a short essay, *Discourse on Cicero*, where he wrote that it was Cicero "who of all the ancients had the most personal merit, and whom I would prefer to resemble."[60] He praised Cicero as "the liberator of his fatherland and the defender of liberty" who deserved "the title of philosopher no less than Roman orator."[61]

Across the channel, John Locke grounded his moral and political philosophy in Cicero's thought, and his library held more works by Cicero than nearly any other author.[62] Conyers Middleton's *Life of Cicero*, published in 1741, was one of the most popular books of its day.[63] This biography, like Plutarch's, was as a key conduit for re-

56. Martin McLaughlin, *Petrarch and Cicero: Adulation and Critical Distance*, *in* BRILL'S COMPANION, *supra* note 52, at 19, 21.

57. CARLO SIGONIO, FRAGMENTA CICERONIS PASSIM DISPERSA (1560)

58. *See infra* Part II.B.1; *see also generally* BENJAMIN STRAUMANN, ROMAN LAW IN THE STATE OF NATURE (2015); HAWLEY, *supra* note 8, at 94–116.

59. ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 18–19 (2010).

60. Montesquieu, *Discourse on Cicero* (1717), *in* MONTESQUIEU: DISCOURSES, DISSERTATIONS, AND DIALOGUES 72, 72 (David W. Carrithers & Philip Stewart eds. 2020).

61. *Id.* at 73.

62. *See generally* TIM STUART-BUTTLE, FROM MORAL THEOLOGY TO MORAL PHILOSOPHY: CICERO AND VISIONS OF HUMANITY FROM LOCKE TO HUME (2019); *see id.* at 19; HAWLEY, *supra* note 8, at 137–85.

63. *See* Robert G. Ingram, *Conyers Middleton's* Cicero, *in* BRILL'S COMPANION, *supra* note 52, at 96, 112–13.

telling Cicero's life and times. John Adams "warmly recommend[ed]" Middleton to friends.[64] Scottish philosophers like David Hume and Adam Smith were heavily influenced by Cicero,[65] as were English jurists like Lord Mansfield who urged young lawyers to read *De Officiis* as an introduction to "general ethics."[66]

Cicero was also a key figure in the English republican tradition. Radical Whigs and Commonwealthmen like Henry Neville, Algernon Sidney, Thomas Gordon, John Trenchard, and Middleton praised Cicero's thought and example, holding him up as a guardian of popular liberty against arbitrary rule.[67] Their work circulated widely in the American colonies and helped fuel resistance to British rule. In certain enclaves, Cicero became a beacon for the Revolution. For example, one Boston clergyman who spoke out against the Stamp Act declared that Cicero "fell as one of the most glorious advocates of liberty that the world ever saw."[68]

Education in eighteenth-century America was education in the classics.[69] Students were steeped in ancient literature and learned to read and write Greek and Latin from an early age. The basics of formal schooling typically consisted of Homer, Aristotle, Cicero, Virgil, and the Greek New Testament. Students learned rhetoric from Cicero's speeches and modeled their prose after his. Translating these speeches was a standard entrance requirement for the

64. John Adams to William Tudor (Aug. 4, 1774), *in* 2 THE PAPERS OF JOHN ADAMS 125, 127 (Robert J. Taylor ed., 1979) [ADAMS PAPERS].

65. *See* Daniel J. Kapust, *Cicero and Eighteenth-Century Political Thought*, *in* THE CAMBRIDGE COMPANION TO CICERO'S PHILOSOPHY 268, 273–77 (Jed W. Atkins & Thomas Bénatouil eds., 2021); FONNA FORMAN-BARZILAI, ADAM SMITH AND THE CIRCLES OF SYMPATHY 6–8, 106–31 (2010).

66. LORD MANSFIELD, A TREATISE ON THE STUDY OF LAW WITH DIRECTIONS TO STUDENTS 49 (1797). Locke did the same, recommending *De Officiis* for the study of "the Principles and Precepts of Vertue, and the Conduct of [] Life." JOHN LOCKE, SOME THOUGHTS CONCERNING EDUCATION § 185 (1693).

67. *See* Weisen, *supra* note 26, at 161–63.

68. CHARLES W. AKERS, CALLED UNTO LIBERTY: A LIFE OF JONATHAN MAYHEW 133 (1964).

69. The material in these two paragraphs on Founding-era education comes from RICHARD, *supra* note 7, at 12–38.

likes of Princeton (then the College of New Jersey), Columbia (then King's College), Harvard, Brown, and William and Mary.

University students studied all manner of ancient works, including Xenophon, Plato, Polybius, Plutarch, Tacitus, Horace, Ovid, Sallust, and Livy. Academic dissertations applied Cicero's political writings to contemporary debates over resistance and revolution. Familiarity with the liberal arts represented to European powers that the American colonials were more than provincial frontiersmen; they could earn what Alison LaCroix describes as "membership in the broader Atlantic world of letters."[70] Early American society was deeply classically literate.

Several editions of Cicero's works circulated in this period and would have sat on the Founders' bookshelves. They included *M. Tulii Ciceronis Opera Omnia* ("The Complete Works of Marcus Tullius Cicero") by the Dutch philologist Cornelis Schrevel and *M. Tullii Ciceronis Opera* ("The Works of Marcus Tullius Cicero") by Thomas Hearne.[71] These tomes would have been an invaluable resource. John Adams owned Schrevel's Cicero; Alexander Hamilton had Hearne's.[72]

Adams wrote that "as all the ages of the world have not produced a greater statesman and philosopher united than Cicero, his authority should have great weight."[73] During the American Revolution, he declared that his "revolution-principles" were "the principles of Aristotle and Plato, of Livy and Cicero, of Sydney, Harrington, and Lock[e]."[74] When he and young John Quincy were delayed returning from a diplomatic mission to France, they passed the time by

---

70. Alison L. LaCroix, *The Lawyer's Library in the Early American Republic*, *in* SUBVERSION AND SYMPATHY: GENDER, LAW, AND THE BRITISH NOVEL 250, 253 (Martha C. Nussbaum & Alison L. LaCroix eds. 2013).

71. *See* CORNELIS SHREVEL, M. TULII CICERONIS OPERA OMNIA (1661); THOMAS HEARNE, M. TULLII CICERONIS OPERA (1783).

72. The "Libraries of Early America" database has catalogued many Founding-era personal libraries. For Adams's library, see https://www.librarything.com/catalog/JohnAdams [https://perma.cc/7D4C-ERS3], and for Hamilton's, see https://www.librarything.com/catalog/AlexanderHamiltonI [https://perma.cc/6HRF-U2YW].

73. 1 DEFENCE, *supra* note 1, at xxii.

74. John Adams, Novanglus No. 1, *in* 2 ADAMS PAPERS, *supra* note 64, at 226, 230.

translating Cicero in their hotel.[75] Adams bemoaned the loss of the text of *De Re Publica*,[76] but liberally quoted the passages and fragments that remained. He also had a hand in picking the nation's motto, *e pluribus unum*, and may have clipped it from *De Officiis*.[77]

Hamilton wrote essays under the pseudonym "Tully," the affectionate diminutive of Cicero's family name "Tullius."[78] Ever the student of classical history, Hamilton viewed statesmanship and American politics through a Ciceronian lens. He argued that "the Catalines and Caesars of [a] community" described "men to be found in every republic," self-serving politicians "who [lead] the dance to the tune of liberty without law."[79] He wrote that "[e]very republic at all times has its Catalines and its Caesars . . . . arbitrary, persecuting, intolerant, and despotic."[80] Hamilton described Aaron Burr as "the Cataline of America" and "as true a Cataline as ever met in midnight conclave."[81] He also called Burr an "embryo-Caesar in the United States."[82] Hamilton cited Cicero favorably in his legal practice, at the Constitutional Convention, and in newspaper

---

75. DAVID MCCULLOUGH, JOHN ADAMS 213 (2001).

76. 1 DEFENCE, *supra* note 1, at xxi ("The loss of his book upon republics is much to be regretted").

77. Adams sat on the committee of the Continental Congress that developed the first seal and motto for the United States. *See* Monroe E. Deutsch, *E Pluribus Unum*, 18 CLASSICAL J. 387, 387–89 (1923). The committee lifted the motto from some classical antecedent, unknown to us but for which Cicero was a possibility, along with Virgil and Horace. *Id.* In *De Officiis*, Cicero wrote of friendship: "When two people have the same ideals and the same tastes, it is a natural consequence that each loves the other as himself; and the result is, as Pythagoras requires of ideal friendship, that several are united in one [*unus fiat ex pluribus*]." DE OFFICIIS, *supra* note 43, at 59 (1.56).

78. *See infra* Part IV.B.2.

79. Catullus No. III (Sept. 29, 1792), *in* 12 HAMILTON PAPERS, *supra* note 5, at 498, 500–01.

80. The Vindication No. 1 (May–August 1792), *in* 11 HAMILTON PAPERS, *supra* note 5, at 461, 463.

81. Alexander Hamilton to Oliver Wolcott, Jr. (Dec. 16, 1800), *in* 25 HAMILTON PAPERS, *supra* note 5, at 257, 257; Alexander Hamilton to James A. Bayard (Aug. 6, 1800), *in* 25 HAMILTON PAPERS, *supra* note 5, at 56, 58.

82. Alexander Hamilton to unknown (Sept. 26, 1792), in 12 HAMILTON PAPERS, *supra* note 5, at 480, 480.

essays. He found things to criticize in Cicero's writings,[83] but on the whole he considered Cicero an indispensable thinker.

So did many others. Thomas Jefferson, when asked about the putative Lockean inspiration for the Declaration of Independence, responded that the Declaration's principles rested on the authority of Cicero and Aristotle as well as Locke.[84] Jefferson's theory of intellectual property may have been adopted from *De Officiis*.[85] John Marshall's biography of George Washington modelled the president's life on Cicero's.[86] Charles Carroll, the wealthy Marylander and only Catholic signatory of the Declaration, declared: "after the Bible . . . give me, sir, the philosophic works of Cicero."[87]

As Cicero was the classical lawyer's lawyer, aspiring practitioners would read his work to hone their rhetorical and legal skills.[88] Universities had general offerings on law, such as James Wilson's *Lectures on Law* given in 1790 at the University of Pennsylvania (then the College of Philadelphia). Wilson's *Lectures* cited Cicero extensively on natural law, republicanism, and other subjects, and he declared that "the jurisprudence of Rome was adorned and enriched by the exquisite genius of Cicero, which, like the touch of Midas, converts every object to gold."[89] He called *De Officiis* "a

---

83. Alexander Hamilton, To Defence No. XX (Oct. 23–24, 1795), *in* 19 HAMILTON PAPERS, *supra* note 5, at 329, 332–33 (critiquing Cicero on a point of just war theory); *see also* Alexander Hamilton, Remarks on an Act Acknowledging the Independence of Vermont (March 28, 1787), *in* 4 HAMILTON PAPERS, *supra* note 5, at 126, 140 ("Neither the manners nor the genius of Rome are suited to the republic or age we live in. All her habits and maxims were military, her government was constituted for war.").

84. Thomas Jefferson to Henry Lee (May 8, 1825), FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/98-01-02-5212 [https://perma.cc/MQX3-XWQV]. Walter Nicgorski suggests that "Lockean generalities dominate in the Declaration primarily because they suggested themselves as the most useful elements in a political consensus, most useful for the purposes at hand," and that they were "but the tip of the iceberg." Nicgorski, *supra* note 7, at 163–64.

85. *See* Jeremey N. Sheff, *Jefferson's Taper*, 73 SMU L. REV. 229 (2020).

86. RICHARD, *supra* note 7, at 36.

87. *See* Oration in Honour of the Late Charles Carroll of Carrollton Delivered Before the Philodemic Society of Georgetown College 21 (Joshua N. Rind ed., 1832).

88. R.H. HELMHOLZ, NATURAL LAW IN COURT 130 (2015)

89. James Wilson, Of the Common Law, *in* 2 COLLECTED WORKS OF JAMES WILSON 749, 760 (Kermit L. Hall & David Hall eds., 2007) [WILSON].

work which does honor to the human understanding and the human heart."[90]

In the generations following the Founding, Cicero became the refuge for those who saw Jacksonian populism as a Caesarian force engulfing the republic. John Quincy Adams, upon losing the 1828 presidential election to Andrew Jackson, reread the *Philippics* in retirement and wrote that they "exhibit the expiring agonies of Roman liberty."[91] Joseph Story, who considered *De Re Publica* the "the most mature" of all Cicero's "splendid labors,"[92] compared Jackson's America to Ceasar's Rome, where "liberty itself expired with the dark and prophetic words of Cicero."[93]

Story repeatedly used Cicero as an authority in his legal treatises on equity, the conflict of laws, and the Constitution.[94] His son William later wrote that his father's "favorites were Aristotle and Cicero."[95] The young Charles Sumner, who studied under Story, grew up reading Cicero and arrived at Harvard Law School as a distinguished Latinist.[96] Sumner worked for the Harvard law library that Story curated, and one can easily imagine the future abolitionist Senator discussing Cicero's natural law late at night with his learned mentor.

---

90. James Wilson, Of the Natural Right of Individuals, *in* 2 WILSON, *supra* note 89, at 1053, 1068.

91. John Quincy Adams, Diary Entry (Apr. 10, 1829) *in* VIII MEMOIRS OF JOHN QUINCY ADAMS, COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848, at 135 (Charles Francis Adams ed., 1876).

92. Joseph Story, The Science of Government as Branch of Popular Education, *in* 2 THE LIFE AND LETTERS OF JOSEPH STORY 183, 188 (William W. Story ed., 1851) [STORY LETTERS].

93. Joseph Story to the Hon. Judge Fay (Feb. 18, 1834), *in* 2 STORY LETTERS, *supra* note 92, at 154, 154.

94. *See* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION (title page), § 325 (1833); 2 *id.* § 525; 3 *id.* § 1782; JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC 898–99 (Lawbook Exchange 2d ed., 2001) (1834); 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1 n.2; § 2; § 3 n.1; § 5 n.2; § 7 n.2; § 18 (Little, Brown & Co., 7th ed. 1857) (1836).

95. William W. Story, Conclusion, *in* 2 STORY LETTERS, *supra* note 92, at 564.

96. ELIAS NASON, THE LIFE AND TIMES OF CHARLES SUMNER 22–26, 39 (1874).

Even as the prominence of the classics waned in the late nineteenth and twentieth centuries, Cicero continued to enjoy great purchase among public intellectuals. Writers as varied as W.E.B. DuBois, Hannah Arendt, and Friedrich Hayek took inspiration from his work.[97]

So did modern American presidents. In 1984, after his famous debate stage quip about Walter Mondale's "youth and inexperience," President Reagan jokingly added: "It was Seneca or it was Cicero, I don't know which, that said 'if it was not for the elders correcting the mistakes of the young, there would be no state.'"[98] President Obama's rhetorical style has been compared to Cicero's, and pundits have suggested that he (or his speechwriters) drew directly from Cicero.[99]

II. THE LAW OF NATURE AND THE LAW OF NATIONS

Cicero wrote extensively on the law of nature and the law of nations. He returned again and again to the relationships between natural law and positive law, international law and local law, and law and human reason. He was not the first to write on these topics. As in many areas, he took Plato and the Stoics as his starting point. The Stoic tradition had long propounded the notion of universal natural laws discoverable by reason.[100] But Cicero's extended treatment of the subject made him the most prominent expositor of the natural law tradition. His work greatly influenced European legal commentators and English and American lawyers and jurists.

---

97. *See* David Withun, *American Archias: Cicero and* The Souls of Black Folk, 13 CLASSICAL REC. J. 384 (2021); Dean Hammer, *Hannah Arendt and Roman Political Thought: The Practice of Theory*, 30 POL. THEORY 124 (2002); F.A. Hayek, *Freedom, Reason, and Tradition*, 68 ETHICS 229, 231 (1958).

98. *See* Transcript, Debate Between the President and Former Vice President Walter Mondale (Oct. 21, 1984), RONALD REAGAN PRESIDENTIAL FOUND., https://www.reaganfoundation.org/media/128828/debate.pdf.

99. *See* Michael J. Cedrone, *Cicero and Barack Obama: How to Unite the Republic Without Losing Your Head*, 20 NEV. L.J. 1177 (2020); Charlotte Higgins, *The New Cicero*, THE GUARDIAN (Nov. 25, 2008).

100. *See* Carli N. Conklin, *The Origins of the Pursuit of Happiness*, WASH. U. JURIS. REV. 195, 235–36 (2015).

A. Cicero's Legal Thought

In *De Legibus*, the characters of Cicero and Atticus debated the nature and origins of law. Atticus asked: "[Do you] not think that the science of law is to be derived from the praetor's edict, as the majority do now, or from the Twelve Tables, as people used to think, but from the deepest mysteries of philosophy?" "Quite right," Cicero answered.[101] "[O]ut of all the material of the philosophers' discussion," he continued, "surely there comes nothing more valuable than the full realization that we are born for Justice."[102] To find out what justice is, Cicero proposed starting "with that supreme Law (*summa lex*) which had its origin ages before any written law (*scripta lex*) existed or any State had been established."[103] The source of this supreme law, he asserted, was "based, not upon men's opinions, but upon Nature."[104]

Cicero then defined law. He stated that "those creatures who have received the gift of reason from Nature have also received right reason (*recta ratio*), and therefore they have also received the gift of Law, which is right reason applied to command and prohibition."[105] Because humans were endowed by nature with the gift of reason, they were expected to live according to that reason. Jed Atkins reminds us that for the ancients, reason was not merely a formal ability to deduct and infer. The ancients "held that reason is substantive and prescriptive. . . . [I]t prescribes what is good, how we should live, and how we should treat one another as social animals."[106]

The same notion of natural law appeared in *De Re Publica* during a debate on justice and injustice between the characters Laelius and

---

101. DE LEGIBUS, *supra* note 40, at 315 (1.17).

102. *Id.* at 329 (1.28).

103. *Id.* at 319 (1.20).

104. *Id.* at 329 (1.28).

105. *Id*. at 333 (1.33). The notion of "right reason" predated Cicero in the work of the Stoic Cleanthes, but the Founders typically considered Cicero the spokesman for Stoicism. RICHARD, *supra* note 7, at 170, 175.

106. Atkins, *supra* note 42, at 5; *see also* MALCOLM SCHOFIELD, CICERO: POLITICAL PHILOSOPHY 114 (2020) (similar).

Philus. Philus defended the argument of the philosopher Carneades that humans should seek whatever is most advantageous to themselves. Though parts of the back-and-forth remain lost (even after the 1819 discoveries), much of it was preserved in the work of the writer Lactantius, including the key passage where Laelius responded to Philus, a particularly elegant description of natural law. Laelius stated:

> True law (*vera lex*) is right reason (*recta ratio*) in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions on good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it altogether. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one ruler and master, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment.[107]

The law of nature was universal, eternal, unchanging, and inscribed on our very being. "Even if there was no written law against rape at Rome," Cicero offered as an example, "we cannot say on that account that [King] Sextus Tarquinius did not break that eternal Law (*lex sempiterna*) by violating Lucretia."[108]

Besides supplying governing norms in the absence of human law, the law of nature also supplied a standard of measurement for human law. "What of the many deadly, the many pestilential statutes

---

107. DE RE PUBLICA, *supra* note 37, at 211 (1.33); *see also* SIGONIO, *supra* note 57, at 7 (preserving this fragment); 3 HEARNE, *supra* note 71, at 380 (same).

108. DE LEGIBUS, *supra* note 40, at 383 (2.10).

which nations put in force? They no more deserve to be called laws than the rules a band of robbers might pass in their assembly," Cicero wrote in *De Legibus*.[109] "The most foolish notion of all is the belief that everything is just which is found in the customs or laws of nations (*leges populorum*). Would that be true, even if these laws had been enacted by tyrants?"[110] Law's ends were "the safety of citizens, the preservation of states, and the tranquility and happiness of human life," he argued, so those that achieved the opposite were "anything but 'laws.'"[111]

The proper role of human law was to apply right reason to facts about human nature. Human law did not have to share all the features of natural law (immutability, universality, and the like). Cicero recognized that humans are imperfect, and that our affairs are contingent and must adapt to changing circumstances. As Jed Atkins summarizes Cicero's view, "[s]o long as law is directed toward justice while it regulates the health of citizens, the security of states, and the happiness of human life, it is to be recognized as genuine law and to possess the authority of such."[112]

Tradition and practice were also sources of authority for Cicero. "[T]he established customs and conventions (*mores institutaque*) of a community . . . are in themselves rules," he stated, "and no one ought to make the mistake supposing that, because Socrates or Aristippus did or said something contrary to the manners and established customs (*consuetudines*) of their city, he has a right to do the same."[113] Cicero believed that customary law had presumptive

109. *Id.* at 385 (2.13).

110. *Id.* at 343–45 (1.42).

111. *Id.* at 383 (2.11).

112. ATKINS, *supra* note 42, at 207.

113. DE OFFICIIS, *supra* note 43, at 151; *see also* CICERO, De Inventione, *in* DE INVENTIONE, DE OPTIMO GENERE ORATORUM, TOPICA 231 (2.67) (H.M. Hubbell trans., Loeb Classical Library 1949) (c. 87 B.C.) [hereinafter DE INVENTIONE] ("Customary law is thought to be that which lapse of time has approved by the common consent of all without the sanction of statute. In it there are certain principles of law which through lapse of time have become absolutely fixed.").

moral authority as a matter of natural law. "[I]t is in a manner prescribed by natural principle (*ius naturale*) that we shall preserve our own customs and laws (*mores legesque*)," he wrote.[114]

Cicero was practical in working out the worldly ramifications of his ideas. Throughout his writings, he restated, expounded, or developed legal principles that applied the law of nature to individuals and states. Self-preservation was the starting point.[115] The human person had a natural right to preserve his or her own life. This right, in turn, meant two things.

First, the human person had a natural right to self-defense. As Cicero put in his speech *Pro Milone*, there "is a law which is a law not of the statute-book, but of nature . . . that if our life should have fallen into any snare, into the violence and the weapons of robbers or foes, every method of winning a way to safety would be morally justifiable."[116]

Second, Cicero defended the right to property, to acquire those things that are useful for preserving human life. "Without any conflict with Nature's laws," he stated, "it is granted that everybody may prefer to secure for himself . . . what is essential for the conduct of life."[117] He also acknowledged the role that positive law played in governing property rights. He saw the need for limits on prop-

---

114. CICERO, De Partitione Oratoria, *in* DE ORATORE BOOK III, DE FATO, PARADOXA STOICORUM, DE PARTITIONE ORATORIA 411 (§§ 130–31) (H. Rackham trans., Loeb Classical Library 1942); *see also* DE INVENTIONE, *supra* note 113, at 329 (2.160) (The "first principles [of justice] proceed from nature, then certain rules of conduct become customary by reason of their advantage; later still both the principles that proceeded from nature and those that had been approved by custom received the [sanction] of the law.").

115. DE OFFICIIS, *supra* note 43, at 13 (1.4).

116. CICERO, Pro Milone, *in* PRO MILONE, IN PISONEM, PRO SCAURO, PRO FONTEIO, PRO POSTUMO, PRO MARCELLO, PRO LIGARIO, PRO REGE DEIOTARIO 17 (§ 10) (Loeb Classical Library, N.H. Watts trans., 1953) (52 B.C.) [hereinafter PRO MILONE].

117. DE OFFICIIS, *supra* note 43, at 289–91 (3.22).

erty "established not by Nature's laws alone . . . but also by the statutes (*leges*) of particular communities, in accordance with which in individual states the public interests are maintained."[118]

As negative corollaries of these two rights, individuals were forbidden from harming or stealing from others. Cicero thus made "the inviolability of the person and property" the cornerstone of his natural law thought.[119]

Natural law could also impose duties on states. The law of war featured prominently in *De Officiis* and *De Re Publica*, with Cicero often drawing on the Roman fetial law. "In the case of a state in its external relations," he wrote, "the law of war (*iura belli*) must be strictly observed."[120] Tracking the right to self-defense for individuals, states had a right to go to war in self-defense. But because of the heavy toll war took on human life, "war is never undertaken by the ideal state, except in defense of its honor or its safety"[121] so that the state "may live in peace unharmed,"[122] Cicero argued. Going to war "without provocation" was unjust, and states had to "proclaim and declare" war and first demand reparation.[123] States had a duty to use diplomacy to avoid war, since diplomacy rested on reason, the defining human characteristic, while war rested on force.[124] When wars concluded, Cicero stressed, states "should spare those who have not been bloodthirsty and barbarous in their warfare," and "ensure protection for those who lay down their arms and throw themselves upon the mercy of [the victor]."[125]

---

118. *Id.* On the extent to which Cicero did or did not consider property rights a matter of natural law, see J. Jackson Barlow, *Cicero on Property in the State*, *in* CICERO'S PRACTICAL PHILOSOPHY, *supra* note 28, at 212.

119. STRAUMANN, *supra* note 58, at 123.

120. DE OFFICIIS, *supra* note 43, at 37 (1.34).

121. DE RE PUBLICA, *supra* note 37, at 211 (1.34).

122. DE OFFICIIS, *supra* note 43, at 37 (1.35).

123. DE RE PUBLICA, *supra* note 37, at 213 (1.35); *see also* DE OFFICIIS, *supra* note 43, at 39 (1.36) ("[N]o war is just, unless it is entered upon after an official demand for satisfaction has been submitted or warning has been given and a formal declaration made.").

124. DE OFFICIIS, *supra* note 43, at 37 (1.34).

125. *Id.* at 37 (1.35).

Cicero discussed principles of interpretation for treaties and truces. Because "[f]idelity to an oath must often be observed in dealings with an enemy,"[126] treaties and truces were to be respected and read according to their natural, reasonable meaning. "Injustice often arises . . . through chicanery, that is, through an over-subtle and even fraudulent construction of the law," he contended. "This it is that gave rise to the now familiar saying, 'More law, less justice.'"[127] Cicero argued that by twisting the meaning of agreements, "a great deal of wrong is committed in transactions between state and state; thus, when a truce had been made with the enemy for thirty days, a famous general [Cleomenes of Sparta] went to ravaging their fields by night, because, he said, the truce stipulated 'days,' not nights."[128]

The law of war applied only to legitimate and declared enemies, however. Pirates, for example, were "not included in the number of lawful enemies, but [were] the common foe of all the world, and with [them] there ought not to be any pledged word nor any oath mutually binding."[129] For this reason, failing to deliver a promised ransom to a pirate would not be considered deception.

In other examples too numerous to count, Cicero wrote on subjects like commercial law, real estate law, rhetoric and trial advocacy, and evidence, bringing the natural law to bear on each subject. Cicero's legal thought and the principles he developed became some of the most influential treatment of law in the Western tradition.

B. The Reception of Cicero's Legal Thought

In the seventeenth and eighteenth centuries, Cicero's writings on the law of nature and the law of nations were discussed across continental Europe and England by commentators, lawyers, and courts. Through these conduits, Cicero's legal thought reached

126. *Id.* at 385 (3.107); *accord id.* at 387 (3.108) ("[There is] no right to confound by perjury the terms and covenants of war made with an enemy.").

127. *Id.* at 35 (1.33).

128. *Id.*

129. *Id.* at 385–87 (3.107).

North American shores and shaped American ideas of natural law, general law, and constitutionalism.

1. International Law and Early American Law

With the publication of Hugo Grotius's landmark treatise *De Jure Belli ac Pacis* ("The Law of War and Peace") in 1625, Cicero's legal thought took on a new stature in the European world and formed the "backbone of [a] new natural law tradition."[130]

De Jure Belli examined the law of international relations and its basis in the law of nature. Its impact was such that Grotius came to be seen as "the defining initiator of modern natural law."[131] Grotius drew heavily on Cicero and made his work the foundation of the treatise—including by drawing the title of the treatise from a line in Cicero's speech *Pro Balbo*.[132] Grotius cited Cicero nearly three hundred times in *De Jure Belli*.[133] In the opening pages, he established the importance of studying international law by referencing Cicero, and he set up Carneades, whose views Laelius had argued against in *De Re Publica*, as a spokesman for the anti-natural law viewpoint.[134] Grotius then took Cicero's definition of war as the starting point for his own discussion.[135]

Even in places where he did not directly quote Cicero, his language is clearly Ciceronian. For instance, he defined a commonwealth as a "complete association of free men, joined together for

130. HAWLEY, *supra* note 8, at 96. Cicero's writings were also the basis for the work of legal commentators that Grotius drew on, like Francisco Suárez. *See, e.g.*, FRANCISCO SUÁREZ, DE LEGIBUS AC DEO LEGISLATORE 40–41, 60, 173, 185, 220 *in* SELECTIONS FROM THREE WORKS (Gwladys L. Williams, Ammi Brown & John Waldron trans., Oxford Clarendon Press 1944) (1612) (citing Cicero's theory of natural law).

131. Knud Haakonssen, *Early Modern Natural Law Theories*, *in* THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE, at 76, 80 (George Duke & Robert P. George eds., 2017).

132. *See* STRAUMANN, *supra* note 58, at 38.

133. *Id.* at 76 & n.118.

134. HUGO GROTIUS, DE JURE BELLI AC PACIS 9–11 (Francis W. Kelsey trans., Oxford Clarendon Press 1925) (1625).

135. *Id.* at 33.

the enjoyment of rights and for their common interest," a restatement of Cicero's definition.[136] One reviewer of the treatise noted that the "whole glory of the Latin philosophers is represented in Cicero, whose two works [*De Legibus* and *De Officiis*] can speak volumes. . . . Grotius is indebted at many points to these books, even when he does not show it."[137]

For Grotius, the law of nature was something external to and above human law. Citing *De Re Publica*, Grotius defined the law of nature as "a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality or moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God."[138] Human law, on the other hand, was conventional and could take multiple forms. Grotius divided human law into municipal law ("that which emanates from the civil power") and the law of nations (that "which is broader in scope than the municipal law" and "which has received its obligatory force from the will of all nations, or of many nations").[139]

Grotius believed that the law of nations was not part of the natural law because *summa lex* on Cicero's account was universal, while positive international law was not. "[I]n one part of the world there [may be] a law of nations which is not such elsewhere," he wrote.[140] Thus, while the law of nations "permits many things which are forbidden by the law of nature, so [the law of nations] forbids certain things which are permissible by the law of nature."[141]

Grotius cited Cicero's treatment of just war theory[142] and argued that war "should be publicly declared, and in fact proclaimed so publicly that the notification of this declaration be made by one of

136. *Id.* at 44; *see infra* note 256 (Cicero's definition).

137. JOHANN HEINRICH BÖCLER, IN HUGONIS GROTII JUS BELLI ET PACIS LIBRUM PRIMUM COMMENTATIO 13 (Geissen 1687).

138. GROTIUS, *supra* note 134, at 38–39, 38 n.4.

139. *Id.* at 44.

140. *Id.*

141. *Id.* at 651–52; *see also id.* at 295 (describing the "volitional law of nations" as "distinct from the law of nature").

142. *Id.* at 54–56.

the parties to the other."[143] He quoted or drew on Cicero in discussing contracts, oaths, and good faith in dealings between states, as well as proportionality in killing, punishment, and pillaging during war, among many other subjects.[144] Grotius adopted Cicero's notion of the right to self-defense and the right to property, and grounded his theory of the state of nature in *Pro Milone*.[145] And he used Cicero to support his discussion of legal interpretation, tracing several general interpretive rules back to Cicero's work.[146]

Grotius's work exerted great influence on American legal thought. Benjamin Straumann writes that "[j]udging by the libraries of pre-Revolutionary Virginia, Grotius was the second-most prominent political and jurisprudential author after Lord Coke, far more prominent than even John Locke," and notes that the Supreme Court has cited Grotius nearly eighty times.[147]

In 1672, Samuel von Pufendorf published *De Jure Naturae et Gentium* ("On the Law of Nature and Nations"). In this extended treatment of Grotius's work, Pufendorf put Grotius in dialogue with seventeenth-century philosophers such as Thomas Hobbes and Richard Cumberland. Like Grotius, Pufendorf took Cicero's philosophy (with nearly two hundred citations) as the foundation on which to advance a natural law framework for the modern European world. He provided the usual references to Cicero—on the law of nature, Carneades and justice, legal interpretation, and more.[148]

Pufendorf dealt with the law of nations differently from Grotius. As he saw it, the natural law was divided into a natural law of individuals and a natural law of states, "commonly called the law of

143. *Id*. at 633.

144. *See, e.g.*, *id.* at 328–33, 348–51, 362–68, 494, 658, 725–31, 860.

145. STRAUMANN, *supra* note 58, at 121–23, 140, 152.

146. *See, e.g.*, GROTIUS, *supra* note 134, at 410 (technical terms are understood according to technical use), 426 (promises do not bind when overriding obligations subsequently arise), 427 (interpreting conflicting rules according to various conventions).

147. STRAUMANN, *supra* note 58, at 233.

148. *See, e.g.*, SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM 193, 220, 710 (C.H. Oldfather & W.A. Oldfather trans., Oxford Clarendon Press 1934) (1672).

nations," though he noted that "on this point scholars are not entirely agreed."[149] He thus considered some aspects of the law of nations as part of the natural law.

Pufendorf and Grotius also took different approaches to Cicero's treatment of piracy. Grotius did not accept Cicero's claim that pirates stood outside the human community.[150] But Pufendorf found Cicero's analysis compelling. "[S]omething can be said for Cicero's position," he reasoned, "since a pirate is the common enemy of all, that is, a man who without having been injured robs and murders any person . . . [and] disturbs and destroys that social relationship between men which has been instituted by God; he has, in consequence, no right to avail himself of that bond."[151]

In the eighteenth century, Emer de Vattel adopted many of Cicero's ideas in his treatise *The Law of Nations*. Published in 1758, *The Law of Nations* "was the most influential treatment of the law of nations in England and America," and was often cited by American courts in the eighteenth century.[152]

Like his predecessors, Vattel considered himself indebted to Cicero. He began his treatise with an epigraph from Scipio's Dream in *De Re Publica*: "For to the Supreme God who governs the whole universe nothing is more pleasing than assemblies and gatherings of people associated in justice, which are called states."[153] He believed Cicero to be "as great a master in the art of government as in eloquence and philosophy."[154] And in other writings, Vattel endorsed Cicero's definition of natural law as right reason in agreement in nature and Cicero's admonition that recourse to philosophy must be had to discern the true nature of law.[155]

---

149. *Id.* at 226.

150. GROTIUS, *supra* note 134, at 793.

151. PUFENDORF, *supra* note 148, at 505.

152. Bellia, Jr. & Clark, *supra* note 9, at 526 & n.12.

153. VATTEL, *supra* note 2, at 1 (translation); *see infra* note 368.

154. VATTEL, *supra* note 2, at 19; *see also id.* at 161 (same).

155. *See* Emer de Vattel, Dissertation on This Question: "Can Natural Law Bring Society to Perfect Without the Assistance of Political Laws?", *in* VATTEL, *supra* note 2, at 773, 802, 808 (T.J. Hochstrasser trans.). This principle of Cicero's was also approvingly

His thematic concern was the same as Cicero's—to understand the relationship between natural law and human law. He agreed with Pufendorf that there could be a natural law of nations, but departed from Pufendorf's belief that it would work the same way as the natural law of individuals. Vattel sought to expound the natural law of nations as a distinct science.[156]

Vattel's treatment of the law of war rested on Cicero numerous times. *The Law of Nations* argued that states should show restraint in punishing conquered foes, since Rome's needless destruction of Corinth "was reprobated by Cicero and other great men."[157] Vattel also approved of *De Officiis*'s claim that states should resort to war only after diplomacy fails because the defining human characteristic is rationality of thought and speech.[158] Similarly, Vattel argued with citation to Cicero that during war nations must keep diplomatic channels open and respect the inviolability of ambassadors.[159]

Vattel's discussion of legal interpretation also drew on Cicero. Vattel described rules of interpretation as "rules founded on right reason . . . approved and prescribed by the law of nature,"[160] and referred to Cicero many times. He cited Cicero for the principle that words should be given their natural and plain meaning, and he used Cicero's example that a truce for a certain number of "days" would cover the nights as well.[161] When interpreting treaties, Vattel wrote, one must discern the "reason of the law" and the intent of the treaty-makers. According to Cicero, he wrote, "the language, invented to explain the will, must not hinder its effect."[162]

---

invoked by Christian Wolff, the writer who inspired Vattel. *See* CHRISTIAN WOLFF, 2 JUS GENTIUM SCIENTIFICA PERTRACTATUM 428 (Joseph H. Drake trans., Oxford Clarendon Press 1934) (1749).

156. VATTEL, *supra* note 2, at 5, 70.

157. *Id.* at 544.

158. *Id.* at 651–52.

159. *Id.* at 701.

160. *Id.* at 410.

161. *Id.* at 413–14, 417.

162. *Id.* at 425. Vattel heavily qualified this interpretive principle, stressing that words generally were sufficient to convey intention and that speculation as to the reason of the law could not overcome clear text. *Id.* at 408–26.

The closest thing the United States had to a Grotius or Vattel was James Wilson. Wilson's *Lectures on Law* grounded American jurisprudence in this classical tradition. For Wilson, as for others, that meant looking to Cicero. Wilson was trained in Roman law and classical philosophy, and he deployed this knowledge throughout his career to inform his work as a constitutional drafter, Supreme Court Justice, and law professor. His inaugural address of the *Lectures on Law*, which invoked Cicero, was attended by Washington, Adams, Hamilton, and Jefferson.[163]

The *Lectures* cited Cicero repeatedly on many subjects and called him an "exquisite judge of human nature and of law"[164] who "knew so well how to illustrate law by philosophy."[165] Following Cicero, Wilson repeatedly identified reason as the defining quality of human nature and of law: "'There are two kinds of disputation,' says Cicero, 'one, by argument and reason; the other, by violence and force. To determine controversies by the former belongs to man; by the latter, to the brutes.'"[166] He also used "right reason" to describe the contours of natural law.

> This law, or right reason as Cicero calls it, is thus beautifully described by that eloquent philosopher. "It is indeed," says he, "a true law, conformable to nature, diffused among all men, unchangeable, eternal. . . . It is not one law at Rome, another at Athens; one law now, another hereafter: it is the same eternal and immutable law, given at all times and to all nations."[167]

Following Vattel, Wilson divided the universal law of nations from the voluntary law of nations. Universal law, or "law which is

---

163. *See* Paul A. Rahe, *Cicero and the Classical Republican Legacy in America*, *in* THOMAS JEFFERSON, THE CLASSICAL WORLD, AND EARLY AMERICA, *supra* note 7, at 248, 249.

164. James Wilson, Of Steps for Apprehending Offenders, *in* 2 WILSON, *supra* note 89, at 1189.

165. James Wilson, Of Man, as a Member of Society, *in* 1 WILSON, *supra* note 89, at 632.

166. James Wilson, Of Man, as a Member of the Great Commonwealth of Nations, *in* 1 WILSON, *supra* note 89, at 676.

167. James Wilson, Of the Law of Nature, *in* 1 WILSON, *supra* note 89, at 523.

communicated to us by reason and conscience," was binding on individuals and states alike.[168] "As addressed to men, it has been denominated the law of nature; as addressed to societies, it has been denominated the law of nations," he wrote.[169] "The law of nations, properly so called," he continued, "is the law of states and sovereigns, obligatory on them in the same manner, and for the same reasons, the law of nature is obligatory on individuals. Universal, indispensable, and unchangeable is the obligation of both."[170] Positive international law, that "which two or more political societies make for themselves," Wilson considered "the voluntary law of nations."[171]

Here Wilson departed from Grotius and Pufendorf, whom he saw as running "into contrary extremes."[172] Grotius had separated natural law and the law of nations entirely, while Pufendorf claimed the two were identical. The "former was of the opinion, that the whole law of nations took its origin and authority from consent," Wilson wrote, while "the latter was of the opinion, that every part of the law of nations was the same with the law of nature."[173] For Wilson, both universal duties and the duties of positive international law were species of the law of nations.

The natural law of nations also helped give the voluntary law of nations moral force. For example, natural law required that vows be kept, so nations that entered agreements with each other were bound to abide by them. Violating a treaty, Wilson argued, "violates not only the voluntary but also the natural and necessary law of nations; for as we have seen that, by the law of nature, the fulfilment of promises is a duty as much incumbent upon states as upon

---

168. James Wilson, Of the General Principles of Law and Obligation, *in* 1 WILSON, *supra* note 89, at 498.

169. *Id.*

170. James Wilson, Of the Law of Nations, *in* 1 WILSON, *supra* note 89, at 529. Like Vattel, Wilson qualified this proposition by adding that "important difference between the objects [nations and individuals] will occasion a proportioned difference in the application of the law." *Id.* at 531.

171. Wilson, Of the General Principles of Law and Obligation, *supra* note 168, at 498.

172. James Wilson, Of the Law of Nations, *supra* note 170, at 530.

173. *Id.*

men."[174] Wilson thus derived the presumptive moral authority of positive law from natural law.

Sitting as a judge, Wilson looked to Cicero and the law of nations as an interpretive guide. Riding circuit in 1791, Justice Wilson instructed a grand jury on the meaning of a federal piracy statute. The statute criminalized forms of piracy committed by "any person," not just by citizens.[175] As Wilson saw it, this raised two problems. First, a question of statutory interpretation. In other provisions, the statute applied only to "citizens"—was the use of the broader term "person" intentional or accidental? Second, a question of statutory validity. If Congress did intend to punish noncitizen conduct on the high seas, was this a legitimate exercise of congressional power under the law of nations?

Like Cicero and other jurists, Wilson regarded piracy as "a crime against the universal law of society [and a] declar[ation of] war against the whole human race."[176] Still, he expressed doubts about this particular statute's long arm. As Wilson saw it, the statute modified the common definition of piracy and countries could traditionally only modify the law of nations as applied to their own people. As he put it in his charge to the grand jury, using *De Re Publica*'s canonical formulation:

> The maritime law is not the law of any particular country: it is the general law of nations. "*Non erit alia lex Romae, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes et omni tempore una eademque lex obtinebit*." [There will not be different laws at Rome and at Athens, or different laws now and in the future, but one law for all peoples and all times.]
>
> The law of nations has its foundations in the principles of natural law, applied to states; and in voluntary institutions, arising from custom or convention. This law is universal in its authority over the civilized part of the world; and is supported by the

174. *Id.* at 547.

175. *See* Act of April 30, 1790, ch. 9, § 8, 1 Stat. 112, 113–14.

176. James Wilson, A Charge Delivered to the Grand Jury in the Circuit Court of the United States for the District of Virginia, in May, 1791, *in* 1 WILSON, *supra* note 89, at 333.

> consideration of its general utility; as well as that of its obligatory force. . . .
>
> True it is, that, so far as the law of nations are *voluntary* or *positive*, it may be altered by the municipal legislature of any state, in cases affecting *only* its own citizens. True it is also, that, by a treaty, the voluntary or positive law of nations may be altered so far as the alteration shall affect *only* the contracting parties. But equally true it is, that no state or states can, by treaties or municipal law, alter or abrogate the law of nations any farther. This they can no more do, than a citizen can, by his single determination, or two citizens can, by a private contract between them, alter or abrogate the laws of the community, in which they reside.[177]

Addressing a grand jury rather than adjudicating a case, Wilson did not have occasion to conclusively address the statute's lawfulness. He remained content to "suggest [his] doubts concerning it."[178] But recourse to natural law and the law of nations to resolve statutory ambiguity and validity was a tool in his legal toolkit.

One scholar has described Wilson as "bolder in asserting [natural law's] existence than in establishing its contents."[179] Wilson probably deserves more credit than that. With self-preservation as the starting point, the *Lectures* derived from natural law many duties and rights states had with respect to matters like national defense, land acquisition, immigration, education, and treaty negotiation.[180]

Wilson also got into specifics bringing natural law to bear on individual rights, which the *Lectures* covered with reference to Cicero. Bearing arms, for example, was an obvious means of making effective the natural right of self-preservation. Wilson explained how

177. *Id.* at 333 (translation added).

178. *Id.* at 334.

179. RICHARD, *supra* note 7, at 177.

180. See Derek A. Webb, *The Great Synthesizer: Natural Rights, the Law of Nations, and the Moral Sense in the Philosophical and Constitutional Thought of James Wilson*, 12 BRIT. J. AM. LEGAL STUD. 79, 98–100 (2023) (cataloguing the duties Wilson described).

"the defence of one's self" was "justly called the primary law of nature" by Cicero's *Pro Milone*.[181] *Pro Milone*, discussed above, was the classical exposition of self-defense and endorsed the carrying of weapons for that purpose.[182] Echoing Cicero, Wilson stated that homicide was lawful when "necessary for the defence of one's person" under "the great natural law of self preservation, which, as we have seen, cannot be repealed, or superseded, or suspended by any human institution."[183] The right was "expressly recognized" in his home state of Pennsylvania, he noted, where the constitution declared that the "right of the citizens to bear arms in the defence of themselves shall not be questioned."[184]

Wilson also argued for a natural right of expatriation. At English common law, the doctrine of perpetual allegiance held that one could not renounce citizenship without the consent of the sovereign. But the doctrine was a poor fit in United States, Wilson insisted, because in consent-based government one had a natural right or "general liberty" "to leave the state."[185] After Locke and "right reason," his authority was Cicero: "'O glorious regulations,' says Cicero, 'originally established for us by our ancestors . . . that no one contrary to his inclination, should be deprived of his right of citizenship; and that no one, contrary to his inclinations, should be obliged to continue in that relation."[186] Wilson agreed with Cicero that "the power of retaining and of renouncing our rights of citizenship, is the most stable foundation of our liberties."[187]

Wilson's familiarity with the classics made an impression on his son, Bird Wilson. When the younger Wilson published his father's

---

181. Wilson, Of the Natural Rights of Individuals, *in* 2 WILSON, *supra* note 89, at 1053, 1082 & n.z. Wilson cited the "celebrated trial of Milo" multiple times in the *Lectures*. *See* Wilson, Of Steps for Apprehending Offenders, *supra* note 164, at 1196; *see also* James Wilson, Of Juries, *in* 2 WILSON, *supra* note 89, at 954, 964–65.

182. PRO MILONE, *supra* note 116, at 13 (§ 7), 17 (§§ 9–11).

183. James Wilson, Of Crimes Against the Right of Individuals to Personal Safety, *in* 2 WILSON, *supra* note 89, at 1137, 1142.

184. *Id.*

185. Wilson, Of Man, as a Member of Society, *supra* note 165, at 642.

186. *Id.*

187. *Id.*

law lectures in 1804, he included as an epigraph a line from Cicero's *Pro Cluentio*: "*Lex fundamentum est libertatis, qua fruimur. Legum omnes servi sumus, ut liberi esse possimus* [Law is the foundation of the freedom we enjoy. We are all slaves to law, so that we may be free]."[188]

2. English Law and Early American Law

English law's cognizance of the law of nature and the law of nations is well documented. Edward Coke's *Institutes*, which began with an epigraph from Cicero's *Pro Caecina*,[189] listed "Lex naturae, the law of Nature" as part of the "divers laws within the Realm of England," along with the common law, statute law, "customs reasonable," the law of war, canon law, and more.[190] Coke's writings cited Cicero more than almost any other classical authority.[191] In 1608, his landmark decision in *Calvin's Case* found that persons born in Scotland were subjects of the King and could enjoy the rights of English citizenship. Coke looked to *De Officiis*'s treatment of natural law to help determine Calvin's legal status.[192] *Calvin's Case* was cited frequently by American colonists[193] and became a key precedent on birthright citizenship for the U.S. Supreme Court.[194]

Cicero was a favorite authority for English republicans. *Cato's Letters*, written by John Trenchard and Thomas Gordon, began by quoting *De Legibus*'s proposition that law is a distinction between

188. 1 WILSON, *supra* note 89, at 415 (translation added).

189. 1 EDWARD COKE, INSTITUTES (title page) (1628–1644) ("*Major hereditas venit unicuique nostrum a Jure & Legibus, quam a Parentibus*." [A greater inheritance comes to each of us from the laws than from our parents.]); *see also* 2 *id.* at 56 (same).

190. 1 *id.* at 11 (1628–1644). HELMHOLZ, *supra* note 88, is the magisterial treatment of this subject.

191. *See* John Marshall Gest, *The Writings of Sir Edward Coke*, 18 YALE L.J. 504, 516–17 (1909).

192. Calvin's Case, 77 Eng. Rep. 377, 391–92 (K.B. 1608).

193. 1 ALFRED H. KELLY, WINFRED A. HARBISON & HERMAN BELZ, THE AMERICAN CONSTITUTION 53 (7th ed. 1991).

194. *See* United States v. Wong Kim Ark, 169 U.S. 649 (1898).

just and unjust things modeled on nature.[195] Trenchard and Gordon also used Cicero's description of law as "right Reason, commanding things that are good and forbidding things that are bad."[196] They took a principle from *De Legibus*'s legal code, *salus populi suprema lex est*, to describe the goal of human law. The *salus populi* principle (their translation: "the Benefit and Safety of the people constitutes the supreme law") was, they wrote, "the most universal and everlasting maxim in government."[197] Government action contrary to this supreme law was not lawful, but "usurpation."[198]

In the 1750s, Thomas Rutherforth published the *Institutes of Natural Law*, a commentary on Grotius that was widely read and cited in the early American legal system. Rutherforth cited Cicero on some of the same points as Grotius did, but in other places he appropriated Cicero's arguments and maxims with no acknowledgment.[199] For example, Rutherforth adopted without citation *De Officiis*'s example of ordinary-meaning interpretation that a truce for thirty "days" would cover full 24-hour periods and would not permit attacks at night.[200] The provenance of the example was probably obvious to the reader. For a classically literate eighteenth-century audience, attribution was not always necessary.

A decade later, Blackstone's *Commentaries* defined natural law and human law in familiar Ciceronian terms. Blackstone wrote that

---

195. 1 JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS (title page) (1723–1724).

196. 2 *id.* at 253–54.

197. 1 *id.* at 67. They considered *salus populi* a matter of natural law: "No Customs can change, no positive Institutions can abrogate, and no Time can efface this primary Law of Nature and Nations." *Id.*

198. *Id.*

199. *Compare* THOMAS RUTHERFORTH, INSTITUTES OF NATURAL LAW 427 (Baltimore, William & Joseph Neal 2d Am. ed. 1832) (1754–1756) (citing Cicero on equitable interpretation), *with id.* at 423 (citing *Rhetorica ad Herennium* on the letter and spirit of the law, without attribution). *See* CICERO, RHETORICA AD HERENNIUM 35–37 (1.19) (Harry Caplan trans., Loeb Classical Library 1954) (c. 80s B.C.). Cicero was long thought to be the author of the *Herennium*, but its authorship has been disputed. *See* Introduction, *in id*. Eighteenth-century writers, aware of the dispute, still gave Cicero credit for it. *See, e.g.*, 1 BLACKSTONE, *supra* note 20, at 61.

200. RUTHERFORTH, *supra* note 199, at 412.

the law of nature was "superior in obligation to any other" and "binding all over the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this," language he copied from Cicero.[201] He also began his discussion of English local law as follows: "[A]s municipal law is a rule of civil conduct, commanding what it right and prohibiting what is wrong; or as Cicero, and after him our Bracton, have expressed it, *sanctio justa, jubens honesta et prohibens contraria* [a just ordinance, commanding what is right and prohibiting what is not], it follows, that the primary and principal objects of the law are rights and wrongs."[202]

Blackstone's rules of interpretation referenced Cicero. When text is unclear, Blackstone wrote, "the most universal and effectual way of discovering the true meaning . . . is by considering the reason and spirit of it; or the cause which moved the legislator to enact it."[203] When "this reason ceases, the law itself ought likewise to cease with it," he concluded, citing Cicero.[204]

In a world where Parliament was sovereign, natural law was not generally used by judges to void statutory law. But at a minimum it could supply a sort of gap-filling or default law. In 1772, Lord Mansfield ruled in *Somerset's Case* that James Somerset, an enslaved man, could not be lawfully detained. Since only positive law, not natural law, could authorize slavery, Somerset could not be held in England where no law authorized it. Decrying slavery as "odious"

---

201. 1 BLACKSTONE, *supra* note 20, at 41; *see also* GUMMERE, *supra* note 7, at 16. Of course, Blackstone also wrote that if "the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it." Whether or how he reconciled these two statements is a contested matter. *See* J.M. Finnis, *Blackstone's Theoretical Intentions*, 12 AM. J. JURIS. 163 (1967).

202. 1 BLACKSTONE, *supra* note 20, at 118 (translation added).

203. *Id.* at 61.

204. *Id.*; *see also* ROGER NORTH, A DISCOURSE OF THE POOR 19 (1753) ("Tully, in his book *De Legibus* . . . concludes, that Reason is so essential to a Law, that it cannot subsist without it: And that a Law against Reason is void."). Like Vattel, Blackstone greatly qualified this interpretive rule. *Id.* at 59–60, 62. So did American courts. *See, e.g.*, Sturges v. Crowinshield, 17 U.S. (4 Wheat.) 122, 202 (1819) (Marshall, C.J.) ("[A]lthough the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words.").

and against the natural order, Lord Mansfield granted habeas relief.[205] Somerset went free. *Somerset's Case* and its use of natural law became a key precedent in American conflict-of-laws debates and the American antislavery tradition.[206]

Appeals to natural law played a central role in American revolutionary rhetoric, which "commingled claims of unconstitutionality and natural injustice."[207] In the celebrated *Writs of Assistance* case, James Otis argued that acts of Parliament "against natural Equity [were] void."[208] In 1764 pamphlet, he similarly maintained that acts of Parliament contrary to "natural laws, which are immutably true," were "void."[209] Quoting Cicero and *Cato's Letters*, Otis declared that "*salus populi suprema lex esto*" [the good of the people shall be the highest law], and reasoned that government had no authority to act against that law.[210]

Hamilton's *The Farmer Refuted* likewise declared acts of Parliament against natural law void. Borrowing from Blackstone (who borrowed from Cicero on this point), Hamilton appealed to that "eternal and immutable law, which is, indispensably obligatory upon all mankind," and recommended that Loyalists familiarize themselves with Grotius, Pufendorf, and Locke.[211] In so doing, Hamilton was recommending that they familiarize themselves with

205. Somerset v. Stewart, 98 Eng. Rep. 499, 510 (1772).

206. *See* Commonwealth v. Aves, 35 Mass. 193, 211–12 (Ma. 1836); STORY, CONFLICT OF LAWS, *supra* note 94, at 144–45 & 145 nn. 3–4; *see also* Scott v. Sandford, 60 U.S. (19 How.) 393, 624 (1857) (Curtis, J., dissenting) ("Slavery, being contrary to natural right, is created only by municipal law.").

207. *See* COOPER & DYER, *supra* note 7, at 34.

208. John Adams's Notes on the First Argument of the Case (February 1761), *in* THE COLLECTED POLITICAL WRITINGS OF JAMES OTIS 5, 6 (Richard Samuelson ed., 2015) [hereinafter OTIS WRITINGS].

209. James Otis, The Rights of the British Colonies Asserted and Proved (1764), *in* OTIS WRITINGS, *supra* note 208, at 119, 155.

210. *Id.* at 125.

211. Alexander Hamilton, The Farmer Refuted, &c. (Feb. 23, 1775), *in* 1 HAMILTON PAPERS, *supra* note 5, at 81, 87; *see also* GUMMERE, *supra* note 7, at 16.

Ciceronian natural law. What one commentator remarked of Grotius was also true of Hamilton—he was indebted to Cicero even when he did not show it.[212]

Related to this use of natural law was the concept of fundamental law. Like natural law, fundamental law was theoretically superior to ordinary law; it fused principles of right reason with custom and written law to arrive at some supposedly inviolable higher order of things. Eighteenth-century lawyers on both sides of the Atlantic thought and spoke of constitutions as fundamental law. They reasoned about fundamental law with reference to "natural law," "right reason," "natural justice," and "general principles of reason and law."[213] Their vocabulary bears the clear imprint of Cicero, with no clearer example than his trademark term "right reason." They also described his *salus populi* maxim as a fundamental law undergirding all nations, unalterable by ordinary lawmaking.

This is not to say that lawyers learned about natural law or right reason from no other writer—quite the opposite. Grotius, Coke, Vattel, Blackstone, and others had much to contribute. But the core of what they taught here can be traced back to Cicero, something they themselves recognized by routinely quoting him. If the terms "nature" and "reason" seem unremarkable in the context of fundamental law because of their ubiquity, that means Cicero has been a victim of his own success. To borrow from Stephen Sachs, minimizing Cicero's influence here would be "like accusing Shakespeare of being full of *clichés*, now that our language is defined by his turns of phrase."[214]

---

212. *See* BÖCLER, *supra* note 137, at 13.

213. *See* Gienapp, *supra* note 12, at 339–46. None of this is to say that lawyers and judges appealed primarily or only directly to natural law for principles of reason. The common law, for example, reflected the "artificial reason" of centuries of practice. *See* Micah S. Quigley, *Article III Lawmaking*, 30 GEO. MASON L. REV. 279, 289–90 (2022). Nor is it to say that natural law required courts to enforce it in freewheeling fashion. The role of a judge and the precise limits of judicial authority in any jurisdiction are matters underdetermined by natural law, matters which can be authoritatively prescribed by constitution-makers or legislatures. *See* J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1 (2022).

214. Stephen E. Sachs, *Good and Evil in the American Founding*, 48 HARV. J.L. & PUB. POL'Y (forthcoming 2025).

Anglo-American law also looked to the law of nations, which combined elements of natural law with custom and convention. Justice Story explained that

> the law of nations may be deduced first, from the general principles of right and justice, applied to the concerns of individuals, and thence to the relations and duties of nations; or secondly, in things indifferent or questionable, from the customary observances and recognitions of civilized nations; or lastly, from the conventional or positive law, that regulates the intercourse between states.[215]

The law of nations mainly consisted of the law merchant, the law maritime, and the law of state-state relations (such as the law of war).[216] The law of nations was alternatively known as general law.[217] It was distinct from local or municipal law, the law of one jurisdiction or sovereign.

As writers like Vattel, Wilson, and Story discussed, the general law encompassed principles of universal applicability and positive law rules arising from custom or choice. Positive law rules were necessary to order human life in matters where the natural law was indifferent.[218] Complex contract cases or disputes over admiralty jurisdiction were not determined by first principles. So long as the lawmaking or lawfinding process was an exercise of right reason, reasoned decisionmaking, it fit with and was sanctioned by natural law.

Like natural law, general law was thought of as universal law shared by all nations.[219] In the 1759 English case of *Luke v. Lyde*, for example, Lord Mansfield quoted Cicero to describe the breadth of the maritime branch of the general law. Maritime law was "not the

---

215. United States v. La Jeune Eugenie, 26 F. Cas. 832, 846 (No. 15,551) (C.C.D. Ma. 1822) (Story, J.).

216. BELLIA, JR. & CLARK, *supra* note 9, at 1–9.

217. Bellia, Jr. & Clark, *supra* note 9, at 660.

218. See Jeffrey A. Pojanowski & Kevin C. Walsh, *Recovering Classical Legal Constitutionalism: A Critique of Professor Vermeule's New Theory*, 98 NOTRE DAME L. REV. 403, 427–28 (2022).

219. This sentiment was more "aspirational" than literally true. Baude, Sachs & Campbell, *supra* note 9, at 1249.

law of a particular country," he wrote, "but the general law of nations. . . '*non erit alia lex Romae, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes et omni tempore, una eademque lex obtinebit*' [there will not be different laws at Rome and at Athens, or different laws now and in the future, but one law for all peoples and all times]."[220]

General law crossed the Atlantic with the common law. American state governments adopted the English common law by statute, thereby incorporating principles of general law that the common law carried with it.[221] General law could apply both substantively and as an interpretive backdrop.[222] It could apply in state court and, after ratification of the Constitution, in federal court.

General law was not federal law. It was not "the supreme law of the land," did not have preemptive effect, and did not give rise to federal question jurisdiction. General law was also not common law, in the sense of local or municipal law. Early federal courts rejected the idea of a comprehensive federal common law,[223] yet routinely applied general law in diversity cases to private commercial or maritime disputes.[224]

The Supreme Court's decision in *Swift v. Tyson*, considered the high-water mark of general law in federal court, reaffirmed the status of general law. *Swift* posed the granular question of whether the exchange of a negotiable instrument for the release of preexisting debt constituted valuable consideration.[225] If it did, then the plaintiff, Swift, was a bona fide holder of a bill of exchange he received from two land speculators, who in turn had fraudulently obtained it from the defendant, Tyson. If he was a bona fide holder, Swift

220. Luke v. Lyde, 97 Eng. Rep. 614, 617 (1759) (translation added).

221. *See* BELLIA & CLARK, *supra* note 9, at 10–11.

222. *See* Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1830–32 (2012).

223. *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812).

224. *See* William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1538–54 (1984) (discussing the "[f]ifty-three diversity cases involving marine insurance law [that] were decided by the United States Supreme Court between 1803 and 1840," and noting how in most cases, "the Court simply considered the question at large . . . follow[ing] its own judgment on what the general law was or should be.").

225. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 15 (1842).

could demand payment on the bill despite the fraud. To answer this question, the Court had to determine the relevant source of law.

Tyson argued that under "the law of New York, as thus expounded by its Courts, a pre-existing debt does not constitute . . . a valuable consideration."[226] But even if that's what the New York courts thought,, Justice Story's opinion found, the Supreme Court did not have to follow the New York courts' view because the question was one of general law, not New York common law. The New York courts themselves considered it a question of general law. "It is observable," Justice Story wrote, "that the Courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage: but they deduce the doctrine from the general principles of commercial law."[227] Since the general law was not the law of any one sovereign, the decisions of the New York courts could furnish "only evidence of what the laws are; and are not of themselves laws."[228] General commercial law could govern cases in New York, but it was not New York law. Justice Story wrote:

> The law respecting negotiable instruments may truly be declared in the language of Cicero, adopted by Lord Mansfield in Luke v. Lyde . . . to be in a great measure, not the law of a single country only, but of the commercial world. *Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtenebit*.[229]

(Justice Story was fond of Cicero's formulation and quoted it in his conflict-of-laws treatise as well.[230])

The Court exercised its independent judgment about the content of the general law (just as all courts were free to do). Justice Story

---

226. *Id.* at 16.

227. *Id.* at 18.

228. *Id.*

229. *Id.* at 19. Lord Mansfield was a prominent authority for American courts. *See, e.g.*, Taylor v. Lowell, 3 Mass. 331, 343 (Ma. 1807) ("The general rules of law applicable to this question [of marine insurance], are expressed by Lord Mansfield."); *see also supra* notes 205–06.

230. STORY, CONFLICT OF LAWS, *supra* note 94, at 898–99.

looked to federal precedent, state precedent, English precedent, and treatises, and found a consensus that the release of debt did constitute consideration under the law merchant.[231] That made Swift a bona fide holder of the note. Tyson had to make good on it.

Swift did not hold that a federal court could overrule a state court on a question of state common law. *Swift* applied general commercial law, something federal and state courts did routinely. The case is remarkable today for being somewhat *un*remarkable then.

When the Court decided *Erie Railroad Co. v. Tompkins* a century later, it overruled "the doctrine of *Swift*," so understood by that time.[232] But the "*doctrine* of *Swift*" in the early twentieth century differed from what *Swift* originally contemplated. As A.J. Bellia and Bradford Clark write, "[o]nly later . . . would courts (mis)cite *Swift* for the broader proposition that federal courts could exercise independent judgment over other kinds of unwritten law, regardless of whether states considered them to be general law or local law."[233] The fact that Justice Story cited Lord Mansfield and Cicero confirms that *Swift* was a decision about general law, not federal or state common law.

Judicial decisions cited Cicero repeatedly throughout the nation's first century, both before and after *Swift*. At the Supreme Court[234] and the federal circuit level,[235] he was a standard legal authority

231. *Swift*, 41 U.S. (16 Pet.) at 19–22.

232. 304 U.S. 64, 69 (1938).

233. BELLIA & CLARK, *supra* note 9, at 33.

234. *See, e.g.*, Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 455 (1793); United States v. Smith, 18 U.S. (5 Wheat.) 153, 163 n.h (1820); Piqua Branch of State Bank of Ohio v. Knoop, 57 U.S. (16 How.) 369, 298 (1853); Watson v. Tarpley, 59 U.S. (18 How.) 517, 520 (1855); Keith v. Clark, 97 U.S. (7 Otto) 454, 460 (1878); Wilson v. McNamee, 102 U.S. (12 Otto) 572, 574 (1880); *see also* Glass v. The Sloop, Betsey, 3 U.S. (3 Dall.) 6, 14 (1794) (counsel citing *Pro Milone*); Hepburn & Dundas v. Ellzey, 6 U.S. (2 Cranch) 445, 446 (1805) (counsel citing *De Re Publica*).

235. *See, e.g.*, Wilson, *supra* note 176 (C.C.D. Va. 1791); Flagg v. Mann, 9 F. Cas. 202, 215 (No. 4847) (C.C.D. Ma. 1837); Jewett v. Hone, 13 F. Cas. 609, 611 (No. 7311) (C.C.S.D. Ga. 1873).

(though no authority was without its critics[236]). State courts were no different.[237]

3. Case Study: Judicial Review

Cicero's writings on law directly contributed to the formation of American judicial review. One of his interpretive principles was that higher law displaces ordinary law when the two conflict. Grotius, Pufendorf, Vattel, and others cited Cicero for this rule in their commentaries, and Hamilton cited Cicero for it in his law practice. Hamilton's celebrated *Federalist No. 78*, arguing for the displacement of statutory law by constitutional law, borrowed from his law practice and from the law of nations. So when *Marbury v. Madison* embraced Hamilton's position, it was constitutionalizing a Ciceronian legal principle.[238]

Cicero discussed rules of interpretation in several works, including *De Inventione*. In one well-known passage from *De Inventione*, he wrote this:

> A controversy arises from a conflict of laws when two or more laws seem to disagree. . . . In the first place, then, one should compare the laws by considering which one deals with the most important matters, that is, the most expedient, honorable, or necessary. The conclusion from this is that if two laws (or whatever number there may be if more than two) cannot be kept because they are at variance, the one is thought to have the

236. Veazie v. Williams, 28 F. Cas. 1124, 1132 (No. 16,907) (C.C.D. Me. 1845) ("I do not rely on the opinion of Cicero as applicable to this subject . . . because [*De Officiis*] was intended as a manual of pure and high moral duties, and not as a treatise on jurisprudence.").

237. *See, e.g.*, Rutgers v. Waddington (NY 1794), *in* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 392, 393 n.*, 402 (Julius Goebel Jr. ed., 1964) (quoting DE OFFICIIS, *supra* note 43, at 36–37 (1.34) without attribution).

238. The literature on American judicial review is voluminous; scholars have located its origins in the English legal notion of judicial duty, the Privy Council's review of colonial statutes, and early American state court practice. *See, e.g.*, William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455 (2005); Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502 (2006); PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008); Justin W. Aimonetti, Note, *Colonial Virginia: The Intellectual Incubator of Judicial Review*, 106 VA. L. REV. 765 (2020). Cicero and the law of nations provide yet another source for the theoretical underpinnings of judicial review.

> greatest claim to be upheld which has reference to the greatest matters.[239]

In other words, the more important or foundational law would control in a conflict of two laws.

The law of nations writers adopted this rule in their legal commentaries. Vattel, for example, articulated ten principles for "the collision or opposition of laws."[240] One principle held that "when two duties stand in competition, that one which is the more considerable, the more praiseworthy . . . is entitled to the preference."[241] Vattel wrote that this was "placed by Cicero at the head of all the rules he lays down on the subject."[242] Grotius cited Cicero for the same rule.[243]

Hamilton, well versed in the writings of Cicero, Grotius, and Vattel, invoked the rule while practicing law. In 1784, he litigated the case of *Rutgers v. Waddington* in New York state court. *Rutgers*, a landmark case in the development of American judicial review, considered whether a New York statute violated of the Treaty of Paris which the Confederation Congress had just ratified.[244] Hamilton argued that the statute violated the Treaty, and that the New York judges were bound to prefer the Treaty to the statute. The question was an open one; there was not yet a Constitution declaring federal law the "supreme law of the land."

To the question "how are the judges to decide" as to the controlling law, Hamilton argued that "they must take notice of the law of Congress as a part of the law of the land."[245] Then, citing "the golden rule of the Roman Orator," Hamilton quoted from Cicero:

---

239. DE INVENTIONE, *supra* note 113, at 313 (2.144–45).

240. VATTEL, *supra* note 2, at 443.

241. *Id.* at 446.

242. *Id.* at 446–47.

243. GROTIUS, *supra* note 134, at 427–28 ("[T]hat provision should prevail which has either the more honourable or the more expedient reasons.") (citing Cicero); *see also* PUFENDORF, *supra* note 148, at 822 (similar); RUTHERFORTH, *supra* note 199, at 432 (similar).

244. Treanor, *supra* note 238, at 480–81, 487.

245. Brief No. 6, Rutgers v. Waddington (1784), *in* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 237, at 362, 380.

"When two or more laws clash, that which relates to the most important concerns ought to prevail."[246]

In the *Federalist*, Hamilton copied his argument from *Rutgers*. Everyone accepted that federal courts would hear cases and adjudicate parties' rights. So courts would have to discern the proper rule of decision when two laws conflicted. When the Constitution set out one rule and a statute set out another, the Constitution, as fundamental law, would have to prevail. Hamilton wrote: "If there should happen to be an irreconcilable variance between the two, that which has superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute."[247] Years later, *Marbury v. Madison* agreed in nearly identical language.[248]

Hamilton seems to have lifted this principle straight from Cicero. The essay does not expressly cite any authority, but it is clear from Hamilton's *Rutgers* brief that he was copying from *De Inventione*: "*si leges duae . . . conservari non possint, quia discrepent inter se, sed ea maxime conservanda putetur, quae ad maximas res*" [Loeb translation: "if two laws . . . cannot be kept because they are at variance, the one is thought to have the greatest claim to be upheld which has reference to the greatest matters"].[249]

We know that Hamilton kept his language skills sharp. His briefs in the *Rutgers* case cited legal authorities in Latin,[250] and friends observed him consulting Grotius in Latin into his forties.[251] With a

---

246. *Id.* at 381.

247. THE FEDERALIST NO. 78, at 466 (Hamilton) (Clinton Rossiter ed., 1961).

248. 5 U.S. (1 Cranch) 137, 177–80 (1803) ("If two laws conflict with each other, the Courts must decide on the operation of each. . . . If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.").

249. DE INVENTIONE, *supra* note 113, at 312–13 (2.145).

250. *See, e.g.*, Brief No. 6, *supra* note 245, at 370–71 (citing Grotius on a contested point, observing that "[i]n the Latin original the difficulty is solved," and sifting through competing translations of Latin terms).

251. *See* James Kent to Elizabeth Hamilton (Dec. 10, 1832), *in* MEMOIRS AND LETTERS OF JAMES KENT 281, 317 (William Kent ed., 1898) (observing that Hamilton "was not

copy of Cicero on his desk, Hamilton may have translated from *De Inventione* on the fly while writing *Federalist No. 78*. Or equally likely, he borrowed from Vattel's or Grotius's quotation of Cicero. Or Hamilton just wrote from memory, having internalized Cicero's rule as a general principle of law and reason. The *Federalist* is yet another example of how eighteenth-century lawyers, immersed in the classics, could use Cicero's language without acknowledgment or second thought.

Whatever the case, this principle's descent from Cicero to the law of nations to Hamilton and *Marbury* is plain. The consensus of Cicero, Grotius, Vattel, and others corroborates *Marbury*'s statement that this method of choosing between conflicting laws rested on principles "long and well established."[252] And it suggests that Hamilton's approach, or something like it, was considered part of the general law. If Chief Justice Marshall was the father of judicial review, Cicero was its ancient ancestor.

III. STRUCTURING GOVERNMENT

The 1770s and 1780s launched a new era of constitution-making. After the break from England, Americans turned to a new form of government—the republic. Most states immediately wrote new republican constitutions, and the federal Constitution followed some years later. This republican renaissance, like the Founders' natural law theory, had origins in the classics. For an eighteenth-century world turning to republican principles, the ancients played "a critical role in keeping alive the memory of self-government through a long epoch in which despotism was the norm."[253]

Republicanism was a slippery concept. In *Federalist No. 39*, Madison asked "what, then, are the distinctive characters of the republican form?" History provided no clear answers: "Were an answer to

---

content . . . with examining Grotius, and taking him as an authority, in any other than the original Latin language"). This is all the more impressive because, as one historian notes, "most educated Americans in the eighteenth century preferred to read English versions of the classics." Botein, *supra* note 16, at 315.

252. 5 U.S. (1 Cranch) at 176.

253. Rahe, *supra* note 163, at 256.

this question to be sought," Madison continued, "in the application of the term by political writers to the constitutions of different states, no satisfactory one would ever be found."[254] Building new republics required recourse to first principles. For many, Cicero—the primary expositor of the ancient republican tradition—provided those principles.

A. Cicero's Republicanism

Cicero helped coin the distinctly Roman idea of *res publica* and made it central to his constitutional project. Translated literally as "public thing" or "public affairs," the term also signified "state" or "commonwealth." In large part thanks to Cicero, *res publica* or "republic" became a foundational concept in Western political thought and the republican tradition emerged as an alternative to arbitrary power.[255]

Three main principles animated Cicero's republicanism. First, a republic belonged to the people and was oriented toward their welfare. Second, the best institutional design to achieve that end was mixed government, where power was separated, checked, and balanced. And third, government had to be bound by the rule of law. The rule of law could refer to higher law that ordered and constrained government—the idea of constitutionalism. But the rule of law could also entail ordinary law. Government had to administer public affairs according to law, not arbitrary will.

The first principle dealt with the people's relationship to the state. In *De Re Publica*, Scipio defined a republic as follows: "A commonwealth (*res publica*) is a property of the people (*res populi*). But a people is not any collection of human beings brought together in any sort of way, but an assemblage of people in large numbers associated in an agreement with respect to justice (*iuris consensu*) and a partnership for the common good (*utilitatis communione*)."[256]

---

254. THE FEDERALIST NO. 39, at 236 (Madison) (Clinton Rossiter ed., 1961).

255. HAWLEY, *supra* note 8, at 17.

256. *Id.* at 65 (1.39); *see also* SIGONIO, *supra* note 57, at 9 (preserving this fragment); 3 HEARNE, *supra* note 71, at 382 (same).

Scipio's definition is laden with assumptions that Walter Nicgorski has unpacked at length. Nicgorski notes that *populus*, or "people," "is left undifferentiated," implying a measure of equality in the people.[257] He also points out the significance of the property metaphor—a republic, as a *res* or possession of the people, can be disposed of as its owner sees fit.[258] Scipio was making an argument for popular sovereignty.

Scipio's republic belonged to the people. The people therefore had a right to participation in government and to be free from arbitrary authority. "[S]urely nothing can be sweeter than liberty," Scipio suggested, and "liberty has no dwelling place in any State except that in which the people's power is greatest."[259] Cicero emphasized his love for liberty elsewhere, too, as in the *Philippics*, where he declared that "the birthright of the Roman people is freedom."[260]

But Scipio's definition did not leave the people entirely to their own devices. Popular assent was a necessary but not sufficient condition for legitimate government. A true republic would be one marked by its disposition toward justice (*ius*) and the common welfare, Scipio insisted. Nicgorski explains that Cicero viewed majorities without such a disposition as mobs who could not "legitimately claim to exercise sovereignty."[261]

The second principle of Cicero's republicanism was the mixed constitution—the form of government that combined the rule of one, the few, and the many to achieve stability. The mixed constitution was a cornerstone of classical constitutional theory.

---

257. Walter Nicgorski, *Cicero's Republicanism*, *in* CAMBRIDGE COMPANION, *supra* note 65, at 215, 223.

258. *Id.*; *see also* BENJAMIN STRAUMANN, CRISIS AND CONSTITUTIONALISM 171–73 (2016).

259. DE RE PUBLICA, *supra* note 37, at 71–73 (1.47).

260. CICERO, Philippic 6, *in* PHILIPPICS 1–6, at 321 (§ 19) (D.R. Shackleton Bailey trans., Loeb Classical Library 2009) (43 B.C.).

261. Nicgorski, *supra* note 257, at 223; *see also* STRAUMANN, *supra* note 258, at 173 ("The idea that the state comes into being by way of contract for the mutual benefit of society is therefore there in Cicero but it is constrained by an ideal of justice which gives some additional normative content and shape to the norms political society is governed by.").

The mixed constitution tradition did not begin with Cicero. Several generations earlier, the Greek historian Polybius had analyzed the Roman Republic in terms of mixed government. Like Plato and Aristotle before him, Polybius laid out three basic forms of government: rule by one (monarchy), by the few (aristocracy), and by the people (democracy). Each had an ideal form and a corresponding corrupt or perverted form. Monarchy could slide into tyranny, for example, while democracy could degenerate into mob rule. The different forms were thought to evolve (and devolve) into each other in a cyclical way. Polybius attributed Rome's greatness to its mixed constitution; it had held off the instability of cyclical regime change by blending and mixing the simple forms of government into a hybrid one.[262]

Polybius developed proto-notions of checks and balances and the separation of powers. He claimed to locate distinct powers vested in the consuls, the Senate, and the people, and lauded the ability of each class to restrain the others.[263] Such arrangements, he believed, prevented any one part of government from obtaining too much power and dominating the others. "Each of the three components of the Roman constitution can harm or help the other two," he argued, making it "the best conceivable system of government."[264] For if "one of the estates . . . pushes itself forward and tries to gain the upper hand over the others . . . the designs of each of them can be effectively counteracted and hampered by the others."[265]

Cicero lauded Polybius as "one of the very best authorities"[266] and built on his foundation. In *De Re Publica*, Scipio spent much of the dialogue defending and fleshing out the mixed regime as the

---

262. Scholars have critiqued Polybius's account as overly simplified or forced, see JED ATKINS, ROMAN POLITICAL THOUGHT 18–24 (2018), but it became a highly influential account regardless.

263. POLYBIUS, HISTORIES 380–81 (Robin Waterfield trans., 2010) (second century B.C.) (describing the distinct powers wielded by the consuls, the Senate, and the people); 381–85 (describing the checking function that divided power served, making each part of government dependent on the other parts and watching over the other parts).

264. *Id.* at 384.

265. *Id.* at 385.

266. DE OFFICIIS, *supra* note 43, at 395.

best form of government. After describing the three simple forms, he declared that he considered "a fourth form of government the most commendable—that form which is a well-regulated mixture of the three."[267] "[T]he absolute rule of one man will easily and quickly degenerate into a tyranny," Scipio argued.[268]

Scipio explained that the ideal constitution would allocate powers over different matters to different institutions. He argued that "there should be a supreme and royal element in the State, some power ought also to be granted to the leading citizens, and certain matters should be left to the judgment and desires of the masses."[269] When such a government obtained, no one group would be able subvert the whole design on its own—"there underlies [this government] no perverted form into which it can plunge and sink,"[270] he concluded.

Limited, balanced, and carefully delineated governmental authority was crucial for Cicero. To avoid the chaos of regime change and preserve liberty, he argued, the different elements of government needed to watch and check the others. "[U]nless there is in the State an even balance of rights, duties, and functions, so that the magistrates have enough power, the counsels of the eminent citizens enough influence, and the people enough liberty, this kind of government cannot be safe from revolution," Scipio argued.[271] Elsewhere in *De Re Publica* and *De Legibus*, Cicero described the tribunes as counterbalancing the consuls, spoke of a carefully calibrated "distribution of powers," and praised "evenly balanced constitution[s]."[272]

---

267. DE RE PUBLICA, *supra* note 37, at 71 (1.45); *see also id.* at 105 (1.69) (same); *id*. at 177–79 (2.65) (same).

268. *Id.* at 69 (1.44).

269. *Id.* at 105 (1.69).

270. *Id.*

271. *Id.* at 169 (2.57).

272. DE LEGIBUS, *supra* note 40, at 477 (3.16); DE RE PUBLICA, *supra* note 37, at 105 (1.69), 107 (1.70), 169 (2.58). The Founding generation, unfortunately, did not have all the material from *De Re Publica*.

The study of classical republicanism often focuses on civic virtue and personal character over political institutions. Some scholars believe that the ancients dismissed institutional design altogether.[273] But Cicero thought that institutional design mattered, and the Founding generation knew it. "The whole character of a republic is determined by its arrangements in regard to magistrates," he wrote.[274] Cicero's republicanism embraced the idea that constitutional structure could provide stability, preserve liberty, and create the conditions for human flourishing.

In the end, the mixed constitution was supposed to bring about social harmony. In a famous simile, Scipio proposed that the political order should look like musical notes brought together to form a beautiful symphony:

> For just as in the music of harps and flutes or in the voices of singers a certain harmony (*concentus*) of the different tones must be preserved, the interruption or violation of which is intolerable to trained ears, and as this perfect agreement and harmony (*concentus*) is produced by the proportionate blending of unlike tones, so also is a State made harmonious by agreement among dissimilar elements, brought about by a fair and reasonable blending together of the upper, middle, and lower classes, just as if they were musical tones. What the musicians call harmony (*harmonia*) in song is concord in a State, the strongest and best bond of permanent union in any commonwealth; and such concord can never be brought about without the aid of justice.[275]

---

273. *See, e.g.*, William A. Galston, *The Use and Abuse of Classics in American Constitutionalism*, 66 CHI.-KENT L. REV. 47, 49 (1990) ("For Madison . . . institutional design trumps personal character. . . . [A]s Gordon Wood argued [] decades ago, the Federalist persuasion contained 'an amazing display of confidence in constitutionalism, in the efficacy of institutional devices for solving social and political problems.' In this respect, as others, the gap between Federalist and classical political thought was wide indeed.").

274. DE LEGIBUS, *supra* note 40, at 461 (3.5). Story's *Commentaries on the Constitution* used this line as an epigraph.

275. DE RE PUBLICA, *supra* note 37, at 181–83 (2.42); *see also* SIGONIO, *supra* note 57, at 5 (preserving this fragment); 3 HEARNE, *supra* note 71, at 377 (same).

The theme of harmony appeared again in Scipio's Dream at the end of *De Re Publica*, where the dialogue took a turn for the cosmological. Scipio recounted a recent dream he had in which his grandfather, the Roman hero Scipio Africanus the Elder, appeared and revealed to him a vision of the universe. The younger Scipio saw stars and planets moving about the heavens with a divine force guiding their orbit.[276]

Scipio asked his grandfather about the beautiful sounds emanating from the planets. Echoing the earlier image of musical harmony, the Elder replied: "That [sound] is produced . . . by the onward rush and motion of the spheres themselves; the intervals between them, though unequal, being exactly arranged in a fixed proportion, by an agreeable blending of high and low tones various harmonies (*concentus*) are produced."[277] Rational principles ordered the natural world, and it was the stateman's job to order human communities according to those principles.

The third tenet of Cicero's republicanism was the rule of law. With roots in Aristotle's philosophy,[278] the concept of the "sovereignty of law over the ruler" was one of the "greatest contribution[s] of ancient thought."[279] The rule of law was essential to a republic, Cicero argued. Wherever a tyrant ruled arbitrarily and not according to the law of the land, "we ought not to say that we have a bad form of commonwealth . . . but that we really have no commonwealth at all."[280]

For Cicero, some sort of fundamental law ought to govern ordinary law. Cicero identified the law of nature as one external constraint on government. But he also believed in constitutionalism, having a higher-order human law comprised of written or custom-

276. DE RE PUBLICA, *supra* note 37, at 269–71 (6.16–17).

277. *Id.* at 271 (6.17).

278. *See* ARISTOTLE, POLITICS 93 (§ 1287a) (Carnes Lord trans., Univ. of Chi. Press 2013) ("[T]o have law rule is to be chosen in preference to having one of the citizens do so.").

279. M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 25 (1998).

280. DE RE PUBLICA, *supra* note 37, at 219 (3.43).

ary law. The legal code proposed in *De Legibus*, Benjamin Straumann explains, was "intended by Cicero to be hierarchically superior to mere legislation: what Cicero is thus engaged in . . . is the drafting of a set of constitutional norms" which would "be more firmly entrenched than mere normal legislation and superior in case of conflict."[281] Ordinary legislation or edicts could be judged unconstitutional and unlawful as well as unjust.

Cicero's legal code seemed to recognize a fundamental law that would govern the consuls. The "safety of the people (*salus populi*) shall be their highest law (*suprema lex*)" he wrote.[282] This principle, which he elsewhere indicated was a matter of natural law,[283] aligned with his vision that republican government be oriented above all toward the popular welfare.

The rule of law meant that government was bound by ordinary law, too. Legislators, judges, and administrators had to conduct business according to known rules and procedures, not will or caprice. "The function of a magistrate is to govern, and to give commands which are just and beneficial and *in conformity with law*," Cicero argued in *De Legibus*.[284] "For as laws govern the magistrate, so the magistrate governs the people, and it can truly be said that the magistrate is a speaking law (*lex loquens*), and the law is a silent magistrate."[285]

Cicero gave his most eloquent articulation of the rule of law in *Pro Cluentio*, a speech given as defense counsel in a criminal trial. Calling it a "great[] shame" for "a state which rests upon law to depart from law," he declared:

> [L]aw is the bond which secures these our privileges in the commonwealth, the foundation of our liberty, the fountain-head of justice. Within the law are reposed the mind and heart, the

281. STRAUMANN, *supra* note 258, at 46. As discussed above, *supra* Part II.B.3, *De Inventione* also contemplated the idea that a higher law could displace lower law in case of conflict.

282. DE LEGIBUS, *supra* note 40, at 467 (3.8).

283. *See* CICERO, Philippic 11, *in* PHILIPPICS 7–14, at 167–69 (§ 28) (D.R. Shackleton Bailey trans., Loeb Classical Library 2009) (43 B.C.).

284. DE LEGIBUS, *supra* note 40, at 459 (3.2) (emphasis added).

285. *Id.* at 461 (3.2).

> judgment and the conviction of the state. The state without law would be like the human body without mind—unable to employ the parts which are to it as sinews, blood, and limbs.
>
> The magistrates who administer the law, the judges who interpret it—all of us in short—are slaves to law so that we may be free.[286]

In sum, Cicero's republican constitutionalism rested on popular sovereignty, incorporated divided power and checks and balances, and made law rule the rulers. Cicero's thought became central to the classical republican tradition along with that of Aristotle, Polybius, and others, and it contributed greatly to Anglo-American constitutional theory.

B. The Reception of Cicero's Republicanism

English and American lawyers took up these ideas with great enthusiasm. The Stuart dynasty oversaw a period of great religious and political upheaval in the English government, from the English Civil War to the Glorious Revolution, and as the seventeenth century gave way to the eighteenth, notions of sovereignty and constitutionalism were subject to constant debate and revision. Early Americans took up this debate, and each of Cicero's principles became principles of American law and government.

First, popular sovereignty. American government post-1776 was based on the idea that civil authority originated in the people. But Americans' conversion to popular sovereignty during and after the Revolution was so quick and complete that it is now "difficult to grasp the radicalism of the undertaking as it appeared to contemporaries."[287] The philosophical sources of popular sovereignty are too numerous to count, but Cicero was one of them. Jefferson and Adams counted Cicero as an inspiration for the revolution and the Declaration. Decades later, reflecting on the formation of the Constitution, Justice Story wrote in his *Commentaries* that the idea of "civil society ha[ving] its foundation in a voluntary consent . . .

---

286. CICERO, Pro Cluentio, *in* PRO LEGE MANILIA, PRO CAECINA, PRO CLUENTIO, PRO RABIRIO PERDUELLIONIS 378 (§ 146) (H. Grose Hodge trans., Loeb Classical Library 1927) (66 B.C.) (author translation, second paragraph).

287. KELLY, HARBISON & BELZ, *supra* note 193, at 66.

does not, in substance, differ from the definition of Cicero, *Multitudo, juris consensu et utilitatis communione sociata*; that is . . . a multitude of people united together by a common interest, and by common laws, to which they submit with one accord."[288]

Second, institutional structure. The English constitutional order resembled the classical mixed constitution. England had a monarch, an aristocratic House of Lords, and a democratic House of Commons, each with its own powers and duties. But when the legitimacy of monarchy and nobility came into question, lawyers and political theorists had some rethinking to do.

Enlightenment thinkers developed the theory of the separation of powers. This theory identified basic governmental functions—legislative power, executive power, and (later on) judicial power. Good government would separate the exercises of these powers to prevent concentration. As Locke wrote in his *Second Treatise of Government*, the legislative power had to be separated from the executive power "because it may be too great a temptation to humane frailty apt to grasp at Power, for the same Persons who have the power of making Laws, to have also in their hands the power to execute them."[289] Montesquieu made the same point in *The Spirit of the Laws* and extended it to judicial power.[290]

The separation of powers was analytically distinct from the mixed constitution. The latter combined social classes, giving a say to the different estates. The former distinguished powers based on their nature or function (legislative, executive, and judicial) and was agnostic as to the holder of the power. One concerns *who*; the other *what*.

---

288. 1 STORY, COMMENTARIES ON THE CONSTITUTION, *supra* note 94, at § 325.

289. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 364, § 143 (Peter Laslett ed., Cambridge Univ. Press 1988) (1689). Locke focused on the legislative and executive powers and did not identify a separate judicial power. His third power was a "federative," or international relations, power.

290. 1 M. DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 163 (§ 11.6) (Thomas Nugent trans., 1914) (1748).

At the same time, they were closely linked. M.J.C. Vile writes that the separation of powers emerged as "an alternative, but closely related, formulation of the proper articulation of the parts of government."[291] The basic insight of the mixed constitution, as propounded by Cicero and Polybius, also animated separationism—divided government limited the ability of any one person or faction to take all power. As Cynthia Farina puts it, "[l]ike separation of powers, the theory of mixed government attempts, through structural devices, to render government power safe."[292] The mixed constitution may not have used *the* separation of powers, but it was *a* separation of power. Many English republicans credited Cicero with showing how the Roman constitution had separated power to safeguard liberty.[293]

Government based on the separation of powers could still resemble a mixed constitution. Parliament was bicameral, with houses for Commons and Lords (the many and the few), and the Crown was a branch of one. After the break from England, state constitutions retained the bicameral model by creating lower and upper legislative houses while excising hereditary membership. "The radical accomplishment of American political theorists in the decade following independence," writes Farina, "was to cut loose the idea of shared, counterbalancing power from the class-based moorings of mixed government, so that it could become the positive mechanism of restraint."[294]

Like mixed government, government based on the separation of powers could also incorporate checks and balances. Checks and

---

291. VILE, *supra* note 279, at 3; *see also* Steven G. Calabresi, Mark E. Berghausen & Skylar Albertson, *The Rise and Fall of the Separation of Powers*, 106 NW. L. REV. 527, 529–36 (2012).

292. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 491 (1989); *see also* HAWLEY, *supra* note 8, at 180 (noting that mixed government and the separation of powers serve "similar function[s]: to protect by institutions the constraints on government that already exist by the law of nature"); SCHOFIELD, *supra* note 106, at 77 (similar).

293. HAWLEY, *supra* note 8, at 129–30.

294. Farina, *supra* note 292, at 492.

balances in the American tradition thus reflected another continuity with the English constitution.[295] Legislative, executive, and judicial branches might work well as a baseline, but each needed a method of checking the others to fend off encroachment. The executive might have a veto to check the legislature, for example, or the executive might need the consent of the legislature to appoint officials.

Eighteenth-century writers often employed Cicero as their classical authority on mixed government, even though Plato, Aristotle, and Polybius had also written on the subject. Blackstone, Wilson, and Adams praised the English constitution as an exemplar of Cicero's model, not Aristotle's or Polybius's.[296]

Third, the rule of law. English lawyers sounded this theme for hundreds of years as relations between Parliament and the Crown evolved. During the seventeenth and eighteenth centuries, many English republicans and Whigs invoked Cicero in the name of subjecting government to law.[297] So did lawyers in Europe and the United States. Cicero's metaphor of magistrates and judges as "speaking laws" was referenced by Coke, Montesquieu, and Wilson, and it appeared in English and American court decisions.[298] Cicero's admonition that those who obey law are truly free had a similar reception.[299]

---

295. *See* Jed Handelsman Shugerman, *Venality: A Strangely Practical History of Unremovable Offices and Limited Executive Power*, 100 NOTRE DAME L. REV. 213, 247–48, 265–66 (2024); Calabresi, Berghausen & Albertson, *supra* note 291, at 529–36.

296. *See* 1 BLACKSTONE, *supra* note 20, at 50; James Wilson, Of Government, *in* 1 WILSON, *supra* note 89, at 689, 711; *infra* Part III.B.1 (Adams).

297. *See* J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT 371–72 (1975); HAWLEY, *supra* note 8, at 129.

298. EDWARD COKE, SEVENTH PART OF THE REPORTS 4 ("*Judex est lex loquens*" ("The judge is a speaking law")); Calvin's Case, 77 Eng. Rep. at 381 (same); 1 MONTESQUIEU, *supra* note 290, at § 11.6 (Judges "are no more than the mouth that pronounces the words of the law."); Wilson, Of the Common Law, *in* 2 WILSON, *supra* note 89, at 749, 754; Ross v. Pleasants (Va. High Court of Chancery, 1788).

299. 1 WILSON, *supra* note 188; Francis W. Gilmer to Thomas Jefferson (July 10, 1816), *in* 10 THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES 205, 206 (James P. McClure & J. Jefferson Looney eds., 2013).

English and American writers also used Cicero to think about fundamental law and constitutionalism. Cicero's *salus populi* principle, that the welfare of the people should constitute the highest law of a state, was invoked by the likes of Locke, Trenchard, Gordon, and Otis. Locke called it a "just and fundamental" rule,[300] while Trenchard and Gordon called it a "a universal and everlasting maxim in government" that "can never be altered by municipal statutes."[301] Trenchard and Gordon added that "[n]o Customs can change, no positive Institutions can abrogate, and no Time can efface this primary Law of Nature."[302] Otis used *salus populi* the same way in *The Rights of the British Colonies Asserted and Proved*, as did countless other American lawyers, writers, and politicians from the Revolution to the Washington administration.[303]

Eventually, Americans came around to the idea of putting fundamental law into writing. They saw the shortcomings of the unwritten English constitution, a combination of statute, custom, and institutional arrangements that Parliament could alter by ordinary lawmaking. As historians have described, early Americans "argued that a constitution, in order to accomplish the purpose of controlling the government, must be fixed [as well as] separate from and antecedent to government so as to be unalterable by the legislature."[304]

---

300. LOCKE, *supra* note 289, at 373.

301. 1 CATO'S LETTERS, *supra* note 195, at 67.

302. *Id.*

303. *See, e.g.*, *supra* note 210; John Adams, Diary Entry (Jan. 18, 1766), *in* 1 ADAMS PAPERS, *supra* note 64, at 296 ("The public Good, the salus Populi, is the professed End of all Government."); Benjamin Franklin, Marginalia in a Pamphlet by Matthew Wheelock (c. 1770), *in* 17 THE PAPERS OF BENJAMIN FRANKLIN 390 (William B. Willcox ed., 1973); Edmund Jenings to John Adams (Nov. 20, 1780), *in* 10 ADAMS PAPERS, *supra* note 64, at 361; Elbridge Gerry to John Adams (Nov. 23, 1783), *in* 15 ADAMS PAPERS, *supra* note 64, at 369; 1 ANNALS OF CONG. 470 (1789) (statement of Rep. Boudinot, calling it "the first object of republican government"); *id.* at 579 (statement of Rep. Vining); "A Citizen of Virginia" to George Washington (Oct. 28, 1793), *in* 14 THE PAPERS OF GEORGE WASHINGTON 294 (David R. Hoth ed., 2008).

304. KELLY, HARBISON & BELZ, *supra* note 193, at 62; *see* Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 307–08 (1795) ("In England, from whence most of our legal principles and legislative notions are derived, the authority of the Parliament is

After the break from England, Americans concluded that principles of right reason and natural justice had to "be given positive, written, documentary expression as a fixed standard . . . against which to hold government accountable."[305] This led to written constitutions at the state and national level. Intriguingly, the oft-cited *salus populi* maxim came from Cicero's *written* constitution in *De Legibus*. We shouldn't make too much of it, but that fact was probably not lost on Americans who invoked it.

1. Adams, the *Defence*, and the Federal Convention

For a case study in how Cicero's republicanism shaped American republicanism, consider John Adams and the Massachusetts Constitution. The Massachusetts Constitution was considered the crown jewel of the early state constitutions.[306] Adams, its principal author, brought the full scope of his classical learning to bear on the document. And his later treatise on American constitutionalism, the *Defence of the Constitutions of Government of the United States of America*, successfully made the case to the federal Convention for a constitution modeled on Massachusetts's.

After independence, most states wrote new constitutions. But although these constitutions were based on the separation of powers, they did not use the balanced tripartite structure we associate with

---

transcendant and has no bounds. . . . [I]n England there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In America the case is widely different.").

305. KELLY, HARBISON & BELZ, *supra* note 193, at 62. STUART BANNER, THE DECLINE OF NATURAL LAW (2021), JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018), and JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM (2024) have explored fixity and written constitutionalism in more detail, though this Article takes no position on their conclusions.

306. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 434 (1969) (observing it "came to stand for the reconsidered ideal of a 'perfect constitution'"); John Phillip Reid, *In the Taught Tradition: The Meaning of Law in Massachusetts Bay Two Hundred Years Ago*, 14 SUFFOLK U. L. REV. 931, 931 (1980) ("[T]he Massachusetts constitution of 1780 should be ranked along the side of the Declaration of Independence, the Constitution of the United States, the Bill of Rights, and the *Federalist* papers, as one of the five most important documents of the revolutionary era.").

the federal Constitution. They largely made legislatures the dominant branch, with weak executives and judiciaries that lacked independence.[307] Governors were often chosen by the legislature and limited by councils. They had short terms and lacked a veto power. The radically democratic Pennsylvania had a plural executive body to water down executive influence.

The powerful state legislatures soon became deeply unpopular. They confiscated property, suspended the means of debt recovery, experimented with paper money schemes, and set aside judicial decisions.[308] The "generally acknowledged failure" of these early constitutions, one scholar states, "led influential political thinkers to reassess what the old theory of mixed government could offer the country."[309]

Massachusetts passed a new constitution in 1780 after the initial wave of state constitution-making. A convention was called and the delegates gave John Adams the task of drafting the document. The convention refined his draft, but on the whole it reflected his authorship.[310] Adams created a bicameral legislature, a popularly elected governor with a veto, and an independent judiciary with life-tenured members.[311] His constitution balanced and divided power among branches more than the other states had done while still making government responsive to the people. The Massachusetts Constitution then became the leading state model at the federal Convention.

Massachusetts was also the first state to submit its constitution to the people for ratification.[312] Earlier state constitutions had been passed by legislatures as statutes, closer to the English model. With its citizens ratifying the constitution outside the ordinary lawmaking process, Massachusetts gave a boost to the emerging idea that

---

307. KELLY, HARBISON & BELZ, *supra* note 193, at 68–74.

308. WOOD, *supra* note 306, at 404–12.

309. Farina, *supra* note 292, at 491.

310. *See* LAWRENCE FRIEDMAN & LYNNEA THODY, THE MASSACHUSETTS STATE CONSTITUTION 11 (2011); Edward F. Hennessy, *The Extraordinary Massachusetts Constitution of 1780*, 14 SUFFOLK U. L. REV. 873, 880 (1980).

311. MASS. CONST. of 1780, Part II, ch. 1, § 1, art. I; *id.* ch. 2, § 1; *id.* ch. 3, § 1.

312. KELLY, HARBISON & BELZ, *supra* note 193, at 69–70.

a written fundamental law could be antecedent and superior to ordinary government. In this respect, as with institutional design, Massachusetts provided the federal Convention with an attractive precedent.

In the late 1780s, while serving as ambassador to England, Adams wrote *A Defence of the Constitutions of Government of the United States of America*. The *Defence* studied governments across history, distilling the essence of republicanism to show how it had been captured in American government (with no clearer example than Adams's Massachusetts Constitution). Adams composed the work in epistolary form as a series of letters critiquing Turgot, a prominent French minister who thought little of English mixed government and argued that republics should have a single legislative body and no real executive. The *Defence*, which Gordon Wood calls "the finest fruit of the American Enlightenment,"[313] ranked among the most influential works of American political thought for years to come.

Adams sought to isolate the structure of mixed government from the social orders of nobility and royalty. He believed that a constitution could combine and adapt the rule of one, few, and many without hereditary offices and titles. His insistence on the vocabulary of classical mixed constitutionalism led him to sometimes retain the terms "monarchy" and "aristocracy," which caused consternation among his opponents. But Adams used the terms more in the typological sense of "one" and "few." He would not have imported royalism across the Atlantic. Still, his less-than-tactical preference for the old vocabulary invited skepticism in some quarters.

The *Defence* made a simple claim—a republic should be based on popular sovereignty and divide power between a bicameral legislature, executive, and judiciary, each checking and balancing the others.[314] Adams wanted to refine English constitutionalism, not

313. WOOD, *supra* note 306, at 568.

314. *See* 1 DEFENCE, *supra* note 1, at iii ("Representations, instead of collections, of the people—a total separation of the legislative from the executive power, and of the judicial from both—and a balance in the legislature by three equal independent branches

replicate it. Many of his contemporaries, Michael Hawley writes, took the *Defence* "to be the best expression of the philosophical underpinnings of both the Revolution and the Constitution."[315]

Adams began the *Defence* with a preface explaining his goals and setting out the basic argument. "Without three orders," he wrote, "and an effectual balance between them, in every American constitution, it must be destined to frequent, unavoidable revolutions."[316] He then turned to Cicero. Adams quoted *De Re Publica* at length (in Latin, replaced here with the translation) to set the stage:

> Cicero asserts, "I consider the best constitution for a republic to be that which is a balanced combination of the three forms, kingship, aristocracy, and democracy" in such peremptory terms the superiority of such a government to all other forms, that the loss of his book upon republics is much to be regretted. . . . As the treble, the tenor, and the bass exist in nature, they will be heard in concert: if they are arranged by Handel, in a skillful composition, they produce rapture the most exquisite that harmony can excite. . . .
>
> "For just as in the music of harps and flutes or in the voices of singers a certain harmony of the different tones must be preserved, the interruption or violation of which is intolerable to trained ears, and as this perfect agreement and harmony is produced by the proportionate blending of unlike tones, so also is a State made harmonious by agreement among dissimilar elements, brought about by a fair and reasonable blending together of the upper, middle, and lower classes, just as if they were musical tones. What the musicians call harmony in song is concord in a State. The strongest and best bond of permanent union in any commonwealth; and such concord can never be brought about without the aid of justice." As all the ages of the world have not produced a greater statesman and philosopher united than Cicero, his authority should have great weight. His

---

[referring to the lower house, senate, and executive veto as a legislative act]—are perhaps the three only discoveries in the constitution of a free government since the institution of Lycurgus.").

315. HAWLEY, *supra* note 8, at 190.

316. 1 DEFENCE, *supra* note 1, at ix.

> decided opinion in favor of the three branches is founded on a reason that is unchangeable; the laws, which are the only possible rule, measure, and security of justice, can be sure of protection, for any course of time, in no other form of government; and the very name of a republic implies, that the property of the people should be represented in the legislature, and decide the rule of justice. "A commonwealth is a property of the people. But a people is not any collection of human beings brought together in any sort of way, but an assemblage of people in large numbers associated in an agreement with respect to justice and a partnership for the common good."
>
> "A republic, or commonwealth, exists when there is good and lawful government whether in the hands of a monarch, or of a few nobles or of the whole people. When, however, the monarch is unlawful, which I call 'tyrant,' or the nobles are unlawful, which I call 'faction,' or the people are unlawful, for which I also find no term other than 'tyrant,' then the state is no longer merely defective, but, as a chain of reasoning from the foregoing definitions has made plain, does not exist at all. For there is no republic when a tyrant or a faction captures the state, nor are the people any longer a people, if they are unjust, since in that case they were not a throng united in fellowship by a common sense of justice and a community of interest."[317]

In just a few paragraphs, Adams imported wholesale Cicero's republican themes—popular sovereignty, mixed government, social harmony, and the rule of law. He believed that the English constitution, properly understood, had brought Cicero's vision to life. And he believed that American constitutionalism could perfect it.

The *Defence* has had a polarizing history. Adams's contemporaries disputed its success within months of its publication. Thomas Jefferson complimented Adams on the book and suggested that it would "do a great deal of good," but James Madison thought that

317. *Id.* at xx–xxiii.

"Men of learning will find nothing new in it, Men of taste many things to criticize."[318]

Modern scholars have long debated the work's relevance to the federal Convention, which Adams missed while serving in London. Some argue that the Convention delegates looked to Adams's work for inspiration,[319] but others disagree, minimizing Adams as a quixotic thinker. After praising Adams's brilliance, Gordon Wood's classic *The Creation of the American Republic* nonetheless concludes, in a chapter titled "The Relevance and Irrelevance of John Adams," that Adams misunderstood the significance of the Convention and remained stuck in outdated mixed constitutionalist modes of thought.[320] Similarly, the editors of the *Documentary History of the Ratification* find the *Defence*'s influence "difficult to determine," stating that there "is not a single recorded reference to Adams or his work in the debates."[321]

Recent work by Mary Sarah Bilder, however, has shed new light on the influence the *Defence* may have had on the Convention. She traces how the *Pennsylvania Mercury* newspaper serialized the *Defence* in Philadelphia as the Convention took place, reproducing Adams's case for a house (many), senate (few), and strong executive (one) with checks and balances for months. Serialization "drummed in Adams's argument over and over again."[322] In May 1787, as the Convention began its work, the *Mercury* excerpted portions of the *Defence*'s crucial preface. It ran the body of the treatise weekly throughout the summer and fall and finished around the time the Convention did.

---

318. Thomas Jefferson to John Adams (Sept. 28, 1787), *in* 12 JEFFERSON PAPERS, *supra* note 4, at 189, 189; James Madison to Thomas Jefferson (June 6, 1787), *in* 10 THE PAPERS OF JAMES MADISON 28, 29 (J.C.A. Stagg ed., 2010).

319. *See* GILBERT CHINARD, HONEST JOHN ADAMS 212 (1964); ZOLTÁN HARASZTI, JOHN ADAMS & THE PROPHETS OF PROGRESS 31 (1952).

320. WOOD, *supra* note 306, at 567–87.

321. Editor's Note on John Adams, A Defence of the Constitutions, *in* 13 DOCUMENTARY HISTORY, *supra* note 21, at 81, 83–84.

322. Mary Sarah Bilder, *The Soul of a Free Government: The Influence of John Adams's A Defence on the Constitutional Convention*, 1 J. AM. CONST. HIST. 1, 15–20 (2023).

Bilder demonstrates that several of the delegates, including George Washington, Benjamin Franklin, William Samuel Johnson, and George Mason obtained early copies of the *Defence* as the Convention began.[323] Other delegates, including James Madison, Alexander Hamilton, Rufus King, and Gouverneur Morris read it and discussed it over the course of the summer.[324] And while Madison found the *Defence*'s ideas unoriginal, he nonetheless admitted that "the book also ha[d] merit" and that it "excited a good deal of attention."[325] He predicted that it would "be read, and praised, and become a powerful engine in forming the public opinion," owing to "the name and character of the Author."[326]

Adams was among the most prominent American intellectuals and had just written a massive treatise on American republicanism; it would have been remarkable if the delegates had *not* discussed his work. The delegates were highly intellectual politicians and lawyers who liked to keep up with the literature. Indeed, contra the claim of the *Documentary History* editors, Bilder finds that the delegates did invoke Adams.[327] Luther Martin, for one, referenced "the celebrated Mr. Adams, who talks so much of checks and balances" in the debates of June 27.[328]

Bilder identifies three main ways the *Defence* made a mark on the Convention.[329] First, it bolstered the credibility of the strong national government proposed by the Virginia Plan.[330] A stronger national government was no foregone conclusion. The Confederation

323. *Id.* at 20; *see also* Weisen, *supra* note 26, at 165 (noting that the *Defence* "was much circulated at the Constitutional Convention").

324. Bilder, *supra* note 322, at 20.

325. Madison, *supra* note 318.

326. *Id.*

327. Bilder, *supra* note 322, at 5 & n.3 (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 439 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS] (Yates's Notes, speech of Luther Martin)).

328. *Id.* at 5.

329. *Id.* at 20–21.

330. *Id.* at 21–27

Congress was unicameral and had no independent executive, similar to the New Jersey Plan, the Virginia Plan's rival.[331] Second, Adams's treatment of a bicameral legislature, familiar from mixed constitution theory, was picked up by Madison in the Convention debates.[332] And third, the Committee of Style's revision of the Convention's draft matched Adams's proposed structure.[333] The Committee edited twenty-three clunky articles down into seven, with three articles for the three branches of government, the cleaner "parallel vesting formulas reinforc[ing] parallel separation."[334]

To the extent the *Defence* made its way into the Convention, so did Ciceronian republicanism. Adams would have found curious Madison's critique that the book was unoriginal; as a repackaging and rearticulation of Cicero's key ideas, it was unoriginal by design.

But Cicero was also invoked in the Convention apart from Adams's transmission. Wilson and Dickinson appeared to cite Scipio's Dream in the debates on the Senate while Hamilton cited Cicero in his speech introducing his plan of government.

2. Wilson, Dickinson, and the Federal Convention

The theme of harmony as the goal of constitution making appeared in the debates over the selection of senators. The delegates were familiar with Scipio's Dream and its picture of the planets moving about the cosmos in harmony. They may have used the Dream to set the terms of debate on the Senate. It is difficult to know for certain from the limited reports available from the debates, but what we do have coincides heavily with the language of the Dream.

On June 7, the Convention considered whether senators would be chosen by state legislatures or popular election. In so doing, the delegates aimed to pick a structure that would bring about "due

331. *See id.* at 26–27.
332. *See id.* at 27–35.
333. *See id.* at 36.
334. *Id.*

harmony" between the state governments and the new federal one.[335]

John Dickinson argued for state legislative selection.[336] Dickinson, who knew his Cicero,[337] defended his proposal with a metaphor reminiscent of Scipio's Dream. Madison's notes tell us that Dickinson "compared the National System to the Solar System, in which the States were the planets, and ought to be left to move freely in their proper orbits."[338] Popular election, he argued, would "extinguish these planets" by excluding the state governments "from all agency in the national one."[339] State selection, by contrast, would generate a "collision between the different authorities which should be wished for in order to check each other."[340] Dickinson maintained that "government thus established would harmonize the whole, and like the planetary system, the national council like the sun, would illuminate the whole—the planets revolving round it in perfect order."[341]

James Wilson, who favored popular election, met Dickinson on the same terms. He turned the planetary metaphor back on his colleague. Wilson feared not that the federal government would subsume the states, but that the states would "devour[] the national Govt."[342] As Madison's notes record, Wilson "was not . . . for extinguishing these planets[, the states,] as was supposed by Mr. D.—neither did [Wilson,] on the other hand, believe that they would

335. 1 FARRAND'S RECORDS, *supra* note 327, at 150 (Madison's notes, motion of Roger Sherman).

336. *See id.* at 152–53 (Madison's notes, speech of John Dickinson).

337. *See supra* note 6. In his Revolution-era *Letters from a Farmer in Pennsylvania*, Dickinson quoted Cicero's *Pro Sestio* and warned his fellow colonists against following the example of one of Cicero's populist opponents. *See* John Dickinson, Letter III, Letters from a Farmer in Pennsylvania, *reprinted in* EMPIRE AND NATION, *supra* note 6, at 15, 19; *id.* at 71 (Letter XI).

338. 1 FARRAND'S RECORDS, *supra* note 327, at 153 (Madison's notes, speech of John Dickinson).

339. *Id.*

340. *Id.*

341. *Id.* at 157 (Yates's notes, speech of John Dickinson).

342. *Id.* at 153 (Madison's notes, speech of James Wilson).

warm or enlighten the sun."[343] Ever the nationalist, Wilson believed that the state governments would unduly hamper federal objectives if given a say in the Senate's composition.[344] "Within their proper orbits [the states] must still be suffered to act for subordinate purposes (for which their existence is made essential by the great extent of our Country[,])"[345] he argued, but they could "only answer local purposes."[346] A national government independent of the state governments would prove more "vigorous."[347]

Dickinson's state selection, of course, prevailed in the end.[348] But the outcome is not the point so much as the process. Both sides were comfortable trading on Ciceronian terms and thought doing so would appeal to other delegates.

3. Hamilton and the Federal Convention

Cicero made another appearance at the Convention, in Alexander Hamilton's famous speech of June 18. With the Convention delegates at an impasse over the Virginia Plan and the New Jersey Plan, Hamilton offered his own.[349] His speech introducing his proposed government lasted several hours and gave his critics ample material with which to tar him as an elitist.[350] His plan provided for a bicameral legislature and an elected executive known as a governor.[351] The governor and the members of the senate would serve during "good behavior," or for life unless impeached.[352]

---

343. *Id.*

344. *See id.* at 153–54

345. *Id.*

346. *Id.* at 157 (Yates's notes, speech of James Wilson).

347. *See id.*

348. *But see* U.S. CONST. amend. XVII. Wilson won the long game.

349. *See* ALEXANDER HAMILTON, Plan of Government (June 18, 1787), *in* 4 HAMILTON PAPERS, *supra* note 5, at 207–09.

350. *See* PAUL EIDELBERG, THE PHILOSOPHY OF THE AMERICAN CONSTITUTION 112 (1968).

351. *See* Plan of Government (June 18, 1787), *supra* note 349, at 207–08.

352. *Id.* at 208–09.

Hamilton began his speech with a genealogy of ancient and modern governments.[353] Paul Eidelberg writes that as Hamilton rose to speak, "he deemed it necessary to have recourse to fundamental principles, that is, to political philosophy."[354] The speech covered ground from Greece and Rome to Charlemagne's France, Germanic states, Swiss cantons, the Venetian republic, Poland, and England, all by way of background.[355] At the linchpin of his speech, Hamilton arrived at British mixed constitutionalism.[356] In his notes, Hamilton wrote to himself at this point to give his sentiments "of the best form of government . . . as a model which we ought to approach as near as possible." [357]

He then scribbled: "British constitution best form. Aristotle—Cicero—Montesquieu—Neckar."[358] The subsequent pages of his notes lay out the traditional arguments for mixed constitutionalism, concluding with a recapitulation of the strengths of the English government and why the Convention would do well to imitate it.[359] One wonders whether Hamilton had Adams's recently serialized *Defence* and its Ciceronian preface in mind.

Hamilton's plan of government earned him a reputation as a monarchist. Perhaps it was well deserved, perhaps not. Scholars generally agree that the plan, which went nowhere, had the effect

353. *See* ALEXANDER HAMILTON, Notes for Speech on a Plan of Government, *in* 4 HAMILTON PAPERS, *supra* note 5, at 181–84.

354. *See* EIDELBERG, *supra* note 350, at 112.

355. *See* Notes for Speech on a Plan of Government, *supra* note 353, at 181–84.

356. *See id.* at 184.

357. *Id.*

358. *Id.* at 184–85. Madison's notes on Hamilton's speech confirm that Hamilton actually delivered this point from his notes. *See* James Madison, Notes, *in* 4 HAMILTON PAPERS, *supra* note 5, at 192.

359. *See* Notes for Speech on a Plan of Government, *supra* note 353, at 184–92.

of casting Madison's Virginia Plan in a much more favorable, centrist light.[360] Hamilton probably had this in mind all along—"a strategic ploy" as much "designed to draw fire as to be adopted."[361] Now a mean between two extremes, the Virginia Plan jumped out ahead as the leading candidate.[362] Instead of a difficult binary choice, the delegates could assure themselves that they had picked a middle road. That Hamilton never formally introduced any document with his plan,[363] avoiding making a record of it, adds support for this view.

Still, Hamilton's choice of authority is telling. If he could plausibly present Cicero as a chief authority on "the best form of government" that the Convention "ought to approach as near as possible,"[364] he was likely not alone. Adams, in absentia, certainly agreed, as did Wilson and others of the Federalist persuasion.

IV. EXECUTIVE AUTHORITY

In structuring the new Congress, the delegates had plenty of models in their state assemblies and the Confederation Congress. But with the new national executive, the delegates were more in the wild.[365]

They did not write on a completely blank slate. They were familiar with King George III and his council government, and most states had governors. But the state constitutions provided more an-

360. *See* Mary Sarah Bilder, *How Bad Were the Official Records of the Federal Convention?*, 80 GEO. WASH. L. REV. 1620, 1653 (2012); HARVEY FLAUMENHAFT, THE EFFECTIVE REPUBLIC: ADMINISTRATION AND CONSTITUTION IN THE THOUGHT OF ALEXANDER HAMILTON 295 (1992) ("The immediate effect of the speech was to make the Virginia plan seem immensely more choiceworthy than the New Jersey plan, by which it had just been challenged.").

361. Bilder, *supra* note 360, at 1653

362. *See* EIDELBERG, *supra* note 350, at 109.

363. Bilder, *supra* note 360, at 1653.

364. *See* Notes for Speech on a Plan of Government, *supra* note 353, at 184.

365. *See* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING 20 (2020) ("[N]o one in attendance at the Philadelphia Convention—indeed no one anywhere—had experience with a strong republican executive for a nation the size of the United States.").

timodels than models, since legislatures often dominated governors. And no one thought monarchy an appropriate institution for a republican nation. The federal executive was to be neither governor nor king.

Several debates framed the creation of the American presidency. Would the executive be plural or single? Would the executive be weak or strong? How would the executive interact with the other branches? To chart a path through these unknowns, the figures most closely associated with the creation and implementation of Article II drew on Cicero's theory and practice.

As far as theory goes, Cicero put forth early versions of the argument for energy and unity in administration. The "rule by one" element of the mixed constitution became the archetype for the single executive. Hamilton, Wilson, and others adopted this position as it had been filtered down through the ages. And as for practice, Cicero's accomplishments as consul left a historical example that inspired Hamilton in handling questions of military force during the Washington administration. Hamilton responded to the Whiskey Rebellion of 1794 using Cicero's name as a pseudonym and imitating his efforts, quashing an insurrection to preserve the rule of law.

By precept and example, Cicero bequeathed to the Founding generation the earliest germ of the Hamiltonian "energetic executive."

A. Cicero's Theory and Example of Executive Authority

Cicero praised statesmanship as the highest human duty across his writings. He stressed in *De Officiis* that "we are not born for ourselves alone, but our country claims a share of our being,"[366] and again in *De Re Publica* that "our country has not given us birth and education without expecting to receive some sustenance, as it were, from us in return."[367] Statesmanship—encompassing things like military leadership and public administration—was the occupation

366. DE OFFICIIS, *supra* note 43, at 23 (1.22). James Wilson cited this passage in his *Lectures*. *See* Wilson, Of Man, as a Member of Society, *supra* note 165, at 631.

367. DE RE PUBLICA, *supra* note 37, at 23 (1.4). Justice Story cited this passage in a speech to the American Institute of Instruction. *See* 2 STORY LETTERS, *supra* note 92, at 188–89.

in which humans could most approach the divine. In Scipio's Dream, Scipio Africanus revealed to his grandson that the afterlife would be especially sweet for those who served well in public office:

> Be assured of this, so that you may be even more eager to defend the commonwealth: all those who have preserved, aided, or enlarged their fatherland have a special place prepared for them in the heavens, where they may enjoy an eternal life of happiness. For nothing of all that is done on earth is more pleasing to that supreme God who rules the whole universe than the assemblies of men associated in justice, which are called States. Their rulers and preservers come from that place, and to that place they return.[368]

Cicero echoed this idea in his speech *Pro Sestio*, where he declared that he "reckon[ed] among the company and number of the Immortal Gods" those "who firmly established this State."[369]

Cicero knew that public administration was an intensely practical task: "If anyone is entering public life," *De Officiis* cautioned, "let him beware of thinking only of the honor that it brings; but let him be sure also that he has the ability to succeed."[370] But should one have the requisite abilities, one "should put aside all hesitation" and "take a hand in directing the government; for in no other way can a government be administered or greatness of spirit made manifest."[371] Cicero differed here from Plato, who preferred that wise citizens "not . . . assume civic duties except under compulsion."[372] As a general matter, public administration on Cicero's view was not to be a reluctant enterprise, but an enthusiastic and vigorous one.

Cicero recognized the need for a deliberative part and an active part of government. The mixed constitution, with its power divided

---

368. DE RE PUBLICA, *supra* note 37, at 267 (6.13). James Wilson cited this passage in his *Lectures*, *see* Wilson, Of Man, as a Member of Society, *supra* note 165, at 635, and *Chisholm v. Georgia*. *See* 2 U.S. (2 Dall.) at 455 (opinion of Wilson, J.).

369. CICERO, *Pro Sestio*, *in* PRO SESTIO, IN VATINIUM 233 (§ 68) (R. Gardner trans., Loeb Classical Library 1958) (56 B.C.).

370. DE OFFICIIS, *supra* note 43, at 75 (1.21).

371. *Id.* at 73–75 (1.21).

372. *Id.* at 29 (1.28).

between different bodies, had room for both. Cicero saw the monarchical element of government as the branch best-suited for energetic leadership—not because he favored royalism, but because he appreciated the structural advantages of unitary governance. The consuls and dictator "represented the monarchical element in the constitution," Michael Hawley writes, "allowing for decisive response to crisis."[373] Scipio admitted in *De Re Publica* that he considered monarchy the best unmixed form of government, as the form most conducive to activity and efficiency.[374] Decisions requiring deliberation and assent from multiple parties or coalitions would naturally require more time: "[I]f the management of a State is committed to more than one," Scipio explained, "you can see that there will be no authority at all to take command, for unless such authority is a unit, it can amount to nothing."[375]

As examples, Scipio pointed to a ship in a storm or a case of terrible sickness.[376] Sailors look to the expert direction of the captain, he observed, while the sick look to a doctor.[377] In an emergency, neither sailor nor sick person would seek to debate the best course of action or ask for a vote. Cicero thus established a goal (energetic, active government) and suggested a possible means or institutional design (unitary decision making) to achieve that goal.

We should not overread Cicero here. First, Scipio's example of the captain and doctor was not part of the extant text in the eighteenth century. Second, Cicero was no monarchist. While he found desirable qualities in unilateral government, he incorporated it as just one part of the larger mixed government framework. Next, his proposed constitution in *De Legibus*, mirroring Rome's, divided the *imperium*, or supreme power, between two consuls.[378] The consulship had developed as a domestication of the old kingship, and Rome

373. HAWLEY, *supra* note 8, at 46–47.

374. DE RE PUBLICA, *supra* note 37, at 83 (1.35), 103–05 (1.45).

375. *Id.* at 91 (1.38). SCHOFIELD, *supra* note 106, at 72, points out that this passage draws upon the Platonic understanding of the mind and its struggle for mastery over the appetites and passions.

376. DE RE PUBLICA, *supra* note 37, at 93–95 (1.39).

377. *Id.*

378. DE LEGIBUS, *supra* note 40, at 465–67 (3.2).

had what we would understand as a plural executive. And last, Cicero lived and wrote well before the idea of distinct powers, including executive power, emerged. Speaking of "Cicero's theory of executive power" might be somewhat anachronistic. He spoke in broader terms of administration or statesmanship.

We can nonetheless find—and more to the point, eighteenth-century readers did find—an association in Cicero's thought between unity, energy, decisiveness, and administration. First, despite the partial loss of *De Re Publica*, the Founding generation was quite familiar with the rest of Cicero's work and his mixed constitution theory.

Second, Rome conspicuously delegated the *imperium* to a sole ruler in times of crisis. Cicero endorsed this practice in his proposed constitution.[379] He included provision for a dictator when the state's welfare required decisive action: "[W]hen a serious war or civil dissensions arise, one man shall hold, for not longer than six months, the power which ordinarily belongs to the consuls, if the Senate shall so decree."[380] As a matter of natural law, states had to have a means of self-preservation, something that required unilateral action from time to time.

And third, while the concept of executive power had yet to be consciously theorized, its referent—military force or the carrying out of laws—did exist. The Romans administered public affairs through various magistrates we would classify as executive officials.[381] So when Cicero made claims about public administration or consular duties, the eighteenth-century reader would have mentally translated them into claims about executive power.[382]

---

379. *Id.* at 467 (3.3).

380. *Id.*

381. *See* BEDERMAN, *supra* note 7, at 79 ("The Roman consuls clearly exercised a bundle of authority that approximated executive power.").

382. *See, e.g.*, Alexander White, *To the Citizens of Virginia*, WINCHESTER VA. GAZETTE (Feb. 22, 1788), *in* 8 DOCUMENTARY HISTORY, *supra* note 21, at 406 ("Where the executive power [of Rome] was vested and how distributed, I will give you in language better than mine. 'While the consuls resided at Rome, they had the administration of all public affairs. All other magistrates, except the tribunes of the people, were subject to them, and obliged to obey them[.]'") (citing Polybius).

So much for theory. Turning to practice, the historical Cicero lived out his ideal of decisive governance. Unlike other classical philosophers, he was a statesman first. He got his hands dirty in the messiness of public life, serving as a prosecutor and public administrator, managing funds, directing troops, conducting festivals, and giving speeches.[383]

In his time as consul, his defeat of the Catilinarian conspiracy exemplified the qualities of energetic and decisive statesmanship. Though Cicero nominally shared power, his co-consul Gaius Antonius Hybrida was a nonfactor.[384] Plutarch described Hybrida as "a man fit to lead neither in a good cause nor in a bad one," and "a valuable accession to another's power."[385] With Hybrida on the sideline, Cicero was effectively the sole consul. Rome had a plural executive on paper, but later generations would have understood Cicero as acting with the dispatch and strength of a unitary executive.

B. The Reception of Cicero's Theory and Example of Executive Authority

The modern notion of executive power emerged in the thought of Machiavelli, Hobbes, and Locke, among others—a centuries-long process of "taming the prince."[386] The recognition of the executive function of government played a central role in the development of the separation of powers.

Cicero's role in shaping early understandings of the American executive has gone entirely unnoticed. Forrest McDonald writes that "the ancient philosophers were not relevant" to the political theory of the presidency, and that "[c]onstitution-makers could . . . look no further back than 1513, when Machiavelli wrote *The Prince*."[387] That might be largely true, but Cicero was the exception.

---

383. *See* PLUTARCH, *supra* note 29, at 412–15.
384. *Id.* at 415.
385. *Id.*
386. *See generally* HARVEY C. MANSFIELD, JR., TAMING THE PRINCE (1989).
387. FORREST MCDONALD, THE AMERICAN PRESIDENCY 39 (1994).

1. Theory: Treatises, the Federal Convention, and Ratification

One of the earliest writers to touch on executive power, Marsilius of Padua, held up Cicero the consul as a sort of proto-executive in his 1324 treatise *Defender of the Peace*.[388] Marsilius, whose work later influenced Machiavelli, cited Cicero's handling of the Catilinarian conspiracy as an example of skillful executive action.[389] Marsilius praised Cicero for acting swiftly and putting Catiline's coconspirators to death rather than prolonging civil unrest.[390] Machiavelli famously argued in a similar vein that executives must have the attributes of suddenness, secrecy, and unity.[391]

Political theorists argued for energy and unity in the executive into the eighteenth century, often with reference to mixed constitution theory. In *The Spirit of the Laws*, Montesquieu invoked Cicero in extolling the virtues of monarchy and argued that "the executive power is . . . enabled to act with greater expedition" in monarchies than in other states.[392] Montesquieu wrote that the "executive power ought to be in the hands of a monarch, because this branch of government, having need of dispatch, is better administered by one than by many."[393]

William Paley, a prominent English philosopher, made the same claim in his work *The Principles of Moral and Political Philosophy*.[394] Paley, described by Gordon Wood as a "summarizer of common

388. *See* MARSILIUS OF PADUA, DEFENDER OF THE PEACE 56–57 (Alan Gerwith trans., 1956) (1324); *see also* NEDERMAN, *supra* note 53, at 108 (noting that Cicero "looms large" in Marsilius's thought).

389. MARSILIUS, *supra* note 388, at 56–57.

390. *Id.*

391. *See* MANSFIELD, *supra* note 386, at 142–49; HAWLEY, *supra* note 8, at 67. Many, of course, took issue with much of Machiavelli's thought. *See* MCDONALD, *supra* note 387, at 39–43.

392. 1 MONTESQUIEU, *supra* note 290, at 59–61.

393. *Id.* at 168.

394. WILLIAM PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY 450 (J. Davis, 2d ed. 1786).

eighteenth-century English thought,"[395] wrote as follows: "The separate advantages of MONARCHY, are unity of council, activity, decision, secrecy, dispatch; [and] the military strength and energy which result from these qualities of government."[396]

Writing at the same time as Paley, John Adams admitted in the *Defence* that he entertained doubts about a single executive and wondered instead whether the executive power should be vested in a council or plural body.[397] But the virtues of a single chief administrator proved irresistible. "I had almost ventured to propose [an] assembly for the executive power," he wrote, "but the unity, the secrecy, the dispatch, of one man, has no equal."[398] As Cicero had argued millennia before and as Montesquieu, Paley, and Adams now believed, the ideal manner of administration (energy) could be achieved through a particular institutional design (unity).

This position carried the day at the Constitutional Convention. Oversimplifying things mightily, the delegates designed the presidency in part as a response to the lack of an energetic, single, or independent national executive under the Articles of Confederation.[399] The shortcomings of the weak state executives bolstered the case for a stronger national executive.[400]

James Wilson, in first introducing the proposal for a single executive, argued that unity would give the "most energy dispatch and

395. WOOD, *supra* note 306, at 261.

396. PALEY, *supra* note 394, at 450. Earlier English writers like Bacon and Locke had argued the same. *See* Jeremy D. Bailey & Haimo Li, *"Decision, Activity, Secrecy, and Dispatch": The Intellectual Origins of Hamilton's Rhetoric in Federalist No. 70*, 42 HIST. POL. THOUGHT 318, 329–35 (2021).

397. *See* 1 DEFENCE, *supra* note 1, at 379.

398. *Id.*

399. *See* MCCONNELL, *supra* note 365, at 19–23.

400. The constitutions of the states (most adopted during a war against a king) generally had powerful legislatures and established weak executives-in-council. But by 1787, the pendulum had swung the other way, as legislatures became increasingly aggressive and unpopular. *See* WOOD, *supra* note 306, at 404–12. "The experience under post-independence state constitutions . . . convinced many Philadelphia Convention delegates and other nationalists that a strong executive was important to political stability." Kent, Leib & Shugerman, *supra* note 17, at 2121.

responsibility to the office."[401] (In response, Edmund Randolph decried "unity in the Executive magistracy" as "the foetus of monarchy."[402]) Hamilton named Cicero as an authority supporting the English constitution, which Hamilton believed would allow for the "vigorous execution of the laws" and a "[b]etter chance for a good administration."[403] Wilson, Hamilton, and their nationally minded allies defeated motions to create an executive council as a limit on presidential power.[404] The Article II that emerged from the Convention made the President single rather than plural and independent of Congress. The Convention's plan gave the President a capacity for "energy" not yet familiar to state republican governments.

As the states began the ratification process, Charles Carroll cited Cicero in support of the proposed executive. Writing for the Maryland ratifying convention, Carroll argued that "the energy of monarchy" was an element of an ideal constitution.[405] "Cicero," he wrote, was "[o]f this sentiment," and was one "of the best judges of Antiquity."[406] The proposed Constitution properly incorporated "the vigor & dispatch of monarchy," Carroll concluded, as the "energy" of the proposed government would "give it respectability abroad, & stability at home."[407] He concluded that the Philadelphia delegates "determined wisely in giving the executive to a single person."[408]

---

401. 1 FARRAND'S RECORDS, *supra* note 327, at 65.

402. *Id.* at 66.

403. *See* Notes for Speech on a Plan of Government, *supra* note 353, at 184–86.

404. *See* MCCONNELL, *supra* note 365, at 33–35.

405. Charles Carroll of Carrollton, Draft Speech for Maryland Convention (January–March 1788), *in* 12 DOCUMENTARY HISTORY, *supra* note 21, at 832, 833. Carroll prepared this speech in anticipation of serving at the Maryland ratifying convention. He never had the chance to deliver it, as his county elected Antifederalist delegates instead. *Id.* at 832. But regardless of whether he actually gave his speech, it still reflected Federalist sentiments on the Constitution that others would have shared. Carroll, a self-professed Ciceronian, *see* Oration, *supra* note 87, cited Cicero multiple times in his draft speech. *See* Carroll, *supra*, at 848.

406. Carroll, *supra* note 405, at 833

407. *Id.* at 834.

408. *Id.* at 841.

And all of this came before Hamilton wrote *Federalist No. 70*.[409] Montesquieu, Paley, Adams, Wilson, Carroll, and others had promoted executive energy and unity—some citing Cicero—in the years leading up to Hamilton's famous essay. They had done so in France, England, and America.

The *Federalist No. 70* recapitulated their points: "Energy in the executive is a leading character in the definition of good government," Hamilton wrote.[410] "A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government."[411] The elements of "energy" were unity, duration in office, salary protection, and "competent powers."[412] Elaborating on unity, Hamilton stated that "[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number."[413]

And we know Hamilton had the Roman example in mind: "Every man the last conversant in Roman history," he declared, "knows how often that republic was obliged to take refuge in the absolute power of a single man."[414] A unitary executive defended Rome against external threats, but Hamilton also suggested that a unitary executive worked just as well internally against "the intrigues of ambitious individuals who aspired to the tyranny," a possible allusion to Cicero's defeat of Catiline.[415]

Though the*Federalist* has proved the most enduring historical text defending energy in the executive, Hamilton was largely recycling

---

409. *See* THE FEDERALIST NO. 70 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

410. *Id.* at 423.

411. *Id.*

412. *Id.* at 424.

413. *Id.*

414. *Id.* at 423.

415. *Id.* Coincidentally, but tellingly, Hamilton's performance at the New York ratifying convention led New York newspapers to deem him "the American Cicero" for his rhetorical success in winning over co-delegates to the Federalist cause. *See Extract of a Letter from a Gentleman in Poughkeepsie, to His Friend in This City*, N.Y. PACKET (June 24, 1788), *in* 22 DOCUMENTARY HISTORY, *supra* note 21, at 1741–42.

the older sources. He even recycled from himself. Almost a decade earlier, he had written a memorandum discussing administrative organizational principles.[416] For government agencies overseeing commerce, Hamilton admitted that a board would do, "but for most other things single men" were preferred.[417] For war, foreign affairs, and finance, a single minister was superior, he maintained, because "[t]here is always more decision, more dispatch, more secrecy, more responsibility where single men [rather than] bodies are concerned," thus blending "the advantages of Monarchy and of a republic."[418] And just months before he wrote *Federalist No. 70*, Hamilton was arguing on the Convention floor for a unitary executive and a "vigorous execution of the laws" with reference to Cicero.

In a modest way, the design of Article II reflected Cicero's thought. The office of President of the United States was proposed, defended, and critiqued in terms of energy and unity. Adams used these concepts in the *Defence*, Wilson used them at the federal Convention, and Hamilton used them during ratification. And Hamilton and Carroll used them on Cicero's authority.

None of this was foreordained. Convention delegates and state ratifiers fought hard for the unity and strength of the presidency we know today. Had votes swung the other way on this or that motion in the Convention, Article II might have vested the executive power in a President and privy council or in the legislature. Taking a cue from classical constitutional theory, the delegates and ratifiers chose the Hamiltonian path instead.

---

416. *See* Letter from Alexander Hamilton to unknown (1779), *in* 2 HAMILTON PAPERS, *supra* note 5, at 234.

417. *Id.* at 246 n.H.

418. *Id.*; *see also* Letter of Alexander Hamilton to James Duane (Sept. 3, 1780), *in* 2 HAMILTON PAPERS, *supra* note 5, 404–05 ("A single man, in each department of administration, would be greatly preferable . . . . [W]e shall blend the advantages of a monarchy and republic in our constitution.").

2. Practice: Hamilton and the Whiskey Rebellion

In the summer of 1794, militias in western Pennsylvania rose up in arms against the federal government.[419] Hamilton led the Washington administration's response, mobilizing a military expedition and running a public relations campaign to win popular support.[420] He used classical Ciceronian imagery and language to do so, taking Cicero's name as a pseudonym to invoke the suppression of the Catilinarian insurrection. Hamilton's actions matched his model's. The Whiskey Rebels were put down. As much as anyone, Hamilton embodied the Ciceronian ideals of energetic statesmanship in service of the rule of law.[421]

Cicero and Hamilton shared several biographical experiences that may have positioned them to approach law and politics with a similar eye. Each was born outside the ruling class, yet worked his way into the upper echelons of power. Cicero was the rare *novus homo* to scale the *cursus honorum*, while Hamilton was the "new man" of the Founding generation, born and raised in Caribbean obscurity.[422] Through talent and sheer will, each overcame humble origins to become peers of those born into wealth, status, and power.

Both valued social order, constitutional stability, and the rule of law. They feared anarchy as much as tyranny. The civil war of Marius and Sulla plagued the Rome of Cicero's early years, while Hamilton's tiny home island of St. Croix was in constant fear of armed slave uprisings.[423] As a student at King's College, Hamilton also

---

419. *See* MCDONALD, *supra* note 3, at 299.

420. *See id.* at 300–01.

421. This section focuses on Hamilton, but he wasn't the only one to see himself as a modern Cicero. *See, e.g.*, THOMAS E. RICKS, FIRST PRINCIPLES: WHAT AMERICA'S FOUNDERS LEARNED FROM THE GREEKS AND ROMANS AND HOW THAT SHAPED OUR COUNTRY xx (2020) (discussing how John Adams liked to "cast himself as a modern Cicero" and drew inspiration from "Cicero's triumph over the Catilinarian conspiracy").

422. *See* MCDONALD, *supra* note 3, at 6–7.

423. Ron Chernow traces Hamilton's later abolitionist efforts to the cruelty against enslaved people he witnessed on St. Croix, cruelty practiced so as to deter revolt. *See* RON CHERNOW, ALEXANDER HAMILTON 33 (2004). Hamilton detested the treatment of enslaved people as much as feared the consequences of uprisings: "The twin specters of despotism and anarchy were to haunt him for the rest of his life." *Id.*

had run ins with the Sons of Liberty.[424] Ideologically sympathetic to their cause, he nonetheless disliked their lawless methods and helped rescue Miles Cooper, the Tory president of King's College, from one of their mobs.[425]

Cicero and Hamilton both took education seriously but halted their studies for military service. As a teenager in 90 B.C., Cicero joined the staff of the Roman commander Gnaeus Pompeius Strabo for a military campaign.[426] Hamilton dropped out of King's College to join the Revolution as George Washington's aide-de-camp.[427]

Hamilton lacked the formal secondary schooling his wealthier peers had, but he taught himself about government, economics, trade, public finance, and military science. His intense personal studies also incorporated classical history and philosophy, which he had begun studying in his youth on St. Croix.[428] Plutarch's *Lives*, which included a biography of Cicero, was his boyhood favorite.[429] During lulls in Revolution campaigns, Hamilton retreated to his books, rereading Cicero and Plutarch alongside modern works on politics and commerce.[430] Hamilton deployed this wide-ranging learning in the crucial years of the drafting and ratification of the Constitution and became the figure most closely associated with the new executive branch.

The Whiskey Rebellion put the republic's authority to the test. After years of rabblerousing over a federal tax on whiskey, Pennsylvania frontiersmen erupted in revolt against the enforcement of the tax.[431] In the summer of 1794, local militias exchanged lethal fire with federal excise officers, tarred and feathered them, robbed the mail, and shut down the federal courthouse.[432] Thousands of rebels

---

424. *See* MCDONALD, *supra* note 3, at 13–14.

425. *Id.*

426. EVERITT, *supra* note 27, at 36–37.

427. *See* MCDONALD, *supra* note 3, at 13.

428. *See id.* at 7.

429. *Id.*

430. *See* JOHN C. MILLER, ALEXANDER HAMILTON AND THE GROWTH OF THE NEW NATION 46 (1964); FLAUMENHAFT, *supra* note 360, at 265.

431. MCDONALD, *supra* note 3, at 297–99.

432. *Id.* at 298–99.

gathered to march on Pittsburgh.[433] State and local authorities did little to stop them.[434] Western Pennsylvania descended into lawlessness.

Hamilton saw the Whiskey Rebellion as a trial of ordered liberty, the supremacy of federal law, and the executive's ability to govern.[435] As acting Secretary of War, he planned to project a show of military strength to render the actual use of force unnecessary.[436] At his urging, President Washington invoked the Militia Act of 1792,[437] which permitted the federal government to call forth the militias of the states whenever "combinations too powerful to be suppressed" obstructed the execution of the law.[438] Washington assembled militia forces from Virginia, Maryland, New Jersey, and Pennsylvania to put down the insurrectionists.[439]

Catiline's insurrection in Cicero's Rome naturally sprang to Hamilton's mind. Under the pseudonym "Tully" (short for Cicero's family name "Tullius"), Hamilton wrote a series of letters in the *American Daily Advertiser* to rally the public to the administration's cause and explain the legality of its actions.

In *Tully No. I*, he reminded the public that resistance to federal law enforcement was resistance to congressional legislation, and resistance to congressional legislation was resistance to the principle of popular sovereignty.[440] Though they might not admit it, what the rebels intimated was that "forcible resistance by a sixtieth part of the community" was permissible against "the representative will of the whole, and the constitutional laws expressed by that will."[441]

---

433. ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1789–1878 35 (1988).

434. MCDONALD, *supra* note 3, at 299.

435. *See id.* at 300.

436. *See id.* Secretary of War Henry Knox was unavailable in Maine at this time. *Id.* at 300–01. Washington designated Hamilton acting secretary. *Id.* at 301.

437. *See id.* at 299–300.

438. Act of May 2, 1792, Ch. 28, § 2, 1 Stat. 264, 264.

439. *See* Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 160–61 (2004).

440. *See* Alexander Hamilton, Tully No. I (Aug. 23, 1794), *in* 17 HAMILTON PAPERS, *supra* note 5, at 132–35

441. *Id.* at 133.

Congressional will required enforcement to have any effect.[442] Hamilton asked the people for their support of the President's expedition, urging them to reject the rebel efforts "to leave the government of the Union in the prostrate condition of seeing the laws trampled under foot by an unprincipled combination of a small portion of the community, habitually disobedient to laws."[443]

Three days later, Hamilton published *Tully No. II*.[444] "[S]hall the majority govern or be governed?" he asked.[445] "[S]hall the nation rule, or be ruled? shall the general will prevail, or the will of a faction? shall there be government, or no government?"[446] Pointing out that the Constitution expressly authorized the setting of excises, he addressed the people directly:

> [T]he four western counties of Pennsylvania, undertake to rejudge and reverse your decrees; you have said, "The Congress *shall have power* to lay *Excises*." They say, "The Congress *shall not have* this power." . . . Your Representatives have said, and four times repeated it, "an excise on distilled spirits *shall* be collected." They say it *shall not* be collected. We [the rebels] will punish, expel, and banish the officers who shall attempt the collection. We will do the same by every other person who shall dare to comply with your decree expressed in the Constitutional character; and with that of your Representative expressed in the Laws. The sovereignty shall not reside with you, but with us. If you presume to dispute the point by force—we are ready to measure swords with you.[447]

Were anyone to argue that the President lacked justification to use military force, Hamilton scoffed that he would be a "pretended republican," "however he may prate and babble republicanism."[448]

---

442. *Id.*

443. *Id.* at 135.

444. Alexander Hamilton, Tully No. II (Aug. 26, 1794), *in* 17 HAMILTON PAPERS, *supra* note 5, at 148–50.

445. *Id.* at 148.

446. *Id.*

447. *Id.* at 149.

448. *Id.*

In *Tully No. III*, Hamilton warned of the dangers of anarchy.[449] "An inviolable respect for the Constitution and Laws" constituted "the most sacred duty and the greatest source of security in a Republic[.]"[450] As a result, "a large and well organized Republic can scarcely lose its liberty from any other cause than that of anarchy, to which a contempt of the laws is the high road."[451] Hamilton classified governments into those ruled by laws and those ruled by arbitrary force.[452] If the laws were "disrespected and disobeyed,"[453] he contended, a government of laws would cease to exist:

> Government supposes controul. It is the POWER by which individuals in society are kept from doing injury to each other and are bro't to co-operate to a common end. The instruments by which it must act are either the AUTHORITY of the Laws or FORCE. If the first be destroyed, the last must be substituted; and where this becomes the ordinary instrument of government there is an end to liberty.
>
> Those, therefore, who preach doctrines, or set examples, which undermine or subvert the authority of the laws, lead us from freedom to slavery; they incapacitate us for a GOVERNMENT OF LAWS, and consequently prepare the way for one of FORCE, for mankind MUST HAVE GOVERNMENT OF ONE SORT OR ANOTHER.[454]

As a final charge, Hamilton quoted one of the most recognizable lines of all of Cicero's speeches—the opening of the Catilinarian orations: "To the plausible but hollow harangues of such conspirators," Hamilton told the public, "ye cannot fail to reply, How long, ye Catilines, will you abuse our patience."[455]

---

449. Alexander Hamilton, Tully No. III (Aug. 28, 1794), *in* 17 HAMILTON PAPERS, *supra* note 5, at 159–61.

450. *Id.* at 159.

451. *Id.* at 160.

452. *Id.*

453. *Id.*

454. *Id.*

455. *Id.* at 161. The line comes from CICERO, IN CATILINAM 32 (C. MacDonald trans., Loeb Classical Library 1977) (63 B.C.) ("Quo usque tandem abutere, Catilina, patientia

Tully No. IV, the final letter, repeated many of the same points and defended the application of armed force to domestic uprisings.[456] "Fellow Citizens," Hamilton wrote, "You are told, that it will be intemperate to urge the execution of the laws which are resisted—what? will it be indeed intemperate in your Chief Magistrate, sworn to maintain the Constitution, charged faithfully to execute the Laws, and authorized to employ for that purpose force when the ordinary means fail—will it be intemperate in him to exert that force, when the constitution and the laws are opposed by force?"[457] To ask such a question was to answer it. Failing to put down the rebellion would "give a CARTE BLANCHE to ambition—to licentiousness; to foreign intrigue. . . . The Hydra Anarchy would rear its head in every quarter."[458]

In the end, the expedition succeeded easily.[459] Thousands of the Whiskey Rebels dispersed without firing any shots.[460] Some were arrested, tried, and convicted, but Washington pardoned them.[461] This show of force and exercise of clemency resulted in a wave of relief and support for the administration throughout the nation.[462]

The Whiskey Rebellion established the first historical precedent on the use of executive force to quell a domestic insurrection. The actions of Hamilton and Washington eased the fears of many in Congress that the presidency could not be trusted with military power.[463] Their response also reasserted the supremacy of federal

---

nostra? Quam diu etiam furor iste tuus nos eludet?") ("How long, O Catiline, will you abuse our patience? How long will this fury of yours elude us?" (author translation)).

456. Alexander Hamilton, Tully No. IV (Sept. 2, 1794) *in* 17 HAMILTON PAPERS, *supra* note 5, at 175–80.

457. *See id.* at 178.

458. *Id.* at 179.

459. MCDONALD, *supra* note 3, at 302.

460. *Id.*

461. *Id.*

462. *Id.* at 301–02.

463. *See* COAKLEY, *supra* note 433, at 67–68. Akhil Amar has described how the "settlements and understandings reached during the Washington Administration" have gained a "special authority" in the liquidation of constitutional government. AKHIL REED AMAR, AMERICA'S CONSTITUTION 197 (2005).

law. The Whiskey Rebels believed that the will of the people, expressed by violent force, might constitute a sort of "plebeian constitutionalism" that could override federal law.[464] In this, they were very much in continuity with Revolution-era notions of mob activity as a natural and healthy channel for expressing popular sentiment. But under the Constitution, the people had to express their will through their representatives in the regular lawmaking process. Hamilton's military efforts and the Tully letters put plebeian constitutionalism to rest, at least for a while.

Some scholars have seen the Pennsylvania militias' actions more as a riot or protest than insurrection.[465] For whatever Hamilton's experience of the affair is worth, he understood the Pennsylvania militias to be in a state of insurrection. Writing under Ciceronian auspices and calling the militia members "Catilines,"[466] he cast the saga in classically insurrectionist terms. He referred in each of the four letters to the militias' "insurrection," called them "insurgents," and accused them of "treason."[467]

This was more than self-serving propaganda. While it was true that the Pennsylvania militias never seriously threatened to overthrow the government, they had successfully suspended the enforcement of federal law.[468] They had also threatened to secede.[469] They were also rumored to be in contact with England and had kickstarted another revolt down in western Maryland.[470] In the age of horse and carriage, keeping wide swaths of rural land under federal control was no joke and the threat of secession was not an empty one. Had the administration failed to respond with strength,

---

464. Saul Cornell, *Mobs, Militias, and Magistrates: Popular Constitutionalism and the Whiskey Rebellion*, 81 CHI.-KENT L. REV. 883, 896–97 (2006).

465. *See* COAKLEY, *supra* note 433, at 67; Vladeck, *supra* note 439, at 161, n.46.

466. *See* Tully No. III, *supra* note 449, at 161.

467. *See* Tully No. I, *supra* note 440, at 133 ("insurrection"), 134 ("insurgents"); Tully No. II, *supra* note 444, at 148 ("insurrection"), 149 ("insurgents"); Tully No. III, *supra* note 449, at 160 ("treason"); Tully No. IV, *supra* note 456, at 176 ("Insurgents").

468. MCDONALD, *supra* note 3, at 301.

469. *Id.*

470. *See id.*

it would have rendered federal collection officials—and the idea of the federal Constitution as supreme law—impotent.

CONCLUSION

In an 1837 speech, Ralph Waldo Emerson worried that "[m]eek young men grow up in libraries, believing it is their duty to accept the views, which Cicero, which Locke, which Bacon, have given, forgetful that Cicero, Locke, and Bacon, were only young men in their libraries when they wrote these books."[471] The Founding generation had no need for that warning. Many were on the younger side, and they took Cicero to heart by infusing his thought into their own work. They wore multiple hats—legal practitioners as well as legal scholars, constitutional architects as well as constitutional theorists. This combination of abilities made them, in many ways, heirs to Cicero's legacy.

Cicero, of course, had his own intellectual debts. He adapted and took inspiration from the work of Polybius, Panaetius, Chrysippus, Cleanthes, and Plato. He is no exception to Alfred North Whitehead's famous remark that the history of Western thought is a "a series of footnotes to Plato."[472]

But the Founders viewed Cicero as indispensable for a lawyer's work. In one way or another, directly or indirectly, they took from him the conceptual framework or substantive dictates of natural law, "right reason," the law of nations, rules of interpretation, judicial review, fundamental law, self-defense, popular sovereignty, republican government, divided power, checks and balances, the rule of law, and the energetic unitary executive. Fully appreciating the Founding period requires appreciating the Ciceronian origins of American law and constitutionalism.

---

471. RALPH WALDO EMERSON, THE AMERICAN SCHOLAR 26–27 (Orren Henry Smith ed., 1911) (1837).

472. A.N. WHITEHEAD, PROCESS AND REALITY: AN ESSAY IN COSMOLOGY 39 (Free Press 1978) (1929).

GOOD AND EVIL IN THE AMERICAN FOUNDING

THE 2023 VAUGHAN LECTURE ON AMERICA'S FOUNDING PRINCIPLES

STEPHEN E. SACHS*

The past few decades have seen a broad moral reevaluation of the American Founding. Both on the left and on the right, many now regard the Founders' ideals as less valuable and their failings as more salient. These reckonings are necessary, but they also risk missing something important: a richer and more human understanding of the past, together with a recognition of the great good that the American Founding achieved, here and elsewhere. This Essay discusses how we ought to understand the Founders' historical legacy—and why we might respect and indeed honor their contributions with open eyes.

I'm honored this afternoon to deliver the Vaughan Lecture on America's Founding Principles. I'd like to begin with a short illustration of those principles, as expressed in the famous letter from George Washington to the Hebrew Congregation in Newport, Rhode Island.

---

* Antonin Scalia Professor of Law, Harvard Law School. This Essay is a revision of Stephen E. Sachs, *Good and Evil in the American Founding*, The Annual Herbert W. Vaughan Lecture on America's Founding Principles (Apr. 19, 2023), https://youtu.be/5iy8ERq0FrY?t=339 [https://perma.cc/S3UR-TNCC]. The author is grateful for advice and comments to William Baude, Samuel Bray, Alida Kass, Christina Mulligan, Lee Liberman Otis, Richard Re, Amanda Schwoerke, and Cass Sunstein; for excellent research assistance to Kennedy Green and Samuel Lewis; and for support to Herbert W. Vaughan and to the James Madison Program at Princeton University.

In 1790, Rhode Island finally agreed to the Constitution.[1] And in August of that year, President Washington paid Newport an official visit.[2] Among the clergy who welcomed him to the city was Moses Seixas, the warden of Congregation Yeshuat Israel, a small community of Sephardic Jews.[3] In response to the congregation's letter of congratulations, Washington wrote the following, which I hope you'll indulge my reading:

> Gentlemen.
>
> While I receive, with much satisfaction, your Address replete with expressions of affection and esteem; I rejoice in the opportunity of assuring you, that I shall always retain a grateful remembrance of the cordial welcome I experienced in my visit to Newport, from all classes of Citizens.
>
> The reflection on the days of difficulty and danger which are past is rendered the more sweet, from a consciousness that they are succeeded by days of uncommon prosperity and security. If we have wisdom to make the best use of the advantages with which we are now favored, we cannot fail, under the just administration of a good Government, to become a great and a happy people.
>
> The Citizens of the United States of America have a right to applaud themselves for having given to mankind examples of an enlarged and liberal policy: a policy worthy of imitation. All possess alike liberty of conscience and immunities of citizenship[.] It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance requires only that they who

1. R.I. DEP'T OF STATE, *U.S. Constitution*, https://www.sos.ri.gov/divisions/civics-and-education/for-educators/themed-collections/ri-and-us-constitution [https://perma.cc/7L5R-P8RE].

2. Jonathan D. Sarna, *George Washington's Correspondence with the Jews of Newport*, *in* WASHINGTON'S REBUKE TO BIGOTRY 73, 74 (Adam Strom, Dan Eshet & Michael Feldberg eds., 2015).

3. *See id.*; David N. Myers, *From Toleration to Equality: George Washington's Letter in Comparative Context*, *in* WASHINGTON'S REBUKE TO BIGOTRY, *supra* note 2, at 141, 142.

> live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support.
>
> It would be inconsistent with the frankness of my character not to avow that I am pleased with your favorable opinion of my Administration, and fervent wishes for my felicity. May the Children of the Stock of Abraham, who dwell in this land, continue to merit and enjoy the good will of the other Inhabitants; while every one shall sit in safety under his own vine and figtree, and there shall be none to make him afraid. May the father of all mercies scatter light and not darkness in our paths, and make us all in our several vocations useful here, and in his own due time and way everlastingly happy.[4]

I don't remember when I first read Washington's letter, likely in high school. To a Jewish kid who grew up in St. Louis, Missouri, this letter of welcome from the Father of His Country has always been extraordinarily moving—as well as deeply emblematic of America's promise, both to my family and to millions of others.

Moses Seixas was the child of *conversos*, Jews who had been forcibly converted and who had preserved their faith in secret across the centuries.[5] His father Isaac left Portugal and came to America,[6] where Moses would cofound the Newport Bank and lead the local congregation. His brother Abraham fought in the American Revolution; his brother Benjamin co-founded the New York Stock Exchange; his brother Gershom was a cantor in New York and Philadelphia, a colleague of Alexander Hamilton, a participant in

4. Letter from President George Washington to the Hebrew Congregation in Newport, R.I. (Aug. 1790), *in* 6 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 284, 284–85 (Mark A. Mastromarino ed., 1996) [hereinafter Washington Letter]. *See generally* WASHINGTON'S REBUKE TO BIGOTRY, *supra* note 2 (collecting essays on the letter and its influence).

5. Myers, *supra* note 3, at 142–43.

6. *Id.*

Washington's first inauguration, and a trustee of Columbia College—the only Jewish trustee for more than a century, until Benjamin Cardozo in 1928.[7]

It's hard to imagine a more American story than this, or one more representative of America's founding principles: that a family could flee oppression in the Old World to build a new life in the New, a place that would give "to bigotry no sanction, to persecution no assistance," and where they could sit, each "under his own vine and figtree," and there would be "none to make him afraid."[8]

But my topic today isn't just praise for America's Founding and for its founding principles. Rather, it's "Good and Evil in the American Founding"—and it isn't hard to find plenty of both.

As we all know, the past decades have seen a broad moral reevaluation of the American Founding. Both on the left and on the right, many now regard the Founders' ideals as less valuable and their failings as more salient.

On the left, the primary charge is that America has never lived up to its principles—that its principles are hypocrisies, pious frauds, designed to disguise the privileges of an elite and the oppression of others. How can it be said that America gave "to bigotry no sanction,"[9] when it held millions of people in slavery based on the color of their skin, and denied rights to millions of its own citizens based on their sex or their poverty? How can it be said that America gave "to persecution no assistance,"[10] when Washington and his wife not only owned hundreds of human beings in their own right, but even sought to recapture one of them, a woman named Ona Judge, after

---

7. *See* Leon Hühner, *Seixas*, *in* 11 THE JEWISH ENCYCLOPEDIA 159, 159–61 (Isidore Singer ed., 1906); ANDREW PORWANCHER, THE JEWISH WORLD OF ALEXANDER HAMILTON 85–86, 220 n.56 (2021); David G. Dalin, *Jews, Judaism, and the American Founding*, *in* FAITH AND THE FOUNDERS OF THE AMERICAN REPUBLIC 63, 67–68, 70 (Mark David Hall & Daniel L. Dreisbach eds., 2014); Gary Shapiro, *Columbia Trustee, Jewish Leader and Patriot of the American Revolution*, COLUM. NEWS (Feb. 17, 2017), https://news.columbia.edu/news/columbia-trustee-jewish-leader-and-patriot-american-revolution [https://perma.cc/Y7E4-66RW].

8. Washington Letter, *supra* note 4, at 285.

9. *Id.*

10. *Id.*

she fled from the presidential mansion?[11] How can it be said that America let "every one . . . sit in safety under his own vine and figtree,"[12] when it repeatedly engaged in the military conquest of its Native American neighbors? Indeed, how can we celebrate the freedom of the Newport congregation, when some of its members were themselves stained by the sin of slavery, a trade in which Abraham Seixas, Moses's own brother, took shameful part?[13]

This isn't nitpicking. These are deeply woven features of the Founding era that have afflicted us to the present day. And any moral outlook that insists on *taking these things seriously*, one that refuses to shrug them off, may understandably have difficulty hearing unqualified praise of the Founding era or indeed seeing statues and monuments raised to its leaders.

This is one side of the challenge, largely from the left: that America's adherence to its founding principles was always limited, always only for a few. But more recently we've seen another side of the challenge, largely from the right: that the principles *themselves* have always been flawed. On this account, the problem isn't that America failed to live up to Washington's "enlarged and liberal policy."[14] The problem is *the liberalism*—the effort to cabin true morals and true religion to some private sphere in favor of a public compromise with falsehood and error. The state's vaunted neutrality can never truly be neutral, the critic might say; it's always deciding, always making choices, even if it conceals those choices in the language of evenhandedness. And even if the state could be neutral,

---

11. *See Mrs. [?] Staines*, *in* SLAVE TESTIMONY: TWO CENTURIES OF LETTERS, SPEECHES, INTERVIEWS, AND AUTOBIOGRAPHIES 248, 248–50 (John W. Blassingame ed., 1977); ERICA ARMSTRONG DUNBAR, NEVER CAUGHT: THE WASHINGTONS' RELENTLESS PURSUIT OF THEIR RUNAWAY SLAVE, ONA JUDGE (2017).

12. Washington Letter, *supra* note 4, at 285.

13. *See* Bertram W. Korn, *Jews and Negro Slavery in the Old South, 1789 – 1865*, 50 PUBL'NS AM. JEWISH HIST. SOC'Y 151, 168–71 (1961). Such involvement shouldn't be overstated by prejudice, as "Jews could not qualify as major players" in "any global analysis of the transatlantic slave trade," Seymour Drescher, *The Role of Jews in the Transatlantic Slave Trade (1993)*, *in* FROM SLAVERY TO FREEDOM: COMPARATIVE STUDIES IN THE RISE AND FALL OF ATLANTIC SLAVERY 339, 349 (1999), but neither can it be overlooked.

14. Washington Letter, *supra* note 4, at 285.

they might argue, so much the worse: neutrality between good and evil is no virtue, and extremism in defense of good is no vice.

These, then, are the challenges, from both left and right, to America's founding principles. How can they be answered?

I'll suggest today that both challenges stem from a form of pessimism—but that neither is quite pessimistic *enough*. Both challenges look at a society that we're accustomed to thinking good, and both see within it very severe evils. But neither quite accepts that widespread societal evil is the *ordinary* condition of societies and of the people who compose them. It's the circumstance in which, throughout history, we normally find ourselves, and we have to assess both people and political regimes accordingly.

As I'll argue today, we ought to be absolutists about right and wrong, but relativists about praise and blame. That particular *wrongs* were widely practiced in the past (or, indeed, are now widely practiced in the present) doesn't make them right. Good and evil don't depend on what the people around you will celebrate or condemn. But when we look at *human beings* in different times and places, we won't be able to understand them, let alone appreciate what's good in them or worth celebrating in them, unless we attend to the circumstances in which they lived and measure them in the same way that we routinely measure ourselves. And when we look at human governments and at the inevitable compromises they reach, we won't be able to understand them either, much less appreciate what goods they have to offer the world, if we ignore the circumstances of disagreement and division they have to face.

The principles on which America was founded—that "it's a free country," that you can go off and found your own weird commune so long as you aren't hurting anybody, and so on—have been slowly but remarkably effective, over time, at cabining the ever-present human impulse for power over others, and at fulfilling Wash-

ington's dream of offering "a safe & agreeable Asylum to the virtuous & persecuted part of mankind, to whatever nation they might belong."[15]

And the reliance on liberal freedoms as a second-best, a *modus vivendi* among those who disagree, has been responsible for hundreds of millions of lives lived in safety and happiness, as well as a historically extraordinary outpouring of freedom, creativity, and abundance. If politics is the art of the possible, we should recognize that America has achieved things that few at its Founding would have thought possible, and that its founding principles deserve much of the credit.

I.

But before we get too far ahead of ourselves, we ought to recognize the seriousness of these challenges.

Begin with the challenge from the left. During the contentious summer of 2020, when many longstanding monuments and statues were removed, some asked whether even statues of George Washington, our country's greatest Founder, would have to come down. In answer, *New York Times* columnist Charles Blow composed an essay, *Yes, Even George Washington*,[16] which I think it instructive to discuss at length.

Blow argued, in short, that "[s]lave owners should not be honored with monuments in public spaces."[17] In the essay, he described the horrors of the Middle Passage: human beings packed into ships, chained for weeks unable to move, many dying from disease before reaching the land where they, their children, and their children's children would work and suffer their entire lives for others' profit.[18]

---

15. Letter from George Washington to Francis Adrian Van Der Kemp (May 28, 1788), in 6 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES, *supra* note 4, at 300, 301, https://founders.archives.gov/documents/Washington/04-06-02-0266 [https://perma.cc/2SAG-RNBP].

16. Charles M. Blow, *Yes, Even George Washington*, N.Y. TIMES, June 29, 2020, at A21, https://www.nytimes.com/2020/06/28/opinion/george-washington-confederate-statues.html [https://perma.cc/84GG-77Y7].

17. *Id.*

18. *Id.*

These people "were just as much human as I am today. They love[d], laugh[ed], cr[ied] and hurt just like I do."[19] And so, for "the people who showed up to greet these reeking vessels of human torture, to bid on its cargo, or to in any way benefit from the trade and industry that provided the demand for such a supply," he wrote, "I have absolute contempt."[20]

Slaveowners such as Washington are often described as "men and women of their age, abiding by the mores of the time"—and yet, Blow pointed out, "[t]here were also men and women of the time who found slavery morally reprehensible."[21] When he heard "people excuse their enslavement and torture as an artifact of the times," Blow wrote, he "consider[ed] that if slavery were the prevailing normalcy of this time, my own enslavement would also be a shrug of the shoulders."[22] Instead, "the very idea that one group of people believed that they had the right to own another human being is abhorrent and depraved. The fact that their control was enforced by violence was barbaric."[23] He therefore declared: "On the issue of American slavery, I am an absolutist: enslavers were amoral monsters."[24]

In considering Blow's argument, I want to begin by noting areas of agreement. Blow is *right* that it's all too easy to respond to historical evils with a "shrug of the shoulders"[25]—that the Founders were flawed people, that we grade them on a curve, and so on. He's *right* that many people at the Founding knew slavery for the evil that it was. (One of the world's first antislavery societies was formed in Pennsylvania in 1775; it was reorganized in 1787 under Benjamin Franklin, one of the most famous people in North America;[26] and

19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. William C. diGiacomantonio, *"For the Gratification of a Volunteering Society": Antislavery and Pressure Group Politics in the First Federal Congress*, 15 J. EARLY REPUBLIC 169, 171 & n.4 (1995).

yet Franklin and other well-known abolitionists were likely in the room at Philadelphia when the Fugitive Slave Clause was added to the draft.[27]) And, most importantly, Blow is *right* about the horrors of slavery—and that, as Lincoln put it, "if slavery is not wrong, nothing is wrong."[28]

If we can understand all this, we ought to be able to understand why many people might resist honoring Washington or other figures of the American Founding. As Senator Charles Sumner said, in arguing against placing a bust of Chief Justice Taney in the Capitol (a bust that has recently been removed): "If a man has done evil during life he must not be complimented in marble."[29]

Indeed, the Founders might seem singularly undeserving of such compliments. How can they have *looked* at slave markets and whipping posts and not recoiled, the way we recoil? How can we honor them? How can we take them as models? How can we even understand them as people like ourselves, when their moral senses seem so stunted compared to our own?

I want to answer these questions by explaining where Blow goes wrong—not in matters of morals, but in moral psychology. Slavery was monstrous, but the people who took part in it weren't necessarily monsters, nor were they amoral. Instead, they were more like us than we'd like to think.

A.

To illustrate this, consider other claims of thoroughgoing societal evil, claims about our own modern society—and claims at which we today might respond with a "shrug of the shoulders."[30]

---

27. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 453–54 (Max Farrand ed., 1911) (noting that Gouverneur Morris suggested an amendment immediately after the adoption of Pierce Butler's suggested clause, codified as U.S. CONST. art. IV, § 2, cl. 3); *see also id.* at 348, 542 (noting Franklin's attendance on nearby dates).

28. Letter from President Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), *in* 7 ABRAHAM LINCOLN, THE COLLECTED WORKS OF ABRAHAM LINCOLN 281, 281 (Roy P. Basler ed., 1953).

29. CONG. GLOBE, 38th Cong., 2d Sess. 1013 (1865); *see* Act of Dec. 27, 2022, Pub. L. No. 117-326, § 1(b), 136 Stat. 4452, 4453 (ordering the bust's removal).

30. *See* Blow, *supra* note 16.

Nothing in our own society, of course, holds the same terror for our modern moral sense as slavery. (If something did, we surely wouldn't shrug at it.) But the injustices of today don't have to be comparable to slavery for us to *respond* to them in a comparable way—for us to shrug at them in much the same way that our forebears, to their dishonor, shrugged at slavery.

And to clarify, lest I be misunderstood, it's the *ease* and *familiarity* and *ubiquity* of this shrug, and not the seriousness or the evil or the injustice of what's being shrugged at, that I want us to place in mind. What we're looking for is an issue that we can *imagine* that we ought to take much more seriously than we do, and yet one at which we ourselves respond—or those whom we love, respect, and admire respond—with a shrug of the shoulders nonetheless.

Consider, then, the following example. My wife previously worked for a nonprofit that provided legal services to the People for the Ethical Treatment of Animals (PETA). Her work brought me into contact with people whose views were rather different from my own. And regardless of your views on the topic, I want you to imagine for a moment the perspective, and to look out on modern America through the eyes, of the dedicated supporter of animal rights.

This animal-rights activist would see in the practice of eating meat (or of farming animals for their milk or their eggs, of testing cosmetics or other consumer products on animals, or of making clothes from their fur or from their skin) a practice that is:

- enormously widespread;
- generally uncriticized, except maybe by a few do-gooders or busybodies;
- associated with a vague sense of moral disquiet;
- perhaps to be abandoned, in some ideal and distant future;
- but nonetheless, for now, an absolutely ordinary part of many people's daily lives.

In other words, they'd see a practice that shares, in its widespread social acceptance, many of the features previously shown by the widespread social acceptance of slavery.[31]

Now, I hasten to recognize that some might consider this juxtaposition by the animal-rights activist inappropriate—indeed, even insulting. The evils of slavery, they might argue, are so vast as to render invalid any comparison with our modern treatment of animals. But I don't think that's quite right, because that isn't quite how comparisons work. One can *compare* a puddle to Lake Superior, without suggesting that the two are of *comparable size*, simply by pointing out that they share common features in an illuminating way. And it's the broad and unreflective *acceptance* of our treatment of animals in the modern day, the animal-rights activist might argue, which bears the crucial resemblance to the broad and unreflective acceptance, in an earlier era, of slavery—an acceptance which in both cases fails to track the wrongness of what's being done, even if both aren't equally wrong.

Others might portray the activist's invocation of animal rights in such a context as itself offensive, because it echoes or even seems to endorse the slaveowners' analogies of enslaved human beings to mere animals. But I don't think that's right either—or that it seeks to understand the activists fairly on their own terms, especially those who invoke their own experiences as the descendants of slaves.[32] If the essential wrong of slavery was that it treated human beings, people just like you and me, as if they were so many cattle to be *used* for others' benefit, then the claim of the animal-rights movement is that maybe it's wrong to treat cows that way too.[33] The point of the activist's argument isn't that we're free to take human suffering less seriously, or to make light of it, but that perhaps we

31. *See, e.g.*, Alice Walker, *Foreword* to MARJORIE SPIEGEL, THE DREADED COMPARISON: HUMAN AND ANIMAL SLAVERY 14 (rev. ed. 1996).

32. *See id.*

33. *See id.* at 15 ("The animals of the world exist for their own reasons. They were not made for humans any more than black people were made for whites or women for men.").

ought to take animal suffering *more seriously*, and to *stop* making light of it.

But whatever one thinks of this juxtaposition, the potential uniqueness of slavery shouldn't prevent us from seeing something that is *not* unique: the toleration by those whom we might otherwise see as good and decent people of some truly bad and indecent things. The removal of one great societal evil, in the abolition of slavery, didn't entail that every socially accepted evil, of every size, was eliminated along with it. Instead of animal suffering, if you prefer, choose misogyny, or xenophobia, or indifference to the environment, or legal abortion, or *restrictions* on abortion, or military interventions abroad, or *failures* to intervene abroad, or any other evils or alleged evils you choose. All of these have been and still are accepted by societies, even as some people speak out against them. And if you think that only monsters could tune out such voices and grow accustomed to such serious societal evils, then I question how many monsters you see walking around you, or else how few serious societal evils you're willing to admit.

For the seriousness of a societal evil, alas, needn't be matched by the degree of society's concern. Return to the example of animal rights. Not long ago a fire in Dimmitt, Texas, killed more than 18,000 cows at a dairy farm, who were trapped inside and burned or suffocated when overheated equipment ignited methane gas.[34] This kind of story quickly disappears from the front page, if it ever gets there. The *Texas Tribune*, in reporting on the event, pointed out that these cows "represent just a fraction" of the 13 million cows raised in the state, noting in passing that "[d]uring Winter Storm Goliath in 2015, 35,000 cattle froze to death."[35]

These unusual events pale beside the ordinary cruelties of animal agriculture—practiced not just by factory farms, the kinds where animals live their whole lives without being able to stand up or turn

34. Jayme Lozano Carver & Erin Douglas, *More than 18,000 Cows Are Dead After Dairy Farm Explosion in Texas Panhandle*, TEX. TRIB. (Apr. 13, 2023, 3:00 PM), https://www.texastribune.org/2023/04/13/texas-dairy-farm-explosion-cows/ [https://perma.cc/CA5E-FHL5].

35. *Id.*

around in their cages,[36] but by "humane" farmers who sell "humanely raised" products.[37] Consider this discussion of typical American egg-raising practices:

> Although the wild cousins of domesticated chickens can live to be ten years old, even hens who avoid succumbing to illness will typically be killed at about two years of age, when their egg production diminishes. Accordingly, farmers must constantly replenish their supply of laying hens.
>
> Hatcheries, meanwhile, cannot determine the sex of chicks until they hatch from their shells. . . . With no market for male layer chicks, they are killed almost immediately after hatching—regardless of whether the female layer chicks will be sent to cages in "factory" farms or to so-called free-range farms.
>
> How do farmers kill male chicks . . . ? Common industry methods include suffocating them by sealing them in garbage bags, gassing them, and macerating them—that is, grinding chicks to death by feeding them along a conveyor belt into a gigantic high-speed meat grinder. . . . It is difficult to imagine anyone thinking that maceration would count as a humane method of euthanasia for an ailing family pet . . . . But even if one were to accept the . . . [claims of the American Veterinary Medical Association, which] classifies those last two methods as "humane," . . . the truth is that many male chicks are killed by methods that the guidelines acknowledge cause serious distress, such as suffocation. And that is to say nothing of the deprivation of life itself suffered by these millions of healthy rooster chicks . . . ."[38]

Now, ordinary Americans who drink milk or eat eggs don't themselves engage in cruelty to cows and chickens, the way that "ordinary" slaveowners like George and Martha Washington were personally steeped in the evils of slavery. Yet the Washingtons also

---

36. *Cf.* Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 363 (2023) (describing "breeding pigs confined in stalls so small they cannot lie down, stand up, or turn around").

37. SHERRY F. COLB & MICHAEL C. DORF, BEATING HEARTS: ABORTION AND ANIMAL RIGHTS 17 (2016).

38. *Id.* at 16–17.

didn't personally inflict the unspeakable horrors of the Middle Passage that Blow eloquently described.[39] They merely hired it done.

Indeed, the animal-rights activist who deplores our modern inattention to the sufferings of animals would find plenty to criticize in the Founding as well. The abuse of animals wasn't written into the Constitution like the Fugitive Slave Clause,[40] or like the prohibition on Congress's restricting the slave trade before 1808 (one of the only *unamendable* parts of the Constitution, put wholly beyond the reach of Article V).[41] Yet it's hard to argue that the abuse of animals wasn't in its own way central to Founding-era life. Historians at Mount Vernon tell us that Washington raised sheep, cattle, pigs, chickens, turkeys, and geese for their meat, and that he "enjoyed fox hunting on the Estate and had a pack of hounds specifically for this purpose."[42] From the perspective of the PETA supporter, the American revolutionaries were literally *fed* through cruelty to animals. The Constitution and the Declaration of Independence were literally *written* on the skins of dead animals, dried and turned into parchment—perhaps animals killed for the purpose.[43] And all this was so even though there were people at the Founding who argued against the misuse of animals,[44] just as there are today.

The dedicated animal-rights activist, then, might condemn the American Founding in much the same *way*, whether or not with as much justification, that others might condemn it on the grounds of human slavery. To such an activist, what others might see as a

---

39. *See* Blow, *supra* note 16.

40. U.S. CONST. art. IV, § 2, cl. 3.

41. *Id*. art. I, § 9, cl. 1; *id*. art. V ("Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article . . . .").

42. *See The Animals on Washington's Farm*, GEORGE WASHINGTON'S MOUNT VERNON, https://www.mountvernon.org/george-washington/farming/the-animals-on-george-washingtons-farm/ [https://perma.cc/DQA2-3UNY].

43. *See Differences between Parchment, Vellum and Paper*, NAT'L ARCHIVES (Aug. 15, 2016), https://www.archives.gov/preservation/formats/paper-vellum.html [https://perma.cc/Q6MK-9G3S].

44. *See, e.g.*, MARCUS REDIKER, THE FEARLESS BENJAMIN LAY: THE QUAKER DWARF WHO BECAME THE FIRST REVOLUTIONARY ABOLITIONIST 115 (2017) (describing the life of Benjamin Lay, the eighteenth-century abolitionist campaigner and vegetarian).

heartwarming Thanksgiving dinner or neighborly Fourth-of-July barbecue might, as David Foster Wallace wrote of the Maine Lobster Festival, instead "take on aspects of something like a Roman circus or medieval torture-fest."[45] "Is it not possible," Wallace asked, "that future generations will regard our own present agribusiness and eating practices in much the same way we now view Nero's entertainments or Aztec sacrifices?"[46]

B.

My point here isn't to preach to you the cause of animal rights. For one thing, I myself am only a vegetarian. Though I've given up on eating meat, I still haven't given up the products of the Dillard, Texas, dairy farm or the chick-killing egg hatcheries—and I have less excuse than most, because I *know* what goes on there. (Once you read this stuff, in the phrase attributed to Wilberforce, you can never again say you did not know.)

Instead, I raise all this not to proselytize or to harangue or to gain converts for veganism, but just to *explain*: to explain how people whom I would *not* call "amoral monsters" (people like my parents, or my friends, or indeed perhaps many of you), people who try hard in much of their lives to do the right thing, might nonetheless take part in what, in the fullness of time, might be understood to be very serious evils—even when they know, in more or less detail, what is actually going on.

A better awareness of history doesn't merely acquaint us with a parade of historical evils. It also proves to us, beyond doubt, that many people who sought to do good have been very wrong about matters of morals, and that others who were right about matters of morals nonetheless failed to act on them. The notion that "the spirit is willing, but the flesh is weak" was observed thousands of years ago,[47] and it hasn't become less true since.

So to say that all these people are "amoral monsters" is wrong—wrong simply as a matter of moral psychology. This isn't a claim of

45. David Foster Wallace, *Consider the Lobster*, GOURMET, Aug. 2004, at 50, 64.

46. *Id.*

47. *See Matthew* 26:41.

moral relativism. One can hold that the treatment of animals in modern farming is monstrous, and not justified by its widespread acceptance, without viewing the *people* who eat meat as amoral monsters themselves. In the same way, we can affirm that what the slaveowners were doing was truly monstrous, and that the circumstances of their times didn't justify it. But we simply won't *understand* them properly if we see them only as inhuman monsters, and not as the same sorts of ordinary sinful humans that we see all around us today. We simply won't understand them, or their societies, if all we can see in them is their indifference to human slavery.

One can insist on viewing a society through such a lens, but only at the cost of rendering opaque all that might otherwise render it comprehensible. By way of illustration: in 1975, Susan Sontag had an exchange in the *New York Review of Books* with Adrienne Rich, who accused Sontag of underplaying the importance of misogyny in a discussion of Nazi Germany.[48] Sontag responded that a focus on misogyny might obscure, rather than illuminate, the nature of Nazi society.[49] "Suppose, indeed," Sontag wrote, quoting Rich, "that 'Nazi Germany was patriarchy in its purest, most elemental form.'"[50] Where, she asked,

> do we rate the Kaiser's Germany? Caesarist Rome? Confucian China? Fascist Italy? Victorian England? Ms. Gandhi's India? Macho Latin America? Arab sheikery from Mohammed to Qaddhafi and Faisal? Most of history, alas, is "patriarchal history." So distinctions will have to be made, and it is not possible to keep the feminist thread running through the explanations all the time. Virtually everything deplorable in human history furnishes material for a restatement of the feminist plaint . . . , just as every story of a life could lead to a reflection on our common mortality and

48. Adrienne Rich & Susan Sontag, *Feminism and Fascism: An Exchange*, N.Y. REV. BOOKS, Mar. 20, 1975, at 31, https://www.nybooks.com/articles/1975/03/20/feminism-and-fascism-an-exchange/ [https://perma.cc/WW4C-VTW8].

49. *Id.*

50. *Id.*

> the vanity of human wishes. But if the point is to have meaning some of the time, it can't be made all the time.[51]

And Sontag went on to suggest "that there are other goals than the depolarization of the two sexes, other wounds than sexual wounds, other identities than sexual identity, other politics than sexual politics—and other 'anti-human values' than 'misogynist' ones."[52] Trying to reduce all of these societies to questions of misogyny would erase extraordinarily important differences among them. We won't understand them or their world if we simply place them somewhere along a single axis of greater or lesser sex equality, if only because there's more than one evil to worry about at a time.

The danger inherent in broadening our gaze to look beyond specific historical evils is that we might, as Blow fears, respond to things like human bondage with a shrug of the shoulders.[53] But the danger inherent in narrowing our gaze to scrutinize such historical evils is that we might, in the glare of their intensity, miss everything else that's illuminating and valuable in human experience. An animal-rights activist who can't see anything but the suffering of animals in a family's sitting down together to Thanksgiving dinner has allowed his awareness of some very great evils to blind him to some very great goods.

Even Frederick Douglass, who was subject to recapture and reenslavement in any state or territory where the Stars and Stripes flew, could still see something of great value in America, something he thought would overcome the evils within it. In his famous Fourth of July address, amid the "dark picture" he offered "of the state of the nation," he insisted that he "d[id] not despair of this country. There are forces in operation," he argued, "which must[,] inevitably, work the downfall of slavery."[54] And he drew "encourage-

---

51. *Id.*

52. *Id.*

53. *See* Blow, *supra* note 16.

54. FREDERICK DOUGLASS, ORATION DELIVERED IN CORINTHIAN HALL, ROCHESTER 37 (Rochester, N.Y., Lee, Mann & Co. 1852).

ment," rather than cynicism, from "'the Declaration of Independence,' the great principles it contains, and the genius of American Institutions."[55] I don't think anyone alive today can claim more reason to hate the Founders' acceptance of slavery than Douglass could; and yet many are unwilling to view the Founders' principles as he did.

Instead, our blindness to the potential faults of the present has led many to take a deeply mistaken attitude to the past. Today, "they had slaves" is often taken as reason enough to disregard whatever someone from the past might otherwise have to teach us, and to refuse to accord them honor on any ground. (Those who have "done evil during life," to quote Sumner again, "must not be complimented in marble.")[56] But this view has a great deal of trouble once we realize how deep the societal evils go. Again, we ought to be absolutists about right and wrong, but relativists about praise and blame. If "they ate meat" shouldn't be enough, *even for the animal-rights activist*, to wipe the slate clean of all achievements worth praising, then the same is true for other evils as well. It'd be absurd, I suggest, to tear down statues of Dr. Martin Luther King, Jr., on the ground that he was a meat-eater who accepted an award from Planned Parenthood.[57] And this ought to be true, I think, *regardless* of one's views on meat-eating or abortion—for to do so would reduce, as Sontag pointed out, all of life to a single axis.[58]

In the same way, I believe, it'd be absurd to tear down statues of the American Founders, or of Gandhi, or of the philosopher David Hume (all of which have been suggested of late), even though all of these expressed truly racist sentiments toward those of African descent, and even though such racism is truly wrong.[59]

---

55. *Id.* at 38.

56. CONG. GLOBE, *supra* note 29.

57. *See* Jill Howard Church, *A King Among Men*, VEGETARIAN TIMES, Oct. 1995, at 128 (describing the vegetarianism of King's son Dexter); *Mrs. King Receives Award for Husband*, AFRO-AM., May 21, 1966, at 14 (describing King's receipt of the Margaret Sanger Award).

58. *See* Rich & Sontag, *supra* note 48.

59. *See* Blow, *supra* note 16; Bukola Adebayo, *Gandhi Statue Pulled Down in Ghana After Controversy over 'Racist' Writings*, CNN (Dec. 14, 2018, 10:18 AM),

The reason is as follows. Today, when racism is thankfully subject to social sanction, it's *easy* to condemn it. In that respect, we who live today are the beneficiaries of a kind of moral luck: the forces of social convention push us toward the correct view of an important moral issue. But it's a form of vanity to claim this luck as something we earned by our own merits—to engage in the historical fiction of suggesting too easily that, "oh, of course, *I* would have hidden Jewish families," or "oh, of course *I* would have helped slaves escape," when we *know* that doing so required unusual, even extraordinary fortitude of character.

Abraham Lincoln knew better. In the same debate with Stephen Douglas in which he spoke of "the monstrous injustice of slavery," he also argued that the white people of the South

> are just what we would be in their situation. If slavery did not now exist amongst them, they would not introduce it. If it did now exist amongst us, we should not instantly give it up. . . . Doubtless there are individuals, on both sides, who would not hold slaves under any circumstances; and others who would gladly introduce slavery anew . . . . We know that some southern men do free their slaves, go north, and become tiptop abolitionists; while some northern ones go south, and become most cruel slave-masters.[60]

Or, as it was put by the famous writer, dissident, Nobel Prize winner, and Putin supporter Aleksandr Solzhenitsyn:[61]

If only there were evil people somewhere insidiously committing evil deeds, and it were necessary only to separate them from the rest of us and destroy them. But the line dividing good and evil cuts

---

https://www.cnn.com/2018/12/14/africa/gandhi-statue-ghana-intl/index.html [https://perma.cc/J4U4-ZGWD]; Felix Waldmann, *David Hume Was a Brilliant Philosopher But Also a Racist Involved in Slavery*, SCOTSMAN (July 17, 2020, 7:30 AM), https://www.scotsman.com/news/opinion/columnists/david-hume-was-a-brilliant-philosopher-but-also-a-racist-involved-in-slavery-dr-felix-waldmann-2915908 [https://perma.cc/4X38-SKY2].

60. ABRAHAM LINCOLN, *Speech at Peoria, Ill.* (Oct. 16, 1854), *in* 2 LINCOLN, *supra* note 28, at 247, 255.

61. *See* Luke Harding, *WikiLeaks Cables: Solzhenitsyn Praise for Vladimir Putin*, GUARDIAN (Dec. 2, 2010, 2:30 AM), https://theguardian.com/world/2010/dec/02/wikileaks-cables-solzhenitsyn-vladimir-putin [https://perma.cc/UKY2-BSM9] ("Under Putin, the nation was rediscovering what it was to be Russian, Solzhenitsyn thought.").

through the heart of every human being. And who is willing to destroy a piece of his own heart?[62]

C.

Every era's ideals throw into stark relief its departures from those ideals. We see deep corruption in republics dedicated to virtue, extraordinary inequalities in socialist states, decidedly unchristian behavior by Christian kingdoms, and so on. In honoring or celebrating particular people, the question for us is whom we should venerate as symbols of our ideals, not which actual and flawed human beings we should worship as idols. As Judge John Bush has put it, we should be judging the morality of the ideas, and not of the people.[63] Today, it's plainly true that in some areas where Gandhi or Hume failed, any of us can easily succeed. But it's also plainly false that what Gandhi or Hume achieved, any of us could as easily achieve.

For this reason we can honor those from the past for their principles and their achievements, if not always for their full characters. A bust of Archimedes in a physics department isn't a celebration of Archimedes's moral qualities (still less of Greek settler colonialism in Syracuse), but of his reported discoveries in science, an attempt to inspire us to similar discoveries. Likewise, a bust of Washington isn't a celebration of his ownership of slaves or his participation in Indian wars, but of the work he did for his country—guiding his soldiers through the Revolution, forestalling more than one potential military coup, and ultimately giving up his own power so that others might enjoy order and freedom. Even as grudging an admirer as King George III once told a friend that Washington's refusal of a third term "placed him in a light the most distinguished of any man living, and that he thought him the greatest character of the age."[64]

---

62. ALEKSANDR SOLZHENITSYN, THE GULAG ARCHIPELAGO 168 (1974).

63. Judge John Bush, How Should We View the Founders?, Panel Discussion Before the Harvard Federalist Society (Apr. 3, 2023).

64. 3 THE LIFE AND CORRESPONDENCE OF RUFUS KING 545 (Charles R. King ed., N.Y., G.P. Putnam's Sons 1896) (recounting a conversation between Rufus King and Benjamin West). *See generally* Julie Miller, *George Washington, "The Greatest Man in the World"?*,

Rather, the reasons why one might object to a statue of Washington have more to do with the present than the past. There are, even today, statues in Mongolia of Genghis Khan.[65] Very few people object to them, even though he's among the greatest murderers of human history, whose "cold and deliberate genocide . . . has no parallel save that of the ancient Assyrians and the modern Nazis."[66] The reason why we can have historical distance from him, and see him as a historical figure only, is that he poses to us no present threat: no one's worried that these statues will inspire new armies of Mongols to sweep across the central Asian steppe.

But people very much *are* worried—and not without cause—that the suffering of American slaves and the interests of their descendants will be met today with a "shrug of the shoulders"; and it's for *this* reason that monuments to slaveowners are said to be unacceptable.[67] Which historical evils are seen as proper grounds for *damnatio memoriæ*, whether slavery or racism or misogyny or religious prejudice or meat-eating, depends on which evils are seen as particularly threatening *today*. This isn't at all to say that such objections are dishonest, or that they serve merely as political weapons (as just about anything can). But they are presentist, and they respond to present concerns.

So we have to be careful not to be misled by those concerns into disregarding what the past still has to teach us. What takes the form of heated moral condemnation of the past can actually be a form of moral quietism about the present. Having shaken off those amoral monsters who came before us, we might feel no need to consider the possibility that *we ourselves* might be such monsters—that we, too, might suffer from deep moral errors, as yet unrecognized and

---

LIBR. CONG. BLOGS: UNFOLDING HIST. (Dec. 15, 2022), https://blogs.loc.gov/manuscripts/2022/12/george-washington-the-greatest-man-in-the-world/ [https://perma.cc/7ALU-VS34] (describing the history of the quotation).

65. *See, e.g.*, Dan Levin, *Genghis Khan Rules Mongolia Again, in a P.R. Campaign*, N.Y. TIMES, Aug. 3, 2009, at A6, https://www.nytimes.com/2009/08/03/world/asia/03genghis.html (describing 131-foot monument).

66. J.J. SAUNDERS, THE HISTORY OF THE MONGOL CONQUESTS 56 (1971).

67. *See* Blow, *supra* note 16.

unrepented. Instead we might feel that we've finally figured everything out—that we've reached a moral "end of history," when all true morality has been revealed, and when there's nothing left to be done but the conversion of the heathen. But to declare a moral Year Zero isn't actually progressive, because you can only really declare it once. Having done so, you've denied the possibility of *future* moral progress, of anything that might require a similar reset later on.

In this way, the contemporary attitude toward the past uncomfortably resembles the reported suggestion of the scholar Li Si, in the reign of China's First Emperor, that "[a]nyone referring to the past to criticize the present should, together with all members of his family, be put to death."[68] Maybe few would put it in such terms. But we should see that the wholesale rejection of the disreputable past, for its failure to share the moral assumptions of the present, can be a way to protect those present assumptions from *further* moral critique. (Consider, for example, the offensiveness claims sometimes leveled against the arguments for animal rights above.)

The reason that "we need intimate knowledge of the past," C.S. Lewis argued, is

> [n]ot that the past has any magic about it, but because we cannot study the future, and yet need something to set against the present . . . . A man who has lived in many places is not likely to be deceived by the local errors of his native village; the scholar has lived in many times and is therefore in some degree immune from the great cataract of nonsense that pours from the press and the microphone of his own age.[69]

When we've morally discredited the past and all that's in it, as beneath our notice if not actively tainted or dangerous, then this cataract finds rather less in its way.

In choosing which figures to honor from the past, then, it matters a good deal what we're honoring them *for*. When confronted with

---

68. Li Si, Memorial on the Burning of Books (213 B.C.E.), *in* 1 SOURCES OF CHINESE TRADITION 209, 210 (Wm. Theodore de Bary & Irene Bloom eds., 2d ed. 1999).

69. C.S. LEWIS, *Learning in War-Time*, *in* THE WEIGHT OF GLORY 47, 58–59 (HarperOne 2001) (1949).

statues of Stonewall Jackson or of Robert E. Lee, we should ask whether they're really being celebrated as generals or as sons-of-the-South without also celebrating the Southern cause in which they fought—the cause of preserving slavery and of betraying the country and Constitution they'd sworn oaths to support, a cause unfortunately not lacking in modern defenders. The objection to their statues isn't that the past is disreputable, but that the particular reasons advanced for honoring them, and for honoring them in particular, are precisely what was disreputable in it. By contrast, it's simply false that we today honor George Washington *for*, rather than despite, his attempts to recapture an enslaved woman seeking her freedom.[70] Instead, we honor him for very different reasons, reasons expressed in our admiration of his letter to the Newport congregation.[71]

If the achievements of the American Republic that Washington helped found—constitutional democracy, individual rights, free speech and press and religion and enterprise, the extraordinary outpouring of creativity and safety and abundance that all these things made possible—now seem to us less impressive in global context, that might be because of their success. After all, constitutional democracies today are a dime a dozen. But that was hardly the case at the American Founding, and America's example had no small amount to do with that. To downplay America's contributions to the world, now that it's succeeded in remaking the world in its image, is like accusing Shakespeare of being full of *clichés*, now that our language is defined by his turns of phrase. And to downplay America's founding principles, the principles that helped put slavery on a path to extinction,[72] because they were often betrayed by the very Founders who helped articulate them, is to forget that

70. *See* DUNBAR, *supra* note 11.

71. *See* Washington Letter, *supra* note 4, at 284–85.

72. IMMANUEL KANT, *Idea for a Universal History with a Cosmopolitan Purpose*, *in* KANT: POLITICAL WRITINGS 41, 46 (Hans Reiss ed., H.B. Nisbet trans., 2d ed. 1991) ("Nothing straight can be constructed from such warped wood as that which man is made of.").

hypocrisy is the tribute that vice pays to virtue, and that from the crooked timber of mankind, no straight thing was ever made.[73]

II.

I turn now to the other critique, the critique from the right—which you'll be glad to learn I plan to address in rather fewer words.

In part that's because, to debate whether America's founding principles themselves are wrong, one needs some shared criteria by which to evaluate those principles. If one truly believes that only a particular form of government can be good or just (whether that's a caliphate, a hereditary monarchy, a dictatorship of the proletariat, or what have you), and if America's liberal founding principles are incapable of supporting such a government, then there's relatively little to be said. But there are some areas, both of theory and of practice, where I think liberals and their critics can usefully speak to one another—and where the criticisms, in my view, seriously misfire.

A.

Start with theory, and the claim that liberal "neutrality" is impossible. Neutrality, the critic might say, just exchanges one sort of rule for another. Few people think the free exercise of religion should allow the free exercise of human sacrifice; and if the state chooses to draw a line here, then it isn't really being neutral. Nor can the state defend its choices as enhancing liberty, for liberty requires coercion: one can only have laissez-faire property rights in a powerful state that uses force to protect them. Every claim to "liberty at one place" is, as Dewey argued, at the same time "a restraint at some

---

73. *See* LINCOLN, *supra* note 60, at 266 ("[M]y ancient faith teaches me that 'all men are created equal' . . . ."); *cf.* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 20 (2005) (noting that many states restricted slavery post-Independence, as "soaring rhetoric of liberty . . . pulled many Americans toward abolition"). *See generally* Dan McLaughlin, *American Slavery in the Global Context*, NAT'L REV. (Jan. 6, 2022, 11:43 AM), https://www.nationalreview.com/magazine/2022/01/24/american-slavery-in-the-global-context/ [https://perma.cc/BC6W-X5CG] (describing the broad extent and slow abolition of global slavery).

other place," part of a "system of control of power, of social restraints and regimentations."[74] The question is which exercises of coercion are justified, not which promote an incoherent goal of "liberty" amid "this endless human struggle."[75]

Yet liberal neutrality was never just an unreasoned refusal to make distinctions. It's a particular way of speaking about a particular set of *goals*, which the principled refusal to distinguish on other grounds is *for*. Professors grading an anonymous exam, for example, are neutral as to their students' identities. That's because those identities are irrelevant to what the professors *ought* to care about, namely the quality of the anonymous students' work. Likewise, a university administration inevitably makes some moral choices, such as whether to have meat in the cafeteria, abortion in the health plan, or tobacco stocks in the endowment; there's no way to remain wholly neutral on such questions. But at the same time, a good university also sets out areas in which it takes no position. It might choose not to declare on university letterhead that it finds meat-eating to be morally acceptable, much less to require its students to sign a statement to that effect—or even not to make them sign the Thirty-Nine Articles of Religion of the Church of England. And it makes these choices, and takes these "neutral" stances, in order to advance the affirmative moral goals of its particular academic mission: for example, that of serving as a "home and sponsor of critics," or as a "community of scholars" organized for the "limited and distinctive purposes" of "teaching and research."[76]

So there's a very big difference between neutrality and indifference—or between thinking that an effective state must make *some* choices and that it must make *every* choice, or even *most* choices. If "Governments are instituted among Men"[77] for a particular *goal*—

74. JOHN DEWEY, *Liberty and Social Control*, *in* THE POLITICAL WRITINGS 158, 159 (Debra Morris & Ian Shapiro eds., 1935).

75. *Id.*; *accord* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 14, 192 (2022).

76. KALVEN COMMITTEE, REPORT ON THE UNIVERSITY'S ROLE IN POLITICAL AND SOCIAL ACTION (1967), https://provost.uchicago.edu/sites/default/files/documents/reports/KalvenRprt_0.pdf [https://perma.cc/S8LK-HRB8].

77. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

say, "to secure these rights" of "Life, Liberty, and pursuit of Happiness"[78]—then this goal helps tell us which distinctions the state should draw and which it should disregard. And it's only because such rights tend to cut across so many once-salient distinctions, such as those that forced Moses Seixas's ancestors first to conceal their religion and then to flee across the Atlantic,[79] that we think of liberalism as particularly "neutral."

For the same reasons, there's a very big difference between recognizing that liberty requires defending (that "freedom isn't free," as the saying goes) and seeing liberty solely as a mask for coercion. Consider the liberty, which many societies have at times restricted, to choose your own spouse rather than having someone else choose for you. If we tried hard enough, we could reword this liberty in Dewey's language of coercion: say, that "the state will use coercion to stop people from making others say wedding vows at gunpoint."[80] But the awkwardness of this phrasing reveals something important. A system in which marriage is largely a matter for individual choice, and a system in which spouses are routinely assigned by maternal uncles or Party committees, aren't just two unremarkable reconfigurations of Dewey's "social restraints and regimentations" amid an "endless human struggle":[81] the former really does give its participants a unique and valuable experience of freedom that the latter does not. (So, too, does the Thirteenth Amendment.)[82] And while Dewey might himself agree that our current system involves *better* forms of coercion than some of the alternatives, the most natural way to express *why* it's better would mention the importance of the individual liberties it protects.[83] Liberty doesn't have to be the only thing of importance, but it's *something* of importance, and something often worth preserving at very real cost.

---

78. *Id.*
79. *See* Myers, *supra* note 3, at 142–43.
80. *See supra* note 74 and accompanying text.
81. *See* Dewey, *supra* note 74.
82. *See* U.S. CONST. amend. XIII.
83. *See* Dewey, *supra* note 74, at 158–60.

B.

Turn now to practice, and the claim that liberalism simply doesn't do what it promises. To some critics, the liberalism of the 1760s and 1770s leads ineluctably to the very different liberalism of the 1960s and 1970s, and ultimately to disenchantment with liberal society.[84] On this portrayal, it's the nature of liberalism to eat its seed corn: it tends to demoralize society, to empty the public square of values and virtue, and to draw down continually on the reservoirs of social norms that keep a good society in operation.[85] The Founding-era promise that a community could build its own "city upon a hill" has been broken; the cities were built, but now they stand empty, and everyone has moved to Vegas instead.

This critique, too, is flawed—and it's flawed, as I said above, because it isn't pessimistic *enough*. If the claim is that liberalism has been tried and found wanting, the problem is that illiberalism has been tried and found wanting too. There are few good models of illiberal governments in modern times, and plenty of cautionary tales, from Castro and Chavez on the left to Franco or Salazar on the right. Many twentieth century attempts to promote religion by government influence, whether in Quebec, Ireland, or Spain, came to rather bad ends as well: bad for the religion and not just for the state.[86] And if it's true, as Edmund Waldstein wrote in *First Things*, that all these states chose too liberal a strategy[87]—that is, that the real illiberalism hasn't yet been tried—then one might ask (as Ross Douthat asked in reply) *why* the committed supporters of those

84. *See, e.g.*, PATRICK J. DENEEN, WHY LIBERALISM FAILED 28–42 (2018).

85. *See id.*

86. *See* Ross Douthat, *A Gentler Christendom*, FIRST THINGS, June 2022, at 27, 31; Ross Douthat, *The Shadow of Failure*, FIRST THINGS, June 2022, at 38, 39; *see also* Dina Nayeri, *Why Is Iran's Secular Shift So Hard To Believe?*, N.Y. MAG. (Oct. 21, 2022), https://nymag.com/intelligencer/article/iran-secular-shift-gamaan.html [https://perma.cc/4RB5-GFEL] (making a similar point regarding the 1979 revolution in Iran).

87. *See* Edmund Waldstein, *All We Need Is Everything*, FIRST THINGS, June 2022, at 34, 36.

governments all made such choices, and why doubling down on the use of state coercion seemed to them even less palatable.[88]

As they say in advertising, you can have the best marketing campaign in the world, but you still have to get the dogs to eat the dog food. Ultimately a government staffed by human beings can only enforce virtue for its citizens if there are a majority of citizens who *want* a particular sort of virtue to be enforced; or, if a minority has taken power instead, if you're lucky enough to get the *right* minority, and not one that worries less about using its power to enforce virtue and more about defending its tenuous hold on that power (or, indeed, abusing it).

This is one of the disagreements between classical political theory, which asked how leaders might be taught to use their power in virtuous ways, and modern political theory, which assumes that power corrupts, and that absolute power corrupts absolutely. We can recognize that *someone* must exercise power in a flourishing society without forgetting that the specific people in power often abuse it, and that familiar kinds of liberty often lower the cost of those abuses. There are many things, for example, that parents might do wrong; but only in unusual cases do we trust that a representative of the state could do better. Thus the restriction of child-neglect law to extreme deprivation or abuse—which, at least in liberal states, usually doesn't include instructing your children in the wrong religion.[89] If responsible parents all agreed on questions of child-raising, we wouldn't need to leave so much up to individual choice; but they don't, so we do.

As this disagreement should remind us, the practical claim against liberalism has a further fault, namely that it forgets why Americans resorted to liberalism in the first place. The colonists weren't all seeking religious *liberty*: many of them were seeking their own religious enclaves, in which they could enforce their own

88. *See* Douthat, *The Shadow of Failure*, *supra* note 86, at 39.

89. *But cf.* Romanus Cessario, *Non Possumus*, FIRST THINGS, Feb. 2018, at 55, 55 (book review) (describing how "the laws of the Papal States stipulated that a person legitimately baptized receive a Catholic upbringing," to the point of removing from his family the involuntarily baptized child of Jews).

beliefs as intolerantly as they liked.[90] But when they were forced to live cheek-by-jowl with other colonists promoting other religions—Puritans in Massachusetts, Anglicans in Virginia, Catholics in Maryland, and Quakers, Baptists, and God knows what else in Pennsylvania—and to make common cause with them in the Revolution, they found themselves forced to recognize a certain kind of liberalism, simply as a means of getting along. Madison's efforts to prevent the choice of any "national religion"[91] later became the Establishment Clause, which left Congress without power to interfere with state establishments and which prevented the national government from favoring some state religions over others.[92] The miracle of the American Founding was that these sorts of realpolitik considerations led to a society in which millions of people could live in freedom and safety.

And attempts to undo the liberal compromise that ignore this realpolitik may find themselves frustrated at the outset. Consider, for example, the proposal of Sohrab Ahmari to restore "blue laws," which once required many stores to stay closed on Sundays; citing the works of Rabbi Abraham Joshua Heschel, Ahmari argues that Sabbath observance is crucial to private and public virtue.[93] Yet we ought to remember that the midcentury legal challenges to blue laws were often brought *by Orthodox Jews*—those who suffered a "double-penalty" when they closed their businesses on Saturdays for their Sabbath observance, but then were forced to remain closed

90. *See, e.g.*, THOMAS H. O'CONNOR, BOSTON CATHOLICS: A HISTORY OF THE CHURCH AND ITS PEOPLE 9 (1998) (describing mistreatment of Catholics in early New England).

91. 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834).

92. *See* Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Non-Establishment Principle*, 27 ARIZ. ST. L.J. 1085, 1089–91 (1995); *see also* Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 490, 567–68 (denying that the Clause was specifically intended to insulate state establishments, but acknowledging that it was redrafted to avoid any implication of interfering with such establishments).

93. Sohrab Ahmari, *What We've Lost in Rejecting the Sabbath*, WALL ST. J., May 8, 2021, at C1.

on Sundays to ease the observance of others.[94] Maybe some practical accommodation among different religions could be reached; but if so, it might well take the form of something largely resembling liberal neutrality, with some stores open, some employees working, and some people shopping on Sundays nonetheless. The modern critic of neutrality can't avoid this outcome simply by wishing away the very divisions that previously forced toleration and acceptance on our forebears.

As projects of compromise, liberal societies won't be one size fits all. Different compromises will be proper in different places or circumstances. America's historical identity as an "Asylum to the virtuous & persecuted part of mankind, to whatever nation they might belong,"[95] may make some compromises more suitable for us than for others. But these decisions remain decisions of principle, because it *matters* how much one values the interests at stake. Requiring that certain kinds of medical care be provided to the children of Christian Scientists,[96] and requiring that a cross be placed atop each U.S. government building,[97] are different places to draw the line, to be sure; that doesn't make choosing among them a mere exercise in line-drawing. As Oliver Traldi has written, "[t]he person who considers a course of action they find distasteful as a last resort does not, in common parlance, share the principles of the person who hardly finds that course of action distasteful at all."[98]

---

94. *See American Jewish Congress Report Foresees Discord on Sunday Blue Laws*, JEWISH TELEGRAPHIC AGENCY DAILY NEWS BULL., July 6, 1961, at 6, http://pdfs.jta.org/1961/1961-07-06_128.pdf [https://perma.cc/NX8V-RHEF]; *accord U.S. Supreme Court Upholds 'Blue Laws' Banning Trading on Sundays*, JEWISH TELEGRAPHIC AGENCY DAILY NEWS BULL., May 31, 1961, at 5, http://pdfs.jta.org/1961/1961-05-31_103.pdf [https://perma.cc/LFH4-2B3J].

95. Letter from George Washington to Francis Adrian Van der Kemp, *supra* note 15.

96. *See* Walker v. Superior Court, 763 P.2d 852 (Cal. 1988), *cert. denied*, 491 U.S. 905 (1989).

97. *See* Matthew Schmitz, *The Cardinal and the Cross*, CATHOLIC HERALD (May 9, 2018, 6:05 P.M.), https://catholicherald.co.uk/matthew-schmitz-the-cardinal-and-the-cross/ [https://perma.cc/83SE-Q6LA].

98. Oliver Traldi, *Free Speech, on Principle*, ARC DIGITAL (Feb. 19, 2022), https://www.arcdigital.media/p/free-speech-on-principle [https://perma.cc/3YF2-YYQRT]; *accord* Oliver Traldi, *Let's Talk About Free Speech*, CITY J. (Apr. 15, 2021), https://www.city-journal.org/article/lets-talk-about-free-speech [https://perma.cc/UF7

Perhaps some compromises are simply too immoral to make. One thinks immediately of America's compromises with slavery, which led Garrison to condemn our Constitution as "a covenant with death and agreement with hell."[99] And none of these arguments may convince someone who finds living together *peacefully* less important than living together *morally*. In his famous speech against the civil disabilities of the Jews, Thomas Macaulay suggested that he would rather take his shoes to "a heretical cobbler" than to one "who had subscribed all the thirty-nine articles, but had never handled an awl."[100] To others, by contrast, it might seem perverse, even diabolical, to care less for salvation than for well-made shoes. (It profits a man nothing to give his soul for the whole world—but for shoes?)[101]

Yet if liberalism might not be anyone's first-best regime, it also might not have to be. As Scott Alexander once put it, "[l]iberalism is a technology for preventing civil war."[102] It emerged from the horrors of the sixteenth century, in which "Europe tore itself apart in some of the most brutal ways imaginable"; its sole aim is to "let people live together peacefully *without* doing the 'kill people for being Protestant' thing."[103] As he wrote, "[p]opular historical strategies for dealing with differences have included: brutally enforced conformity, brutally efficient genocide, and making sure to keep" the machinery of liberalism "tuned *really really carefully*."[104]

I can say little to persuade those who prefer either of the first two options to the third. But anyone who sees something deeply *wrong* with the ways in which Moses Seixas's ancestors were treated in

---

N-5J6S].

99. *The Union*, LIBERATOR, Nov. 17, 1843, at 182.

100. T.B. Macaulay, Civil Disabilities of the Jews (1831), *in* THE SPIRIT OF THE AGE: VICTORIAN ESSAYS 80, 82 (Gertrude Himmelfarb ed., 2007).

101. *Cf.* ROBERT BOLT, A MAN FOR ALL SEASONS 100 (1960) (Methuen Drama 1995) (asking the same question, but for Wales).

102. Scott Alexander, *Against Murderism*, SLATE STAR CODEX (June 21, 2017), https://slatestarcodex.com/2017/06/21/against-murderism/ [https://perma.cc/7T5A-QNZN].

103. *Id.*

104. *Id.*

Portugal[105]—and who hopes to minimize, if one possibly can, the occasions on which someone must be discouraged from worshipping and acting in the ways his conscience demands—will understand the attractions that America's founding principles have to offer.

Living together is never easy, and there's no guarantee that we, any more than the Founders, will arrive at the right answers. In this regard, I see no other course but to express the same hope that Washington did, and to conclude here as he concluded his letter to the Newport congregation:

> May the father of all mercies scatter light and not darkness in our paths, and make us all in our several vocations useful here, and in his own due time and way everlastingly happy.[106]

105. *See* Myers, *supra* note 3, at 142–43.

106. Washington Letter, *supra* note 4, at 285.

THE NATURAL LAW MOMENT IN CONSTITUTIONAL THEORY

J. JOEL ALICEA*

INTRODUCTION

Over the last several years, we have seen an outpouring of legal scholarship about the relationship between natural law and American constitutional theory. Consider just a sample of the work produced since 2016:

1. Jeff Pojanowski and Kevin Walsh's co-authored articles "Enduring Originalism"[1] and "Recovering Classical Legal Constitutionalism";[2]

2. Lee Strang's book *Originalism's Promise*;[3]

---

* Associate Professor of Law, The Catholic University of America, Columbus School of Law. This essay was originally delivered as the Herbert W. Vaughan Memorial Lecture at Harvard Law School on April 9, 2024. I thank Randy Barnett, Marc DeGirolami, Sherif Girgis, Jeffrey Pojanowski, Lawrence Solum, and Kevin Walsh for comments on earlier drafts. I also thank Benjamin Eidelson, Richard Fallon, Jack Goldsmith, Lawrence Lessig, and Saikrishna Prakash for attending the lecture. Finally, I thank Gerald Sharpe and Steve Young for very helpful research assistance.

1. Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97 (2016).

2. Jeffrey A. Pojanowski & Kevin C. Walsh, *Recovering Classical Legal Constitutionalism: A Critique of Professor Vermeule's New Theory*, 98 NOTRE DAME L. REV. 403 (2022) (reviewing ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022)).

3. LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION (2019).

3. Marc DeGirolami's articles on traditionalism[4] and his forthcoming book *We Mean What We Do: The New Constitutional Traditionalism*;[5]

4. Adrian Vermeule's book *Common Good Constitutionalism*;[6]

5. And a few of my own pieces: "The Role of Emotion in Constitutional Theory,"[7] "The Moral Authority of Original Meaning,"[8] and "Constitutional Theory and the Problem of Disagreement."[9]

Other scholars and works could be added to this list,[10] but this sample should already make clear that something new is happening in American constitutional theory. Never before have so many legal scholars sought to ground constitutional theory in the natural-law tradition. And, if I might add anecdotally, this supply of new scholarship is matched by a demand for it on the part of jurists,

---

4. *See, e.g.*, Marc O. DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES 9, 43–49 (2023).

5. MARC O. DEGIROLAMI, WE MEAN WHAT WE DO: THE NEW CONSTITUTIONAL TRADITIONALISM (forthcoming 2025).

6. VERMEULE, *supra* note 2.

7. J. Joel Alicea, *The Role of Emotion in Constitutional Theory*, 97 NOTRE DAME L. REV. 1145 (2022).

8. J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1 (2022).

9. J. Joel Alicea, *Constitutional Theory and the Problem of Disagreement*, 173 U. PA. L. REV. 321 (2025).

10. For example, though he has not yet published a piece grounding his approach to constitutional theory in the natural law, Sherif Girgis has presented an argument for the compatibility of originalism and the natural law in public remarks. *See* Sherif Girgis, *Are Originalism and Natural Law Compatible?*, CIT (Sept. 1, 2022), https://cit.catholic.edu/events/originalism-natural-law, [https://perma.cc/H5MQ-7R54]. And while my list focuses on American legal scholars, Conor Casey—Vermeule's sometime co-author—has made substantial contributions to the literature in this area as well, *see, e.g.*, Conor Casey, *Constitutional Design and the Point of Constitutional Law*, 67 AM. J. JURIS. 173, 173–97 (2022), as has Richard Ekins, *see, e.g.*, Richard Ekins, *The State and Its People*, 66 AM. J. JURIS. 49 (2021); Richard Ekins, *How to Be a Free People*, 58 AM. J. JURIS. 163 (2013).

lawyers, and law students alike. Indeed, we can truly say that we are living through a natural-law moment in constitutional theory, a period of unprecedented interest in natural law among constitutional theorists.

In making this claim, I use the terms "constitutional theory" and "natural law" broadly. The term "constitutional theory," for instance, can refer to at least two different kinds of theories. Most commonly in American legal scholarship, it refers to "normative constitutional theories,"[11] which are theories that propose a methodology for resolving constitutional disputes (such as David Strauss's common-law constitutionalism[12]) and offer a justification for adopting that methodology.[13] But "constitutional theory" can also refer to theories of law, which try to identify what *the* law—and more specifically, *our* law—is, but do not necessarily propose a methodology for adjudicating legal disputes.[14] I understand Steve Sachs's original-law originalism to be an example of this type of constitutional theory.[15] I mean to encompass both understandings of "constitutional theory" in my remarks today, except where I make clear that I am using a narrower meaning.

Similarly, by "natural law," I intend a broad meaning that includes a variety of theories and traditions that travel under that banner. Generally speaking, "natural law" refers to those principles and precepts that conduce to the human good and are knowable through human reason.[16] Natural law theory holds that there are

---

11. *See* Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 545–49 (1999).

12. *See, e.g.*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 894–97 (1996).

13. J. Joel Alicea, *Liberalism and Disagreement in American Constitutional Theory*, 107 VA. L. REV. 1711, 1729–34 (2021).

14. J. Joel Alicea, *Practice-Based Constitutional Theories*, 133 YALE L.J. 568, 577–78 (2023).

15. Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 823–27 (2015).

16. *See, e.g.*, THOMAS AQUINAS, SUMMA THEOLOGIAE pt. I-II, q. 94, art. 2 (Fathers of the Eng. Dominican Province trans., 2d & rev. ed. 1920) (c. 1270). Although the definition I offer here focuses on the moral-philosophical character of natural-law theory, I also mean to include its jurisprudential character, as reflected in the debates between legal positivists and natural lawyers. *See infra* Sections I.A, III.A.

objective goods, understandable in light of human nature, that we can identify through reason, which also means that there are objective moral wrongs.[17] Unlike other moral frameworks, the natural-law tradition would claim that there are some absolute moral wrongs.[18] The tradition's most well-known thinkers include Aristotle,[19] Cicero,[20] and Aquinas.[21]

My assertion that we are living through a natural-law moment in American constitutional theory immediately calls to mind three questions, which will be the focus of my remarks today. First: how, if at all, are the theorists of this moment different from prior theorists who sought to ground constitutional theory in natural law? Second: what explains the rise of natural law in American constitutional theory? Third: what are the implications for constitutional theory of our natural-law moment?

In my limited time today, I would like to sketch answers to these questions, with the caveat that much more could be said about them than I will be able to cover here. For example, my focus will be on the revival of interest in natural law among American constitutional *theorists*, but it is worth noting that there has also been a revival of interest in natural law among American legal *historians*,

17. AQUINAS, *supra* note 16, at pt. I-II, q. 94, art. 2. Among other things, this focus on human goods distinguishes natural-law theories from deontological theories. *See* Robert P. George, *Recent Criticism of Natural Law Theory*, 55 U. CHI. L. REV. 1371, 1395 n.61 (1988).

18. 1 JOHN FINNIS, *Moral Absolutes in Aristotle and Aquinas*, *in* REASON IN ACTION: COLLECTED ESSAYS 187, 187–98 (2011). Among other things, this recognition of moral absolutes distinguishes natural-law theories from consequentialist theories. *See* J. BUDZISZEWSKI, WRITTEN ON THE HEART: THE CASE FOR NATURAL LAW 147–48, 165–68 (1997).

19. *See, e.g.*, ARISTOTLE, NICOMACHEAN ETHICS (Roger Crisp ed. & trans., Cambridge Univ. Press rev. ed 2014) (c. 384 B.C.E.).

20. *See, e.g.*, CICERO, *On the Laws*, *in* ON THE COMMONWEALTH AND ON THE LAWS (James E.G. Zetzel ed., 1999).

21. *See, e.g.*, AQUINAS, *supra* note 16.

such as Stuart Banner,[22] Jud Campbell,[23] Jonathan Gienapp,[24] Richard Helmholz,[25] and others. A complete analysis of our natural-law moment would need to account for this parallel development in legal scholarship, and it would need to examine the potential implications of this historical scholarship for constitutional theory.[26] But I will leave these intriguing lines of inquiry for another occasion.

I. THE DISTINCTIVENESS OF THE NATURAL LAW MOMENT

So let us start with my first question: what makes the theorists of our natural-law moment distinctive, other than the fact that there are more of them now than in previous decades? While there are many things that could be said in response to this question, I will limit myself to three points.

A. Thomism and the Natural Law Tradition

The first distinctive feature of today's natural-law constitutional theorists is that they are self-consciously Thomistic in their approach to natural law.

Now, there are extensive and baroque debates about what "Thomism" is and which natural-law theories are or are not properly classified as "Thomistic,"[27] and I do not intend to wade into those debates here. Rather, by "Thomistic," I simply mean that the constitutional theorists of our natural-law moment rely heavily on the work of Thomas Aquinas and purport to ground their theories in

22. *See, e.g.*, STUART BANNER, THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED (2021).

23. *See, e.g.*, Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 264–94 (2017).

24. *See, e.g.*, Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 L. & HIST. REV. 321, 334–56 (2021).

25. *See, e.g.*, R.H. HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE 142–72 (2015).

26. *See, e.g.*, John O. McGinnis & Mike Rappaport, *The Finished Constitution*, LAW & LIBERTY (Sept. 28, 2023), https://lawliberty.org/book-review/the-finished-constitution/ [https://perma.cc/UQB3-KSVJ]; Pojanowski & Walsh, *supra* note 2, at 447 & n.226; Gienapp, *supra* note 24, at 324.

27. *See, e.g.*, RUSSELL HITTINGER, A CRITIQUE OF THE NEW NATURAL LAW THEORY (1987).

Aquinas's thought. For example, all the scholars that I mentioned at the beginning of my lecture expressly adopt Aquinas's classic definition of law: (1) an ordinance of reason, (2) for the common good, (3) promulgated, (4) by a legitimate authority.[28] They build their constitutional theories on this understanding of what law is. But even beyond Aquinas's theory of law, these scholars, to varying degrees, rely on Thomistic arguments about the nature of political authority,[29] the relationship between reason and emotion in the human person,[30] and the moral obligations of jurists, lawmakers, and citizens in relation to law.[31]

By contrast, scholars who wrote about natural law and constitutional theory in previous decades tended not to be Thomistic in their approach. Professors Hadley Arkes and Harry Jaffa, for example, are probably the best-known scholars who consistently wrote about natural law and constitutional theory prior to our natural-law moment, but their theories were quite eclectic, borrowing from and blending together arguments by figures as varied as Aristotle, John Locke, Immanuel Kant, Abraham Lincoln, and George Sutherland.[32] For instance, Professor Arkes's most recent book on natural law, titled *Mere Natural Law*,[33] never cites Aquinas's definition of law, and Aquinas appears on many fewer pages than Abraham Lincoln or James Wilson do. That is not to say that Professors Arkes and Jaffa omit Aquinas from their account of natural law; one cannot really avoid Aquinas when writing about natural law. Professor

28. *See, e.g.*, Pojanowski & Walsh, *supra* note 1, at 117–26; STRANG, *supra* note 3, at 262–63; DeGirolami, *supra* note 4, at 46; VERMEULE, *supra* note 2, at 3; Alicea, *supra* note 8, at 14–15.

29. *See* Alicea, *supra* note 8, at 16–33; STRANG, *supra* note 3, at 246–65.

30. *See* Marc O. DeGirolami, *Establishment as Tradition*, 133 YALE L.J.F. 372, 395–96 (2023); Alicea, *supra* note 7, at 1153–69.

31. *See, e.g.*, Alicea, *supra* note 8, at 43–52; VERMEULE, *supra* note 2, at 43–47; STRANG, *supra* note 3, at 265–95; Pojanowski & Walsh, *supra* note 1, at 122–24.

32. *See* HADLEY ARKES, MERE NATURAL LAW: ORIGINALISM AND THE ANCHORING TRUTHS OF THE CONSTITUTION 48–55, 87–91 (2023); Harry V. Jaffa, *Equality, Liberty, Wisdom, Morality and Consent in the Idea of Political Freedom*, 15 INTERP. 3 (1987).

33. ARKES, *supra* note 32.

Jaffa, after all, wrote an entire book on Thomism.[34] But, as a general matter, neither Arkes nor Jaffa grounded his constitutional theory in Aquinas's thought.[35] Rather, they relied on a mixture of theorists and traditions that cannot all be considered Thomistic.

This lack of a Thomistic grounding has ramifications for Arkes's and Jaffa's constitutional theories. Because Arkes, for example, does not rely on Aquinas's definition of law, he is not forced to confront whether his understanding of the judicial role is compatible with the scope of legitimate judicial authority under the American Constitution or with the relevance of the promulgated constitutional text, which are questions that would be difficult for him to avoid were he using Aquinas's definition of law.[36]

My purpose here is not to litigate the merits of Arkes's or Jaffa's theories, nor is it to argue that a Thomistic approach is superior to, or more coherent than, the way in which they conceive of natural law. I am simply pointing out that the lack of a Thomistic grounding for their views has important implications for their constitutional theories, and that the Thomistic grounding of today's theorists likewise has important implications.

B. Constitutional Theorists, Not Philosophers

Of course, there have been some foundational works of American constitutional theory produced by Thomistic theorists prior to our natural-law moment. Among the most important that come to mind are Professor Russell Hittinger's book *The First Grace*[37] and some of Professor Robert P. George's works, such as his book *In*

34. HARRY V. JAFFA, THOMISM AND ARISTOTELIANISM: A STUDY OF THE COMMENTARY BY THOMAS AQUINAS ON THE NICOMACHEAN ETHICS (1952).

35. *See, e.g.*, Harry V. Jaffa, *The American Founding as the Best Regime*, CLAREMONT REV. OF BOOKS (July 4, 2007), https://claremontreviewofbooks.com/digital/the-american-founding-as-the-best-regime/ [https://perma.cc/7C3W-H5C8].; Jaffa, *supra* note 32, at 6.

36. J. Joel Alicea, *Anchoring Originalism*, NAT'L REV. (June 22, 2023), https://www.nationalreview.com/magazine/2023/07/10/anchoring-originalism/ [https://perma.cc/A497-XZ2H].

37. RUSSELL HITTINGER, THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD (2003).

Defense of Natural Law.[38] Yet, Hittinger and George's contributions highlight a second distinctive feature of today's natural-law constitutional theorists: they are primarily *constitutional theorists*, not *legal philosophers*. They are constitutional theorists who rely on natural-law philosophy, whereas Hittinger and George are natural-law philosophers who sometimes write about constitutional theory.

This might not sound significant, but it can be. While there are exceptions, constitutional theorists tend to be more deeply enmeshed in the specifics of the American constitutional regime than are legal philosophers, and they tend to care more about the *application* of sound legal philosophy to American legal and social practices. Professors Hittinger and George, for instance, are not really concerned with prescribing or defending an approach to constitutional law or adjudication, be it originalist or non-originalist. They have certainly said things about those topics.[39] George, for instance, has at times offered brief natural-law defenses of originalism in his various writings.[40] But these scholars are focused on more foundational questions of the nature of law.

By contrast, all of the natural-law constitutional theorists of our natural-law moment defend originalist[41] or non-originalist[42] constitutional theories and make arguments closer to the ground of American law.[43]

---

38. *See* ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 102–12 (1999). Some of Professor John Finnis's work could also be mentioned here. *See* Casey, *supra* note 10, at 190–96 (summarizing and analyzing Finnis's work on constitutional adjudication).

39. *See* HITTINGER, *supra* note 37, at 61–84.

40. *See* Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269, 2282 (2001); GEORGE, *supra* note 38, at 111.

41. *See* Alicea, *supra* note 8, at 43–59; STRANG, *supra* note 3, at 278–307; Pojanowski & Walsh, *supra* note 1, at 126–57.

42. *See* DeGirolami, *supra* note 4, at 25–34; VERMEULE, *supra* note 2, at 91–116.

43. *See, e.g.*, Kevin C. Walsh, *Chair Lecture*, CIT (Sept. 7, 2023), https://cit.catholic.edu/events/2023–chair-lecture/ [https://perma.ccM3YXZ-ET5J] (analyzing severability doctrine through the lens of the act-potency distinction); Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1123–24 (2020) (providing an extensive analysis of traditionalism across multiple areas of constitutional law).

C. Both Originalists and Non-Originalists

This distinction points to the final distinguishing characteristic of the current group of natural-law constitutional theorists: they come in originalist and non-originalist varieties.

This is a significant change from earlier natural-law constitutional theorists like Arkes[44] or Jaffa,[45] who were fierce critics of originalism. While Professors DeGirolami and Vermeule continue in the tradition of non-originalist natural-law constitutional theorists, it is a remarkable fact that most natural-law constitutional theory scholarship produced today comes from originalists.[46]

That is a stark departure from the era in which Judge Robert Bork[47] and Justice Antonin Scalia[48] assailed their natural-law critics and defended originalism in terms that bordered on—and sometimes seemed to pass over into—moral relativism.[49]

II. WHY NOW FOR THE NATURAL LAW MOMENT?

This last observation leads to our second question: what explains the rise of natural law in American constitutional theory at this moment? Since there have always been a few non-originalist natural-law constitutional theorists, what really requires explanation is the existence of originalist natural-law theorists. What has changed since the time of Bork and Scalia that created the possibility of a natural-law moment in constitutional theory that spans the originalist-non-originalist divide?

---

44. See ROBERT H. BORK, *Natural Law and the Law: An Exchange* (May 1992), *in* A TIME TO SPEAK: SELECTED WRITINGS AND ARGUMENTS 315, 315–20 (2008).

45. *Id.* at 340, 340–47.

46. *Compare* Alicea, *supra* note 8, at 43–59, *with* Vermeule, *supra* note 2, at 91–116.

47. *Id.* at 305–14, 328–33, 347–48.

48. ANTONIN SCALIA, *Natural Law*, *in* SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED 243, 243–49 (Christopher J. Scalia & Edward Whelan eds., 2017).

49. *See* Antonin Scalia, *Of Democracy, Morality and the Majority, Address at Gregorian Univ. (May 2, 1996)*, in 26 ORIGINS 81 (1996); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 258–59 (1990) [hereinafter THE TEMPTING OF AMERICA]; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 10 (1971) [hereinafter NEUTRAL PRINCIPLES].

A. Historical Contingencies

Certainly, some of the reasons are historically contingent. For example, there might have been less interest among scholars and jurists about the interaction of natural law and originalism had originalists remained a small minority faction within the federal judiciary, as they were when Bork and Scalia were in their prime. But because originalism in some form is now arguably the dominant methodology among federal judges—including a majority of the Supreme Court[50]—the need for worked out, rigorous justifications of originalism is more relevant to legal scholarship than ever before.[51] And the rise of originalism within the federal judiciary was, of course, the result of innumerable historical contingencies, both legal and political.[52]

Another, perhaps less obvious, historical contingency was the work of two prior generations of natural-law theorists, including Professors John Finnis, Hittinger, and George. These scholars revived interest in the natural-law tradition within parts of the academy. (I should note that Professor Lee Strang has made this point before, so I am borrowing from him here.) How these natural-law theorists accomplished the revival of natural-law theory is a long and complicated story, and it is one that others are better-suited to telling than I am. But without the efforts of these legal philosophers, we can venture to guess that no revival of natural law would be present in constitutional theory today.[53]

---

50. This assertion admittedly depends on how one defines originalism. *Compare* Mike Rappaport, *The Year in Originalism*, LAW & LIBERTY (Mar. 24, 2021), https://lawliberty.org/the-year-in-originalism/ [https://perma.cc/MRR2-SHHY] (arguing that there are four originalists on the Court, not including Justice Alito), *with* J. Joel Alicea, *The Originalist Jurisprudence of Justice Samuel Alito*, 2023 HARV. J.L. PUB. POL'Y *PER CURIAM* 1, 1–2 (2023) (arguing that Justice Alito is an originalist).

51. *See* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. PUB. POL'Y 599, 603–05 (2004) (making a similar observation regarding legal conservatism more broadly).

52. *See generally* JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT (2007).

53. As noted in the text, this paragraph borrows from Strang. For the video and transcript of Strang's remarks on this topic, see Lee J. Strang, *Are Originalism and Natural Law Compatible?*, CIT (Sept. 1, 2022), https://cit.catholic.edu/events/originalism-natural-law/ [https://perma.cc/Ge7Z-DLFV].

Indeed, it is a striking fact that three of the legal scholars who work at the intersection of natural-law and constitutional theory today—Jeff Pojanowski, Sherif Girgis, and myself—were all students of Robert George at Princeton. It is hard to imagine that I'd be writing about natural-law constitutional theory had I not been George's student, and I suspect that Pojanowski and Girgis would say the same thing.

B. Originalism and Moral Neutrality

But there have also been theoretical developments that help explain why we now have a natural-law moment that spans the divide between originalists and non-originalists. Strang, again, has offered helpful insights on this score,[54] but I would suggest that the most important theoretical development was that originalist scholars started embracing the need to make moral truth claims in constitutional theory, at least insofar as the theorist is proposing a methodology of constitutional adjudication.

As I said, most constitutional theories propose a methodology for resolving constitutional disputes and offer a justification for why judges ought to adopt that methodology.[55] For example, Strauss argues that, by and large, judges should resolve constitutional disputes through a common-law, precedent-based methodology, and he offers justifications for that methodology.[56] A constitutional theory that proposes a methodology of constitutional adjudication therefore has to explain why judges *ought* to adopt that methodology.

From the 1970s through the mid-1990s, originalists largely attempted to justify their methodologies without resorting to contested moral truth claims.[57] Bork, for example, emphasized the importance of moral neutrality in constitutional adjudication and refused to provide a worked-out moral argument for originalism,

---

54. *See id.*

55. Alicea, *supra* note 13, at 1729–34.

56. *See* Strauss, *supra* note 12.

57. *See* Gerard V. Bradley, *Moral Truth and Constitutional Conservatism*, 81 LA. L. REV. 1317, 1418–25 (2021).

arguing instead that originalism was the methodology required by our constitutional history and traditions.[58] Why we should be bound by our history and traditions was never really explained.

When pressed on the need for a moral argument justifying originalism, Bork fell back onto claims that seemed to cross over into moral relativism. Consider his statement, when writing about "fundamental values," that "[t]here is no way of deciding these matters other than by reference to some system of moral or ethical values that has no objective or intrinsic validity of its own and about which men can and do differ."[59]

Bork's approach reflected a broader moral skepticism among early originalists. To be clear, I am not claiming that Bork or other early originalists denied that there are moral truths. While the statement I just read could be understood that way, Bork and other early originalists elsewhere affirmed that there are moral truths.[60] But these early originalists were wary of making moral truth claims in constitutional theory, largely in reaction against what they perceived (correctly, in my view) to be the abuse of judicial power by the Warren and Burger Courts in imposing controversial moral views through constitutional law.[61]

But the ostensible moral neutrality proposed by the early originalists could not endure. Justifying a constitutional methodology requires arguing that judges ought to employ that methodology, which requires making a moral argument that the methodology is better than its competitors.[62] And we can only know the comparative moral soundness of competing methodologies by reference to some standard of moral evaluation.[63] And for a theorist to assert that there is a standard of moral evaluation that other people ought to accept is to assert that the moral standard applies to them

58. *See* Alicea, *supra* note 13, at 1762–63 (providing an overview of Bork's theory).

59. Bork, *Neutral Principles*, *supra* note 49, at 10.

60. *See* ANTONIN SCALIA, *Judges as Mullahs*, *in* SCALIA SPEAKS, *supra* note 48, at 243, 243–48; BORK, THE TEMPTING OF AMERICA, *supra* note 49, at 66.

61. *See* Alicea, *supra* note 8, at 4; Bradley, *supra* note 57, at 1418–25.

62. *See* Alicea, *supra* note 13, at 1773–75; Fallon, *supra* note 11, at 545–49; David A. Strauss, *What Is Constitutional Theory?*, 87 CALIF. L. REV. 581, 586–88 (1999).

63. Alicea, *supra* note 8, at 13–14.

as much as it applies to the theorist; this ultimately means—though some further argumentation would be required to show this—that the theorist is asserting that the moral standard is *true*. Therefore, attempting to justify constitutional theories based on social facts or with thin, uncontroversial moral claims will not succeed, since moral truth claims are both necessary to constitutional theory and will inevitably be controversial.[64]

Thus, if originalists wanted judges to accept their view and reject competitor theories, they had to provide a moral argument based on contested moral truth claims. That does not mean that originalist judges necessarily have to make case-by-case moral judgments when adjudicating cases, but it does mean that they necessarily have to make moral judgments *in choosing originalism* over its competitor methodologies.[65]

The gradual realization of this theoretical point coincided with the rise of originalism within the federal judiciary that I noted earlier. To borrow loosely from a point Keith Whittington made in a related context, "As [originalists] found themselves in the majority, . . . [they] needed to develop a governing philosophy appropriate to guide majority opinions, not just to fill dissents."[66] That meant the inadequate moral justifications of the 1970s and 1980s had to give way to stronger justifications.

This confluence of theoretical and historical reasons might explain why the generation of originalists who began writing towards the end of the 1990s and into the early 2000s rejected the ostensible moral neutrality or relativism of the older originalist theories. Thus, Whittington's 1999 book, *Constitutional Interpretation*, offered a moral defense of originalism based on popular sovereignty,[67] and that was followed by works like Randy Barnett's *Restoring the Lost*

64. Alicea, *supra* note 14, at 623–28. There are, of course, challenges to this thesis, including from Rawls and those influenced by him. For a more extensive discussion, see Alicea, *supra* note 9, at 323–36.

65. *See* Andrew Coan, *What Is the Matter with Dobbs?*, 26 U. PA. J. CONST. L. 282, 320, 324 (2024).

66. Whittington, *supra* note 51, at 604.

67. KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 110–59 (1999).

Constitution that likewise grounded originalism in moral truth claims.[68] Indeed, it is often forgotten that Barnett relied on Aquinas for part of his argument.[69]

This embrace of moral truth claims by originalists opened the door to moral justifications rooted in the natural-law tradition,[70] and this occurred around the same time that new generations of future constitutional theorists were being formed in the natural-law tradition by scholars like Finnis, Hittinger, and George. The result was that, whereas Bork famously argued against natural-law critics of originalism by asserting the moral neutrality of originalism, some of his successors argued for originalism based on natural law.[71]

III. IMPLICATIONS OF THE NATURAL LAW MOMENT FOR CONSTITUTIONAL THEORY

So we have a natural-law moment in constitutional theory that is distinctive and that emerged at this time for various theoretical and historical reasons. But why should we care? What are the implications of the natural-law moment for constitutional theory? In this final section of my remarks, I will be highlighting three implications of our natural-law moment. I should preface what I'm going to say by noting that there are other important implications that I do not highlight here, such as the possible role of natural law in situations of legal underdeterminacy.[72] It's also worth noting that

68. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 53–117 (2004).

69. *Id.* at 50–51.

70. *See* Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419 (2006). It is worth noting that Strang was the first among the constitutional theorists of our natural-law moment to begin writing in this area. His work was a pioneering and, for a long time, solo endeavor.

71. *See* Alicea, *supra* note 8, at 43–59; STRANG, *supra* note 3, at 278–307; Pojanowski & Walsh, *supra* note 1, at 126–57.

72. This issue has been a point of disagreement among natural-law constitutional theorists. *Compare* Adrian Vermeule & Connor Casey, *Pickwickian Originalism*, IUS & IUSTITUM (Mar. 22, 2022), https://iusetiustitium.com/pickwickian-originalism/

the extent to which each implication applies might vary with the type of natural-law constitutional theory at issue.

A. Theories of Law and Theories of Adjudication

First, natural-law constitutional theories have a smaller gap between their theories of law and their theories of adjudication than other constitutional theories tend to have. That is to say, once you've bought into the natural-law way of thinking about what law is and how to identify the law, there are normative implications for how you should think about methodologies for resolving legal disputes.

In recent years, several scholars—both originalist and non-originalist—have argued that constitutional theorists should focus more on theories of law rather than on theories of adjudication. They seek to establish a consensus around the law of our Constitution, leaving for another day normative questions like whether we ought to obey the Constitution and how we ought to resolve disputes under the Constitution. Mitch Berman,[73] Will Baude,[74] and Steve Sachs[75] represent this trend in constitutional theory—sometimes called "the 'positive turn'"[76]—and it is not surprising that these scholars are all legal positivists of the Hartian[77] or quasi-Hartian[78] variety. Because Hartian legal positivism defines what law is

---

[https://perma.cc/DT88-NWF5] (arguing that resort to natural law is required in situations of underdeterminacy), *with* J. Joel Alicea, *Why Originalism Is Consistent with Natural Law: A Reply to Critics*, NAT'L REV. (May 3, 2022), https://www.nationalreview.com/2022/05/why-originalism-is-consistent-with-natural-law-a-reply-to-critics/ [https://perma.cc/C73D-DJ9T] (arguing that the original meaning of the positive law might itself supply closure rules in situations of underdeterminacy).

73. *See* Mitchell N. Berman & David Peters, *Kennedy's Legacy: A Principled Justice*, 46 HASTINGS CONST. L.Q. 311, 323–30 (2019); Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1337–44 (2018).

74. *See* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2351–54 (2015).

75. *See* Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 823–27 (2015).

76. Baude, *supra* note 74, at 2351.

77. William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1463 (2019).

78. *See* Berman, *supra* note 73, at 1358–70 (modifying Hartian positivism).

and identifies the law of a jurisdiction according to social facts,[79] it might—if legal positivism is the right way to think about law—be possible to cleanly separate the question of what the law of our Constitution is from the normative questions involved in constitutional adjudication.[80] What the law of our Constitution is would, in a sense, be a descriptive matter, whereas how we should adjudicate constitutional disputes would be a normative matter.[81]

But if we instead adopt the Thomistic understanding of law, normative evaluation is built *into* identification of what the law is,[82] since the focal meaning of law requires that law be an ordinance of reason directed toward the common good and that it be promulgated by a legitimate authority.[83] If one concludes, for example, that the original meaning of the Constitution is the "law" in the fullest sense of that term, it follows that we have a prima facie moral obligation to obey it, since doing so would be good for us both in terms of the law's content and in preserving the authority of its author.[84] Thus, there cannot be a total separation between identifying what the law of our Constitution is and normative questions related to constitutional adjudication. A natural-law theory of the Constitution's legality is closely linked with a natural-law theory of constitutional adjudication.[85]

So one might see natural-law constitutional theorists as mounting a counterargument to the so-called positive turn in constitutional theory. Indeed, Professors Pojanowski and Walsh's "Enduring Originalism" article took the positive turn as its jumping-off point, criticizing Professors Baude and Sachs for their attempt to divorce law-evaluation from law-identification.[86]

---

79. *See* H.L.A. HART, THE CONCEPT OF LAW 116–17 (2d ed. 1994).
80. *See* Baude, *supra* note 74, at 2392.
81. *Id.*
82. *See* Pojanowski & Walsh, *supra* note 1, at 110–16.
83. AQUINAS, *supra* note 16, at pt. I-II, q. 94, art. 2.
84. *See* Alicea, *supra* note 8, at 43–45.
85. *Id.*
86. Pojanowski & Walsh, *supra* note 1, at 110–16.

B. Interdisciplinary Constitutional Theory

A second implication of our natural-law moment in constitutional theory is related to the first implication, and it has to do with a long-running debate among theorists about the extent to which constitutional theory is unavoidably interdisciplinary.

Judge Bork once mocked the idea that constitutional theory required "settl[ing] the ultimate questions of the basis of political obligation, the merits of contractarianism, rule or act utilitarianism, the nature of the just society, and the like."[87] He thought constitutional theory could be largely separated from the domains of philosophy and other disciplines and be confined to more mundane and technical lawyers' work. In this, Judge Bork represented a persistent strain of constitutional theory that proposes a division of labor between lawyers (who handle constitutional adjudication) and scholars from other disciplines (who handle abstract questions of morality).

On the other side, you have theorists like Richard Fallon, who has argued that constitutional theory is inherently interdisciplinary and "cannot be understood except through an approach that links legal, philosophical, and political scientific inquiries."[88] Fallon urges us to "venture the risk" of going beyond our training as lawyers to integrate other fields into our discussions of constitutional theory.[89]

In this long-running debate, natural-law constitutional theorists and scholars like Professor Fallon are on the same side, though perhaps for different reasons, given Fallon's legal positivism.[90] If we see constitutional theory through the lens of the natural-law tradition, we cannot adjudicate constitutional disputes without resolving antecedent questions of political morality.

For instance, we need to know whether the Constitution furthers

---

87. ROBERT H. BORK, *Tradition and Morality in Constitutional Law*, *in* A TIME TO SPEAK *supra* note 44, at 397, 402.

88. RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT xi (2018).

89. *Id.*

90. *See id.* at 83–104; Richard H. Fallon, Jr., *Constitutional Precedent Viewed through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1113 (2008).

the common good,[91] and that requires knowing what the common good is,[92] which requires knowing something about who the human person is and how we flourish as the distinctive kinds of beings that we are.[93] Or, to take another example, we need to know whether the Constitution was promulgated by a legitimate authority,[94] and that requires knowing what makes an authority legitimate,[95] which means investigating why we need authority,[96] and the relationship between authority and human flourishing.[97] So constitutional theory cannot be neatly separated from deep questions of moral and political philosophy.

Many constitutional theorists outside of the natural-law tradition might agree, at a high level of generality, with what I just said, but I would go further and say that natural-law constitutional theory widens the scope of inquiry even more than other constitutional theories tend to do. Because the natural-law tradition situates positive law within a broader understanding of the human good,[98] it calls into service disciplines that American constitutional theorists have generally overlooked.

For example, in proposing various theories of constitutional legitimacy, constitutional theorists have almost entirely ignored the role of emotional or affective attachments to our Constitution, focusing almost exclusively on the best arguments made in favor of one theory or another.[99] But while Aquinas wrote a treatise on law, he also wrote a treatise on the passions, and the two are interlinked because, as Aquinas argued, human beings develop habits or dispositions—which can be either virtues or vices—only when their reason and emotions are pointed in the same direction.[100] *If* one of the

91. AQUINAS, *supra* note 16, at pt. I-II, q. 94, art. 2.
92. Alicea, *supra* note 8, at 20–21.
93.. *Id.* at 19–20.
94. AQUINAS, *supra* note 16, at pt. I-II, q. 94, art. 2; Alicea, *supra* note 8, at 24–43.
95. Alicea, *supra* note 8, at 20–21.
96. *Id.* at 22–24.
97. *Id.*
98. *See* HITTINGER, *supra* note 37, at 3–37.
99. *See* Alicea, *supra* note 7, at 1187–89.
100. *See id.* at 1153–69.

tasks of constitutional theory is to develop a theory of constitutional legitimacy that conduces to the stability and acceptance of the Constitution over time—and many constitutional theorists across the jurisprudential and political spectrum believe that that is one of their tasks[101]—then it needs to be a theory that inculcates in the people a habit or disposition in favor of obedience to the Constitution.[102] And they won't develop that disposition if our theory of legitimacy ignores the traditions, rituals, symbols, concepts, and other practices that align the people's passions with the reasons for obeying the Constitution.[103] Constitutional theory thus has to take into account insights from the science and philosophy of emotion,[104] to take just one example of the way in which natural-law constitutional theory broadens—rather than constricts—our field of inquiry.

Now, as Professor Fallon has observed, this interdisciplinary approach to constitutional theory is uncomfortable for many legal scholars, since it forces us to venture into domains in which we are not experts. And I am not arguing that judges or practicing lawyers cannot do their jobs well without resolving deeply complex questions of political philosophy. But I am arguing, with Fallon, that the field of constitutional theory *does* require exploring such topics, even at the risk of appearing foolish by overstepping our expertise. It is our responsibility to seek out the best scholarship in other disciplines to inform ourselves, as best we can, to the extent necessary to do constitutional theory well.

C. Recovering Sources

This leads to the final implication of our natural-law moment that I want to highlight here, and I will close my remarks with this: natural-law constitutional theorists seek to bring the rest of the field

---

101. *See, e.g.*, FALLON, *supra* note 88, at 125–32; JACK M. BALKIN, LIVING ORIGINALISM 59–99 (2011); DAVID A. STRAUSS, THE LIVING CONSTITUTION 99–114 (2010); ROBERT H. BORK, *Styles in Constitutional Theory*, *in supra* note 44, at 223, 235.

102. Alicea, *supra* note 7, at 1185–87.

103. *Id.* at 1169–82.

104. *Id.* at 1153–69.

into conversation with authors and sources that have too-long been neglected in American constitutional theory scholarship.

Most obviously, natural-law constitutional theorists rely heavily on Aristotle and Aquinas. While both figures—especially Aristotle—have played a role in constitutional-theory scholarship over the last several decades (such as in the virtue-ethics work of Professor Lawrence Solum),[105] natural-law constitutional theorists explore the writings of Aristotle and Aquinas in far greater depth than has been typical of American constitutional theorists.[106]

But that is just one example. There are many profound and consequential figures in the natural-law tradition whose work has been almost entirely overlooked by American constitutional theorists. My own scholarship, for example, has attempted to bring constitutional theorists into conversation with thinkers like Cicero,[107] Cajetan,[108] Suárez,[109] Bellarmine,[110] Rommen,[111] and Simon,[112] all of whom have—up until now—played virtually no role in American constitutional theory scholarship.[113] My respectful suggestion is that these giant figures of the natural-law tradition have much to

105. *See, e.g.*, Lawrence B. Solum, *Natural Justice*, 51 AM. J. JURIS. 65 (2006); Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178 (2003).

106. *See, e.g.*, Pojanowski & Walsh, *supra* note 2, at 416–48; Alicea, *supra* note 7, at 1153–69; STRANG, *supra* note 3, at 142–57.

107. Alicea, *supra* note 9, at 336–45, 360–64 (analyzing CICERO, ON THE COMMONWEALTH AND ON THE LAWS (James E.G. Zetzel ed., 1999)).

108. *See* Alicea, *supra* note 8, at 28 nn. 206–07 (citing Thomas Cajetan, *The Apology of Brother Tommaso de Vio of Gaeta, Master General of the Order of Preachers, Concerning the Authority of the Pope Compared with That of the Council, to the Most Reverend Niccolò Fieschi, Well-Deserving Cardinal of the Holy Roman Church, in* CONCILIARISM AND PAPALISM (J.H. Burns & Thomas M. Izbicki eds., 1997)).

109. *See id.* at 27 nn. 198–99 (citing FRANCISCO SUÁREZ, *De Legibus, ac Deo Legislatore, in* 2 SELECTIONS FROM THREE WORKS OF FRANCISCO SUÁREZ, S.J. 383 (James Brown Scott ed., Gwladys L. Williams, Ammi Brown, John Waldron & Henry Davis trans., 1944)).

110. *See id.* at 39 (citing ROBERT BELLARMINE, DE LAICIS OR THE TREATISE OF CIVIL GOVERNMENT 26–27 (Kathleen E. Murphy trans., 1928)).

111. *See id.* at 39 (citing HEINRICH A. ROMMEN, THE STATE IN CATHOLIC THOUGHT: A TREATISE IN POLITICAL PHILOSOPHY 240 (Cluny Media 2016)).

112. *See id.* at 23 (citing YVES R. SIMON, A GENERAL THEORY OF AUTHORITY 31–50 (1962)).

113. *See id.* at 5–6.

teach us about constitutional theory, and their time of being neglected should come to an end.

In this way, our natural-law moment in constitutional theory holds out the exciting prospect of the discovery—or we might say the *re*-discovery—of insights and arguments that have lain dormant for all these many years, patiently waiting for us to find them. Thank you.

REFLECTIONS ON *THE NATURAL LAW MOMENT IN CONSTITUTIONAL THEORY*

CONOR CASEY*

"*The idea of the natural law may thus be compared to the seed which, buried under the snow, sprouts forth as soon as the frigid and sterile winter of positivism yields to the unfailing spring of metaphysics. For the idea of natural law is immortal*."

—Heinrich Rommen[1]

"*[I]n spite of all opposition, and the numerous periods of neglect and decline, Natural Law comes again into ascendancy, because it is based on man's rational and social nature and the moral order of life*."

—Robert N. Wilkin[2]

INTRODUCTION

Professor's lecture[3] is timely and thoughtful. He deftly outlines the core commitments of a distinctive intellectual trend that has been percolating in United States legal academia for several years now; namely, a renewed interest in how the classical natural law tradition can offer insights and answers to perennial questions of constitutional law and theory. Many public law scholars are taking, as their starting point for intellectual inquiry in their field, the view that "there are human objectives

* Associate Professor, University of Surrey School of Law. Thanks to Adrian Vermeule and Dennis Wieboldt III for helpful conversations. Many thanks as well to the editors of the *Harvard Journal of Law & Public Policy* for their hard work on this essay.

1. HEINRICH ROMMEN, NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY 118 (Thomas R. Hanley trans., 1947).

2. Robert N. Wilkin, *Status of Natural Law in American Jurisprudence*, 24 NOTRE DAME L. REV. 343, 357 (1949).

3. Joel Alicea, *The Natural Law Moment in Constitutional Theory*, 48 HARV. J.L. & PUB. POL'Y 307 (2025).

and ends that are dependent upon law; and there are demands of justice and social order for which law," including constitutional law, "is the only fully viable mechanism" for securing.[4] In doing so, they consciously seek to follow in the tradition of the greats mentioned in Alicea's lecture, like Cicero, Thomas Aquinas, Francisco Suárez, and Robert Bellarmine, or more recently the likes of Heinrich Rommen, Jacques Maritain, Yves Simon, John Finnis, and Robert P. George.[5]

Alicea highlights that, in the classical natural law tradition, answers to questions about how to understand Constitutions and legal practices and their point or purpose lead us on to further ethical and moral questions about human goods, our nature as rational, social, and political animals, and why—and in what ways—political and legal authority are intelligible and reasonable responses to aspects of this nature, and what states of affairs allow it to flourish. And it is in answers to these high-level and perennial questions that many jurists are, once again, eagerly seeking out guidance, rules of thumb, and insights for more specific questions common to public law scholarship like, for instance, how to think about constitutional design, judicial role morality, or legal interpretation.[6]

Unsurprisingly then, I found little to quarrel with in Professor Alicea's remarks, and I endorse wholeheartedly his concluding exhortation that public lawyers today can find many treasures in the work of the tradition's canonical thinkers.[7] Their corpus of thought is a precious intellectual inheritance that will always repay careful and renewed attention. I would merely like to add in parenthesis to Alicea's cogent remarks that the current natural law moment he documents seems to be a truly transatlantic affair, with constitutional lawyers in Canada,[8] Ireland, and the United Kingdom[9] all drawing deeply on the Aristotelian-Thomistic tradition.

---

4. SEAN COYLE, NATURAL LAW AND MODERN SOCIETY, 3 (2023).

5. *See* Alicea, *supra* note 3, at 326.

6. *See id.* at 315.

7. *Id.* (manuscript at 16–17).

8. Scholars like Gregoire Webber, Kerry Sun, Stephane Serafin, Xavier Foccroulle Menard, and Bradley Miller.

9. Examples of public lawyers working in Ireland and the United Kingdom whose work is influenced by the classical natural law tradition are Gerry Whyte,

What I want to do here is build on Alicea's insights by probing the following question: what can scholars of this current natural law moment learn from past revivals? The current transatlantic revival of interest in the classical natural law tradition is merely one amongst several that has taken place within the last century. While the classical natural law tradition's influence on public law thought and practice has never fully dissipated in jurisdictions like the United States, Ireland, or the United Kingdom, there have been moments in the not so distant past where it has been more pronounced, and in the case of Ireland, even predominant.[10] But the fact we are speaking of a *current* moment means that these previous moments eventually faltered or fell away, leaving the classical natural law tradition's influence on public law thinking subdued. What sparked these previous revivals? What achievements did they enjoy? Why did they fall away? What does their ultimate fate say about the prospects of the current moment? I think these are questions worth asking.

These are big questions, and so here I will only try to give some very tentative thoughts by engaging with two past natural law moments from the mid-twentieth century, in the United States and Ireland, respectively. Both countries saw their legal cultures impacted by a broader worldwide Neo-Scholastic revival.

I. THE ARISTOTELIAN-THOMISTIC REVIVAL IN AMERICAN LEGAL CULTURE

It is well documented that the legal thought and practice of the American Republic has, for much of its history, been heavily influenced by the natural law tradition, in both its social-contractarian[11] and classical iterations.[12] The legal traditions of the

---

Maria Cahill, Leonard Taylor, Rachael Walsh, Michael Foran, Richard Ekins, Dominic Burbidge, Nick Barber, Paul Yowell, Timothy Endicott, Maris Kopcke, Veronica Rodriguez-Blanco, Sean Coyle, and Asanga Welikala.

10. *See generally* Desmond M. Clarke, *The Role of Natural Law in Irish Constitutional Law*, 17 IRISH JURIST 187 (1982).

11. *See* Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993).

12. Here I am thinking about the influence of jurists like William Blackstone, Richard Hooker, Matthew Hale, and Christopher St Germain—all of whom drew

colonies, the Declaration of Independence, the Preamble and Bill of Rights of the Federal Constitution,[13] and the text of many state constitutions, all bear its imprint.[14] It is also detectable in the intellectual scaffolding of the abolitionist movement and in the Reconstruction Amendments they helped spearhead and frame.[15] In a broader sense, the political theory underlying the foregoing parts of the American legal system took the *purpose* of law and source of its *legitimacy* to be profoundly moral—to secure the general welfare of the commonwealth and secure the rights of all its citizens.

The natural law tradition also had a pronounced influence on legal practice and the day-to-day work of lawyers and judges. As Professor Vermeule puts it, American lawyers were steeped in a shared "classical legal cosmology in which civil positive law gives specification to, and is interpreted in light of, general background principles of natural law and the law of nations, understood as enduring commitments of the legal order."[16]

While American law did not speak with one voice about the role natural law should play within the legal system, jurists shared a conceptual framework and vocabulary that regarded natural law precepts of eminent relevance to the construction of positive law materials and rendering justice according to law.

---

on Thomistic thinking to varying degrees. These influential jurists were also familiar with Roman law and the civilian juristic side of the classical natural law tradition. *See* Ian Williams, *Christopher St. German: Religion, Conscience and Law in Reformation England*, *in* GREAT CHRISTIAN JURISTS IN ENGLISH HISTORY 69 (Mark Hill & Richard Helmholz eds., 2017) [GREAT CHRISTIAN JURISTS]; Norman Doe, *Sir Edward Coke: Faith, Law and the Search for Stability in Reformation England*, *in* GREAT CHRISTIAN JURISTS 93; David Sytsma, *Matthew Hale as Theologian and Natural Law Theorist*, *in* GREAT CHRISTIAN JURISTS 163; Wilfrid Priest, *William Blackstone's Anglicanism*, *in* GREAT CHRISTIAN JURISTS 213; *see also* KODY W. COOPER & JUSTIN BUCKLEY DYER, THE CLASSICAL AND CHRISTIAN ORIGINS OF AMERICAN POLITICS: POLITICAL THEOLOGY, NATURAL LAW, AND THE AMERICAN FOUNDING 11 (2022) ("The classical natural-law tradition was in the intellectual air that both the future Federalists and the future Republicans breathed.").

13. RICHARD HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE 142 (2015).

14. Johnathan Gienapp, *Written Constitutionalism, Part and Present*, 39 LAW & HIST. REV. 321, 339–41 (2021).

15. RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 101–03 (2021).

16. ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 5 (2022).

Professor Atiq reminds us that for much of the American Republic, "jurists did not explain the legality of moral principle by adverting to social facts," but treated moral laws as "self-evident, unchangeable, and applicable *ex proprio vigore*, expressly distinguishing such laws from enacted laws and customary laws."[17] Lawyers would rely on both natural and positive law in their submissions to courts and were "taught that the two laws were in harmony and should be used together."[18]

In the late nineteenth and early twentieth centuries, however, this picture of legal practice began to fall apart. For a welter of reasons -- doubtless including an increase in ethical and religious skepticism, the rise of liberalism, and a greater appetite for grounding socio-political argument on empirical and scientific methodology[19] -- *explicit* reliance on natural law reasoning became increasingly regarded as a "suspect element in professional legal discourse".[20] The natural law tradition would endure within seminaries and parts of the academy, but explicit invocation of its precepts by lawyers went from being "almost universally accepted in the legal system in 1870," to "almost completely gone by the early 20th century."[21]

Lawyers, jurists, and judges became more dismissive of the relevance of the natural law to legal practice. Lawyers might readily agree that natural law principles were of relevance to questions of personal morality, or even for guiding the actions of the legislature in making law, but they were not considered legitimate tools in the lawyer's tool-kit.[22] Other lawyers and judges began to see law in explicitly positivistic terms, as a

---

17. Emad H. Atiq, *Legal Positivism and the Moral Origins of Legal Systems*, 36 CAN. J.L. & JURIS. 37, 50 (2023).

18. Sytsma, *supra* note 12, at 176–77.

19. Early twentieth century "skepticism, cynicism, and negation toward the moral and ideal concepts of Natural Law philosophy found a very congenial climate of opinion in the intense scientism, materialism, and secularism which followed World War I." Robert Wilkins, *The Status of Natural Law in American Jurisprudence*, 24 NOTRE DAME L. REV. 343, 345–46 (1949).

20. Steven D. Smith, *Presently Absent, or Absently Present? The Curious Condition of Natural Law*, 67 AM. J. JURIS. 119, 119 (2022).

21. STUART BANNER, THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED 167 (2021); *see also* John M. Breen & Lee J. Strang, *The Forgotten Jurisprudential Debate: Catholic Legal Thought's Response to Legal Realism*, 98 MARQ. L. REV. 1203, 1217–19 (2015).

22. Breen & Strang, *supra* note 21, at 1271–74.

product of human will,[23] and not an ordinance of reason with a telos towards objective human goods.[24] It was, to put it lightly, a gloomy time to be a classical natural lawyer.

From the 1930s to the late 1950s, however, the legal culture of the United States once again became open to natural law thinking. The reasons for this development are many and complex, but they are partly linked to a worldwide revival in interest in Aristotelian-Thomistic thought and Catholic social teaching, which took on a greater sense of urgency with the rise of Communism and Fascism, the outbreak of the deadliest conflict in history, and the unspeakable barbarities committed by Nazi Germany and its allies during the Holocaust. Spearheaded in the United States by expatriates like Heinrich Rommen[25] and Yves Simon,[26] this classical revival eventually penetrated the law schools and professoriate.

This period, which has been documented in invaluable detail by scholars like Lee Strang, John Breen,[27] and Dennis Wieboldt,[28] saw an impressive outpouring of scholarship rooted in the classical natural law tradition. Natural law jurists produced a rich body of work touching upon many important questions of public law theory: the normative foundations of legal and political authority, the principles guiding the limits of legitimate state

---

23. Steven D. Smith, *A Bleak Future for Legal Education?*, LAW & LIBERTY (Sept. 1, 2023), https://lawliberty.org/forum/a-bleak-future-for-legal-education/ [https://perma.cc/QYZ5-6HPE].

24. *See* VERMEULE, *supra* note 16, at 70.

25. *See* HEINRICH ROMMEN, THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY (Thomas R. Hanley trans., 1947).

26. *See* YVES SIMON, AQUINAS LECTURE 1940: NATURE AND FUNCTIONS OF AUTHORITY (1940).

27. *See e.g.*, Breen & Strang, *supra* note 21; John M. Breen & Lee J. Strang, *The Road Not Taken: Catholic Legal Education at the Middle of the Twentieth Century*, 51 AM. J. LEGAL HIST. 553 (2011).

28. *See* Dennis Wieboldt, *Natural Law for the Laity: A Case Study in Catholic Education on the Airwaves*, *in* THEOLOGY AND MEDIA(TION): RENDERING THE ABSENT PRESENT (Stephen Okey & Katherine Schmidt eds., 2023); Dennis Wieboldt, *Our Natural Law Moment(s)*, (unpublished manuscript) (on file with author); Dennis Wieboldt, *Ideas With(out) Consequences?: The Natural Law Institute and the Making of Conservative Constitutionalism During the Cold War, 1947–1951*, LAW & HIST. REV. (forthcoming 2025) (on file with author).

action,[29] the nature of the political common good and its antonyms in liberal individualism and authoritarian collectivism,[30] the dangers of moral relativism and positivism to sound legal practice,[31] the relevance of natural law principles to legal reasoning,[32] and the deep dependence of the common good upon the positive law and prudential *determinatio* through law-making and adjudicative institutions that specify and give concrete shape to natural law's broad and general first principles.[33] Much of this scholarship also included the same call that Alicea would make in his lecture some 80 years later—for a rediscovery of the greats like Aquinas, Gratian, Suárez and the application of their thought to contemporary legal debates.[34]

Many of the scholars at the spear tip of this revival—such as Walter B. Kennedy,[35] Miriam Theresa Rooney,[36] Brendan Brown,[37] Francis Lucey, S.J.,[38] and Harold McKinnon[39]—also en-

---

29. Wendell Phillips Dodge, Jr., *Thomas Aquinas: Advocate of Natural Law and Limited Sovereignty*, 33 A.B.A. J. 1013 (1947).

30. *See generally* Ben W. Palmer, *Defence Against Leviathan*, 32 A.B.A. J, 328 (1946); John C. H. Wu, *The Natural Law and Our Common Law*, 23 FORDHAM L. REV. 13 (1954); Ben W. Palmer, *Groping for a Legal Philosophy: Natural Law in a Creative and Dynamic Age*, 35 A.B.A. J. 12 (1949).

31. *See* Edward S. Dore, *Human Rights and the Law*, 15 FORDHAM L. REV. 3 (1946); Miriam Theresa Rooney, *Natural Law Gobbledygook*, 5 LOY. L. REV. 1 (1946); Walter B. Kennedy, *Law Reviews As Usual*, 12 FORDHAM L. REV. 50 (1943); Francis E. Lucey, *Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society*, 30 GEO. L.J. 493 (1942).

32. *See* Brendan F. Brown, *Natural Law: Dynamic Basis of Law and Morals in the Twentieth Century*, 31 TUL. L. REV. 491, 530 (1956–1957); Brendan F. Brown, *Natural Law Norms*, 9 CATH. LAW. 57 (1963); Miriam T. Rooney, *Law without Justice — The Kelsen and Hall Theories Compared,* 23 NOTRE DAME L. REV. 140 (1948); David C. Bayne, *The Natural Law for Lawyers–A Primer*, 5 DEPAUL L. REV. 159 (1956).

33. *See generally* Harold R. McKinnon, *Natural Law and Positive Law*, 23 NOTRE DAME L. REV. 125 (1948); Brendan F. Brown, *The Natural Law Basis of Juridical Institutions in the Anglo-American Legal System*, 4 CATH. U. L. REV. 81 (1953).

34. *See, e.g.*, Linus Lilly, *Possibilities of a Neo-Scholastic Philosophy of Law in the United States Today*, 12 PROC. AM. CATH. PHIL. ASS'N 111 (1936); Miriam Theresa Rooney, *The Movement for a Neo-Scholastic Philosophy of Law in America*, 18 PROC. AME. CATH. PHIL. ASS'N 185, 187 (1942).

35. Professor and Dean of Fordham University School of Law.

36. Professor and first Dean of Seton Hall University School of Law.

37. Professor and Dean of Catholic University of America Columbus School of Law.

38. Professor and Regent of Georgetown University Law Center.

39. Attorney and Member of the American Law Institute.

gaged in institution building, with a view to establishing permanent forums for the study and dissemination of the classical natural law tradition.[40] Some of the fruits of this attempt remain with us today, including several flagship law reviews and the international legal journals like the *American Journal of Jurisprudence* based at the University of Notre Dame, which began life as the *Natural Law Forum*,[41] and the *Journal of Catholic Legal Studies*,[42] which started as the *Catholic Lawyer*.[43]

This was generally a period of great optimism for classical natural law jurists. Writing in 1949, Judge Robert Wilkin of the United States District Court for the Northern District of Ohio captured something of this attitude when he remarked, with evident satisfaction, that the legal culture of the United States was showing "unmistakable signs of dissatisfaction over the insufficiency, the aridity, of modern positivism" and "very definite indications of a revival of Natural Law philosophy."[44]

This intellectual revival, unfortunately, would not translate into serious practical influence on the course of American public law.[45] Instead, in the following decades, American constitutional jurisprudence would be alternatively dominated by an autonomy-centered social liberalism and, more recently, by forms of originalism whose foremost proponents were, in Alicea's words, "wary of making moral truth claims in constitutional theory"[46] and who justified their legal methods by appeal to democratic self-government and moral neutrality.

---

40. *See* Rooney, *supra* note 34, at 185.

41. *Natural Law Forum*, NOTRE DAME LAW SCHOOL, https://scholarship.law.nd.edu/nd_naturallaw_forum/index.5.html#year_1957 [https://perma.cc/363N-9EVN].

42. *Journal of Catholic Legal Studies*, ST. JOHN'S UNIV. SCH. OF L., https://scholarship.law.stjohns.edu/jcls/ [https://perma.cc/2YCW-3NN9].

43. *See* Joseph T. Tinnelly, *The Catholic Lawyer: An Idea and a Program*, 1 CATH. LAW. 3, 3 (1955).

44. Robert N. Wilkin, *The Status of Natural Law in American Jurisprudence*, 24 NOTRE DAME L. REV. 343, 344 (1949).

45. *See* Wieboldt, *Natural Law Moment(s)*, *supra* note 28, at 19–20.

46. Alicea, *supra* note 3.

II. THE ARISTOTELIAN-THOMISTIC REVIVAL IN IRISH LEGAL CULTURE

Ireland also saw a revival in Aristotelian-Thomistic thought around the same time period.[47] A vibrant literature grew in the 1930s that urged for a closer alignment of Irish political and legal life with classical natural law thought.[48] Happily for its authors these sentiments were shared by the then-Prime Minister Éamon de Valera, the most influential Irish statesman of the century. A keen student of the natural law tradition and Catholic social teaching, de Valera and his talented drafting team[49] had a key role in spearheading the integration of natural law thinking into the text of the 1937 Constitution.[50]

Many readers will be aware that the 1937 Irish Constitution is a document suffused in Aristotelian-Thomistic thought, committing the State to promote the "the common good" as its proper end, guided by values of "prudence, justice, and charity" so that the "freedom and dignity" of the individual and inalienable and imprescriptible rights of the family can be secured.[51] But readers will perhaps be surprised to learn that the enactment of this Constitution did not immediately spark a classical natural law revival in legal thinking and practice. Far from it. In fact, until the 1960s many of the Constitution's classically influenced provisions were simply rarely deployed by lawyers and not commented upon by judges.[52]

---

47. *See* Thomas Mohr, *Natural Law in Early Twentieth-Century Ireland*—State (Ryan) v. Lennon *and Its Aftermath*, 42 J. LEGAL HIST. 1 (2021).

48. *See generally* EDWARD CAHILL, THE FRAMEWORK OF A CHRISTIAN STATE (1932); Edward Coyne, *The Inadequacy of Christian Politics*, 64 IRISH MONTHLY 240 (Apr. 1936); Alfred O'Rahilly, *The Constitution and the Senate*, 25 STUD.: IRISH Q. REV. 1 (Apr. 1936); Vincent Grogan, *Irish Constitutional Development*, 40 STUD.: IRISH Q. REV. 385 (1951); Vincent Grogan, *The Constitution and the Natural Law*, 8 CHRISTUS REX 201 (1954).

49. Particularly the lawyer and diplomat John Hearne, the architect-in-chief of the drafting process. *See* Eugene Broderick, *John Hearne: Architect of the 1937 Constitution of Ireland* 110–47 (2017).

50. For unrivalled accounts of the drafting process, see DONAL K. COFFEY, DRAFTING THE IRISH CONSTITUTION, 1935–1937: TRANSNATIONAL INFLUENCES IN INTERWAR EUROPE (2018); GERARD HOGAN, THE ORIGINS OF THE IRISH CONSTITUTION, 1928–1941 (2012).

51. CONSTITUTION OF IRELAND, July 1, 1937, pmbl., art. 41.

52. *See* Conor Casey, *The Irish Constitution and Common Good Constitutionalism*, 46 HARV. J.L. & PUB. POL'Y 1064–65 (2023).

In some respects, the rather dull impact of the Constitution in this domain was unsurprising. Its jurisprudential commitments and those of its drafters were quite at odds with the prevailing outlook of the legal academy, bench, and bar, whose members were largely ambivalent or confused about the natural law tradition's relevance to legal practice.[53] The Constitution, and the underlying scholastic intellectual movement that helped shape its text, thus initially did little to alter the mindset of a judiciary and legal profession steeped in the presuppositions of positivistic late-nineteenth-century English jurisprudence.[54] The fact that most Irish judges and lawyers of the time were Catholic—and so in their personal lives presumably thought natural law precepts where of immense *moral* relevance—clearly had little impact on their jurisprudential views as to their *legal* relevance.

The modest impact of the Constitution would have come as no surprise to the likes of Edward Cahill, S.J., a Jesuit and political theorist who provided input and suggestions during its drafting. During the drafting process, Cahill had unsuccessfully urged De Valera to insert an interpretative clause explicitly stating that the Constitution's provisions would be interpreted harmoniously with the dictates of natural law. Cahill's motivation for inserting this provision stemmed from his fear that terms in the Constitution like "common good" "social justice", "personal rights" and "property rights" were in real danger of being interpreted inconsistently with the natural law tradition that underpinned them. Cahill feared they would either be treated as dead letters or, alternatively, construed in light of the "individualistic and liberal principles" of English jurisprudence in which most Irish judges and lawyers at that time would have been schooled.[55]

This picture of Irish legal culture would change utterly, and with remarkable speed, in the 1960s when a new generation of lawyers and judges well-versed in the natural law tradition, rose to prominence. This group included some of the most acclaimed Irish jurists of the twentieth century, including Donal

53. *Id.*

54. *Id.*

55. GERARD HOGAN, ORIGINS OF THE IRISH CONSTITUTION, 571–74 (2012).

Barrington,[56] Declan Costello,[57] Seamus Henchy,[58] Cearbhall Ó Dálaigh,[59] John Kenny,[60] and Brian Walsh.[61]

All of these jurists were educated at University College Dublin (UCD) in the 1940s and 1950s, and were the first generation of Irish law students to be exposed to the natural law tradition. Many of the jurists of Ireland's classical legal revival were deeply impacted by the instruction of the likes of Professors Daniel Binchy and Patrick McGilligan, both of whom were committed natural lawyers. More generally, this new generation were also impacted by the totalitarian horrors of the early twentieth century and believed that the reaffirmation of natural law thinking represented a critical bulwark in protecting human dignity from both the dangers of *laissez faire* liberalism and state authoritarianism.

Professor Binchy was a former ambassador and famed scholar of legal history, jurisprudence, and Roman law. In a lecture entitled "The Law and the Universities" published in 1949, Professor Binchy gave an insight into his views on the point of legal education.[62] He argued that jurisprudence was the "lynchpin" of all higher legal studies and its purpose was to provide a "*trait d'union* between the profession of law and the philosophical and ethical principles from which alone legal systems derive their ultimate validity."[63] As the Irish ambassador to Germany in 1932, Professor Binchy was a first-hand witness to the rise of National Socialism and their brutal disregard for law and justice. Binchy feared that unless lawyers and legislators cleaved to the classical concept of positive law (one he says runs from "Plato and Aristotle, through the Roman jurists and the mediaeval Schoolmen, down to the neo-Scholastic philosophers of

56. Justice of Supreme Court of Ireland.

57. President of High Court of Ireland.

58. Justice of Supreme Court of Ireland.

59. Chief Justice of Ireland and later Judge of European Court of Justice.

60. Justice of Supreme Court of Ireland.

61. Justice of Supreme Court and later Judge of European Court of Human Rights.

62. Daniel Binchy, *The Law and the Universities*, 38 STUD.: IRISH Q. REV. 257, 262–64 (1949).

63. *Id.* at 262.

our own day"[64]) whose "ultimate sanction lies not in a command of the State but in its conformity to a transcendental idea of justice"[65] then the risk of disastrous consequences following for law and politics would inevitably spike. For Binchy, the legal order could only thrive and contribute to the common good if "professional lawyers (and our legislators) are equipped with a sound theory of law on which to base their approach to concrete problems."[66]

Patrick McGilligan was UCD's Professor of Constitutional Law from 1934 to 1959. McGilligan was a firm proponent of natural law reasoning in constitutional adjudication, dubbing principles of natural law the 1937 Constitution's "sheet anchor" and not something that could be considered irrelevant to legal practice. Writing extrajudicially, the current Chief Justice of Ireland Donal O'Donnell has noted how "almost all of the judges in the High Court and the Supreme Court during the 1970s and 1980s were taught constitutional law by McGilligan"[67] and that McGilligan's views on the relevance of natural law thinking to adjudication would have a profound effect on their work.

Some of this new generation would add their own valuable contributions to natural law scholarship in Ireland.[68] But perhaps the most revolutionary contribution made by the generation of judges and lawyers educated at UCD during this time was their spearheading of the use of natural law precepts and the Constitution's background principles of legal justice during constitutional adjudication, to better determine the meaning of its posited text and structure in a way that ensured harmony between the positive law and intentions of the lawmaker and enduring principles of natural law. This contribution would precipitate serious shifts in Irish legal practice whose effects are still felt today.[69]

---

64. *Id.*

65. *Id.*

66. *Id.*

67. Donal O'Donnell, *Irish Legal History of the Twentieth Century*, 105 STUD.: IRISH Q. REV. 98, 112 (2016).

68. *See* Declan Costello, *The Natural Law and the Irish Constitution*, STUD.: IRISH Q. REV., 403 (1956); Seamus Henchy, *Precedent in the Irish Supreme Court*, 25 MOD. L. REV. 544 (1962).

69. *See* Casey, *supra* note 52, at 1082, 1089–90.

That is not to say that the natural law tradition remains dominant in Irish legal culture—it is not. Skepticism toward natural law reasoning has been growing stronger since the late 1990s. In his lauded 1992 work *A Short History of Western Legal Theory*,[70] the leading Irish constitutional scholar J.M. Kelly could justly observe with confidence that Ireland was the only place in the Western world where natural law thinking was thriving in legal practice.[71] Thirty years on, however, Irish law is undoubtedly witnessing a serious weakening of the grip of the natural law tradition on mainstream legal thinking in the law faculties, in the bar, and on the bench.

Natural law reasoning retains some vibrancy within Irish constitutional law, especially in jurisprudence concerning the rights and autonomy of the family unit vis-à-vis the State, and the State's duty to protect the integrity of the human person from unjust attack. This is why I have argued elsewhere a classical flavor remains in Irish constitutional adjudication, even while the explicit use of natural law terminology dwindles.[72] However, it *is* to say that below the surface of Irish public law doctrine there is increasing uncertainty about its ultimate normative foundations—like what the point and purpose of public power and the source of constitutional rights are.

Judicial skepticism about the use of natural law principles began to spike roughly around the time that the ascent of economic and social liberalism in Irish politics and culture became increasingly dominant. It is likely several interlocking factors played a role in the rapid erosion of the natural law tradition in legal and political life, including rapid secularization, the erosion of the Catholic Church's moral authority, Ireland's deep reliance on global corporate investment and good-will, and the Irish State's increasingly deep integration into the European Union liberal legal order. All of these socio-political developments have helped push the classical natural law tradition, whose metaphysical and moral claims are in many ways deeply

70. JOHN KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY, 424–25 (1992).
71. *Id.* at 424.
72. Casey, *supra* note 52, at 1082.

antithetical to Ireland's emerging liberal orthodoxy, to the margins of its legal culture.[73]

III. LESSONS

How do these short vignettes speak to our current natural law moment? Bearing in mind all the (many) caveats that must attend any comparison of the legal culture of a small island nation and a sprawling superpower, I want to offer the following thoughts.

These previous revivals showcase how significant shifts in legal culture can be aided by small, dedicated groups of jurists. The Irish and American revivals of Thomistic thought in their respective legal cultures began humbly enough: in debates and discussions in lecture halls and seminar rooms and in the pages of legal periodicals. Small but enthusiastic bands of classically minded scholars and teachers were able to introduce new generations of scholars, lawyers, and students to the axioms and presuppositions of the natural law tradition—a tradition that up until that point had been moribund in the public law thought of both countries.

In Ireland, when those students and lawyers eventually made their way onto the bench, they were able to transform Irish public law by bringing to the judicial role the jurisprudential commitments and worldview that were central to their legal formation. The tradition did not penetrate legal practice as far in the United States, but the Trojan work of Thomistic jurists throughout the 1930s to the 1950s helped keep the tradition alive, leaving an important scholarly and institutional legacy from which American natural lawyers continue to profit today.

Today, then, while we may regret that the classical tradition in both the United States and Ireland lacks the vitality it previously had, we should take heart from the fact there are many legal minds that are hungry for, and curious about, legal approaches more intellectually and morally satisfying than positivism or legal realism. The examples of these previous revivals suggest to me that if this hunger can be met, and curiosity satisfied, then the results can be profound.

---

73. *Id.* at 1087–88.

The differing degrees of success natural lawyers in Ireland and the United States had in influencing legal practice is likely due to background sociopolitical conditions in the former which were ultimately much more receptive to the classical tradition. In a predominantly Catholic country, the Irish bar, bench, and professoriate of the 1940s and 1950s were more receptive to hearing novel arguments that sought to ground constitutional law and theory on the rich metaphysical and normative foundations of Aristotelian-Thomism. Note, too, that the natural law tradition's relevance to Irish constitutional law started to come under pressure at about the same time Ireland's wider culture and politics became increasingly dominated by liberalism.

Another necessary lesson for natural law jurists today, then, is that the longevity or influence of this moment is bound up in a wider political contest over what kind of moral vision society should be oriented toward, and what the good life consists of. If the wider political sentiment within a country is suspicious of claims that man is governed by an objective—God-given—moral order whose basic precepts are accessible by reason but independent of human will, then convincing lawyers and judges of the merits of the natural law tradition will be far more difficult. This is a sobering fact, but one we cannot sensibly ignore.

Finally, these previous revivals remind us that our lot as natural law jurists might be to sow the intellectual seeds of fruit we will never live to see reaped. There is every possibility that this particular natural law moment may pass without influencing the ways in which most lawyers or judges think about constitutional law. Our predecessors working within the tradition were alive to and undeterred by this possibility, and it is one that should not deter us today from articulating answers to public law issues that we think rest on true, good, and reasonable foundations. Nor should we shrink from passing the natural law tradition onto the next generation of jurists to the best of our ability. As we hope that this natural law moment will bear rich fruit, we should nonetheless gladly accept, as our juristic forebears did, that it "may be ours to sow that others may reap."[74]

74. Lilly, *supra* note 34, at 117.

IS AND OUGHT IN CONSTITUTIONAL LAW: A RESPONSE TO JOEL ALICEA

STEPHEN E. SACHS*

INTRODUCTION

Why be an originalist? One answer might be that originalism is *true:* that it describes what our law actually requires.[1] Not everyone, of course, agrees that originalism is true. Plenty of people think it's false, or that the jury's still out. But some press a different argument: that even granting everything about U.S. law an originalist heart might desire, to "be an originalist" needs something more, namely that originalism is *good:* that it prescribes duties our officials or citizens actually owe.[2]

---

* Antonin Scalia Professor of Law, Harvard Law School. For advice and comments, the author is grateful to Joel Alicea, Stephanie Barclay, William Baude, Samuel Bray, Alma Diamond, Robert George, Sherif Girgis, Haley Proctor, Richard Re, Amanda Schwoerke, Cass Sunstein, Francisco Urbina, Bill Watson, and Keith Whittington. The author is also grateful for support of the workshop hosted by the Notre Dame Law School Program on Constitutional Structure and the Catholic University Center for the Constitution and the Catholic Intellectual Tradition.

1. For suggestions to this effect, *see* Stephen E. Sachs, *Originalism as a Theory of Legal Change,* 38 HARV. J.L. & PUB. POL'Y 817, 835–74 (2015); *see also, e.g.,* William Baude, *Is Originalism Our Law?,* 115 COLUM. L. REV. 2349 (2015); William Baude & Stephen E. Sachs, *Grounding Originalism,* 113 NW. U. L. REV. 1455, 1477–90 (2019); Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism,* 105 GEO. L.J. 97 (2016).

2. *See, e.g.,* J. Joel Alicea, *The Natural Law Moment in Constitutional Theory,* 48 HARV. J.L. & PUB. POL'Y 307 (2025).

For participants in the "natural-law moment" Joel Alicea describes,[3] adopting originalism is a moral choice, so it requires a moral defense.[4] "Justifying a constitutional methodology," Alicea writes, means "arguing that judges ought to employ that methodology," which involves "a moral argument that the methodology is better than its competitors."[5] If originalists want judges—or anyone else—"to accept their view and reject competitor theories," they can't just argue the law: they have to "provide a moral argument based on contested moral truth claims."[6] No matter how we determine what our law *is*, we still might wonder if one really *ought* to follow it, and we can't answer that question by redescribing what our law is (even at louder volume).[7]

Call this the "practical-reason argument" against letting law determine constitutional theory. Adopting an interpretive approach to the U.S. Constitution and applying it to real people is an *action*, a move in the real world. And actions can only be justified by "practical" reasoning—sometimes also called ethical, moral, or normative reasoning, the kind of reasoning that answers "the question of what one is to do."[8] That's distinct from "theoretical" or epistemic reasoning, the kind "concerned with matters of fact and their explanation."[9] If legal and moral reasons can *ever* come apart, as even natural lawyers may think they can, then legal reasoning alone can't tell you what to do, including what interpretive choices to make.[10] Or, as Alicea phrases the claim, a "constitutional theory that

3. *Id.* at 309.

4. *See id.* at 318.

5. *Id.*

6. *Id.* at 319.

7. *See id.*

8. R. Jay Wallace & Benjamin Kiesewetter, *Practical Reason*, STAN. ENCYC. PHIL. (July 31, 2024), https://plato.stanford.edu/entries/practical-reason/.

9. *Id.*

10. On interpretive choice, see Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535 (1999); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74 (2000); see also Richard Ekins, *Interpretive Choice in Statutory Interpretation*, 59 AM. J. JUR. 1 (2014) (criticizing the notion). On natural lawyers admitting a legal-moral distinction, see infra text accompanying notes 29–41.

proposes a methodology of constitutional adjudication . . . has to explain why judges ought to adopt that methodology."[11]

This demand for an "ought" implies, as Francisco Urbina argues, that only practical reasons—"reasons for choice and action"[12]—can truly "justify adopting or abandoning a method of interpretation."[13] The right theory, in Cass Sunstein's phrasing, is the one that makes "the American constitutional order better rather than worse."[14] Indeed, self-identifying with a particular approach (e.g., "I'm an originalist") might turn out to be foolhardy, because what makes things better or worse might vary by circumstance.[15] To argue for originalism based on democracy, justice, rights, welfare, stability, etc., would make you not an originalist but a democracy-justice-rights-welfare-stability-ist, someone who'd follow those rationales when they support originalism and when they reject it. Better, surely, to treat interpretive choice as "contingent," tracking "the balance of normative reasons," which "change as circumstances change."[16]

How might originalists like me resist this argument? Maybe originalism actually *is* good;[17] maybe it makes other claims on officials.[18] But set those arguments aside for now. The problem with the practical-reason argument is that it proves too much. *Any* action has to be defended, if at all, with practical reasons. Adopting and applying originalism, as a claim about U.S. law, is no more of an

11. Alicea, *supra* note 2, at 317.

12. Francisco J. Urbina, *Reasons for Interpretation,* 124 COLUM. L. REV. 1661, 1688 (2024).

13. *Id.* at 1722.

14. CASS R. SUNSTEIN, HOW TO INTERPRET THE CONSTITUTION 8 (2023).

15. *See* Urbina, *supra* note 12, at 1666.

16. *Id.* (emphasis omitted). To be clear, Alicea needn't adopt this sort of case-by-case approach, so long as his moral argument for a constitutional methodology is sufficiently invariant across circumstances.

17. *See, e.g.,* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013); J. Joel Alicea, *The Moral Authority of Original Meaning,* 98 NOTRE DAME L. REV. 1 (2022).

18. *See, e.g.,* Evan D. Bernick & Christopher R. Green, *What Is the Object of the Constitutional Oath?,* 128 PA. ST. L. REV. 1 (2023); Richard M. Re, *Promising the Constitution,* 110 NW. U. L. REV. 299 (2016).

action than adopting and applying any other claim about how the world is. Asking "why be an originalist?" is like asking "why be a heliocentrist?," "why be a Darwinist?," or "why be a string-theorist?" Choosing one's approach to astronomy, biology, or physics is an action, too, sometimes a controversial one.[19] But astronomers, biologists, and physicists don't worry too much about this, given their uncontroversial reasons to represent accurately both the world and their beliefs about it (call these "truth-telling reasons"). In many cases our truth-telling reasons reduce complex practical questions, like whether we should publicly avow heliocentrism, to simpler theoretical questions, like whether the Earth really orbits the Sun. So, in slogan form, we might say that the moral case for originalism rests on its being true: *originalism really is the law around here, and judges and officials should say so.*

This answer is so straightforward as to risk seeming glib. True, the case for originalism is far less settled than the case for Copernicus. But to the extent one goes around talking about U.S. law, one has truth-telling reasons to say true things about it rather than false things, which gives real normative bite to originalism's claim (such as it is) to describe U.S. law accurately. As it happens, judges, officials, and citizens talk a good deal about U.S. law.[20] So they have good reason to investigate their claims before making them, to avoid making sociological, historical, or philosophical errors, and so on. If they don't want to be held to correct descriptions of U.S. law, they don't have to talk about it! But if they *do* talk about it, they should describe it correctly, or else carry the heavy moral burden of not doing so.

In other words, once you grant that originalists are right on the law (and not everyone does), there's not much room left for "interpretive choice."[21] We can choose to read texts in many ways, some of them more enlightening than others. But if we want to know *what*

---

19. *See, e.g.*, Peter Woit, *Is String Theory Even Wrong?*, 90 AM. SCI. 110 (2002).

20. *See* Stephen E. Sachs, *According to Law*, 46 HARV. J.L. & PUB. POL'Y 1271, 1285–93 (2023).

21. *See supra* note 10.

law was made by adopting or enacting a text—whether a constitution, a contract, or a municipal building code—then the relevant norms of interpretation might be questions of law too: a law of interpretation, whose myriad defaults, presumptions, and canons of construction all reflect interpretive choices already made.[22] In that respect a methodology of constitutional interpretation is nothing special; it's simply one facet of a legal system that has many different rules for reading many different instruments.

Or to put it another way, paraphrasing a famous argument by Robert Nozick: If legal instruments "fell from heaven like manna"[23]—simply as marks on paper, unconnected to any particular interpretive approach—then it might be plausible to choose among ways of interpreting them on ordinary normative grounds. But is *this* the appropriate model for deciding how legal instruments are to be read?[24] To the extent that these instruments come into being in the context of some existing legal system—not just as arbitrary marks on paper, but as well-formed legal objects, statutes and contracts and constitutions and so on—there's no need to search for some optimal interpretive theory to apply to them. "The situation is not an appropriate one for wondering, 'After all, what is to become of these things; what are we to do with them.'"[25] In the non-manna-from-heaven world in which legal instruments are made or produced or transformed by preexisting legal institutions, with an eye to preexisting legal rules, there's no separate process of interpretive choice for a theory of interpretive choice to be a theory *of*.[26]

None of this, of course, tells us whether our current law of interpretation leads to clear answers—or whether, once we understand the law that our instruments make, it ought to be obeyed or disobeyed. In that sense officials and citizens really do sometimes face

22. *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1118–21, 1132–40 (2017).

23. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 198 (1974).

24. *See id.*

25. *Id.* at 219.

26. *See id.*

tough choices. But the tough choices are rarely the *interpretive* ones. Our obligation to do the right thing is ever-present, when the law is clear as much as when it's ambiguous, whether we should follow that law or break it. But we also have obligations, albeit defeasible ones, to talk about the law truthfully—and usually that's enough to go on with.

I.

Start by giving the practical-reason argument its due. Showing that an interpretive approach *is* the law doesn't show that anyone, judges included, *ought* to obey and apply it in a particular case. Only practical reasons can do that.[27]

Importantly, this argument isn't part of the usual fights between positivism and natural law, such as whether (or how often) legal questions might depend on moral answers. Terms like "law" and "legal" can be used to refer only to obligations that bind in conscience, but they aren't always used exclusively in that sense.[28] And the practical-reason problem remains so long as you might *ever* have all-things-considered moral reasons to do what your all-things-considered legal reasons forbid.[29]

Even on standard natural-law accounts, in which moral reasoning is part and parcel of legal reasoning, a society's law isn't just a summary of what its members really ought to do—including what they ought to do given the past activities of legislatures and officials. Jaywalking, for example, might sometimes be legally forbidden but still morally permissible, even required. (An attorney racing to a court appearance for an imperiled client might have a moral duty to jaywalk, even a duty resulting from the actions of legal institutions, but no legal defense to a ticket.[30]) Nor is law just a summary of when police officers really ought to issue tickets or when

27. *See supra* notes 8–10 and accompanying text.

28. *See* Sachs, *supra* note 20, at 1274.

29. *See* Hasan Dindjer, *The New Legal Anti-Positivism*, 26 LEGAL THEORY 181, 187–91 (2020) (discussing conflicts of these all-things-considered reasons).

30. *See* Sachs, *supra* note 20, at 1276–79.

judges really ought to enforce them. Ordinary citizens have legal rights and obligations just as much as officials do, and a judge or other official might similarly face a "jaywalking case" with both clear law and a clear duty to disobey it.[31] What the law *is* may be one question and whether we *ought* to follow it another.

While some people see law simply as a subtopic of morality, with legal and moral requirements always on all fours, that view is implausible, as the jaywalking case shows.[32] It's also widely rejected, including by natural lawyers.[33] Suppose one grants (for purposes of argument) that the central case of law involves rational, beneficent ordinances announced by legitimate authorities:[34] this fully admits the possibility of noncentral but unremarkable cases in which authorities are less-than-fully legitimate or their ordinances less-than-fully rational—"intra-systemically valid laws, imposing 'legal requirements,'" that fail to bind in conscience.[35]

The point of the practical-reason argument is to show that our legal system's rules of interpretation might fall in this noncentral category. We deploy legal texts as part of some larger enterprise: "deciding a case, declaring what the law is, passing legislation coherent with other norms," and so on.[36] If there's more than one way of "carrying out that enterprise,"[37] then we have to decide what to

31. *See id.* at 1278.

32. *See* Dindjer, *supra* note 29, at 188–89 (describing such theories and noting their implausibility).

33. *See* Brian Bix, *Natural Law Theory, in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 209, 214–15 (Dennis Patterson ed., 1996) (noting rejection by natural lawyers).

34. *See* Alicea, *supra* note 2, at 312. On central cases generally, see JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 9–19 (1980).

35. *See* John Finnis, *On the Incoherence of Legal Positivism*, 75 NOTRE DAME L. REV. 1597, 1603 (2000); *see also* J. Joel Alicea, *Practice-Based Constitutional Theories*, 133 YALE L.J. 568, 605 n.276 (2023) (noting the possibility of incoherent human laws); Urbina, *supra* note 12, at 1731 (addressing "noncentral cases of law").

36. Urbina, *supra* note 12, at 1687.

37. *Id.* at 1689.

do next—a decision governed by practical reason, the kind "concerned with what to intend" as distinct from "what to believe."[38] Theoretical questions are still important; we need to understand the world to know how to act in it. But those inquiries supply only "'subordinate' reasons" supporting one normative reason or another;[39] the right choice has to be determined by *all* "the relevant normative reasons,"[40] not just "legal reasons" only.[41]

II.

The response to this practical-reason argument is one of confession and avoidance. No, theoretical reason never justifies actions on its own; yes, practical reason always gets the last word. Yet these true claims are often trivial, for by the time one gets to practical reason, the important moves may have already been made.

We might frame the practical-reason argument as follows:

(O1) Acting in a certain way can only be justified, if at all, by practical reasoning.
(O2) Adopting and applying originalism is acting in a certain way.
∴(O3) Adopting and applying originalism can only be justified, if at all, by practical reasoning.

This argument is perfectly sound. Practical reasoning is the kind appropriate to action, rather than belief, so one needs it to justify acting in one way rather than another. And adopting and applying originalism *is* acting in a certain way; it involves real conduct in the real world and has real consequences for real people.

But now consider a parallel argument:

38. *Id.* at 1688 n.130 (quoting Gilbert Harman, *Practical Reasoning,* 29 REV. METAPHYSICS 431, 431 (1976)).

39. *Id.* at 1670.

40. *Id.* at 1704.

41. *Id.* at 1701.

(H1) Acting in a certain way can only be justified, if at all, by practical reasoning.
(H2) Adopting and applying heliocentrism is acting in a certain way.
∴ (H3) Adopting and applying heliocentrism can only be justified, if at all, by practical reasoning.

This argument is perfectly sound too! Avowing heliocentrist claims in front of others, corrupting the youth with heliocentrist doctrines, designing and launching satellites as if heliocentrism were true, and so on, are all undoubtedly actions. (One could, after all, just shut up about the whole Earth-Sun thing.) So engaging in them requires normative defense, the kind capable of justifying action. Indeed, these choices commonly *are* justified by practical reasoning: If challenged to explain why we design satellites as if heliocentrism were true, we might say not only that heliocentrism is true, but also things like "Satellites cost lots of money, and it'd be bad if they crashed into the Sun." It's just that the specifically *practical* parts of this reasoning are the uninteresting ones, and all the important work is done by the subordinate reasons—by considerations of what's theoretically reasonable to believe about our solar system. Likewise, whether there's "a ravenous lion in the middle of the classroom"[42] is a question for theoretical reason, not practical; yet it's hardly academic, and the fact that we have practical reason to run screaming from the room is highly dependent on our having theoretical reason to believe a ravenous lion is there.

The same is true of more contestable disciplines. What to tell your twelve-year-old about why the Soviet Union fell (as mine recently asked me) depends partly on what's practically reasonable, like how much time one should spend explaining or how detailed an account a twelve-year-old might need. But it also depends on

42. *See* Scott Alexander, *Are We All Doxastic Voluntarists?*, ASTRAL CODEX TEN (Mar. 15, 2023), https://www.astralcodexten.com/p/are-we-all-doxastic-voluntarists [https://perma.cc/4YW3-HFGU] (quoting @freganmitts, X (Jan. 25, 2023, 1:15 PM), https://x.com/freganmitts/status/1618311520244625410 [https://perma.cc/NX8H-CBNV].

what's theoretically reasonable, like what we ought to believe happened in the late twentieth century or which facts we should consider salient or as having high explanatory value. We can't wholly reduce this theoretical rationality to the practical kind, such as by asking what strikes us as *useful* to believe happened, or what the causes of the Soviet Union's fall really *ought* to have been; we need some separate notion of what our evidence supports.[43] That only practical reason can independently guide action is true but trivial, for often the subordinate, dependent reasons are decisive, especially as to the explanations we don't give (say, aliens).

This reasoning easily extends to law. Whatever your "account of what law is," whether "purely descriptive" or thoroughly normative, you may have to look elsewhere for "normative premises that can justify adherence."[44] (Again, think of the jaywalking case.) But usually you won't have to look very far. Whether the top marginal income tax rate should be 37 percent or 39 percent is a choice, and one that ought to be justified by practical reason. But it isn't hard to imagine why individual tax collectors might have practical reason not to collect more taxes than are legally required[45]—and, in particular, not to *represent* more taxes as due than are legally required, in the sense of "legally required" that sometimes departs, even for natural lawyers, from what true morality demands. Likewise, judges hearing a jaywalking case might have good reason to let the accused go free, but they'd need an extra-good reason before they could lie about whether that result was required by law. To the extent that judges or other officials regularly have practical reason not only to follow the law but to *say* true rather than false things about

43. *See* David Christensen, *The Ineliminability of Epistemic Rationality,* 103 PHIL. & PHENOMENOLOGICAL RES. 501, 513–516 (2021); *see also* NOZICK, *supra* note 23, at 247 (discussing the curious field of "[n]ormative sociology, the study of what the causes of problems *ought to be"*).

44. *See A*licea, *supra* note 35, at 575.

45. *Cf.* Emad H. Atiq, *There Are No Easy Counterexamples to Legal Anti-Positivism,* 17 J. ETHICS & SOC. PHIL. 1, 6 (2020) (arguing that "if a rule is widely accepted, then quite plausibly there is always some moral reason for agents to follow it," though contending that this undermines positivism).

their having done so, the practical questions are the uninteresting ones, and the theoretical questions the whole ballgame.

As it happens, when judges and other officials explain and defend their conduct, their statements are absolutely shot through with law-talk. These officials are routinely in the business of describing various norms as either belonging or not belonging to our legal system—usually explicitly, and in other cases by implication. Knowledge being the norm of assertion,[46] these officials have practical reason to investigate the truth of what they say about the law before saying it. So whatever the right theory of law might be, positivist or natural-law-based or anything else, if on that theory originalism turns out to give a true account of U.S. law (as some people argue it does),[47] then judges and other officials would have practical reason to say so—and not to mislead their audiences by omission, even unknowingly or inadvertently.

All this is regularly presupposed by originalist arguments that judges and officials should straighten up and follow a more consistently originalist understanding of our law. This may look like a moralized effort at changing the law, and to some people it is. But others make these arguments by way of calling for our official class to follow the law, to do what they already *claim* to be doing. It's perfectly coherent to argue that judges or officials generally ought, as a matter of practical reason, to reconcile their applications of the law with their standard-issue statements about it, and that they ought to reconcile their standard-issue statements about the law with the best and most accurate theoretical understandings thereof—whatever those might be. The originalist objection to lower-level legal practice, that it often fails to adhere to shared higher-level legal standards, charges officials with a version of hypocrisy, something we usually have good practical reasons (among them truth-telling reasons) to avoid. As our reasons to avoid hypocrisy are by-and-large uncontroversial, and the exceptions few and

46. *See, e.g.*, Christopher R. Green, *Constitutional Theory and the Activismometer: How To Think About Indeterminacy, Restraint, Vagueness, Executive Review, and Precedent*, 54 SANTA CLARA L. REV. 403, 427 (2014).

47. *See, e.g.*, sources cited *supra* note 1.

far between, originalists can often levy criticisms on such grounds while otherwise prescinding from "controversial moral views,"[48] whether about high political theory or the substance of particular legal rules. If our truth-telling reasons are strong enough, we can plan in general to rely on them, and to worry about unusual exceptions as they arise.

III.

Maybe one has to resolve controversial moral questions just to identify the law in the first place. That's a deep question of jurisprudence, on which my disagreements with Alicea needn't be fleshed out here.[49] But there's nothing particularly *interpretive* about these disagreements: Morality has as much to say about the content of tax rates or copyright terms as it does about how to *read* the tax code or the copyright law. If interpretive method can be a matter for law (as it can), then there's nothing special about interpretive choice as distinct from the many other choices the law makes. Whatever your theory of what the law *is,* you still need a good explanation of why you *ought* to follow it—and if you've got one, the law of interpretation will usually come along for the ride.

Whatever one's ideal theory of interpretation might be, there are different interpretation-like things that a particular legal system might *do* with a text, and each system will usually contain instructions on which we're supposed to use.[50] For holographic wills, say, a legal system might care about what the author intended;[51] for

48. Alicea, *supra* note 2, at 318.

49. *Compare* Baude & Sachs, *supra* note 1, at 1459, 1463 (espousing positivism), *with* Alicea, *supra* note 2, at 322 (rejecting it).

50. *See generally* Baude & Sachs, *supra* note 22.

51. *E.g.,* In re Dern's Est., 251 P. 2d 28, 29 (Cal. Dist. Ct. App. 1952).

street signs, what reasonable members of the public would understand;[52] for debt collection letters, what "'unsophisticated' consumers" might think;[53] and so on. Some legal systems treat statutes as oral agreements among legislators, only later and imperfectly reduced to writing;[54] others care intensely about the words chosen for the statute book, whether legislators read them or not.[55] And some legal systems rely extensively on customary rules that have no canonical formulation in text,[56] while at the same time providing that certain enactments (say, the Constitution) retain their original content over time until they're lawfully changed.[57] All these choices might be wise or foolish, just as other legal rules might be. Yet in the non-manna-from-heaven world in which we live, they're just the sort of choices that legal systems tend to make.

These decisions about interpretation are inextricable from substantive law, not just because they're part of the same corpus juris, but also because they're part of *how we express* the legal system's commitments on more substantive topics—contractual obligations, say, or tax rates, or whether the President can remove executive officers. What makes a legal system a *system* is that "rules of different kinds" might "fit together in a structured and articulated whole."[58] In a jurisdiction that's adopted the subjective theory of contract, for example, judges who impose on contracting parties a different, more objective interpretation run the risk of imposing on them legal duties that neither had undertaken; so too judges in an objective-

52. *E.g.,* Commonwealth v. Loy, 2 Pa. D. & C. 2d 268, 269–70 (Cumberland Cnty. Quar. Sess. 1954).

53. *E.g.,* Daugherty v. Convergent Outsourcing, Inc., 836 F.3d 507, 511 n.2 (5th Cir. 2016).

54. *See* S.E. Thorne, *The Equity of a Statute and* Heydon's Case, 31 ILL. L. REV. 202, 203 (1936).

55. *See* United States v. Tinklenberg, 563 U.S. 647, 655 (2011) (stating that, "in a close to definitional way, the words [of a statute] embody Congress'[s] own view of the matter").

56. *See* Stephen E. Sachs, *Originalism Without Text,* 127 YALE L.J. 156, 159–60 (2017).

57. *See* Baude & Sachs, *supra* note 22, at 1134–36.

58. Jeremy Waldron, *"Transcendental Nonsense" and System in the Law,* 100 COLUM. L. REV. 16, 25 (2000).

theory state who ignore the standard interpretation in seeking out a meeting-of-the-minds. The point isn't that such a bait-and-switch would be morally wrong, or even that its costs would have to be balanced against its moral benefits; the point is that if such judges told the parties "you undertook the following legal obligation," they'd be stating something *false.* Enforcing the substantive law on contracts, taxes, or removal powers means enforcing the legal rules of interpretation that identify this substantive law: There's no separate process of "interpretive choice" that can be carried out without revising the substance.

That's why moral arguments made for or against methods of constitutional interpretation can often be made just as easily against the constitutional rules themselves. Sunstein, for example, describes "[t]he problem" for constitutional interpreters as being "that the Constitution does not contain the instructions for its own interpretation."[59] But even had the Framers set out instructions with unnerving clarity, one might still argue, as Sunstein does, that the "fixed meaning of an old law is hardly sufficient for legitimacy" in the modern day[60]—or wonder "[w]hy on earth" it'd be "'legitimate,' here and now, for judges to strike down laws" based on the decisions of "long-dead people in 1788."[61] The concerns about interpretive method and about substance are one and the same; they're both part of the same legal system, for better or worse.

Constitutional interpretation is no more dependent on moral argument than anything else in law. The Founders' choice to rely heavily on unwritten interpretive rules instead of written ones might offer more opportunities for confusion or disagreement today.[62] But if the natural lawyers were right that we need to consider morality to identify the law, then we'd need to consider it when the text is clear no less than when it's ambiguous, or even when there's

---

59. SUNSTEIN, *supra* note 14, at 9 (emphasis omitted).

60. *Id.* at 71 (emphasis omitted).

61. *Id.*

62. *See, e.g.*, THE FEDERALIST NO. 83, at 559 (Jacob E. Cooke ed., 1961) (Alexander Hamilton) ("The rules of legal interpretation are rules of *common sense,* adopted by the courts in the construction of the laws.").

no text at all. Interpretive methods needn't operate on some special plane external to the law; they might be just so many more internal features of a legal system, like when taxes are due or whether burglary has to be at night.

Given a sufficiently hideous constitution, written or unwritten, it's an official's moral duty to disobey. Identifying such cases is vitally important, but it needn't be a *legal* question, nor one on which trained attorneys might have any particular expertise. While nothing stops a legal system from adopting an absurdity canon (or otherwise discouraging hideous readings),[63] its rules for constitutional interpretation are no more likely to be hideous than anything else. And once one ascertains what those rules entail, the resulting constitution would have to be *extra* hideous to justify, not just disobedience, but concealment. (In this respect the Garrisons have an advantage over the Spooners of the world: They tell it like it is.[64])

No matter what the law says, one always has the obligation to do the right thing. In many cases, the right thing is to follow the law. In yet more cases, it's to describe that law honestly. Originalism's main claim on our attention is that it might tell us how to do that. If it can, we have very good practical reason to listen.

63. *See* Christopher R. Green, *Moral Reality as a Guide to Original Meaning: In Defense of U*nited States v. Fisher, 14 J. CHRISTIAN LEGAL THOUGHT 35 (2024) (discussing the Founding-era interpretive role of consequences).

64. *Compare* [William Lloyd Garrison], *The Union,* LIBERATOR (Boston), Nov. 17, 1843, at 182, *with* LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY (Boston, Bela Marsh 1845).

ORIGINALISM AND TRUTH-TELLING: A REPLY TO STEPHEN SACHS

J. JOEL ALICEA*

I thank Conor Casey and Stephen Sachs for their responses to my Vaughan Lecture. While both responses make valuable and insightful contributions, I will focus my reply on Sachs's response, since Casey and I seem to be generally in agreement.

Sachs focuses on my claim that a theory of constitutional adjudication needs to make a moral argument that justifies telling judges why they ought to decide constitutional disputes in a particular way rather than in some other way.[1] Why be an originalist, for example, rather than a common-law constitutionalist? In answering that question, a theory of constitutional adjudication cannot depend exclusively on a positivist, descriptive account of what the law is—even if Sachs correctly identifies originalism as the law—because knowing that originalism is the "law" (in a positivist sense of "law") does not tell us why anyone *ought* to follow originalism

* Associate Professor of Law, The Catholic University of America, Columbus School of Law. I thank Sherif Girgis, Kevin Walsh, and the participants of the workshop hosted by the Notre Dame Law School Program on Constitutional Structure and the Catholic University Center for the Constitution and the Catholic Intellectual Tradition for comments on earlier drafts.

1. J. Joel Alicea, *The Natural Law Moment in Constitutional Theory*, 48 HARV. J.L. PUB. POL'Y 307, 319 (2025) (Sachs discusses my argument alongside the argument of Francisco Urbina and Cass Sunstein that we must make a normative choice on a case-by-case basis, though he acknowledges that my argument need not adopt a case-by-case approach. Stephen E. Sachs, *Originalism and Truth*, 48 HARV J.L. PUB. POL'Y 345, 347 n.13 (2025). To be clear, my argument is distinct from Urbina's and Sunstein's. While I argue that whether to adopt a constitutional theory is a normative choice, I do not think that normative choices are always necessary in deciding cases, such that one's constitutional theory might vary from one case to the next.

in resolving constitutional disputes. We need a moral account of why judges should choose originalism over its rivals.

Sachs's response is one of "confession and avoidance."[2] He thinks my claim—that a theory of constitutional adjudication requires making a moral argument—is "true but trivial."[3] To Sachs, the moral arguments for adopting originalism "are the uninteresting ones, and all the important work is done" by the descriptive arguments for concluding that originalism is our law.[4] With characteristic humor, Sachs asserts: "Asking 'why be an originalist?' is like asking 'why be a heliocentrist?'"[5] Once one concludes, as a descriptive matter, that originalism is our law or that the Earth does indeed orbit the Sun, the normative reasons for acting accordingly are uncontroversial.[6]

And what are those uncontroversial reasons that Sachs puts forward? "If originalism turns out to be a true description of our law, then judges and other officials would have practical reason to say so, and not to mislead their audiences by omission, even unknowingly or inadvertently."[7] It is a "don't lie or deceive" argument, or a "don't be a hypocrite" argument.[8] "It's perfectly coherent to argue that judges or officials generally ought, as a matter of practical reason, to reconcile their applications of the law with their standard-issue statements about it, and that they ought to reconcile their standard-issue statements about the law with the best and most accurate theoretical understandings thereof."[9]

On the surface, this argument seems plausible, but only because it either relies on an implausible sociological assumption about

---

2. Sachs, *supra* note 1, at 352.
3. *Id.* at 354.
4. *Id.* at 353.
5. *Id.* at 348.
6. *Id.* at 348–50.
7. *Id.* at 355.
8. *Id.* at 355–56.
9. *Id.* at 355. While Sachs sometimes describes his truth-telling argument as limited to "say[ing] true rather than false things," *id.* at 356, he elsewhere makes clear that he intends his argument to extend to "applying originalism" or "applications of the law" in resolving cases, *id.* at 352, 355.

judicial commitments or because it attributes to a positivist understanding of "law" an unearned normative heft. "Law" as understood by Sachs[10] (following H.L.A. Hart) is fundamentally a matter of social fact.[11] The law is what our officials *say* the law is.[12] That is why Hart described his approach to law as a form of "descriptive sociology."[13] So "law" in this positivist sense is purely descriptive, referring to how officials speak about the law.[14]

In defining what law is and in identifying originalism as our law, Sachs uses the positivist understanding of law,[15] relying on judges' "standard-issue statements about the law" (i.e., the social facts about what officials *say* the law is).[16] But he then makes the move that judges are engaged in either dishonesty or hypocrisy by failing to "reconcile their applications of the law with their standard-issue statements about it" and by failing to resolve that inconsistency in favor of applying originalism.[17] Yet, from the fact (supposing it is a fact) that officials speak as if originalism is our law, it does not follow that they ought to apply originalism in resolving constitutional disputes. Even granting (again, for the sake of argument) that it would be dishonest or hypocritical for judges to acknowledge

10. Sachs frames his argument against the importance of normative theory as valid under any understanding of law, not only under his positivist understanding of law. Nonetheless, I will examine how his argument against normative theory interacts with his positivist understanding of law, which will highlight the problems with his argument.

11. William Baude & Stephen E. Sachs, *Grounding Originalism,* 113 NW. U. L. REV. 1455, 1463 (2019).

12. William Baude & Stephen E. Sachs, *The Official Story of the Law,* 43 OXFORD J. LEGAL STUD. 178, 181 (2023). I will use "officials" throughout because that is Hart's language, but Sachs has an expansive understanding of whose statements determine what the law is. *See id.* at 195–96. His broader understanding of "officials" does not affect my argument below.

13. H.L.A. HART, THE CONCEPT OF LAW vi (2d ed. 1994).

14. Charles L. Barzun, *The Positive U-Turn,* 69 STAN. L. REV. 1323, 1341 (2017); Scott J. Shapiro, *What Is the Rule of Recognition (and Does It Exist)?, in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION, 235, 238–39 (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

15. *See generally* Baude & Sachs, *supra* note 11.

16. Sachs, *supra* note 1, at 355.

17. *Id.* at 7–8.

originalism as the law in their statements but apply non-originalism in resolving cases, that does not tell us *which way* the inconsistency should be resolved.

In other words, the ostensibly uncontroversial moral premise that Sachs is willing to inject into his argument—that lying or hypocrisy should be avoided—does not lead to the conclusion that judges ought to be originalists (even assuming that originalism is our law in a Hartian sense). Judges might instead resolve the inconsistency by continuing to apply non-originalism and changing the way they speak about the law. Sachs does not provide a reason why the alleged inconsistency between judicial statements and judicial conduct must be resolved in favor of judicial statements.

Sachs might respond to this problem in one of two ways, neither of which succeeds. First, he might assert, as a sociological matter, that judges have a Hartian understanding of the law in mind when they affirm (ostensibly uncontroversially) that they ought to follow the "law." This would be a version of the oath argument that Sachs's co-author, William Baude, has advanced.[18] Thus, because judges have committed to following the law in a Hartian sense, they must adhere to originalism when it is identified as the law, rather than changing how they speak about the law. But Sachs offers no evidence that judges do, in fact, have a Hartian concept of law in mind when they affirm that they ought to follow the "law." Indeed, it is implausible to think that judges have a Hartian concept of law in mind, since it would be unreasonable for a judge to commit herself in advance to following *whatever* a society's social practices say the law is even if the content of the law turns out to be deeply unjust.[19] Rather, when judges agree that they should follow the law, they are presupposing (based on prior evaluation of and experience under the law) that the "law" in question will generally be morally sound (even if unsound in some instances), so that there would be

18. *See* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2392–95 (2015).

19. *See* J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1, 12 (2022).

no moral problem with committing to obeying it.[20] But insofar as Sachs is assuming a Hartian understanding of "law" throughout his argument, he has no entitlement to those moral assumptions, given that they are excluded from a Hartian concept of law. Sachs would therefore be left assuming an implausible commitment on the part of judges to applying the "law" in a Hartian sense—even if it is deeply unjust—simply because that is the "law" identified through officials' statements.[21]

Alternatively, Sachs might say that a judge ought to resolve an inconsistency between her statements about what the law is (originalist) and her conduct in resolving cases (non-originalist) in favor of her statements because refusal to do so would be to "subvert the law,"[22] which would be a violation of the rule of law. But this response presupposes that originalism's status as "the law" carries with it a presumptive duty of obedience, and under a positivist understanding of law—in which the law is simply a social fact—no such duty follows. If originalism's status as "law" means merely that officials tend to *speak* about originalism as if it were binding, that is an interesting sociological observation, but it is not a reason for anyone to actually treat originalism as binding—just reportage about how officials tend to speak. Thus, if a judge decided to apply non-originalism and to try to change the way officials talk about originalism, the only way for Sachs to criticize such a judge for violating a moral duty—rather than for committing a

20. Indeed, many arrive at those presuppositions having first made the normative choice in favor of a non-originalist constitutional theory, which they in turn apply in evaluating the moral soundness of the "law" of our Constitution prior to taking the oath. It would surprise them to learn, after having taken the oath, that they had committed to originalism because the "law" (in a Hartian sense) that they agreed to uphold meant something radically different than they had in mind (in a non-Hartian sense) when they took the oath.

21. Sachs might respond that the moral evaluation of the law prior to taking the oath is necessary, but since it is uncontroversial that the Constitution is generally morally sound (assuming that it is uncontroversial), his argument can still go through without implicating contested moral truth claims. I have responded to this argument elsewhere. *See* J. Joel Alicea, *Constitutional Theory and the Problem of Disagreement,* 173 U. PA. L. REV. 1, 27–29 (2025).

22. Baude & Sachs, *supra* note 12, at 198.

social faux pas—would be to make a moral argument for why originalism's status as "law" creates a presumptive duty of obedience to originalism. But that is precisely the kind of "high political theory" and evaluation of "the substance of particular legal rules" that Sachs claims (wrongly) he can "prescind[]" from offering.[23]

This discussion highlights the false (though humorous) equivalence in Sachs's comparison between heliocentrism and originalism. If it is true (and it is!) that the Earth orbits the Sun, there is no good reason *not* to act in accordance with this true fact. By contrast, if it is true that officials in our system tend to speak as if originalism was the law, there are potentially many good reasons *not* to act in accordance with this true fact. Officials might say that originalism is the law, but if originalism entails the perpetuation of racist and/or sexist views[24] or presupposes deeply unjust ratification procedures,[25] why should we apply originalism? Whether to adopt heliocentrism does not force us to confront such weighty questions, as Sachs concedes.[26]

The arguments necessary to sustain originalism are hardly "uninteresting" or widely accepted.[27] For example, to say, as Sachs might want to, that judges have a moral obligation to adhere to the limits on their authority imposed by the positive law—even when those limits would prevent the judge from stopping a moral injustice—is a controversial moral claim. Indeed, it is a claim I once devoted an entire article to defending,[28] yet my argument (alas) was not met with universal acclamation and acceptance.[29] As I have argued elsewhere, it is impossible to escape contested moral truth

23. Sachs, *supra* note 1, at 356.

24. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2324–26 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting).

25. *See, e.g.*, *id.*

26. Sachs, *supra* note 1, at 348.

27. *Id.* at 355.

28. *See* Alicea, *supra* note 19.

29. *See, e.g.*, Adrian Vermeule & Conor Casey, *Pickwickian Originalism*, IUS & IUSTITIUM (Mar. 22, 2022), *https://iusetiustitium.com/pickwickian-originalism/* [https://perma.cc/G3Z6-YY7F].

claims in justifying a constitutional theory.[30]

Sachs's desire to avoid making such claims is why, even if he could succeed in convincing non-originalist judges that originalism is "the law" in a positivist sense, the response would likely be a collective shrug. Unlike Sachs's argument for originalism, I am not asking those jurists to submit to a theory that they might regard as unjust simply because we tend to speak as if the theory is the law. Rather, I am meeting them on their own ground and arguing that their moral judgment is *mistaken* --that originalism is morally *sound*. That argument, if correct, can carry the day for originalism, and the increasing awareness of its necessity helps explain why our natural law moment in constitutional theory has arrived.

30. Alicea, *supra* note 19, at 10–33.

STRUCTURAL TEXTUALISM AND MAJOR QUESTIONS

JONATHAN MEILAENDER*

INTRODUCTION

Can a textualist embrace the Major Questions Doctrine ("MQD")? If the MQD is a clear-statement rule, as Justice Gorsuch suggests in *West Virginia v. EPA,*[1] probably not: a clear-statement MQD will sometimes sacrifice the best reading of the text in favor of external values.[2] So Justice Barrett offers an alternative MQD formulation in *Biden v. Nebraska:*[3] maybe the MQD is actually a non-substantive canon that relies on the role of context in shaping textual meaning.[4] It rests on commonsense intuitions about both the broader concept of delegation and the specific relationship between Congress and agencies, and so functions as an aid to finding textual meaning, not a means of evading it. Justice Barrett calls this underlying set of presumptions about the Congress-agency relationship her "basic premise": the idea that statutory context includes an assumed congressional preference for answering major questions.[5]

This Note argues that Justice Barrett's method largely succeeds, but only because her *Biden v. Nebraska* concurrence offers a novel approach to textualism itself. It is an approach this Note calls

* J.D. Candidate, Harvard Law School 2025. The author thanks Professors Cass Sunstein and Jack Goldsmith for inspiring this Note; the JLPP notes team of Joel Erickson, Coy Ozias, and Christian Carson, for their careful edits and comments; the remainder of the JLPP editorial team for their editorial oversight and review; and Ben Rolsma, Maria Arcara, and Kelina Rodgers for their helpful feedback on early drafts.

1. 142 S. Ct. 2587 (2022).
2. *Id.* at 2619 (Gorsuch, J., concurring).
3. 143 S. Ct. 2355 (2023).
4. *Id.* at 2378 (Barrett, J., concurring).
5. *Id.* at 2380.

"structural textualism," an attempt to situate a structural argument within textual meaning.

That name arises from the nature of the "basic premise," Justice Barrett's background presumption that shapes textual meaning.[6] Justice Barrett repeatedly emphasizes her use of the usual textualist lens of a constructed, reasonably informed third-party interpreter.[7] In other words, what Congress *actually intends* is irrelevant to establishing textual meaning. Instead, what matters is what a reasonable third-party observer would *think Congress means*.[8] And that observer's assumptions about Congress-agency relationships do not originate from real-world activity, whether congressional action or the views of actual observers. Instead, the "basic premise" is a structural one—a premise derived from the structure of the constitutional text and the governing framework it creates. The Constitution logically compels Justice Barrett's "basic premise," in the sense that a rational third-party interpreter cannot escape it without ceasing to be rational. Justice Barrett's observer is not like a median or aggregate interpreter, who establishes a contextual norm by looking for widespread conventional agreement. Instead, Justice Barrett's observer establishes context by examining the Constitution in a way that is normatively rational.[9] The observer's premise embodies common sense in the sense that her conclusion is reasonable, not in the sense that it is common. Additional empirical context might rebut this structural premise, but it is not the starting point.

This structurally textualist concept of statutory interpretation allows Justice Barrett's MQD to overcome two recent critiques. First, Professor Cass Sunstein argues that the "basic premise" is empirically doubtful: Congress does often seem to delegate major questions.[10] So maybe the premise is not a statement about what Congress actually does in practice, but instead a "normative claim,"

---

6. *Id.*

7. *See, e.g., id.* at 2380–81.

8. *See id.*

9. *See id.* at 2381.

10. Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, 76 FLA. L. REV. 251, 258 (2024).

something like a "constitutionally motivated" "legal fiction" that rightly forms part of a statute's interpretive context.[11] But if that is true, then Justice Barrett's MQD no longer looks very different from Justice Gorsuch's—it too simply protects a normative value.[12] Professor Sunstein's account, though, does not recognize the way in which a third-party lens avoids empirical pitfalls. Professor Sunstein correctly intuits the eventual nature of Justice Barrett's "basic premise," but fails to discern the difference (for a textualist) between a rationally compelled structural premise and a "constitutionally motivated" legal fiction.

Second, Professors Benjamin Eidelson and Matthew Stephenson offer a critique similar in outline, though different in method.[13] They argue that Justice Barrett's basic presumption cannot alter the way a reasonable third-party interpreter perceives the text—a textualist's usual inquiry.[14] On their account, a presumption can be part of contextual "common sense" only if it is "genuinely common," so widely shared and pervasive as to form part of a statute's shared communicative backdrop.[15] But this one is not, they say. Not only does Congress fail to act like it believes this "basic premise," but there is also no general agreement among educated observers that the premise is right.[16] Professors Eidelson and Stephenson accurately describe the basic textualist project as applied to the MQD, but fall short because they suppose that Justice Barrett's common sense is mostly "common," not mostly "sensible."

This Note summarizes Justice Gorsuch's MQD in Section I, identifying the ways in which it might irk a textualist. Section II explains how Justice Barrett's MQD seeks to address these textualist misgivings. Section III demonstrates how Justice Barrett's use of a third-party interpreter limits recourse to actual Congressional activity or intent, and so avoids Professor Sunstein's empirical critique.

11. *Id.* at 260.

12. *Id.*

13. Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism,* 137 HARV. L. REV. 515, 540–44 (2023).

14. *Id.* at 521–26 (providing overview of textualist priors).

15. *Id.* at 543.

16. *Id.*

Section IV addresses the Eidelson-Stephenson challenge by invoking the third-party interpreter's normative rationality. Section V examines potential modifications to the "basic premise" to further assuage textualist objections. Finally, this Note will conclude with a general discussion of the value of Justice Barrett's innovative structural textualism.

I. JUSTICE GORSUCH'S MQD: PROTECTING THE CONSTITUTION

Justice Gorsuch's *West Virginia* concurrence begins with a general defense of clear-statement rules. Clear-statement rules, he argues, ensure that statutes comply with the Constitution.[17] That would seem to imply that all clear-statement rules are applications of the avoidance canon, and Justice Gorsuch goes on to defend the canon against retroactivity, and clear-statement rules favoring sovereign immunity, as doctrines that avoid constitutional problems.[18] The Major Questions Doctrine, Justice Gorsuch says, works the same way—it is a clear-statement rule that protects the separation of powers, especially the Article I Vesting Clause.[19] He then spends a number of paragraphs explaining the conceptual importance of the separation of powers, why the Founding generation cared about it, and why "[p]ermitting Congress to divest its legislative power to the Executive Branch" causes countless practical problems.[20] Interestingly, Justice Gorsuch does *not* say that the MQD enforces the nondelegation doctrine, but only that it protects the separation of powers generally—so his MQD might protect something like a

17. *See* 142 S. Ct. at 2616–17 (Gorsuch, J., concurring).

18. *Id.* But is it true that the Constitution prohibits retroactive legislation, or is that prohibition really just an ancient common-law prohibition, one which Congress might consider when legislating, and so one that might affect a statute's communicative content? If it is the latter, it no longer looks like a clear-statement rule. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) (noting merely that "[r]etroactivity is not favored in the law"); William V. Luneburg, *Retroactivity and Administrative Rulemaking*, 1991 DUKE L.J. 106, 135–36.

19. *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring).

20. *Id.* at 2617–18.

general constitutional norm.[21] Thus, Professor Sunstein helpfully dubs Justice Gorsuch's MQD "Lockean": it is enforcing a substantive norm that echoes Locke's description of the separation of powers.[22] In fact, Justice Gorsuch quoted Locke's description in his call for a revived nondelegation doctrine in his dissent in *Gundy v. United States,*[23] which he cites in *West Virginia.*[24]

That Lockean norm, though, is not free-floating. Instead, it is tethered to a presumption about congressional intent. Clear-statement rules "assume that. . . Congress *means* for its laws to operate in congruence with the Constitution."[25] The MQD "protects against 'unintentional, oblique, or otherwise unlikely'" delegations (and in this way differs from the nondelegation doctrine, which prevents deliberate, though unconstitutional, delegations).[26] It prevents "'agencies [from] asserting highly consequential power beyond what Congress could reasonably be understood to have granted.'"[27] Justice Gorsuch does not say exactly what kind of presumption about congressional intent this is: it could be the kind of "objectified" intent Scalia thinks is appropriate for textualists.[28] But Justice Gorsuch also proceeds to examine failed legislation (a kind of legislative intent) in deciding whether a question is major because it may show "that an agency is attempting to '"work [a]round"' the legislative process to resolve for itself a question of great political

21. *See id.* at 2619 (observing that the MQD protects the Article I Vesting Clause). Justice Gorsuch distinguishes the non-delegation doctrine from the MQD more precisely in his earlier concurrence in *Nat'l Fed'n of Indep. Bus. v. OSHA,* 142 S. Ct. 661 (2022). There, he explains that the nondelegation doctrine prevents Congress from delegating its own power deliberately, while the MQD prevents the executive from seizing power Congress never intended to grant. *Id.* at 668–69 (Gorsuch, J., concurring).

22. *See* Sunstein, *supra* note 10, at 251–52.

23. 139 S. Ct. 2116 (2019).

24. *West Virginia,* 142 S. Ct. at 2619 (Gorsuch, J., concurring) (citing *Gundy,* 139 S. Ct. at 2141–42 (Gorsuch, J., dissenting)).

25. *Id.* at 2616 (emphasis added).

26. *Id.* at 2620 (citing *Nat'l Fed'n of Indep. Bus.,* 142 S. Ct. at 669 (Gorsuch, J., concurring)).

27. *Id.*

28. ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in* A MATTER OF INTERPRETATION 3, 17 (new ed. 2018).

significance."[29] That sounds like ordinary intent, not objectified intent. Justice Kagan's dissent objects—that is not textualist, she argues.[30] Justice Gorsuch responds in a footnote, explaining that he (and the majority) has used such failed legislation only to figure out *whether a major question exists*, not to "resolve what a duly enacted statutory text means."[31] But that is an odd response. True, if legislative failures merely trigger a clear-statement rule, they do not play a direct role in discerning what the text means—but now their presence can *override* the text's best meaning, since that is what a clear-statement rule does (or can do). It would seem less offensive to textualism to simply acknowledge that legislative failure does play a role in finding textual meaning. Justice Gorsuch's precise response does not really matter, though, because failed legislation influences the result either way, whether by triggering the doctrine or by guiding its application.

Reliance on failed legislation combined with a focus on *unintentional* delegations also opens an empirical Pandora's Box: what if Congress does routinely intend to delegate major questions? Justice Gorsuch could have cited empirical research suggesting that Congressional staffers do hope to answer major questions when drafting legislation, and hope that agencies will refrain from doing so.[32] At least one study has attempted to measure congressional intent with respect to major questions in just this way, and it favors him. Abbe Gluck and Lisa Schultz Bressman surveyed 137 congressional staffers, focusing on those responsible for drafting legislation.[33] They asked about the MQD, among other things (though of course the doctrine was less developed then). "More than 60% of respondents" agreed that "drafters intend for Congress, not agencies, to resolve [major questions]," but "[o]nly 28% of our respondents

29. *West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) (citing *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 667 (Gorsuch, J., concurring)).

30. *See id.* at 2641 (Kagan, J., dissenting).

31. *Id.* at 2621 n.4 (Gorsuch, J., concurring) (emphasis added).

32. *See, e.g.*, Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside —- An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 1003 (2013).

33. *See id.* at 919–20.

indicated that drafters intend for agencies to fill ambiguities or gaps relating to major policy questions[.]"[34]

But Justice Gorsuch does not cite those studies, and many statutes do unambiguously task agencies with major policy choices. As Professor Sunstein points out, Congress frequently passes statutes whose text seems to require agencies to answer major questions.[35] We need look no further than the Clean Air Act, the statute at issue in *West Virginia*. Section 112(n), for example, requires the EPA to regulate hazardous pollutants from power plants upon a finding that such regulation is "appropriate and necessary."[36] Section 109(b)(1) requires the EPA to promulgate national ambient air quality standards at levels "requisite to protect the public health."[37] Those sections seem to require EPA to resolve major questions. And the Act's legislative history, especially the goals of Senator Ed Muskie, who spearheaded it, strongly supports an intent to delegate major decisions.[38] So an honest Congressional-intent investigation might well show that most delegations Justice Gorsuch would call "unintentional" are, in fact, deliberate.

But suppose Justice Gorsuch eliminates the references to failed legislation—they are not essential to his argument. Does not the mere use of a clear-statement rule still offend textualism because it risks overriding the best meaning of the text? Justice Gorsuch is

34. *Id.* at 1003.

35. *See* Sunstein, *supra* note 10, at 259.

36. 42 U.S.C. § 7412(n)(1)(A).

37. 42 U.S.C. § 7409(b)(1). One might even argue that § 108(a)(1)(C) allows EPA total discretion in deciding whether to regulate any pollutants as "criteria pollutants" in the first place, though this argument has not yet found favor with the courts. *See* Nat. Res. Def. Council, Inc. v. Train, 545 F.2d 320, 324 (2d Cir. 1976).

38. Professor Richard Lazarus put it this way: "Congressional intent in the context of federal environmental law may be fairly equated with the intent of Senator Ed Muskie of Maine. Federal courts in their opinions have cited to the views of Senator Muskie in the enactment of federal environmental statutes in at least 293 separate cases." Richard J. Lazarus, *Senator Muskie's Enduring Legacy in the Courts*, 67 MAINE L. REV. 239, 242 (2015) (emphasis omitted). Professor Lazarus further explains that the EPA relied on Muskie twice in its Clean Power Plan rulemaking proposal and five more times in the accompanying legal memorandum, mostly to show that § 111(d) would, in Muskie's mind, have encompassed generation-shifting. *Id.* at 249.

aware of that problem, too.[39] We might expect him to respond like Justice Scalia, who once suggested that textualism could tolerate some clear-statement rules as "exaggerated statement[s] of what normal, no-thumb-on-the-scales interpretation would produce anyway. For example, since congressional elimination of state sovereign immunity is such an extraordinary act, one would normally expect it to be explicitly decreed rather than offhandedly implied—so something like a 'clear statement' rule is merely normal interpretation."[40] Perhaps Justice Gorsuch agrees—he never explicitly claims to be overriding the best meaning of the text, and Justice Scalia's explanation matches Justice Gorsuch's assumptions about Congressional intent.[41] But he does not respond with the Justice Scalia view. Instead, he looks to history: "[O]ur law is full of clear-statement rules and has been since the Founding."[42] The dissenters rely on clear-statement rules too, he says.[43] Then he drops the point and moves on. It is not clear how this perfunctory response quiets textualist concerns. Maybe the historical reference could, if expanded, justify clear-statement rules under a kind of original-methods originalism: perhaps the Article III judicial power simply

39. *West Virginia,* 142 S. Ct. at 2625 (Gorsuch, J., concurring). Oddly, Gorsuch claims to be responding to Kagan's dissent in defending clear-statement rules, but Kagan never explicitly attacks them. *Id.*

40. Scalia, *supra* note 28, at 29.

41. Justice Barrett describes substantive canons as imposing a "'clarity tax' on Congress[.]" *Biden,* 143 S. Ct. at 2376–77 (Barrett, J., concurring) (quoting John Manning, *Clear Statement Rules and the Constitution,* 110 COLUM. L. REV. 399, 403 (2010)). Justice Gorsuch never uses that sort of language to describe clear-statement rules. He does, however, open by citing then-Professor Barrett to argue that "clear-statement rules help courts 'act as faithful agents of the Constitution.'" *West Virginia,* 142 S. Ct. at 2616 (Gorsuch, J., concurring) (quoting Amy Coney Barrett, *Substantive Canons and Faithful Agency,* 90 B.U. L. REV. 109, 169 (2010)). In the quoted passage, Justice Barrett argued that clear-statement rules might indeed strain textual meaning, or impose a clarity tax, and in that sense clash with the view that federal judges are faithful agents of *Congress.* Perhaps, though, when enforcing constitutional boundaries, judges are faithful agents of the *Constitution,* rather than Congress. If Justice Gorsuch meant to import that meaning, he may well agree that clear-statement rules sometimes strain the text itself, and instead think they are best justified on other grounds (like constitutional fidelity).

42. *West Virginia,* 142 S. Ct. at 2620 (Gorsuch, J., concurring).

43. *Id.*

includes the power to establish clear-statement rules. Whatever his precise rationale, Justice Gorsuch seemingly thinks that clear-statement rules and textualism can coexist. The judiciary is ultimately charged with making sure that Congress does not violate the Constitution, and clear-statement rules help to keep it from doing so—as they always have.[44]

In short, Justice Gorsuch's MQD might irk a textualist for two basic reasons. First, as a clear-statement rule, it prioritizes a structural norm over the best reading of the text. Second, it relies upon a presumption about congressional intent, which is not merely uncomfortable for a textualist but also (arguably) empirically wrong. And Justice Gorsuch does not attempt any serious textualist defense of this apparent departure from basic textualist procedure, instead falling back on history, tradition, and (perhaps) the original meaning of the Article III judicial power.

II. JUSTICE BARRETT'S MQD: STRUCTURAL CONTEXT

Justice Barrett's *Biden v. Nebraska* concurrence begins with a frank acknowledgement: substantive canons expressed as clear-statement rules pose grave problems for an honest textualist.[45] Textualism seeks the meaning of a text—but with a clear-statement MQD, "a plausible antidelegation interpretation wins even if the agency's interpretation is better."[46] But the MQD *is* acceptable, she argues, if it simply yields a text's actual meaning. Textual meaning always depends on context, both linguistic context and "common sense."[47] A word's communicative content depends on who speaks it and who hears it: it depends on shared meaning.

Justice Barrett offers her now well-known example of a parent and a babysitter.[48] It is an example that leads Professor Sunstein to call her MQD "Wittgensteinian," for it is resembles an illustration

44. *See id.* at 2616–17 (observing that judiciary is charged with ensuring constitutional fidelity and uses clear-statement rules as a tool for doing so).

45. 143 S. Ct. at 2377 (Barrett, J., concurring).

46. *Id.*

47. *Id.* at 2378.

48. *Id.* at 2379.

from Ludwig Wittgenstein's *Philosophical Investigations*.[49] Wittgenstein proposes the following thought experiement to illustrate how a word may denote a greater or lesser category of items according to context:

> Someone says to me: "Shew the children a game." I teach them gaming with dice, and the other says "I didn't mean that sort of game." Must the exclusion of the game with dice have come before his mind when he gave me the order?[50]

The implication, of course, is that it must *not* have come before his mind to limit the meaning of "game" in this context, because shared societal linguistic understanding suggests that "game" does not include gambling when joined with "children." Likewise, Justice Barrett's hypothetical parent hands over her credit card and tells the babysitter, "Make sure the kids have fun."[51] Absent additional context, this command does not allow the babysitter to take the kids on an expensive overnight trip, even though such a trip will probably ensure a good time for the kids.[52] The delegation, though literally inclusive of amusement park trips, cannot be reasonably read to encompass them. On the other hand, additional contextual information about the parents and the babysitter will change the delegation's meaning.[53] If the babysitter is a grandparent, the amusement park trip might be fine.[54] If the parents are billionaires, the "fun" can be more expensive. If the parent "mentioned that she had budgeted $2000 for weekend entertainment," then $2000 is probably acceptable, even if that information arises from context, rather than the words of the delegation itself.[55] In short, "[s]urrounding circumstances, whether contained within the

49. Sunstein, *supra* note 10, at 251, 254.

50. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 33 (G.E.M. Anscombe trans., 3d ed. 1986); Sunstein, *supra* note 10, at 254.

51. *Biden,* 143 S. Ct. at 2379 (Barrett, J., concurring).

52. *Id.* at 2379–80.

53. *Id.* at 2380.

54. *Id.*

55. *Id.*

statutory scheme or external to it, can narrow or broaden the scope of a delegation."[56]

All this applies to statutory interpretation, too. Just as we expect the parent to authorize a weekend trip clearly, we expect Congress to authorize major policy choices clearly. And "[t]his expectation of clarity is rooted in the basic premise that Congress normally 'intends to make major policy decisions itself, not leave those decision to agencies.'"[57] The expectation is a matter of "common sense."[58]

But hold on—that "basic premise" looks familiar. It sounds very much like Justice Gorsuch's presumptions about Congressional intent. Thus, as Professor Sunstein points out, it opens Justice Barrett to the same empirical problems: what if Congress *does* frequently intend to leave major policy decisions to agencies?[59] Now even this reworked, textualist MQD seems to be relying on Congressional intent.

III. THE THIRD-PARTY OBSERVER: AVOIDING CONGRESSIONAL INTENT

Justice Barrett's solution comes from the way she phrases the "basic premise" elsewhere in the opinion. In the same paragraph that introduces the "basic premise," Justice Barrett observes that "a reasonable interpreter" would expect Congress to answer major policy questions.[60] In the next paragraph, she explains it like this: "My point is simply that in a system of separated powers, a *reasonably informed interpreter* would expect Congress to legislate on 'important subjects' while delegating away only 'the details.'"[61] As a dedicated textualist, Justice Barrett reads the text through a third-

56. *Id.*

57. *Id.* (citing U.S. Telecomm. Ass'n. v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc)).

58. Barrett repeats that description in numerous places. *See, e.g., Biden,* 143 S. Ct. at 2378, 2379, 2384 (Barrett, J., concurring).

59. Sunstein, *supra* note 10, at 258–59.

60. *Biden,* 143 S. Ct. at 2380 (Barrett, J., concurring).

61. *Id.* at 2380–81 (emphasis added) (citing Wayman v. Southard, 10 Wheat. 1, 43 (1825)).

party lens. Thus, it simply does not matter, at least initially, whether Congress does or does not routinely intend to delegate major questions. Justice Barrett is not asking what Congress *actually does or intends:* she is asking what a reasonable third-party interpreter would *think* it does or intends.

Justice Barrett's third-party interpreter approach makes a difference, both in practice and in theory. In practice, this approach may well create interpretive outcomes that diverge from actual congressional intent. It is very possible that Senator Muskie intended the Clean Air Act to grant EPA the broadest latitude possible to regulate substances newly discovered to possess dangerous properties, like carbon emissions, thereby covering the Clean Power Plan at issue in *West Virginia.*[62] It might well follow that he, and other drafters of the Clean Air Act, did want EPA to make major policy decisions. If so, Justice Gorsuch has a problem: his fundamental assumption about congressional intent turned out to be wrong. But Justice Barrett is fine, because it is still possible that a third party, looking on from the outside and declining to inquire into *actual* Congressional intent, would observe a mismatch between "best system of emission reduction" [63] and EPA's generation-shifting scheme for carbon emissions. What counts is not what Congress actually intended, but what a reasonable observer would *think* it intended on the basis of constitutional context. It is the reasonable observer's "practical understanding of legislative intent"—which really relies on a commonsense understanding of the Constitution—that matters.[64] Legislators might well possess private intentions that a reasonable reader of the text would not uncover. Suppose the parent really *had* secretly hoped her babysitter would venture upon a wild escapade. It would be no less absurd for a reasonable observer, knowing what reasonable people know about babysitting in general, to suppose

62. *See* Lazarus, *supra* note 38, at 242–43; *see also Fact Sheet: Overview of the Clean Power Plan,* ENVIRONMENTAL PROTECTION AGENCY (August 2015), https://archive.epa.gov/epa/cleanpowerplan/fact-sheet-overview-clean-power-plan.html [https://perma.cc/FL6F-C8HV] (describing the Clean Power Plan).

63. 42 U.S.C. § 7411(a)(1).

64. *Biden,* 143 S. Ct. at 2380 (Barrett, J., concurring) (quoting *West Virginia,* 142 S. Ct. at 2609).

that "go and have fun" includes amusement parks.[65] Our observer could *ask* the parent for clarification if she suspected a secret meaning. But if the parent says, "Yes, I did really mean for the kids to visit an amusement park," then the clarification has formed part of the command. In the context of statutory interpretation, this is like asking Congress to clarify its intent by expressing that intent in law. And this is exactly what every variant of the MQD demands.

Justice Barrett's approach makes a theoretical difference, too, because an empirical inquiry into an *observer's* state of mind with respect to congressional intent is not offensive to textualism, unlike an empirical inquiry into congressional intent *per se.* Asking how some third party would understand the text *is* the textualist inquiry—not just for the MQD, but in general. It is this understanding that forms a text's meaning. And a reasonable interpreter might have contextual views about congressional intent in general—that is, views about what Congress generally does, or what would be commonsensical for Congress to do, or the like. Judge Easterbrook, for example, notes that "Language takes meaning from its linguistic context, but historical and governmental contexts also matter."[66] Justice Scalia is willing to consider "a sort of 'objectified' intent."[67]

---

65. Has the reasonable observer any duty to inquire into *actual* Congressional intent? An observer who failed to do so might arguably be unreasonable. And it is probably true that absolute certainty about intent would alter the meaning of a delegation. The problem, of course, is that no such inquiry is practically possible: there is no such thing as a deliberative body's uniform intent. Besides, the inquiry is highly specialized, which makes it especially challenging for ordinary regulated parties. So a reasonable observer with such a duty would no longer be a textualist reasonable observer, to the extent that textualism rests on an ontological definition of "law" from the viewpoint of regulated persons. Even if an inquiry into actual intent is necessary to establish the absolute best textual meaning, textualism as a legal methodology must settle for the best textual meaning available without that inquiry.

66. Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited,* 112 HARV. L. REV. 1876, 1913 (1999).

67. Scalia, *supra* note 28, at 17; *see also* Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 354 (2005). This notion of "objectified" intent may be justified by thinking of the Constitution as a contract, as originalists generally do. In evaluating consent, the ordinary common-law rules of contract interpretation seek the intent of the parties. But this is not subjective intent: instead, it is the intent a document objectively manifests to a reasonable observer.

But a reasonable interpreter could not inquire into *actual* congressional intent: that would defeat the whole textualist project of positing a third-party interpreter in the first place. That is why Justice Barrett's observer draws contextual information from the Constitution. She is "treating the Constitution's structure as part of the context in which a delegation occurs,"[68] as Justice Barrett explains. It is "[b]ecause the Constitution vests Congress with '[a]ll legislative powers'"—not because Congress does this, that, or the other thing—that her interpreter "would expect it to make the big-time policy calls itself."[69] What Justice Barrett is trying to show is that, absent additional information, a reasonable third party would not take a passage ostensibly delegating a major question to actually encompass that delegation. And that reasonable observer (a good textualist) does not get there by troubling herself about the empirical niceties of what Congress actually does. Instead, the observer looks to constitutional context, learning from the Constitution what kind of thing Congress is, and what kind of thing an agency is, and what kind of relationship they should therefore have.

IV. THE EIDELSON-STEPHENSON CHALLENGE: CAN A SUBSTANTIVE CANON BE RENDERED NON-SUBSTANTIVE?

Justice Barrett's structure-first approach also helps counter one of the latest, and most sophisticated, objections to her MQD formulation. Professors Benjamin Eidelson and Matthew Stephenson argue convincingly that substantive canons and textualism cannot coexist.[70] But Professors Eidelson and Stephenson also argue that Justice Barrett's attempt to turn the MQD into a non-substantive canon is not textualist, either. That argument is less convincing.

68. *Biden,* 143 S. Ct. at 2380 (Barrett, J., concurring).

69. *Id.*

70. Eidelson & Stephenson, *supra* note 13, at 516–21.

A. The challenge: Does a shared anti-major-delegations norm really shape statutory meaning?

Professors Eidelson and Stephenson aptly describe the basic distinction between textually permissible and impermissible canons. A canon is substantive (and thus impermissible for a textualist) only when "it purports to speak to a statute's proper legal effect in a way that is not mediated by its evidentiary bearing on what a reasonable reader would take a lawmaker to have said in enacting the statute."[71] By contrast, a textualist may consider canons "that are justified by their probative value with respect to a statute's *communicative content*—that is, by the light that they cast on what a reasonable reader would understand a lawmaker to have said."[72] Professors Eidelson and Stephenson agree there is nothing "inherently improper" in Justice Barrett's attempt to use congressional purpose in a general, contextual sense, as part of a reasonable third party's interpretive backdrop.[73] But they nevertheless think her argument is flawed. They do not think a "reasonable interpreter" would agree that Congress generally does intend to answer major questions. A reasonable interpreter would not be justified in treating that premise as the kind of shared presumption that affects the communicative content of language.

First, they echo Professor Sunstein's concerns: they worry that Congress does often delegate major questions and that Justice Barrett's "baseline assumptions" might be normative in the sense that they "reflect her sense of what 'the Constitution's structure contemplates—namely, a regime in which Congress make[s] the big-time policy calls itself'—rather than even her own sense of what Congress actually does."[74] More importantly:

> In order for a textualist interpreter to be justified in drawing the sort of inference about statutory meaning that we have described [in favor of a presumption that Congress generally intends to

71. *Id.* at 533–34.
72. *Id.* at 533.
73. *Id.* at 541.
74. *Id.* at 541–42.

> answer major questions itself], it is not enough for them to be correct in endorsing the premises of a given canon—for example, correct in the belief that Congress rarely makes major delegations—or even to be correct in thinking that the lawmaker shares their perspective on that point. What matters, really, is whether the interpreter thinks that the lawmaker knows that this same perspective is widely shared among the audience by whom they intend to be understood. Only then would a reasonable reader expect the lawmaker to take their (presumed) knowledge of some proposition into account in shaping a message to them[.][75]

In other words, Professors Eidelson and Stephenson argue, a reasonable interpreter would not merely need to be *right* that Congress generally intends to answer major questions on its own, but would also need to also be justified in supposing that Congress thought readers would agree, and drafted statutes with that assumption in mind.[76] But this anti-major-delegations perspective is hardly a matter of common knowledge, or even one upon which most educated observers agree. If we polled lawyers or members of Congress, for example, we might well find that majorities think either that Congress *does* frequently intend to delegate major questions, or else that the Constitution allows such delegations. It makes little sense to suppose that Congress took this premise for granted in the minds of its readers and legislated accordingly. Thus, this premise is not something a reasonable interpreter could honestly take to be part of a statute's communicative backdrop, and therefore not something that genuinely modifies textual meaning.[77]

B. The response: Yes, because the "basic premise" is a normatively rational structural premise, not a shared background convention.

Professors Eidelson and Stephenson object that any anti-major-delegations presumption is neither obvious enough nor widely shared enough to modify textual meaning. But that objection

75. *Id.* at 542.
76. *Id.*
77. *Id.* at 543.

misallocates the burden of proof and misunderstands Justice Barrett's structural emphasis. The *first* context Justice Barrett's interpreter sees is the Constitution's Congress-agency relationship—just as someone looking in on the parent and babysitter would first identify them as parent and babysitter before parsing their words. Thus, it does not really matter whether a shared anti-major-delegations supposition is common knowledge, or is widely shared by actual observers, or indeed whether it reflects an underlying reality. What matters is whether a reasonable interpreter would *look at the Constitution and say it exists.*

Professors Eidelson and Stephenson must be thinking of the reasonable observer as something like an aggregate of actual observers—one whose rationality rests, in part, on what actual observers think.[78] That is why they care whether Congress actually does delegate major questions, and that is why they ask whether Congress actually shares the relevant presumptions.[79] The answers to those questions might well affect shared interpretive background, and so modify the views of a third-party observer who operates like an amalgamation of actual observers. But Justice Barrett's reasonable observer seems to emphasize *normative or pure* rationality, relying on what is reasonable *per se,* not what most people *say* is reasonable. Not once does Justice Barrett's opinion in *Biden v. Nebraska* refer to actual Congressional practice, or widespread agreement about a non-delegation norm, or anything like that. Instead, a contextual no-major-delegations premise "makes eminent sense in light of our *constitutional structure,* which is itself part of the legal context framing any delegation."[80] That is a logical judgement about what kind of principal-agent context the Constitution creates.[81]

---

78. Thanks to Bill Watson for first suggesting this idea.

79. Eidelson & Stephenson, *supra* note 13, at 541–42 (noting that the authors "see little reason to think that" delegations of major questions really are "anomalous").

80. *Biden,* 143 S. Ct. at 2380 (Barrett, J., concurring) (emphasis added).

81. At the root of confusion about how to define a reasonable, third-party interpreter lies a difficulty that extends beyond the scope of this Note: the concept of "faithful agency" is sometimes at odds with the quest for textual meaning. Textualists usually describe judges as faithful agents of Congress. *See, e.g.,* Barrett, *supra* note 41, at 109;

Even our intuitions about parents and babysitters do not arise merely from cultural convention. Instead, "[o]ur expectation of clearer authorization for the amusement-park trip . . . reflects the intuition that the parent is in charge and sets the terms for the babysitter."[82] "If, by contrast, one parent left the children with the other parent for the weekend, we would view the same trip differently because the parents share authority over the children. The balance of power between those in a relationship inevitably frames our understanding of their communications."[83] These are logical deductions—logical deductions that rely on shared cultural practice, but also abstract assessments of the balance of power in a relationship.

The point is even clearer in the context of a constitutional command than a parental one. "[W]hen it comes to the Nation's policy, the Constitution gives Congress the reins—a point of context that no reasonable interpreter could ignore."[84] The Constitution is a text susceptible to logical analysis—a kind of authoritative manual for

---

John Manning, *Textualism and the Equity of the Statute,* 101 COLUM. L. REV. 1, 5, 127 (2001) (arguing that the original meaning of the Article III "judicial power" requires or at least allows faithful agency); Manning, *Clear Statement Rules and the Constitution, supra* note 41, at 428–30. But consider another example Barrett offers in *Biden v. Nebraska*. Suppose a grocer tells his clerk to "go the orchard and buy apples for the store." *Id.* at 2379. Context implies limits to the clerk's "apple-purchasing authority;" he cannot buy far more apples than the grocer usually stocks, for example. *Id.* But this limit, from the agent's (the clerk's) point of view, is less one of context than presumed subjective intent. The clerk, as a good servant, will ask himself what his boss really had in mind, because he knows that he will be rewarded or punished based on whether he did what his boss really wanted, not based on whether his interpretation of the command was reasonable in light of all the surrounding circumstances. A good servant (or a faithful agent) would never, in other words, ask how a reasonable third-party observer might interpret his command, but would always try to guess his master's secret wishes, and would rely on inside information about his relationship to his master—exactly the kinds of things textualist judges try to avoid. Perhaps, therefore, it makes more sense to describe a textualist judge—one interested in justice and fair notice to regulated parties—as a faithful agent *of the statutory text itself,* not a faithful agent of the legislature. Faithful agency to text is also more democratic than faithful agency to the legislature *per se.* Voters can pass judgement on the meaning of a statutory text and adjust their votes accordingly, but cannot very well police legislative intent.

82. *Id.* at 2381.

83. *Id.*

84. *Id.*

the Congress-agency relationship, one that shapes an interpreter's common sense before the introduction of any other evidence.

Think of it this way: suppose all parents started letting all their babysitters go on weekend trips, and said "have fun" with the expectation of fancy trips; and suppose all babysitters understood this. But imagine also a kind of "owner's manual" that delineated the Platonic roles of parents and babysitters: we might call it "The Constitution of Parents and Babysitters." Justice Barrett's reasonable interpreter is like an observer who has the owner's manual and who reads that manual before turning to any information about this novel set of cultural conventions. She does not decode the manual's meaning by conducting a poll of experts—even if, as discussed below, those experts might offer some value *after* she has finished reading the manual.[85] The owner's manual establishes an authoritative structural premise for interpreting parent-babysitter delegations, just as the Constitution establishes an authoritative structural premise for interpreting Congress-agency delegations.

With that structural premise in mind, a reasonable observer would probably be justified in concluding "that the lawmaker," or the parent, "knows that this same perspective is widely shared among the audience by whom they intend to be understood," and had shaped his statutory message accordingly.[86] But in fact even that conclusion is now unnecessary, because the statutory message,

85. But linguistic meaning is conventional, and the Constitution consists of words. So is it even possible to interpret the Constitution with an emphasis on "pure reason"? Is that even a coherent idea? Undoubtedly some resort to shared linguistic meaning is necessary: that is the whole point of the original public meaning project. But linguistic meaning relies on both logic and convention, and the ratio of logic to convention increases as complexity and length increase. Consider a word or a phrase: these things mean whatever we all agree they mean. But if a phrase contains a logical deduction or statement, then the meaning of that deduction or statement is not conventional. Every term it employs might have a meaning that arises from social conventions, but once all those meanings have been established the deduction remains, and must be performed by logic alone. And logic itself is not capable of social construction, but rather depends upon the structure of the human mind: our minds cannot evade basic logical rules while continuing to "think" in any coherent sense. So one can think of textual meaning as a set of conventions connected by logic. And the longer and more complicated the text grows, the more logical connections predominate in establishing meaning.

86. Eidelson & Stephenson, *supra* note 13, at 542.

read in its constitutional context, now excludes major delegations by default, without any intermediate step of presumed message-shaping. Given the owner's manual, the parent's command excludes long trips, whether she ever thought about the meaning of "have fun" or not. Or, to return to the Wittgenstein example, "Shew the children a game" excludes gambling by default; the whole point of the example is that the possibility of gambling must *not* have come before the mind of the game-demander.[87] We can assume that the parent would exclude long trips *if asked,* and assume that the game-demander would exclude gambling *if asked,* but must not assume that either one has given any actual thought to the matter. Those assumptions do not even need to be correct—they just need to be reasonable.

All this does not render shared communicative presumptions or the views of actual interpreters irrelevant: perhaps they come into play after the reasonable observer has reasonably consulted the Constitution. Maybe the observer polls the experts after reading the manual. But Justice Barrett's observer clearly starts with the Constitution to find an initial, rationally derived structural context, which might then be rebuttable by other means.[88] As Justice Barrett puts it, "[i]n some cases, the court's initial skepticism might be overcome by text directly authorizing the agency action or context demonstrating that the agency's interpretation is convincing."[89]

Professors Eidelson and Stephenson would demand a clear, shared anti-major-delegation understanding to override a text's apparent major delegation.[90] Starting from this structural premise, though, the Eidelson-Stephenson test might be restated to say that a textualist interpreter can draw from statutory text an inference *in favor* of a major delegation only if she can find a shared

87. WITTGENSTEIN, *supra* note 50, at 33.

88. When is a shared understanding between Congress and agencies sufficient to override the structural premise? A bright-line answer extends well beyond the scope of this Note, but most likely the line is one for elucidation through judicial and congressional practice. That practice, after all, itself helps shape the shared background assumptions that create shared meaning.

89. *Biden,* 143 S. Ct. at 2381 (Barrett, J., concurring).

90. Eidelson & Stephenson, *supra* note 13, at 543.

presumption between Congress and the agencies (and maybe regulated parties) that delegations are to be read with the strictest literalism, even when they encompass major matters. Only then has the communicative content of language changed to favor a delegation.

C. Can textualism accommodate a structure-first observer?

But does this structure-first approach to the third-party interpreter make sense? In truth, any hypothetical "reasonable" observer needs both a little pure rationality and a little empiricism. An observer who disregarded the views of all actual observers probably would not be "reasonable," since language is ultimately a social construct. But an observer who lacks *any* normative priors is not reasonable, either, because reasonability is itself a normative prior. And there might be good reasons for a textualist to emphasize a logic-first, constitutional-structure-first approach.

First, the Congress-agency relationship *does have* an owner's manual. It is the Constitution. Indeed, that is why the Congress-agency relationship is a little different from the parent-babysitter relationship, and why it is more like a parent-babysitter relationship that comes with a "Constitution of Parents and Babysitters." Absent that document, a reasonable interpreter will rely largely on shared societal conventions about what parents and babysitters do. But it makes perfect sense for an interpreter who has the manual to check the manual first.

Second, common sense and abstract rationality become more important as empirical evidence diminishes. Our interpreter is more likely to check the owner's manual if she does not know anything about what babysitters and parents usually do, or if public opinion is hopelessly muddled on the subject. Maybe parenting experts disagree about how often parents do let their babysitters go on weekend trips. In that case, even an interpreter *without* an owner's manual will be left to rely more heavily on abstract deductions about the Platonic nature of parents and babysitters. And the empirical

evidence about what Congress does, and what actual observers *think* it does, is debatable and inconclusive.[91]

Finally, a pure-reason, structure-first inquiry into objectified congressional intent has, for a textualist, the advantage of minimizing the use of *actual* intent. The problem of reliance on actual intent will almost certainly arise if the third-party observer is something like an aggregate of actual observers, since the views of many actual observers probably do depend, at least indirectly, on actual congressional practice. (That is probably why Professors Eidelson and Stephenson mention actual congressional practice.)[92] A structure-first inquiry minimizes the awkward problems of distilling unitary intent from a multi-member body or examining legislative history or otherwise relying on information probably unknown to regulated parties.[93] In short, it minimizes the problems that lead textualists to eschew congressional intent in the first place. The "basic premise" is less awkward for textualism if it is mostly an abstract endeavor rather than an attempt to aggregate presumptions commonly shared among legislative drafters, lawyers, law professors, or regulated parties.[94] And it fits the spirit of textualism, too: that spirit, insofar as an interpretive methodology can have a spirit, is that Congress could mean something, could expect regulated parties to agree with its own priors, could shape its message accordingly, and be wrong anyway, because the text just does not say that.[95]

---

91. *See* Gluck & Bressman, *supra* note 32, at 1003.

92. *See* Eidelson & Stephenson, *supra* note 13, at 541.

93. Are normative priors unknown to regulated parties? If they are truly matters of "common sense" or basic reasonableness, they ought to be more easily ascertained than legislative intent.

94. Barrett's MQD is less an attempt to integrate Congressional intent into textualism than an attempt to integrate structuralism into textualism.

95. *See, e.g.*, Justice Scalia's opinion in *City of Chicago v. Env't Def. Fund,* 511 U.S. 328, 335–37 (1994). There Congress had attempted to create a complete exclusion from hazardous waste requirements for certain kinds of waste incinerators. Everyone knew what Congress meant, and why it had chosen the language it did: it was trying to codify a pre-existing EPA regulation that did create this kind of complete exclusion. But the language it chose simply did not create the exclusion it wanted to create. *Id.*

V. SMUGGLING IN SUBJECTIVITY?

But all this raises one more hurdle: if Justice Barrett's "basic premise" is not empirical, it has another problem, Professor Sunstein argues.[96] Yes, maybe Justice Barrett is relying on the Constitution, not actual Congressional practice, and so escaping any empirical difficulties.[97] But now she seems to be making a normative claim—the same kind of "Lockean" normative claim Justice Gorsuch was making! Her linguistic argument "starts to converge with the Lockean argument."[98] So perhaps Justice Barrett is just smuggling in her preferences under the guise of a linguistic canon. Professors Eidelson and Stephenson worry about the same thing, too—and point to Justice Barrett herself, who, in her academic career, objected to the "'temptation to rationalize ostensibly substantive canons' in nonsubstantive terms."[99]

The objection is a severe one. Justice Barrett might offer two kinds of defenses. She might begin by agreeing that her MQD is Justice Gorsuch with extra steps, but she might say that the extra steps really matter. By claiming that her structural premise shapes the meaning of a delegation, she is claiming that a hypothetical third-party interpreter who disagreed would be not merely wrong but *unreasonable or irrational.* She must show that her proposition is not merely *correct* but required by common sense. Normative rationality must compel it. That higher standard stops her from smuggling in mere personal preferences, at least in theory. Of course that distinction might grow weaker in practice, since there is room for debate about which Constitutional interpretations are so false as to be irrational.[100]

---

96. Sunstein, *supra* note 10, at 260.

97. *Id.*

98. *Id.*

99. Eidelson & Stephenson, *supra* note 13, at 543 (quoting Barrett, *supra* note 41, at 120–21).

100. This "rationality barrier" would be a necessary implication even if Justice Barrett's reasonable interpreter relied on an empirical assessment of shared conventions, as Professors Eidelson and Stephenson suppose, but in that case "irrationality" would

Then Justice Barrett might also try a defense that applies equally to Justice Gorsuch: the substantive norm or position they are both defending is very different from a preference or a policy view. Professor Sunstein describes the Lockean argument as "normative," and suggests that Justice Barrett's "basic premise," if not empirical, might be something like "a legal fiction, or an article of faith, grounded on Article I, Section I."[101] But those terms do not adequately describe Justice Barrett's premise (and they probably do not describe Justice Gorsuch's, either). Both Justice Gorsuch and Justice Barrett are offering a structural claim about the Constitution—a legal argument about what the Constitution says. It is falsifiable or at least contestable, like any structural argument. A dissenter could argue that the Constitution does not rely on such a rigid separation; that delegations of major questions occurred even in the early Republic; or that delegations will not "dash [the] whole scheme," as Justice Gorsuch puts it.[102] Indeed, accumulating originalist evidence against a strong nondelegation doctrine is perhaps the greatest threat to Justice Gorsuch's separation-of-powers project, and that evidence makes it harder to say that an interpreter would start with Justice Barrett's structural premise as a matter of common sense.[103] Maybe Justice Barrett (and Justice Gorsuch) think the Constitution *should* protect the separation of powers by limiting major delegations. But their respective structural premises are each, in different ways, not about whether it *should,* but about whether it *does.*

---

have different, and perhaps more stringent, implications. It is probably very clear, in many cases, that a premise is not so widely shared as to constitute a background presumption that shapes communicative content. That judgement is probably more obvious and less subjective than a judgement about whether a rational person can rationally adopt only one particular view of the Constitution.

101. Sunstein, *supra* note 10, at 260.

102. *West Virginia,* 142 S. Ct. at 2618 (Gorsuch, J., concurring) (citing *Dep't of Transp. v. Ass'n of Am. R.R.,* 575 U.S. 43, 61 (2015) (Alito, J., concurring)).

103. *See, e.g.,* Ilan Wurman, *Nondelegation at the Founding,* 130 YALE L.J. 1288 (2021), for an account favorable to the nondelegation doctrine that still falls well short of establishing the version Justice Gorsuch has advocated.

VI. STREAMLINING THE "BASIC PREMISE"

All this may serve to render Justice Barrett's MQD textualist, but not, perhaps, to render it convincing. The whiff of subjective judgement lingers. The "basic premise" might be structural, but it could be a bad structural premise. Or perhaps the notion of a normatively rational third-party interpreter just will not do. Perhaps the "basic premise" is more trouble than it is worth.

Actually, as Professor Sunstein points out, Justice Barrett might not need the "basic premise" at all.[104] The mere fact that most of the delegations the MQD fells are novel or surprising or bad fits for a statutory scheme might be enough to render them textually impermissible without any underlying assumptions about the nature of Congress or the separation of powers.[105] Perhaps she keeps it, Professor Sunstein suggests, because she does believe that something about the modern administrative state cuts a deep gash into the design of our constitutional order, and she thinks the point is an important one to remember.[106]

Justice Barrett's "basic premise" might be placed on firmer textual footing, while retaining some of its separation-of-powers flavor, if the structural norm is scaled back slightly, rendering it less categorical. As it stands, the "basic premise" says that a reasonably informed interpreter would assume that Congress "intends to make major policy decisions itself, not leave those decision to agencies."[107] Suppose the premise is reworded like this: "A reasonably informed interpreter will assume that Congress does not usually want agencies to make policy decisions that are novel, strange, or unexpected." This sort of phrasing, though still vague, is a more precise and more nuanced substitute for "majorness" alone. It is probably easier to see that an agency action is strange or statutorily unexpected than to decide whether it has major economic or political implications, and the standard might, in practice, prove more

104. Sunstein, *supra* note 10, at 258.
105. *Id.*
106. *Id.*
107. *Biden,* 143 S. Ct. at 2380 (Barrett, J., concurring).

neutral.[108] Economic or political majorness is closely tied to political preferences about the proper size of government in a way novelty alone is not. That phrasing allows for the possibility that Congress sometimes does want to delegate a lot of *power*, but assumes that Congress, when it does delegate substantial power, wants that power to be used in predictable ways, probably ones related to agency expertise. Congress might tell the EPA, "Go ahead and use your expertise to come up with clever ways to reduce air pollution—just do not frighten me!" The nice thing about this kind of supposition is that it could rest on many different foundations. It could rely upon a real concern about separation-of-powers (and thus upon a structural, Constitutional norm, like Justice Barrett's "basic premise"). It could also rely on institutional jealousy, or even notions of efficient technocracy and the division of labor. It is a premise that *could* be justified in a structure-first way, but it is maybe also a premise that is empirically true and widely shared by actual observers. That would make it acceptable in Professors Eidelson and Stephenson's account of a third-party observer, too: this kind of norm *might* actually be part of a statute's communicative backdrop.[109]

---

108. Consider *Texas v. EPA*, a challenge, now pending before the D.C. Circuit, to the Biden Administration's Clean Air Act motor vehicle standards. State and private petitioners have tried to argue "majorness" by noting potential impacts on foreign policy, electricity consumption, state energy grids. Final Opening Brief for State Petitioners at 22–24, Texas v. EPA (No. 22-1031) (D.C. Cir. argued Sept. 14, 2023) The EPA responded by arguing that the rule is *good* for national security and disputing the other alleged impacts. EPA's Final Answering Brief at 57–59, Texas v. EPA (No. 22-1031) (D.C. Cir. argued Sept. 14, 2023). That is a pure policy debate. (Besides, alleged national security effects should render an MQD argument less plausible. A foreign-affairs delegation is less novel or surprising than any other kind.)

109. Eidelson and Stephenson, *supra* note 13, at 542 (asking whether a legislator would shape language in expectation of a reasonable reader's interpretive lens). Of course, if watered down too far, the basic premise eventually just looks like the absurdity canon. Perhaps Justice Barrett's MQD could even be described as a structural twist on the absurdity canon—a suggestion that some structural assumptions are absurd, and that some structural premises are necessary to avoid absurdity. The question is how far beyond the absurdity canon structural textualism can go (or how much structure the concept of "absurdity" can accommodate). Is it "absurd" to omit a rationally compelled premise? Or is "irrational" a lower bar than "absurd"?

It is very possible that lower courts will water down the MQD this way, using what Professor Sunstein calls an "incompletely theorized" presumption against novel or astonishing statutory language, with an occasional reach for structural principles (assuming they gravitate toward Justice Barrett's version, eschewing Justice Gorsuch's more rigid framework).[110] The idea that novel and surprising agency action lies outside the scope of statutory text is intuitively appealing, and perhaps an occasional reach for a structural norm makes sense when a court can't otherwise explain why a particular agency action is odd or textually off in some way—or when a court wants to make a point about the separation of powers.

CONCLUSION

Justice Barrett's MQD is not so much a textualist stretch, a desperate attempt to transform a substantive canon into a nonsubstantive one, as it is a thoroughly novel way of integrating constitutional structure into textual meaning. The idea that a third-party interpreter's rationality and common sense is not just "commonness," but instead normative reasonableness, serves as a check to an account of linguistic meaning that sacrifices logic to convention. "Logic" can serve as a vehicle for smuggling in judicial preference—but shared meaning can do the same, when the inquiry into sharedness becomes an inquiry into actual Congressional practice, or an inquiry only into what Congress thought its audience thought it was going to mean, on the basis of what most people think it usually means. Perhaps more importantly, though, Justice Barrett's MQD helps create a logical home for structuralism, an ill-defined method of constitutional interpretation that hovers awkwardly around the edges of a first-year law student's introduction to legal interpretation, never quite fitting into the simplified "originalist"

110. Sunstein, *supra* note 10, at 263 (citing Cass R. Sunstein, *Incompletely Theorized Agreements,* 108 HARV. L. REV. 1733, 1735–36 (1995)).

and "living constitutionalist" binary.[111] It is most valuable, in the end, not because it renders the MQD textualist, though this Note has argued that it does. It is valuable because it probes the nature of textualism itself.

111. Even though Justice Barrett's MQD applies to statutes, not constitutions, the structural logic can be transposed: the Constitution might establish structural premises logically evident to a reasonable third-party interpreter, and so ones that modify what specific passages actually mean.

CHARLES FRIED AS FRIEND

RANDALL KENNEDY*

Eulogizing one of the other greats of Harvard Law School, Charles Fried remarked that "Phillip Areeda was a supremely intelligent man."[1] That is true of Charles as well. His magnificent intelligence showed itself in his books, his articles, his classes, his arguments on behalf of the United States as Solicitor General, his jurisprudence as an associate justice of the Supreme Judicial Court of Massachusetts, and his numberless contributions to the Harvard Law School faculty over the course of six decades. He was an extraordinarily nimble, wide-ranging, and probing lawyer, intellectual, and scholar who was deeply devoted to the betterment of the university. These are important features and they mattered to Charles; he worked hard at being at the top of his crafts. I am delighted to recall the strength of his mind; doing so prompts a vivid recollection of him. Such memories, however, albeit welcome, are not what most prompt my gratitude and admiration. Those sentiments are best elicited by recalling Charles Fried as friend.

I met Charles in the summer of 1984 when I joined the Harvard Law School faculty. We became friends quickly and remained friends until the end of his life. Two features especially endeared him to me. He was, emotionally, quite generous. Some may find this surprising because often Charles came off as stern, even forbidding. He was exacting as anyone knows who encountered him as a

* Michael R. Klein Professor of Law, Harvard Law School. The Harvard Law School Federalist Society bestowed upon Professor Kennedy the Charles Fried Intellectual Diversity Award in 2017 and 2024.

1. Justice Charles Fried, *In Memoriam: Phillip E. Areeda*, 109 HARV. L. REV. 889, 891 (1996).

teacher, judge, adversary, or reader. But he was also a person capable of exuding sympathy and offering comfort. I discovered this in tragic circumstances in 2005 when my wife of blessed memory, Dr. Yvedt L. Matory, passed away due to melanoma. Charles and his ever-present wife, Anne Summerscale whom he adored, were tremendously consoling to me. On one occasion, they invited me and my three children to their home for a Sunday supper that became legendary in my household. Twenty years later, my children recall fondly that delicious meal featuring a chicken dish that gave rise to requests for seconds and thirds. They also remember the way that Charles talked with them. Though they were quite young, ranging in age from six to eleven, he treated them with respect, posing questions and sharing agreements and disagreements. They appreciated being taken seriously. For me, though, the most memorable thing about the evening was Charles's straightforward, unreserved, empathetic embrace of my sorrow. He expressed his condolence with a quiet sincerity that provided much-needed solace.

The other deeply attractive feature of Charles's persona was a genuine pluralism that enabled him to entertain friendships with people who occupied all sorts of positions on various political, ideological, philosophical, aesthetic and religious spectrums. From the outset, Charles and I had sharp disagreements. He venerated Ronald Reagan and Margaret Thatcher while I cheered their opponents to the left. He believed that the union movement in the United States no longer served much of a useful purpose. I championed unionism. He scoffed at Judge J. Skelly Wright's invocation of the unconscionability doctrine in *Williams v. Walker-Thomas Furniture Company*.[2] I praised the efforts of the judge (my former boss) to do what he could to discipline an avaricious firm. Charles maintained that the racial justice movement had veered off course with affirmative action and related doctrines. I fervently defended affirmative action.

In 1990 Charles defended President George H. W. Bush's veto of legislation aimed at overriding several recent Supreme Court

2. 350 F.2d 445 (D.C. Cir. 1965).

rulings that had weakened civil rights laws enacted in the 1960s and broadened by courts in the 1970s. Charles maintained that Bush acted rightly in vetoing what the president sneeringly called "a 'quota bill.'"[3] I suggested that Charles was insufficiently attentive to persistent racial harms. He suggested that I was insufficiently attentive to the ways in which bureaucracies and professional reformers habitually over-reach. Our public debates became rather heated. On my part there was shouting, and attempted guilt-tripping, and the energetic deployment of all of the standard left-liberal arguments. On his part, there was a steely refusal to give an inch. Yet we remained friends throughout.

Politics mattered to Charles. But he always kept politics in its place. It was for him a major concern. But never an all-encompassing concern. A pluralist, he resisted any totalizing impulse. He enjoyed the complicated, paradoxical, mysterious particularity of individuals and thus eschewed assessments that depended excessively on generalizations. He was quite willing to acknowledge that while, in his view, a person had espoused an idea he found to be ill-advised, even abhorrent, he nonetheless *liked* that person and was unwilling to abandon them solely on ideological, philosophical, or partisan grounds.

In one of his most cited articles, *The Lawyer as Friend*,[4] Charles defends the virtue of attorneys who zealously represent unsavory clients. He bases his defense on analogizing attorneys to "special purpose friend[s]."[5] In the course of doing so, Charles writes strikingly that "[j]ustice is not all; we are entitled to reserve a portion of our concern and bestow it where we will. We may bestow it entirely at our discretion as in the case of friendship . . . ."[6] I do not claim that I was entitled to Charles's friendship or even that I deserved it. I do

3. Adam Clymer, *Bush Assails 'Quota Bill' at West Point Graduation*, N.Y. TIMES (June 2, 1991), https://www.nytimes.com/1991/06/02/us/bush-assails-quota-bill-at-west-point-graduation.html [https://perma.cc/5EXP-9RBY].

4. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

5. *Id.* at 1072.

6. *Id.* at 1078.

assert that I benefitted from his friendship tremendously, deriving solace, learning, inspiration, and delight. Charles was a great friend. I miss him.

RECOLLECTIONS OF CHARLES FRIED

RICHARD FALLON*

Charles Fried was not literally larger than life, only because nobody is, but he came as close as anyone I have ever known. He was physically imposing, had a booming stentorian voice, and exuded dramatic flair. But other qualities contributed even more to Charles's aura. Among them, he was immensely learned across a range of disciplines, had a remarkably versatile mind, and perennially sought new challenges.

When I first met Charles in the summer of 1982, upon my arrival at Harvard Law School as an assistant professor, I already knew him by reputation. During law school, I had read Charles's philosophical manifesto, *Right and Wrong*,[1] and his celebrated article linking legal ethics to general ethics, *The Lawyer as Friend*.[2] While I was clerking, Charles had also published his paradigm-making book, *Contract as Promise,* which portrayed contract law as aspiring to enforce the moral obligation to keep promises in a messy world of sometimes unknowable intentions and good-faith misunderstandings.[3] As it happens, Harvard Law School's Powers That Be had slated me to teach a section of Contracts during my first semester on the premises. My efforts to master contract law under the tutelage of *Contract as Promise* only enhanced my sense of Charles as operating on an intellectual plane inaccessible to ordinary mortals.

---

* Story Professor of Law, Harvard Law School.

1. CHARLES FRIED, RIGHT AND WRONG (1978).

2. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 YALE L.J. 1060 (1976).

3. CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981).

Charles, however, was much more than an intimidating intellect. When I joined the Law School faculty, he and his wife Anne quickly invited my wife Jenny and me to dinner. At a time when senior faculty routinely tendered dinner invitations to new arrivals, Jenny noticed that a number of professors who had entertained us in their homes would fail even to recognize her in subsequent encounters. Not Charles. He regularly greeted Jenny in an exuberant tone of voice and with a delighted smile whenever he chanced to see her. That behavior was characteristic. Charles's unforced warmth brightened many a day for those who knew him. He had more friends, I would venture, than any other faculty colleague of his generation.

Although Charles was among the great, defining figures of Harvard Law School, his larger-than-life career also included highly consequential roles in other arenas. In 1985 the Reagan Administration tapped him to become Solicitor General of the United States. At the time of his appointment, Charles's academic work had nearly all involved private law, and he had little administrative experience. Yet Charles mastered his brief with alacrity and, I am told, developed warm relations with his deputies in the tightly-knit community of the Solicitor General's Office. After he left his post at the end of the Reagan Administration, Charles wrote a captivating memoir of his experience, *Arguing the Reagan Revolution,* in which he reflected on the challenges that he faced as a principled official serving in the politically charged environment of the Reagan Justice Department.[4]

Having already achieved distinction as a lawyer-philosopher and a Supreme Court advocate for the Reagan Administration, Charles made a foray into a different kind of public service when Governor Willian Weld nominated him to be an associate justice of the Massachusetts Supreme Judicial Court. Charles served with distinction in that post, but he reported privately that he felt "muzzled" when norms of judicial ethics, which he observed scrupulously,

4. CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION — A FIRSTHAND ACCOUNT (1991).

precluded him from speaking publicly on issues of law and public policy, including ones unrelated to the cases on his docket. When Charles let it be known that he would welcome reappointment to the Harvard Law School faculty, his colleagues' unanimous vote to invite him back was an occasion for celebration.

Upon returning to the Law School, Charles again made a distinctive mark. As a trusted counselor to and ally of then-Dean Elena Kagan, he helped heal a number of lingering divisions in the School that had impeded the hiring and recruitment of new faculty during the prior two decades. At the same time, Charles became a valued and inspiring mentor to conservative law school students and organizations.

He also, I think it fair to say, became a better teacher than he had been previously. Always warm and welcoming in relations with friends and colleagues, Charles began to engage more empathetically with his students, even in large classes. When I commented to him one day that his office hours routinely drew throngs to the corridor that we shared in Areeda Hall, he remarked with evident satisfaction, "Yes, I love it."

As the years wore on, I especially admired Charles's responses to two last professional challenges. At the time of his death, Charles was at work on a book about historical figures, including political leaders, who at some stage in their careers had radically rethought positions that once had appeared to define them. In a draft that I read, Charles signaled that he had embarked on a critical reappraisal of his own conservative political beliefs. By this time, he had long since become a public critic of Donald Trump. Going further, Charles now contemplated that a number of the philosophical premises to which he had long subscribed might not withstand the scrutiny to which he increasingly subjected them. I do not know where Charles's intellectual journey might have taken him if he had lived long enough to complete it. But I suspect he might have rejected the idea of completion as an illusion. For him, to be alive was to be engaged in a quest for truth that required a perpetual openness to new ideas.

While Charles's late-life willingness to reconsider his political commitments was intellectually brave, his stoic response to age-related physical decline modeled courage along a different dimension. The once-characteristic bounce having vanished from his step, Charles needed a walker to get about in his last years, and he came to his office later and left earlier. But if he was physically bent, he was temperamentally unbowed. Despite a series of hospitalizations, he continued to teach his classes, which he loved, ably and conscientiously until the very end. He remained among the most regular attendees at faculty workshops, for which he had always read the papers, and he often had witty and incisive comments. Charles's office hours were as crowded in his last semester of teaching as they had been a decade earlier. If he felt anything other than enthusiasm for the day's challenge as he wheeled his walker to the elevator and made his way to his last class only about a month before he died, he never let it show.

Charles's death occasioned immense sadness both at Harvard Law School and throughout Harvard University, where his intellect, warmth, courage, and charisma had won him innumerable admirers. In over forty years at Harvard Law School, I can recall no colleague whose death was felt by more people as a deeply personal loss.