Society for the Rule of Law

Rule of Law Summit 2025

October 22, 2025

The Society for the Rule of Law's signature annual gathering will feature the nation's leading legal voices discussing the state of the rule of law and the unprecedented challenges facing our legal norms and institutions.

We are a membership organization of lawyers, law students, and concerned citizens who are working to support the rule of law and American democracy.

Agenda

Coffee & Networking — 9:00 am

Welcome: New Challenges for the Rule of Law — 9:30 am (Alan Raul and Gregg Nunziata)

<u>Panel I</u>: Theory and Reality: Should Conservatives Rethink the Unitary Executive? — *9:45 am*

For decades, the "unitary executive" theory has been a cornerstone of conservative constitutional thought, emphasizing the president's control over the executive branch. It rests on the first clause of Article II: "The executive Power shall be vested in a President of the United States of America." But recent years have tested its limits—and its wisdom—as constitutional theory has collided with political practice in ways that unsettle traditional conservative priorities. This panel will examine the intellectual origins of the unitary executive, its role in the separation of powers, and whether a rebalancing toward congressional or judicial checks is necessary. Panelists will explore historical practice, Supreme Court precedent, and contemporary political realities to ask: Is the unitary executive still a sound constitutional principle, or has it become a liability in preserving the rule of law?

Speakers:

Nathaniel Zelinsky, Washington Litigation Group
Nathaniel Zelinsky is senior counsel and a member of the steering committee at the Washington Litigation Group. He is an appellate lawyer who has handled high-stakes constitutional and procedural cases; he has argued before every level of the federal judiciary, including the U.S. Supreme Court. In October Term 2024, he argued *Barnes v. Felix* before the Supreme Court and secured a unanimous (9–0) victory. He also played a role in *Delaware v. Arkansas* (an original-jurisdiction dispute among states) and has authored merits briefs on complex constitutional and civil procedure questions.

Amit Agarwal, Special Counsel, Protect Democracy
Amit Agarwal currently serves as Special Counsel at Protect Democracy. He was previously Solicitor General of Florida (from 2016 to 2021), where he oversaw appellate litigation for the state and taught as the Richard W. Ervin Eminent Scholar at Florida State University College of Law. Earlier in his career, he clerked for Justice Samuel Alito and Judge Brett Kavanaugh, and served in the Office of Legal Counsel at the U.S. Department of Justice. In his current role, he has worked on First Amendment and separation-of-powers litigation, including representing plaintiffs in *Slaughter v. Trump* challenging attempted removal of FTC commissioners.

Todd Gaziano, Center for Individual Rights
Todd Gaziano is a legal scholar and currently affiliated with the Center for Individual Rights

Shannen Coffin, Former Counsel to the Vice President
Shannen Coffin is a former counsel to the Vice President.

Provided course material: Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*. Link here.

Panel II: Norms, Prudence, and Republican Virtue: Can Our Political Culture Still Support Ordered Liberty? — *10:45 am*

Constitutional design relies not only on law but on the informal restraints of norms, prudence, and civic virtue. This panel will explore how these unwritten rules of behavior have historically supported the functioning of the republic, the ways in which they are under strain in a polarized era, and whether they remain a reliable check on power. Panelists will discuss the limits of norms as a safeguard, the interplay between law and virtue, and what role prudence and moral responsibility can play in preserving the rule of law and the health of democratic institutions.

Speakers:

Greg Jacob, Former Counsel to the Vice President
Greg Jacob served as Counsel to Vice President Mike Pence from 2020 to 2021, advising on legal issues for the Office of the Vice President and on matters involving the White House Coronavirus Task Force. Prior to that, he held roles in the U.S. Department of Justice's Office of Legal Counsel and the Department of Labor under the George W. Bush administration. In the days before and during January 6, 2021, he played a key role in drafting memoranda for Pence regarding the Electoral Count Act and rejecting claims that the Vice President could unilaterally reject or delay electoral votes. After leaving government service he returned to private practice as a partner at O'Melveny & Myers.

Jonathan Rauch, Brookings Institution
Jonathan Rauch is a senior fellow at the Brookings Institution broadly focused on democracy, civil society, and institutional reform. He is also a journalist, commentator, and author known for engaging ideas about polarization, political norms, and the future of liberal democracy. His writing often explores how norms and informal constraints support constitutional order beyond formal

rules.
Notable publications / works: *The Constitution of Knowledge*; *Political Realism: How Hacks, Machines, Big Data, and Polls Are Transforming American Politics*; various essays in *The Atlantic* and other outlets on democratic norms and institutional resilience.

Jay Nordlinger, Renew Democracy Initiative
Jay Nordlinger is a journalist, editor, and commentator. He has been a national editor at *National Review* and is a contributor to *The Weekly Standard* and *The National Interest*. His commentary often focuses on culture, temperament in politics, and questions of political character and virtue.
Notable works: *Children of Monsters: An Inquiry into the Sons and Daughters of Dictators*; *Peace, They Say: Nobel Peace Prize Laureates on War, Violence, and Humanity*; numerous magazine essays and book reviews on political and cultural topics.

Lindsay Chervinsky, George Washington Presidential Library
Lindsay Chervinsky is a historian and researcher affiliated with the George Washington Presidential Library. Her work involves archival research and historical interpretation, especially of American political institutions, constitutional history, and the development of norms over time. She writes and lectures on how institutional culture, precedent, and behavior shape constitutional practice beyond legal texts.

Provided course material: Ashraf Ahmed, *A Theory of Constitutional Norms*. Link here.

Panel III: The Ultimate Check: How Free and Fair are Our Elections? — *11:45 am*

In theory, elections are the greatest safeguard of democracy—but in practice, their execution is under increasing pressure. This panel will assess the resilience of our electoral systems amid rising challenges—from partisan interference and election denialism to foreign influence and the rise of disinformation and AI-generated distortion. Panelists will explore recent and threatened actions by the Trump administration, the status of the Federal Election Commission, and recent developments in both red and blue states. They'll also spotlight credible reforms—and the institutional strengths—that can preserve electoral legitimacy and reinforce the rule of law.

Speakers:

Stephen Richer, Former Maricopa County Recorder
Stephen Richer served as Maricopa County Recorder from January 2021 to January 2025, overseeing voter registration, early voting, and document recording in one of the largest election jurisdictions in the U.S. He holds a B.A. from Tulane University and both an M.A. and J.D. from the University of Chicago, and before public service he practiced as a transactional attorney. During his time in office he became known for publicly defending election integrity against baseless claims of widespread fraud, and for deploying transparency measures (e.g. live video streams, public explanations of procedures) to bolster public trust. After leaving the Recorder's office, he joined the Harvard Kennedy School's Ash Center for Democratic Governance and Innovation as a Senior Practice Fellow in American Democracy.

Trevor Potter, Founder & President, Campaign Legal Center
Trevor Potter is a lawyer and longtime expert in campaign finance, political law, and election integrity. He served as commissioner and chairman of the U.S. Federal Election Commission and was general counsel to John McCain's presidential campaigns. In 2002 he founded the Campaign Legal Center, a nonprofit that litigates and advocates for stricter campaign finance rules and electoral transparency. He has taught election law at Harvard and the University of Virginia and is known publicly for advising Stephen Colbert on his satirical Super PAC as a way to publicize loopholes in campaign finance law.
Notable works: *Campaign Finance Reform: A Sourcebook*, *Inside the Campaign Finance Battle: Court Testimony on the New Reforms*, *The New Campaign Finance Sourcebook*, *Political Activity, Lobbying Laws and Gift Rules Guide* (and its periodic updates).

Matt Germer, R Street Institute
Matt Germer is affiliated with the R Street Institute, a public policy think tank focused on free markets, limited government, and regulatory reform. His work addresses issues in electoral law, governance, and institutional design.

Richard Bernstein, Society for the Rule of Law
Richard Bernstein focuses on legal institutions, constitutional structure, and safeguarding rule of law norms.

Provided course material: Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*. Link Here.

Panel IV: State of Emergency: Can Congress Still Check the Executive? — *1:30 pm*

The Framers designed Congress as the first branch—vested with the power of the purse, the power to legislate, and the power to oversee. Yet in recent decades, the balance of power has shifted decisively toward the presidency. From expansive uses of emergency authorities to unilateral foreign policy moves and aggressive regulatory action, presidents of both parties have tested the limits of executive power. The present administration is challenging those limits further still, often relying on claims of emergencies. This panel will explore whether Congress still has the institutional capacity, political will, and constitutional tools to serve as an effective check necessary to restore the Madisonian equilibrium.

Speakers:

Amanda Carpenter, Protect Democracy
Amanda Carpenter is a political commentator, author, and senior writer at Protect Democracy. She previously served as communications director for Senator Ted Cruz and before that was a senior communications advisor and speechwriter for Senator Jim DeMint. In media and public commentary, she often addresses issues of executive power, democratic accountability, and abuse of emergency authority. She is the author of *Gaslighting America: Why We Love It When Trump Lies to Us*.

Barbara Comstock, Former Member of Congress
Barbara Comstock served as a U.S. Representative for Virginia's 10th Congressional District from

2015 to 2019. Before that, she held roles in state government and as a staffer in Congress, including work on oversight and regulatory matters. Her career focuses include promoting accountability, oversight of executive power, and constituent advocacy in a politically divided district. She has written opinion pieces in outlets like *The Washington Post* and other regional media on governance, congressional authority, and public policy.

Ilya Somin, Professor of Law, George Mason University / Cato Institute
Ilya Somin is a law professor at George Mason University and holds the B. Kenneth Simon Chair in Constitutional Studies at the Cato Institute. His scholarship concentrates on constitutional law, property rights, political ignorance, and the limits of government power. He emigrated from the Soviet Union as a child and later earned degrees from Amherst College, Harvard, and Yale. Notable works include *Democracy and Political Ignorance: Why Smaller Government is Smarter*, *Free to Move: Foot Voting, Migration, and Political Freedom*, and *The Grasping Hand: "Kelo v. City of New London" and the Limits of Eminent Domain*.

James Wallner, Foundation for American Innovation
James Wallner is a scholar affiliated with the Foundation for American Innovation, focusing on policy, executive power, and structural institutional reform. His work engages with how institutions adapt in times of crisis, the balance of forces between branches of government, and the constitutional underpinnings of emergency authority.

Provided course material: Samuel Weitzman, *Back to Good: Restoring the National Emergencies Act*. Link Here.

Panel V: The Judiciary in the Maelstrom: Can an Indispensable Branch Withstand the Storm? — 2*:30 pm*

The federal judiciary is facing an unprecedented, coordinated, and sustained campaign aimed at undermining its authority and independence. This panel of retired federal judges will examine the constitutional role of the courts, the sources and consequences of these attacks, and the risks to public confidence in judicial impartiality. Panelists will discuss how the judiciary can preserve its legitimacy, what mechanisms exist—or could be strengthened—to safeguard judicial independence, and the role of judges, lawyers, and citizens in defending the courts as an equal branch of government and indispensable guardian of the rule of law.

Speakers:

J. Michael Luttig, Retired Federal Judge
J. Michael Luttig served on the U.S. Court of Appeals for the Fourth Circuit from 1991 until his retirement in 2006. He later became counsel to the president and a legal advisor in other capacities, and he remains active in public commentary on constitutional issues. His jurisprudence is known for its clarity on separation of powers, executive authority, and judicial independence. He has co-written articles and opinion pieces on the threat to institutional norms in the judiciary, particularly in the current polarized environment.

Paul Grimm, Retired Federal Judge
Paul Grimm is a retired U.S. District Court judge (District of Maryland). During his career, he presided over significant litigation including complex civil, administrative, and constitutional matters. He is known for applying careful procedural rigor and often speaking on the institutional role of the judiciary in safeguarding democratic norms. Since retiring, he has engaged in commentary and legal education efforts about judicial governance and ethics.
Notable publications/works: He has contributed to legal symposia and judicial conferences on

Nancy Gertner, Retired Federal Judge
Nancy Gertner served on the U.S. District Court for the District of Massachusetts (appointed in 1994) before assuming senior status and ultimately retiring from active service. She has been a law professor (at Harvard Law School) and a public commentator on civil liberties, access to justice, and reform of judicial institutions. Gertner is known for her principled defense of judicial independence, her writings on sentencing, criminal justice, and equality, and her broader reflections on the role of courts in a polarized society.
Notable publications/works: She has written extensively in law reviews on sentencing reform, gender and the law, and access to courts; she is also author of *In Defense of Women: Memoirs of an Unrepentant Advocate*.

Ben Wittes, Senior Fellow / Commentator (Lawfare)
Ben Wittes is a legal commentator and writer, best known as a co-founder of the Lawfare blog and as a senior fellow at the Brookings Institution. His work focuses on national security law, executive power, and the rule of law. He routinely analyzes and critiques pressures on the judiciary, the growth of executive authority, and institutional integrity in public commentary and books.
Notable publications/works: *Law and the Long War: The Future of Justice in the Age of Terror*; *The Future of Violence: Robots and Germs, Hackers and Drones*; numerous essays on Lawfare on judicial independence, separation of powers, and oversight.

Provided course material: Stephen I. Vladeck, *Putting the "Shadow Docket" in Perspective*. Link Here.

Panel VI: Litigating for Law and Liberty: What Can Lawsuits Achieve? — *3:45 pm*

Public interest litigation has long been a tool for advancing constitutional principles, protecting individual rights, and holding government to account. This panel brings together leaders of ideologically diverse nonprofit law firms to discuss what litigation can—and cannot—achieve for the rule of law in today's legal and political environment. Panelists will explore the strategic promise and practical limits of using the courts to defend first principles, how the judiciary is performing as a guardian of liberty, and how litigation fits into a broader ecosystem of advocacy for the rule of law and American democracy.

Speakers:

George Conway, Board President, Society for the Rule of Law
George Conway is a litigation attorney, commentator, and founding leader in conservative legal circles. He spent decades in business and appellate litigation at Wachtell, Lipton, Rosen & Katz, and

argued Morrison v. National Australia Bank before the U.S. Supreme Court. He founded the legal advocacy group Checks & Balances (now the Society for the Rule of Law) to ensure that constitutional norms are respected even by those in power. Conway is also a regular writer and commentator in media on constitutional and institutional issues.
Notable publications / works: He has co-authored pieces in major outlets (e.g. with Neal Katyal in *The New York Times*) challenging executive overreach and defending constitutional structure; he also writes for *The Atlantic* and other venues.

Norm Eisen, Democracy Defenders Action
Norm Eisen is a scholar, attorney, and former federal ethics official who has served in multiple roles including as U.S. Ambassador to the Czech Republic and as special counsel to the U.S. House's impeachment managers. He is active in public interest litigation and advocacy around government accountability, oversight, and rule of law issues. Eisen frequently writes and speaks at the intersection of law, democracy, and institutional norms, and he has argued in courts and filed amicus briefs on constitutional and separation-of-powers issues.
Notable publications / works: *The Sword and the Shield: The Revolutionary Lives of Malcolm X and Martin Luther King Jr.* (co-written with Jeremi Suri); *So Damn Much Money: The Triumph of Lobbying and the Corrosion of American Government*; numerous op-eds and essays in *The Washington Post*, *The Atlantic*, *Lawfare*, etc.

Mark Chenoweth, New Civil Liberties Alliance
Mark Chenoweth is a lawyer with the New Civil Liberties Alliance (NCLA), where he works on constitutional litigation, especially challenges to administrative and executive power. At NCLA, he coordinates or supports lawsuits that seek to restrain government overreach, protect individual rights, and enforce structural constitutional limits. Chenoweth brings experience as a litigator in both appellate and trial courts, with an emphasis on clean-law, principled legal arguments.

Darpana Sheth, Center for Individual Rights
Darpana Sheth is a senior lawyer at the Center for Individual Rights (CIR), where she focuses on constitutional litigation and civil rights enforcement. She has led and participated in lawsuits defending free speech, property rights, separation-of-powers, and other constitutional protections. Sheth's work involves both strategic case selection and detailed appellate advocacy.

Provided course material: Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights From Theory and Practice*. Link Here.

Panel VII: Politics and Prosecutors: How Bad is the Damage to the DOJ and FBI? — *4:45 pm*

The Department of Justice has long prided itself on professionalism and independence from inappropriate political interference, as has the Federal Bureau of Investigation. But both have faced severe pressure during the present administration, as senior political officials have launched purges of longstanding career employees and appeared to put the agencies in the service, not of the law, but of the occupant of the White House. Defenders of the administration claim it is simply correcting for bias and weaponization by the prior administration. This panel will assess the extent of the damage: how much the DOJ's credibility has eroded, how deeply political influence has penetrated prosecutorial decision-making, how badly the FBI's investigative capacities have been undermined, and what all of this means for the

rule of law. Panelists will consider whether institutional norms and internal safeguards are strong enough to withstand these pressures, what reforms might be needed to restore public trust, and how prosecutors and special agents can continue to serve justice in a polarized environment.

Speakers:

Peter Keisler, Former Acting Attorney General
Peter D. Keisler is an appellate and civil litigation attorney who served as Assistant Attorney General for the Civil Division in the George W. Bush administration, and later as Acting Attorney General following Alberto Gonzales's resignation in 2007. Before joining the DOJ, he practiced at Sidley Austin, focusing on general litigation and telecommunications law, and has argued before the U.S. Supreme Court and various federal appeals courts. Keisler also served as Associate Counsel to President Reagan, and earlier clerked for Judge Robert Bork and Justice Anthony Kennedy. Throughout his career, he has been involved in high-stakes government litigation and administrative law defense work, and he currently returns to private practice while speaking on rule-of-law issues.

Stuart M. Gerson, Former Acting Attorney General
Stuart Michael Gerson served as Acting U.S. Attorney General for a brief period in early 1993 at the start of the Clinton administration, having been the Assistant Attorney General for the Civil Division under President George H. W. Bush. Before that, he oversaw civil cases at the DOJ and played roles in transition planning and legal staff at the Department of Justice. Gerson's legal career includes significant experience in government oversight, administrative law, and civil litigation. His role at the DOJ placed him in a unique position during a transitional period in American government.

Donald Ayer, Former Deputy Attorney General
Donald Ayer served as U.S. Deputy Attorney General from 1989 to 1990 under President George H. W. Bush, and earlier as Principal Deputy Solicitor General during the Reagan years. Over his career he has argued cases before the U.S. Supreme Court, served as U.S. Attorney, and held various roles in the Justice Department. After government service, Ayer became an academic and commentator on constitutional law, executive power, and criminal justice. His experience spans both prosecutorial decision-making and appellate advocacy.

Brendan Ballou, Former January 6 Prosecutor
Brendan Ballou is a former federal prosecutor who was involved in prosecuting crimes arising from the January 6, 2021, Capitol breach. His experience gives him firsthand insight into politically charged enforcement decisions, DOJ priorities, and prosecutorial discretion under pressure. Following his time in government, Ballou has spoken and written about reforming prosecutorial practices, strengthening internal DOJ norms, and restoring public trust in law enforcement institutions.

Michael Feinberg, Former FBI Agent
Michael Feinberg is a former FBI special agent who has served in the Bureau and is now involved in oversight, investigations, and commentary on internal FBI practices, institutional integrity, and the pressures facing federal investigative agencies. He has a practical background in law enforcement, including investigative protocol, chain of command, and internal safeguards. Feinberg speaks and writes about how to restore the FBI's institutional credibility and autonomy.

Provided course material: Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*. Link Here.

IDENTIFYING AND MINIMIZING THE RISK OF ELECTION SUBVERSION AND STOLEN ELECTIONS IN THE CONTEMPORARY UNITED STATES

Richard L. Hasen[*]

INTRODUCTION

The United States faces a serious risk that the 2024 presidential election, and other future U.S. elections, will not be conducted fairly and that the candidates taking office will not reflect the free choices made by eligible voters under previously announced election rules. The potential mechanisms by which election losers may be declared election winners are: (1) usurpation of voter choices for President by state legislatures purporting to exercise constitutional authority, possibly with the blessing of a partisan Supreme Court and the acquiescence of Republicans in Congress; (2) fraudulent or suppressive election administration or vote counting by law- or norm-breaking election officials; and (3) violent or disruptive private action that prevents voting, interferes with the counting of votes, or interrupts the assumption of power by the actual winning candidate.

Until recently, it would have been absurd to raise the possibility of such election subversion or a stolen election in the United States. Few cases have emerged in at least the last fifty years of actual election sabotage by election officials,[1] leading to an election loser being declared the election winner, despite other unique pathologies of American election administration.[2]

The conduct of former President Donald Trump in repeatedly and falsely claiming that the 2020 election was stolen has markedly raised the potential for an actual stolen election in the United States. Millions of Trump's Republican supporters now believe the false claim of a stolen election, and some Republican elected officials have pursued sham "audits" and taken other steps that undermine voter confidence in the fairness of the election process. States have passed new laws not only restricting the vote but also making it easier to sabotage election results. Threats of violence and intimidation have led to unprecedented attrition

---

[*] Chancellor's Professor of Law and Political Science, and Co-Director, Fair Elections and Free Speech Center, University of California, Irvine School of Law. Thanks to Ben Berwick, Ned Foley, Liz Howard, Michael Morley, Larry Norden, Mike Parsons, and Stephanie Singer for useful comments and suggestions.

[1] *See infra* note 134.

[2] Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, And How to Treat and Cure Them*, 19 ELECTION L.J. 263, 263 (2020) (describing three pathologies: "First, the United States election system features deep fragmentation of authority over elections. Second, protection of voting rights in the United States is marked by polarized and judicialized decision making. Third, constitutional protections for voting rights remain weak.").

among election administrators, and some exiting officials are being replaced by those who may not have allegiance to the integrity of the election system. Those Republican election officials who stood up to President Trump in 2020 and saved the United States from a potential constitutional and political crisis have been censured, stripped of power, and challenged for office by those embracing the "Big Lie." Together, these actions serve both to delegitimate the election of Democrats, including President Joe Biden in 2020, and to open the door to election manipulation in future elections. Elected officials, election officials, and others believing or purporting to believe the false claim that the 2020 presidential election was stolen may seek to justify subverting future election results in response to earlier purported fraud.

The solutions to these problems are both legal and political. Legal changes should include: (1) paper-ballot, chain-of-custody, and transparency requirements, including risk-limiting audits of election results; (2) rules limiting the discretion of those who certify the votes, including Congress, through reform of the Electoral Count Act[3] (ECA); (3) rules limiting the overpoliticization of election administration, especially by state legislatures; (4) increased criminal penalties imposed on those who tamper with federal elections or commit violence or intimidation of voters, election officials, or elected officials who certify candidates; and (5) rules countering disinformation about elections, particularly disinformation about when, where, and how people vote. In addition, it will be necessary to organize for political action to reenforce rule-of-law norms in elections. This means advocating for laws that deter election subversion and against laws making stolen elections easier; politically opposing would-be election administrators who embrace false claims about stolen elections; and preparing for mass, peaceful protests in the event of attempts to subvert fair election outcomes.

Part I of this Essay describes the path to this unexpected moment of democratic peril in the United States. Part II explains the three potential mechanisms by which American elections may be subverted in the future. Part III recommends steps that can and should be taken to minimize this risk. Preserving and protecting American democracy from the risk of election subversion should be at the top of everyone's agenda. The time to act is now, before American democracy disappears.

I. HOW WE GOT HERE

Republican claims of widespread voter fraud committed mostly by Democrats, people of color, and union members are not new, but they accelerated after the disputed election between then–Governor George W. Bush and Vice President Al Gore in 2000.[4] These statements from a

---

[3] Ch. 90, 24 Stat. 373 (1887) (codified as amended at 3 U.S.C. §§ 5–7, 15–18).

[4] *See* RICHARD L. HASEN, THE VOTING WARS 44–51 (2012).

segment of conservatives and Republicans (and resisted by other conservatives and Republicans) persist despite all reliable evidence that voter fraud in the contemporary United States is rare and that when such fraud occurs it tends to happen on a small scale that does not tip the result of elections.[5] The purported "evidence" of widespread voter fraud consists primarily of describing isolated instances of fraud as the "tip of the iceberg" or by taking administrative error or slack in election administration as conclusive proof of malfeasance.[6]

The statement of Trump-supporter and attorney Rudy Giuliani is typical of the genre of unsupported, vague allegations. He told CNN's *State of the Union* program during the 2016 presidential election campaign: "I'm sorry, dead people generally vote for Democrats rather than Republicans . . . . You want me to [say] that I think the election in Philadelphia and Chicago is going to be fair? I would have to be a moron to say that."[7]

The primary purpose of such voter fraud claims, at least until the Trump presidency, was two-fold: First, such claims served as the basis to pass laws, such as voter identification laws, aimed at making it harder for people likely to vote for Democrats to register and to vote.[8] Second, such claims riled up the Republican base and helped with fundraising by convincing supporters that Democrats were cheating and did not legitimately deserve to serve in office. The claims fueled party tribalism and animus, convincing both sides that the other was trying to manipulate election outcomes.[9] The Trump presidency moved the voting wars from a tired debate over the relative threats of voter fraud compared to voter suppression to a new level of delegitimation of the election process itself, raising the danger of election subversion.

Trump's voter fraud claims were a hallmark of his presidency. He remarkably claimed that there was voter fraud in the 2016 election that he won against Democrat and former Secretary of State Hillary Clinton, falsely stating that at least three million noncitizens voted in the election,

---

[5] For details, see *id.* at 52–54.

[6] *See* RICHARD L. HASEN, ELECTION MELTDOWN 15–46 (2020) (describing lawsuit against Kansas law requiring documentary proof of citizenship to register to vote and former Kansas Secretary of State Kris Kobach's characterization of the evidence of noncitizen voting to support such a law as the "tip of the iceberg," *id.* at 24); *id.* at 24 (quoting the federal district court examining the evidence put forward by Kobach and concluding: "There is no iceberg . . . only an icicle, largely created by confusion and administrative error" (quoting Fish v. Kobach, 309 F.3d 1048, 1103 (D. Kan. 2018))).

[7] Mahita Gajanan, *Donald Trump Claims Election Will Be Rigged at Polling Sites*, TIME (Oct. 17, 2016, 8:54 AM), http://time.com/4532679/donald-trump-election-rigged [https://perma.cc/MG2E-EUXQ] (alteration in original).

[8] Although suppressing likely Democratic votes appears to be the purpose of many such laws, these laws did not always have such a suppressive effect, in part because the laws provoke backlash and countermeasures. *See* HASEN, *supra* note 6, at 44–45, 152 n.64.

[9] *See id.* at 15–46.

all for his opponent.[10] Not coincidentally, the number of purported fraudulent votes matched the margin by which Clinton beat Trump in the national popular vote for President.[11]

Once in office, President Trump formed a presidential commission on voter fraud that was populated with commissioners, including former Kansas Secretary of State Kris Kobach (who served as vice-chair below Vice President Mike Pence), the Heritage Foundation's Hans von Spakovsky, and former Department of Justice (DOJ) lawyer and frequent Fox News contributor J. Christian Adams, each known for making false or exaggerated claims of voter fraud.[12] The Commission had only two meetings before it was disbanded, after numerous lawsuits over the Commission's transparency and its work.[13] Its purpose appeared to have been to make findings of the potential for widespread voter fraud to serve as the predicate for Congress passing a law allowing states to require documentary proof of citizenship before people would be eligible to register to vote.[14]

As the 2020 election neared with Trump's reelection chances uncertain and with the COVID-19 pandemic raging in the United States, President Trump markedly increased his rhetoric charging that the upcoming election would be "rigged" or "stolen," focusing primarily on vote-by-mail.[15] The rate of voting by mail unsurprisingly exploded during the pandemic because many voters and election officials saw it as a safer way of balloting than voting in person at polling places,[16] and

---

[10] *See* Aaron Blake, *Donald Trump Claims None of Those 3 to 5 Million Illegal Votes Were Cast for Him. Zero.*, WASH. POST (Jan. 26, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/25/donald-trump-claims-none-of-those-3-to-5-million-illegal-votes-were-cast-for-him-zero [https://perma.cc/E7UM-S635] ("Of those [supposed three-to-five million fraudulent] votes cast, none of 'em come to me. None of 'em come to me. They would all be for the other side. None of 'em come to me.").

[11] *See* Alana Abramson, *Hillary Clinton Officially Wins Popular Vote by Nearly 2.9 Million*, ABC NEWS (Dec. 22, 2016, 4:35 PM), https://abcnews.go.com/Politics/hillary-clinton-officially-wins-popular-vote-29-million/story?id=44354341 [https://perma.cc/UQG4-BQQC]; ROB GRIFFIN, RUY TEIXEIRA & JOHN HALPIN, CTR. FOR AM. PROGRESS, VOTER TRENDS IN 2016, at 1 (2017); Steven Porter, *Clinton Wins US Popular Vote by Widest Margin of Any Losing Presidential Candidate*, CHRISTIAN SCI. MONITOR (Dec. 22, 2016), https://www.csmonitor.com/USA/Politics/2016/1222/Clinton-wins-US-popular-vote-by-widest-margin-of-any-losing-presidential-candidate [https://perma.cc/N9ZG-ECMP].

[12] *See* HASEN, *supra* note 6, at 16, 25–27.

[13] *See id.* at 29–30.

[14] *Id.* at 28–32.

[15] For a detailed chronology, see RICHARD L. HASEN, CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS — AND HOW TO CURE IT 1–19 (2022).

[16] *See* Reid J. Epstein, *Democrats' Vote-by-Mail Effort Won in Wisconsin: Will It Work Elsewhere?*, N.Y. TIMES (Sept. 14, 2020), https://www.nytimes.com/2020/05/10/us/politics/Wisconsin-election-vote-by-mail-.html [https://perma.cc/A4FJ-3K7K] ("In Georgia, more than 1.2 million people have requested absentee ballots for the state's June 9 primary — compared to just 36,200 requests for the 2016 presidential primary."); Drew DeSilver, *Mail-in Voting Became Much More Common in 2020 Primaries as COVID-19 Spread*, PEW RSCH. CTR. (Oct. 13, 2020),

President Trump himself voted by mail — even allowing his ballot to be "harvested" by someone else to deliver it to Florida election officials — during the 2020 presidential primaries.[17] Despite Trump's statements about fraud and the unprecedented nature of conducting a modern presidential election during a pandemic, no evidence emerged anywhere in the United States of significant fraud or other problems in the administration of the 2020 U.S. presidential election.[18]

President Trump repeatedly used social media, including Twitter and Facebook, to spread false claims of fraud, going so far as to claim that the only way he could lose the election was if it was "rigged."[19] The "cheap speech" revolution that lessened the news media's important intermediary role in helping voters receive truthful content facilitated the spread of Trump's false claims directly to tens of millions of followers.[20] President Trump disseminated over four hundred false claims of rigged

---

https://www.pewresearch.org/fact-tank/2020/10/13/mail-in-voting-became-much-more-common-in-2020-primaries-as-covid-19-spread [https://perma.cc/H3U8-XH9X]; Emily Bazelon, *Will Americans Lose Their Right to Vote in the Pandemic?*, N.Y. TIMES (July 18, 2021), https://www.nytimes.com/2020/05/05/magazine/voting-by-mail-2020-covid.html [https://perma.cc/W3V8-SP9K]; ERIC MCGHEE, JENNIFER PALUCH & MINDY ROMERO, PUB. POL'Y INST. OF CAL., VOTE-BY-MAIL AND VOTER TURNOUT IN THE PANDEMIC ELECTION 5–6, 9–10 (2021).

[17] Miles Parks, *Trump, While Attacking Mail Voting, Casts Mail Ballot Again*, NPR (Aug. 19, 2020, 4:11 PM), https://www.npr.org/2020/08/19/903886567/trump-while-attacking-mail-voting-casts-mail-ballot-again [https://perma.cc/U462-VVSX].

[18] *See* Christina A. Cassidy, *Far Too Little Vote Fraud to Tip Election to Trump, AP Finds*, ASSOCIATED PRESS (Dec. 14, 2021), https://apnews.com/article/voter-fraud-election-2020-joe-biden-donald-trump-7fcb6f134e528fee8237c7601db3328f [https://perma.cc/TFP7-HXWZ]; Pam Fessler, Miles Parks & Barbara Sprunt, *As Trump Pushes Election Falsehoods, His Cybersecurity Agency Pushes Back*, NPR (Nov. 14, 2020, 7:00 AM), https://www.npr.org/sections/live-updates-2020-election-results/2020/11/14/934220380/as-trump-pushes-election-falsehoods-his-cybersecurity-agency-pushes-back [https://perma.cc/6XS7-SSLW] (citing joint statement signed by prominent government actors concluding that the 2020 election was "the most secure in American history . . . [with] no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised"); Samantha Putterman, Amy Sherman & Miriam Valverde, *Rudy Giuliani, Trump Legal Team Push Conspiracy Theories, Baseless Claims About 2020 Election*, POLITIFACT (Nov. 20, 2020), https://www.politifact.com/article/2020/nov/20/giuliani-trump-legal-team-push-conspiracy-theories [https://perma.cc/B9GA-54HU].

[19] *See* William Cummings, Joey Garrison & Jim Sergent, *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021, 10:50 AM), https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001 [https://perma.cc/79U5-44T4]; Alex Hern, *Trump's Vote Fraud Claims Go Viral on Social Media Despite Curbs*, THE GUARDIAN (Nov. 10, 2020, 1:43 PM), https://www.theguardian.com/us-news/2020/nov/10/trumps-vote-claims-go-viral-on-social-media-despite-curbs [https://perma.cc/8458-PVJY]; Greg Sargent, Opinion, *Trump Just Repeated His Ugliest Claim About the Election. Why Isn't It Bigger News?*, WASH. POST (Sept. 15, 2020), https://www.washingtonpost.com/opinions/2020/09/15/trump-just-repeated-his-ugliest-claim-about-election-why-isnt-it-bigger-news [https://perma.cc/7Y7Z-QAYV].

[20] HASEN, *supra* note 15, at 2; *see id.* at 1–19.

or stolen elections to his supporters via Twitter following the election in 2020.[21]

The turning point on electoral fraud claims came after President Trump lost the presidential election in November 2020 to his Democratic opponent, then–Vice President Joe Biden. Few people who closely followed President Trump expected he would ever concede defeat; the question was whether he would merely grumble about voter fraud and acquiesce to his defeat or double down on his false claims.

President Trump did more than double down. He pursued a political and legal strategy aimed not just at sowing doubt but also at subverting the outcome of the presidential election. This strategy, which has no precedent at any point in American history,[22] had many parts, but the best evidence now available shows that this was less about saving face and more about reversing election outcomes.

A key part of Trump's strategy aimed to activate the Trumpian base by continuing to spread false claims of a stolen election on social media and through friendly cable television and news outlets such as Fox, Newsmax, and the One America News Network.[23] The claims included traditional false claims of ballot box stuffing and fraudulent ballots, outlandish ones about Italian satellites being used to manipulate votes,[24] and tired tropes of votes being stolen in Democratic cities in swing states with large populations of people of color. On November 27, 2020, for example, President Trump tweeted: "Biden can only enter the White House as President if he can prove that his ridiculous '80,000,000 votes' were not fraudulently or illegally obtained. When you see what happened in Detroit, Atlanta, Philadelphia & Milwaukee, massive voter fraud, he's got a big unsolvable problem!"[25]

---

[21] Karen Yourish & Larry Buchanan, *Since Election Day, A Lot of Tweeting and Not Much Else for Trump*, N.Y. TIMES (Nov. 24, 2020), https://www.nytimes.com/interactive/2020/11/24/us/politics/trump-twitter-tweets-election-results.html [https://perma.cc/LZN4-RUV2] ("In total, the president attacked the legitimacy of the election more than 400 times since Election Day, though his claims of fraud have been widely debunked."). For more details, see HASEN, *supra* note 15, at 3–11.

[22] *See* Ned Foley, *How Best to End "Electoral McCarthyism"?*, ELECTION L. BLOG (Sept. 13, 2021, 8:49 AM), https://electionlawblog.org/?p=124540 [https://perma.cc/75QN-C4PZ] ("Based on the research I did for *Ballot Battles*, I'm not aware of a historical example (prior to 2020) in which a serious dispute over counting votes was accompanied by the kind of blatant falsification of reality that is the mark of McCarthyism-style demagoguery. Not even the Hayes-Tilden dispute, in my judgment, was of that nature.").

[23] For a more detailed chronology, see HASEN, *supra* note 15, at 1–19.

[24] Martin Pengelly, *Trump Aide Asked DOJ to Investigate Bizarre "Italygate" Claim Votes Were Changed by Satellite*, THE GUARDIAN, (June 6, 2021, 9:35 AM), https://www.theguardian.com/us-news/2021/jun/06/donald-trump-mark-meadows-doj-italygate [https://perma.cc/5CHD-M48E].

[25] The tweet from President Trump, which originally appeared on Twitter on November 27, 2020, is no longer available on Twitter (which deplatformed Trump). The archived version is available at: Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 27, 2020, 10:56 AM), https://web.archive.org/web/20201211212108/https://twitter.com/realDonaldTrump/status/1332352538855747584 [https://perma.cc/E2YV-HFJQ].

This drumbeating led to public protests over vote counting and threats of violence against election officials. It also helped to bring pressure from below on elected officials to consider taking steps to turn a Trump loss into a victory. Election offices where tabulating and recounting took place were subject to sometimes-violent protests, and election officials received death threats and intimidating messages, which continue to this day as President Trump continues to falsely claim fraud.[26]

For example, Claire Woodall-Vogg, the executive director of the Milwaukee Election Commission, "received voicemails calling for her hanging" in August 2021, nine months after the end of the election.[27] One angry caller railed: "You motherfucker. You rigged my fucking election, you fucking piece of shit. We're going to try you, and we're going to fucking convict your piece-of-shit ass, and we're going to hang you. You fucking piece — you get the fuck out of my country, you pile of shit."[28] A report by the Brennan Center for Justice and Bipartisan Policy Center found one in three election officials reported feeling unsafe because of their job.[29] No doubt in part driven by this conduct, states and local governments are beginning to witness a mass exodus of election officials.[30]

---

[26] *See, e.g.*, Linda So & Jason Szep, *Reuters Unmasks Trump Supporters Who Terrified U.S. Election Officials*, REUTERS (Nov. 9, 2021, 11:00 AM), https://www.reuters.com/investigates/special-report/usa-election-threats [https://perma.cc/HX2Y-EMQ3]; Linda So & Jason Szep, Special Report, *Terrorized U.S. Election Workers Get Little Help from Law Enforcement*, REUTERS (Sept. 8, 2021, 1:46 PM), https://www.reuters.com/legal/government/terrorized-us-election-workers-get-little-help-law-enforcement-2021-09-08 [https://perma.cc/5MTG-JHSJ]; John Kruzel, *Threats of Violence Spark Fear of Election Worker Exodus*, THE HILL (Aug. 2, 2021, 6:00 AM), https://thehill.com/homenews/campaign/565722-threats-of-violence-spark-fear-of-election-worker-exodus [https://perma.cc/V8VE-6EZ2]; Nick Corasaniti, Jim Rutenberg & Kathleen Gray, *Threats and Tensions Rise as Trump and Allies Attack Elections Process*, N.Y. TIMES (Feb. 1, 2021), https://www.nytimes.com/2020/11/18/us/politics/trump-election.html [https://perma.cc/887Q-3YXD].

[27] Rob Kuznia, Bob Ortega & Casey Tolan, *In the Wake of Trump's Attack on Democracy, Election Officials Fear for the Future of American Elections*, CNN (Sept. 13, 2021, 7:30 AM), https://www.cnn.com/2021/09/12/politics/trump-2020-future-presidential-elections-invs [https://perma.cc/G348-8D8D].

[28] *Id.* The audio of the call may be accessed directly at: https://pmd.cdn.turner.com/cnn/2021/images/08/27/threatening-call-wi.mp3 [https://perma.cc/QT7Z-F8Z2].

[29] Press Release, Brennan Ctr. for Just., One in Three Election Officials Report Feeling Unsafe Because of Their Job (June 16, 2021), https://www.brennancenter.org/our-work/analysis-opinion/one-three-election-officials-report-feeling-unsafe-because-their-job [https://perma.cc/8BNH-5WGV]. For the report itself, see BRENNAN CTR. FOR JUST. & BIPARTISAN POL'Y CTR., ELECTION OFFICIALS UNDER ATTACK (2021).

[30] Michael Wines, *After a Nightmare Year, Election Officials Are Quitting*, N.Y. TIMES (July 2, 2021), https://www.nytimes.com/2021/07/02/us/politics/2020-election-voting-officials.html [https://perma.cc/RG2P-B7S9]; Fredreka Schouten, *Personal Threats, Election Lies and Punishing New Laws Rattle Election Officials, Raising Fears of a Mass Exodus*, CNN (July 21, 2021, 7:02 AM), https://www.cnn.com/2021/07/21/politics/election-officials-exodus [https://perma.cc/7F7T-22Y7].

By one count, President Trump and his allies filed at least sixty-two lawsuits aimed at contesting the results of elections in states President Biden had won.[31] Among the most high-profile of these cases was an original action that the State of Texas filed directly in the United States Supreme Court against four other states seeking to reverse the outcome of the election.[32] The claims were based upon false evidence of voter fraud and unsupported legal theories, and the Supreme Court rejected them without a hearing.[33] President Trump and his allies eventually lost all but one of the cases.[34]

Trump's behind-the-scenes activities were the most nefarious. He made over thirty contacts with governors, state election officials, state elected officials, and others to either stall or reverse official certification of presidential election results in the states and to facilitate state legislative action on presidential election results.[35] In one of the most notorious incidents captured on an audio recording, President Trump

---

[31] Cummings et al., *supra* note 19.

[32] *See* Adam Liptak, *Supreme Court Rejects Texas Suit Seeking to Subvert Election*, N.Y. TIMES (Jan. 15, 2021), https://www.nytimes.com/2020/12/11/us/politics/supreme-court-election-texas.html [https://perma.cc/AW9V-NEPC].

[33] *See* Texas v. Pennsylvania, 141 S. Ct. 1230, 1230 (2020) (mem.).

[34] Cummings et al., *supra* note 19 ("Out of the 62 lawsuits filed challenging the presidential election, 61 have failed . . . . Some cases were dismissed for lack of standing and others based on the merits of the voter fraud allegations. The decisions have came [sic] from both Democratic-appointed and Republican-appointed judges — including federal judges appointed by Trump."); *see also* Russell Wheeler, *Trump's Judicial Campaign to Upend the 2020 Election: A Failure, But Not a Wipe-Out*, BROOKINGS INST. (Nov. 30, 2021), https://www.brookings.edu/blog/fixgov/2021/11/30/trumps-judicial-campaign-to-upend-the-2020-election-a-failure-but-not-a-wipe-out [https://perma.cc/E2RP-W288] ("Trump . . . lost all but one case — and the great majority of judicial votes in all cases disfavored his claims."); Rosalind S. Helderman & Elise Viebeck, *"The Last Wall": How Dozens of Judges across the Political Spectrum Rejected Trump's Efforts to Overturn the Election*, WASH. POST (Dec. 12, 2020), https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8_story.html [https://perma.cc/YBD3-H2FC] ("In a remarkable show of near-unanimity across the nation's judiciary, at least 86 judges — ranging from jurists serving at the lowest levels of state court systems to members of the United States Supreme Court — rejected at least one post-election lawsuit filed by Trump or his supporters . . . ."); Liptak, *supra* note 32; HASEN, *supra* note 15, at 159–60 (describing losing lawsuits).

[35] Anita Kumar & Gabby Orr, *Inside Trump's Pressure Campaign to Overturn the Election*, POLITICO (Dec. 21, 2020, 4:30 AM), https://www.politico.com/news/2020/12/21/trump-pressure-campaign-overturn-election-449486 [https://perma.cc/H5MB-RU4V] ("In total, the president talked to at least 31 Republicans, encompassing mostly local and state officials from four critical battleground states he lost — Michigan, Arizona, Georgia and Pennsylvania. The contacts included at least 12 personal phone calls to 11 individuals, and at least four White House meetings with 20 Republican state lawmakers, party leaders and attorneys general, all people he hoped to win over to his side. Trump also spoke by phone about his efforts with numerous House Republicans and at least three current or incoming Senate Republicans."); Maria Polletta, *Trump Lashes Out at Gov. Doug Ducey Following Certification of Arizona Election Results*, AZCENTRAL (Dec. 1, 2020, 12:35 PM), https://www.azcentral.com/story/news/politics/elections/2020/11/30/president-trump-slams-arizona-gov-ducey-after-election-certification/6472784002 [https://perma.cc/39NC-LMGE]; Kyle Cheney, *Trump Calls on GOP State Legislatures to Overturn Election*

pressured Georgia Secretary of State Brad Raffensperger to "find" at least 11,780 votes to reverse President Biden's win in Georgia.[36] Secretary Raffensperger refused.[37]

In addition to reaching out to state officials, President Trump was working with an assistant attorney general in DOJ, Jeffrey Clark, to get DOJ to weigh in on election disputes by falsely claiming fraud cost President Trump the election.[38] Clark prepared a letter that would have had DOJ falsely claim that there were serious irregularities in the conduct of the election in Georgia, and he pushed for DOJ to file federal litigation in the Supreme Court mirroring the defeated Texas lawsuit.[39] Acting Attorney General Jeffrey Rosen rejected Clark's attempts, and President Trump considered firing Rosen and replacing him with Clark, an attempt that apparently failed only because several high-profile DOJ officials threatened to resign in protest.[40]

President Trump, along with at least one Republican member of Congress and members of his own legal team, including his attorney John Eastman, attempted to pressure Vice President Pence, who presided over the joint congressional session counting Electoral College votes on January 6, 2021, either to delay the proceedings to give state legislatures a chance to send in alternative slates of electors or simply to declare President Trump the election winner.[41]

Results, POLITICO (Nov. 21, 2020, 10:21 PM), https://www.politico.com/news/2020/11/21/trump-state-legislatures-overturn-election-results-439031 [https://perma.cc/UNT9-K3RV].

[36] Amy Gardner, *"I Just Want to Find 11,780 Votes": In Extraordinary Hour-Long Call, Trump Pressures Georgia Secretary of State to Recalculate the Vote in His Favor*, WASH. POST (Jan. 3, 2021), https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555_story.html [https://perma.cc/ZF8M-9JS6].

[37] *Id.*

[38] *See* Katie Benner, *Report Cites New Details of Trump Pressure on Justice Dept. over Election*, N.Y. TIMES (Nov. 6, 2021), https://www.nytimes.com/2021/10/06/us/politics/trump-election-fraud-report.html [https://perma.cc/3JBS-Q8V2].

[39] *See* Mark Joseph Stern, *The DOJ Official Who Tried to Steal the Election for Trump Has a Sweet New Gig*, SLATE (Aug. 4, 2021, 2:35 PM), https://slate.com/news-and-politics/2021/08/jeffrey-bossert-clark-justice-department-covid-vaccine.html [https://perma.cc/XYX7-XLJX].

[40] Benner, *supra* note 38; *see also* Katie Benner, *Former Acting Attorney General Testifies About Trump's Efforts to Subvert Election*, N.Y. TIMES (Aug. 7, 2021), https://www.nytimes.com/2021/08/07/us/politics/jeffrey-rosen-trump-election.html [https://perma.cc/993B-AF7X]; Katherine Faulders & Alexander Mallin, *DOJ Officials Rejected Colleague's Request to Intervene in Georgia's Election Certification: Emails*, ABC NEWS (Aug. 7, 2021, 2:56 PM), https://abcnews.go.com/US/doj-officials-rejected-colleagues-request-intervene-georgias-election/story?id=79243198 [https://perma.cc/EAE4-AC4D].

[41] Jamie Gangel & Jeremy Herb, *Memo Shows Trump Lawyer's Six-Step Plan for Pence to Overturn the Election*, CNN (Sept. 21, 2021, 5:39 PM), https://www.cnn.com/2021/09/20/politics/trump-pence-election-memo [https://perma.cc/DM92-SABH]; *see also* Kevin Breuninger, *Trump Ally Jim Jordan Forwarded Mark Meadows Argument for Mike Pence to Reject Biden Electoral Votes*, CNBC (Dec. 16, 2021, 6:50 PM), https://www.cnbc.com/2021/12/15/jim-jordan-texted-mark-meadows-argument-for-mike-pence-to-reject-biden-electoral-votes.html [https://perma.cc/J763-ULMK]. For a rebuttal to Eastman's arguments on the merits, see generally Matthew A. Seligman, The Vice President's Non-existent Unilateral Power to Reject Electoral Votes

Putting together all of these actions, the endgame was: (1) to get state legislatures to rely on purported evidence of fraud or other irregularities to declare alternative slates of presidential electors, despite a lack of legal authority to do so; (2) to argue that the ECA, which governs the counting of Electoral College votes, permitted Congress to consider these alternative slates of electors because the irregularities constituted a "failed" election under the Act[42] or that portions of the ECA limiting the discretion of Congress to count legislatively submitted alternative slates of electors[43] were unconstitutional; and (3) either to get Vice President Pence to delay the counting of Electoral College votes until enough states could declare alternative slates of electors (or simply declare President Trump the winner), or alternatively, to prevent President Biden from obtaining a majority of Electoral College votes, triggering a procedure for choosing the President via votes by each state's House of Representatives delegation,[44] which would have favored President Trump.[45]

Vice President Pence refused to participate in the scheme,[46] and the counting on January 6, 2021, confirmed Biden's victory, even as it was interrupted by a violent invasion of the United States Capitol in the middle of the vote counting.[47] Even after the insurrection, 138 Republican members of the House and seven Republican Senators voted

---

(unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3939020 [https://perma.cc/973D-EPW6].

42 *See* 3 U.S.C. § 2 ("Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.").

43 *See id.* § 15.

44 U.S. CONST. amend. XII.

45 *See* Deanna Paul, *Trump Campaign Wants States to Override Electoral Votes for Biden. Is that Possible?*, WALL ST. J. (Nov. 21, 2020, 10:48 AM), https://www.wsj.com/articles/trump-campaign-wants-states-to-override-electoral-votes-for-biden-is-that-possible-11605973695 [https://perma.cc/SD9D-FU36]. A federal district court reviewing a challenge by John Eastman to a subpoena from a House committee investigating the January 6 insurrection concluded that Eastman and Trump's actions "more likely than not constitute attempts to obstruct an official proceeding." Eastman v. Thompson, No. 22-cv-00099, at *33 (C.D. Cal. Mar. 28, 2022), https://storage.courtlistener.com/recap/gov.uscourts.cacd.841840/gov.uscourts.cacd.841840.260.0_4.pdf [https://perma.cc/H2QC-5YKS]. The court concluded: "If Dr. Eastman and President Trump's plan had worked, it would have permanently ended the peaceful transition of power, undermining American democracy and the Constitution. If the country does not commit to investigating and pursuing accountability for those responsible, the court fears January 6 will repeat itself." *Id.* at 44.

46 *See* Maggie Haberman & Annie Karni, *Pence Said to Have Told Trump He Lacks Power to Change Election Result*, N.Y. TIMES (Sept. 14, 2021), https://www.nytimes.com/2021/01/05/us/politics/pence-trump-election-results.html [https://perma.cc/QZY9-PJY5].

47 Lisa Mascaro, Eric Tucker, Mary Clare Jalonick & Andrew Taylor, *Biden Win Confirmed After Pro-Trump Mob Storms US Capitol*, ASSOCIATED PRESS (Jan. 7, 2021), https://apnews.com/article/joe-biden-confirmed-0409d7d753461377ff2c5bb91ac4050c [https://perma.cc/F4GN-YGSD].

to object to the counting of Pennsylvania's Electoral College votes based upon spurious grounds.[48]

The bravery of Republican and other election officials and elected officials prevented Trump's gambit from succeeding. It was not just Vice President Pence, Secretary Raffensperger, and Acting Attorney General Rosen who stood up to President Trump, but also Republican governors, Republican-appointed election officials, and others, many of whom faced pressure and condemnation from both President Trump and the base of the Republican Party.[49] For example, Secretary Raffensperger faces a Republican primary challenge as he runs for reelection as Secretary of State against Representative Jody Hice, a current member of Congress who has parroted Trump's claims of a stolen 2020 election.[50]

President Trump riled up his supporters to attend "wild" protests in Washington, D.C., and thousands of his supporters obliged.[51] And at his January 6 rally, he directed his supporters to the Capitol after he and other speakers once again claimed a rigged and stolen election and demanded that Vice President Pence and others do something about it.[52]

---

[48] Harry Stevens, Daniela Santamariña, Kate Rabinowitz, Kevin Uhrmacher & John Muyskens, *How Members of Congress Voted on Counting the Electoral College Vote*, WASH. POST (Jan. 7, 2021, 12:48 PM), https://www.washingtonpost.com/graphics/2021/politics/congress-electoral-college-count-tracker/ [https://perma.cc/AN8W-Q93K]; *Tempers Flare as Congress Rejects Objections to Pennsylvania Electoral Votes*, 6ABC (Jan. 7, 2021), https://6abc.com/conor-lamb-morgan-griffiths-house-confrontation-pennsylvania-electoral-votes/9430160 [https://perma.cc/L25K-39KP]; Jonathan Tamari, *Eight Pennsylvania Republicans in Congress Will Join a Push Today to Reverse Trump's Election Loss*, PHILA. INQUIRER (Jan. 6, 2021), https://www.inquirer.com/politics/election/electoral-college-certification-congress-pennsylvania-republicans-20210106.html [https://perma.cc/HG7R-MNT6].

[49] Helderman & Viebeck, *supra* note 34; Richard L. Hasen, *More and More Republican Officials Are Standing Up to Trump and His Effort to Overturn the Election*, SLATE (Dec. 1, 2021, 2:58 PM), https://slate.com/news-and-politics/2020/12/republican-officials-who-have-gone-against-trump-barr-ducey-kemp.html [https://perma.cc/D73V-BRJ2].

[50] *See* Ian Millhiser, *Jody Hice Tried to Overturn the 2020 Election. Now He Wants to Be in Charge of Georgia's Elections*, VOX (Mar. 22, 2021, 6:10 PM), https://www.vox.com/2021/3/22/22345029/jody-hice-2020-election-donald-trump-georgia-secretary-of-state-brad-raffensperger [https://perma.cc/6L9F-L572].

[51] Dan Barry & Sheera Frenkel, *"Be There. Will Be Wild!": Trump All but Circled the Date*, N.Y. TIMES (July 27, 2021), https://www.nytimes.com/2021/01/06/us/politics/capitol-mob-trump-supporters.html [https://perma.cc/UN5J-TY2K].

[52] For a detailed chronology, see Trial Memorandum of the United States House of Representatives in the Impeachment Trial of President Donald J. Trump at 20–22, *In re* Impeachment of President Donald J. Trump (U.S. Sen. Feb. 2, 2021), https://judiciary.house.gov/uploadedfiles/house_trial_brief_final.pdf [https://perma.cc/6SWZ-TEST].

The January 6, 2021, riot left over 140 law enforcement officers injured,[53] four Trump supporters dead,[54] and four Capitol police officers who died by suicide by August 2021.[55] Some officers' injuries were serious, including a lost eye, broken ribs and spinal disks, and concussions; insurrectionists tased one officer so many times that he had a heart attack.[56]

It was the first successful violent attack on the Capitol since the British attacked during the War of 1812.[57] Had things gone even slightly differently, the Vice President and congressional leadership could have been captured or killed;[58] the events could have provoked a military response and left the counting of election results uncompleted.[59] Thanks to the bravery of law enforcement officials and members of Congress, the counting resumed after the violence, and President Biden was found to be the winner early on the morning of January 7.[60]

---

[53] Michael S. Schmidt & Luke Broadwater, *Officers' Injuries, Including Concussions, Show Scope of Violence at Capitol Riot*, N.Y. TIMES (July 12, 2021), https://www.nytimes.com/2021/02/11/us/politics/capitol-riot-police-officer-injuries.html [https://perma.cc/6XXW-WFFY].

[54] Jack Healy, *These Are the 5 People Who Died in the Capitol Riot*, N.Y. TIMES (Feb. 22, 2021), https://www.nytimes.com/2021/01/11/us/who-died-in-capitol-building-attack.html [https://perma.cc/2HV9-TWYY].

[55] Jan Wolfe, *Four Officers Who Responded to U.S. Capitol Attack Have Died by Suicide*, REUTERS (Aug. 2, 2021, 11:19 PM), https://www.reuters.com/world/us/officer-who-responded-us-capitol-attack-is-third-die-by-suicide-2021-08-02 [https://perma.cc/TH7B-TXGD]; Peter Hermann, *Two Officers Who Helped Fight the Capitol Mob Died by Suicide. Many More Are Hurting.*, WASH. POST (Feb. 21, 2021, 2:56 PM), https://www.washingtonpost.com/local/public-safety/police-officer-suicides-capitol-riot/2021/02/11/94804ee2-665c-11eb-886d-5264d4ceb46d_story.html [https://perma.cc/5E22-XZPA].

[56] Peter Baker & Sabrina Tavernise, *One Legacy of Impeachment: The Most Complete Account So Far of Jan. 6*, N.Y. TIMES (Aug. 31, 2021), https://www.nytimes.com/2021/02/13/us/politics/capitol-riots-impeachment-trial.html [https://perma.cc/VBE5-UYSY].

[57] Jackie Salo, *US Capitol Building Invaded for the First Time Since War of 1812*, N.Y. POST (Jan. 6, 2021, 6:57 PM), https://nypost.com/2021/01/06/us-capitol-building-invaded-for-first-time-since-war-of-1812 [https://perma.cc/93YK-5ZZH].

[58] *See* Ashley Parker, Carol D. Leonnig, Paul Kane & Emma Brown, *How the Rioters Who Stormed the Capitol Came Dangerously Close to Pence*, WASH. POST (Jan. 15, 2021), https://www.washingtonpost.com/politics/pence-rioters-capitol-attack/2021/01/15/ab62e434-567c-11eb-a08b-f1381ef3d207_story.html [https://perma.cc/QZ8X-6D5F]; Adam Goldman, John Ismay & Hailey Fuchs, *Man Who Broke into Pelosi's Office and Others Are Charged in Capitol Riot*, N.Y. TIMES (Jan. 10, 2021), https://www.nytimes.com/2021/01/08/us/politics/capitol-riot-charges.html [https://perma.cc/XT3K-RMLC]; *New Timeline Shows Just How Close Rioters Got to Pence and His Family*, CNN (Jan. 15, 2021), https://www.cnn.com/videos/politics/2021/01/15/mike-pence-close-call-capitol-riot-foreman-vpx.cnn [https://perma.cc/7R2D-KHCP].

[59] *See* Dan Lamothe, Karoun Demirjian & Devlin Barrett, *Generals Cast Military Response to Capitol Riot as an "Unforeseen" Change in Mission*, WASH. POST (June 15, 2021, 8:10 PM), https://www.washingtonpost.com/politics/generals-cast-military-response-to-capitol-riot-as-an-unforeseen-change-in-mission/2021/06/15/5201dcbe-ce0a-11eb-a7f1-52b8870bef7c_story.html [https://perma.cc/P3KC-HJDF].

[60] Mascaro, Tucker, Jalonick & Taylor, *supra* note 47. For example, Eugene Goodman was the Capitol police officer who single-handedly led a portion of the January 6 mob away from discovering the entrance to the Senate chambers. Rebecca Tan, *A Black Officer Faced Down a Mostly*

President Trump reluctantly left office at his constitutionally prescribed time on January 20, 2021, but he refused to participate in the custom of attending his successor's inauguration and affirming the peaceful transition of power that has been a hallmark of U.S. elections.[61] President Trump instead continues to insist falsely that the 2020 election was stolen, even as many of his comments on the subject reach fewer readers thanks to the decisions of Facebook and Twitter to remove his accounts from their websites.[62]

Deplatforming President Trump did little to dampen the enthusiasm among some conservatives and Republicans to relitigate November 2020 and insist on a Trump victory. Arizona's Republican-led Senate ordered an "audit" of the state's presidential election results months after President Biden took office.[63] The senators employed a firm, "Cyber Ninjas," that had no experience conducting election audits and that was headed by someone who had parroted Trump's false claims of a stolen election;[64] the sham audit revealed no evidence of a stolen election.[65] Pressure fell on Republicans in other states to emulate the "audit,"[66] and similar bogus investigations began in states including Wisconsin and

White Mob at the Capitol. Meet Eugene Goodman., WASH. POST (Jan. 14, 2021), https://www.washingtonpost.com/local/public-safety/goodman-capitol-police-video/2021/01/13/08ab3eb6-546b-11eb-a931-5b162d0d033d_story.html [https://perma.cc/SRJ4-4ZZY]. For these efforts, Goodman was unanimously awarded a Congressional Gold Medal by the Senate. Alana Wise, *Senate Unanimously Votes to Award Officer Eugene Goodman a Congressional Gold Medal*, NPR (Feb. 12, 2021, 7:27 PM), https://www.npr.org/sections/trump-impeachment-trial-live-updates/2021/02/12/967520702/senate-unanimously-votes-to-award-officer-eugene-goodman-a-congressional-gold-me [https://perma.cc/5LD7-6EB6].

[61] Ayesha Rascoe, *For 1st Time in 150 Years, Outgoing President Doesn't Attend Inauguration*, NPR (Jan. 20, 2021, 4:10 PM), https://www.npr.org/2021/01/20/958905703/for-1st-time-in-150-years-outgoing-president-doesnt-attend-inauguration [https://perma.cc/C37L-W5RU]; *see also* Michael D. Shear, Maggie Haberman, Nick Corasaniti & Jim Rutenberg, *Trump Administration Approves Start of Formal Transition to Biden*, N.Y. TIMES (Nov. 24, 2020), https://www.nytimes.com/2020/11/23/us/politics/trump-transition-biden.html [https://perma.cc/64N7-QA97].

[62] On the deplatforming of President Trump by Facebook and Twitter, see HASEN, *supra* note 15, at 2, 15–16, 123, 145–57.

[63] Michael Wines, *Half a Year After Trump's Defeat, Arizona Republicans Are Recounting the Vote*, N.Y. TIMES (Sept. 23, 2021), https://www.nytimes.com/2021/04/25/us/Election-audit-Arizona-Republicans.html [https://perma.cc/6SFV-DDC2].

[64] *Id.*; *see* Nicholas Riccardi, *Experts or "Grifters"? Little-Known Firm Runs Arizona Audit*, ASSOCIATED PRESS (May 23, 2021), https://apnews.com/article/donald-trump-arizona-business-technology-election-recounts-c5948f1d2ecdff9e93d4aa27ba0c1315 [https://perma.cc/4LMS-2RS9].

[65] Jack Healy, Michael Wines & Nick Corasaniti, *Republican Review of Arizona Vote Fails to Show Stolen Election*, N.Y. TIMES (Sept. 30, 2021), https://www.nytimes.com/2021/09/24/us/arizona-election-review-trump-biden.html [https://perma.cc/D7NW-28LD].

[66] Andrew Seidman, *Pennsylvania GOP Leaders Face Growing Pressure to Pursue an Arizona-Style 2020 Election "Audit,"* PHILA. INQUIRER (June 4, 2021), https://www.inquirer.com/politics/pennsylvania/pennsylvania-republicans-election-audit-legislature-arizona-20210604.html [https://perma.cc/9A2G-2MPJ].

Pennsylvania.[67] Some Wisconsin Republicans advocated eliminating the state's bipartisan election agency to replace it with party loyalists.[68]

Those Republican election officials and elected officials who stood up in 2020 to President Trump have faced censure, removal from office, and other consequences. Party organizations have condemned secretaries of state and governors who vouched for the fairness of the 2020 election;[69] a Republican on Michigan's Board of State Canvassers, who served in a ceremonial role in certifying the state's presidential election results, was replaced by Republicans unhappy that he did his ministerial duty.[70] Republican members of the House who voted for Trump's impeachment for events related to the January 6 insurrection have faced threats as well. Representative Anthony Gonzalez decided not to run for reelection, citing the threats and calling President Trump "a cancer for the country."[71] Republican Adam Kinzinger, who is serving on a House committee investigating the January 6 events, also declined to run for reelection.[72]

The State of Georgia passed a law removing Secretary of State Raffensperger from his position as Chair of the State Election Board, replacing him with someone chosen by the state legislature.[73] That same

---

[67] *See* Nick Corasaniti, *Republicans Seek Pennsylvania Voters' Personal Information as They Try to Review the 2020 Results.*, N.Y. TIMES (Oct. 14, 2021), https://www.nytimes.com/2021/09/15/us/politics/pennsylvania-election-audit-republicans.html [https://perma.cc/K7L9-MWDP]; Scott Bauer, *Wisconsin Election Clerks Say GOP Investigator's Inquiry Landed in Junk Folders*, PIONEER PRESS (Sept. 14, 2021, 5:19 PM), https://www.twincities.com/2021/09/14/wisconsin-election-clerks-say-gop-investigators-inquiry-landed-in-junk-folders [https://perma.cc/GMP7-62UW].

[68] Reid J. Epstein, *Wisconsin Republicans Push to Take Over the State's Elections*, N.Y. TIMES (Nov. 19, 2021), https://www.nytimes.com/2021/11/19/us/politics/wisconsin-republicans-decertify-election.html [https://perma.cc/AF7F-JQQM].

[69] Michelle L. Price, *Nevada GOP Censures Election Official Who Defended Results*, ASSOCIATED PRESS (Apr. 11, 2021), https://apnews.com/article/donald-trump-barbara-cegavske-nevada-elections-bccf4ffe9a52dd6ebbe6e93ad0285e5a [https://perma.cc/W7UH-VHE7]; Lisa Lerer, *Republicans in Two Rural Georgia Counties Censure Gov. Brian Kemp and Others*, N.Y. TIMES (Aug. 30, 2021), https://www.nytimes.com/2021/04/14/us/politics/georgia-kemp-raffensperger-trump-republicans.html [https://perma.cc/RD8A-R4VU].

[70] Dave Boucher, *Whitmer Appoints New Member to Elections Board After GOP Wanted Replacement*, DET. FREE PRESS (Jan. 19, 2021, 5:24 PM), https://www.freep.com/story/news/politics/elections/2021/01/19/tony-daunt-whitmer-gop-michigan-board-state-canvassers/4210262001 [https://perma.cc/U3R4-6WG9].

[71] Jonathan Martin, *Ohio House Republican, Calling Trump "a Cancer," Bows Out of 2022*, N.Y. TIMES (Nov. 2, 2021), https://www.nytimes.com/2021/09/16/us/politics/anthony-gonzalez-ohio-trump.html [https://perma.cc/2Q4V-Q6VZ].

[72] Reid J. Epstein, *Adam Kinzinger, Republican Trump Critic, Won't Seek Re-election in House*, N.Y. TIMES (Oct. 29, 2021), https://www.nytimes.com/2021/10/29/us/politics/adam-kinzinger-illinois-election.html [https://perma.cc/B6AT-AYDA].

[73] Nick Corasaniti & Reid J. Epstein, *What Georgia's Voting Law Really Does*, N.Y. TIMES (Aug. 18, 2021), https://www.nytimes.com/2021/04/02/us/politics/georgia-voting-law-annotated.html [https://perma.cc/4WWL-DXB5].

legislation gave the board authority to suspend county election officials, including in heavily Democratic counties such as Fulton County.[74]

The Georgia law was one of 216 bills across forty-one states that gave or would give partisan state legislators greater control of the election process over state and local election officials, according to a report by the States United Democracy Center, Protect Democracy, and Law Forward.[75] In Iowa, local election officials could face criminal penalties for sending an absentee ballot application to a voter unless first requested by the voter;[76] in Texas, poll workers could face criminal sanctions for interfering with the activities of "poll watchers," who can now engage in intimidation and interference at polling places.[77] While many of these laws have provisions that might be seen as aimed at voter suppression, at least some of them appear geared to providing a path for overturning election results.[78] Perhaps the most troubling bills introduced so far, but not passed, are those in the State of Arizona, which would have given the state legislature authority to ignore the vote of Arizonans and appoint its own slate of presidential electors upon flimsy allegations of election irregularities or for any reason at all.[79]

---

[74] *See id.*

[75] STATES UNITED DEMOCRACY CTR., PROTECT DEMOCRACY & LAW FORWARD, A DEMOCRACY CRISIS IN THE MAKING: HOW STATE LEGISLATURES ARE POLITICIZING, CRIMINALIZING, AND INTERFERING WITH ELECTION ADMINISTRATION 1 (2021) [hereinafter DEMOCRACY CRISIS IN THE MAKING], https://s3.documentcloud.org/documents/20688594/democracy-crisis-report-april-21.pdf [https://perma.cc/3HBS-XAS2]; STATES UNITED DEMOCRACY CTR., PROTECT DEMOCRACY & LAW FORWARD, DEMOCRACY CRISIS REPORT UPDATE: NEW DATA AND TRENDS SHOW THE WARNING SIGNS HAVE INTENSIFIED IN THE LAST TWO MONTHS 1 (2021), https://statesuniteddemocracy.org/wp-content/uploads/2021/06/Democracy-Crisis-Part-II_June-10_Final_v7.pdf [https://perma.cc/7SM2-BDEE] (updating earlier report).

[76] DEMOCRACY CRISIS IN THE MAKING, *supra* note 75, at 26 (citing Act of Mar. 8, 2021, ch. 12, 2021 Iowa Acts Reg. Sess. 22 (codified at scattered sections of IOWA CODE)); *see* IOWA CODE §§ 39A.2(1)(g), 39A.6(3)(a), 53.2(1)(c), 53.8(4) (2022).

[77] Sean Morales-Doyle, *We're Suing Texas over Its New Voter Suppression Law*, BRENNAN CTR. FOR JUST. (Sept. 7, 2021), https://www.brennancenter.org/our-work/analysis-opinion/were-suing-texas-over-its-new-voter-suppression-law [https://perma.cc/9TBM-83GE] (describing new Texas law that "threatens poll workers with criminal prosecution if they try to stop partisan poll watchers from harassing or intimidating voters"). On the general danger of election surveillance intimidating voters and poll workers, see Rebecca Green, *Election Surveillance*, 57 WAKE FOREST L. REV. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3982460 [https://perma.cc/5U8H-R3BZ].

[78] *See* Green, *supra* note 77 (manuscript at 23–31); Lawrence Norden, *Protecting American Democracy Is No Crime: New Laws Could Make Election Officials Legal Targets*, FOREIGN AFFS. (Apr. 7, 2021), https://www.foreignaffairs.com/articles/united-states/2021-04-07/protecting-american-democracy-no-crime [https://perma.cc/5RCD-D7UK]. On the differences and similarities between voter-suppression and election-subversion concerns, see *infra* note 105.

[79] *See* DEMOCRACY CRISIS IN THE MAKING, *supra* note 75, at 9–10 (describing and criticizing proposed Arizona laws).

The changed laws and continued threats and harassment aimed at election officials have caused an unprecedented exodus of election officials, who already faced harsh conditions and budget shortfalls.[80] The loss of these officials creates two simultaneous risks to election integrity. First, lack of professionalization increases the risk of election-administrator error, which, in the current hyperpolarized atmosphere in the United States, can further undermine confidence in the election process. Second, vacancies in election positions in the current atmosphere may facilitate the population of these positions with those who believe the 2020 election was stolen and who may be more willing to break the rules out of a mistaken desire to level the playing field. Thousands of Trump loyalists, at the urging of Trump-ally Steve Bannon, have been filling positions as Republicans on local election boards, raising the serious danger of vote miscounting in future elections and the undermining of confidence in elections for those on the left.[81]

The risk of election officials undermining the security of election systems was on full display in August 2021, when the Mesa County, Colorado, election administrator Tina Peters spoke at a conference organized by MyPillow chief executive Mike Lindell that perpetuated false statements that the 2020 election was stolen.[82] Although Peters denied releasing the source code used on Dominion Voting Systems (Dominion) voting machines, she admitted copying it, and the Lindell conference made the code publicly available, raising serious questions about whether those machines would now be more vulnerable to hacking.[83] A Brennan Center report explains how the "insider" threat of election sabotage is growing.[84]

And among the Republican base, beliefs have hardened that the 2020 election was stolen. Trump's stolen election claim has become a core article of faith, part of what it means in the contemporary United States to *be* a Republican: in a September 2021 CNN poll, 59% of Republicans

---

[80] *See* sources cited *supra* note 30.

[81] *See* Isaac Arnsdorf, Doug Bock Clark, Alexandra Berzon & Anjeanette Damon, *Heeding Steve Bannon's Call, Election Deniers Organize to Seize Control of the GOP — And Reshape America's Elections*, PROPUBLICA (Sept. 2, 2021, 5:00 AM), https://www.propublica.org/article/heeding-steve-bannons-call-election-deniers-organize-to-seize-control-of-the-gop-and-reshape-americas-elections [https://perma.cc/JJ5J-Z3FF] ("ProPublica contacted GOP leaders in 65 key counties, and 41 reported an unusual increase in signups since Bannon's campaign began. At least 8,500 new Republican precinct officers (or equivalent lowest-level officials) joined those county parties. We also looked at equivalent Democratic posts and found no similar surge.").

[82] Nick Corasaniti, *G.O.P. Election Reviews Create a New Kind of Security Threat*, N.Y. TIMES (Oct. 27, 2021), https://www.nytimes.com/2021/09/01/us/politics/gop-us-election-security.html [https://perma.cc/ETQ8-YC6F].

[83] *See id.*

[84] Lawrence Norden & Derek Tisler, *Addressing Insider Threats in Elections*, BRENNAN CTR. FOR JUST. (Dec. 8, 2021), https://www.brennancenter.org/our-work/analysis-opinion/addressing-insider-threats-elections [https://perma.cc/KMR3-8HMP].

and Republican-leaning independents said "[b]elieving that Donald Trump won the 2020 election" was "very" or "somewhat" important to what it means to be a Republican today.[85] Overall, 36% of Americans polled in the summer of 2021 did not believe that Biden was the legitimate president.[86] "Among Republicans, 78% say that Biden did not win and 54% believe there is solid evidence of that, despite the fact that no such evidence exists. That view is also deeply connected to support for Trump."[87] The report further found that "[a]mong Republicans who say Trump should be the leader of the party, 88% believe Biden lost — including 64% who say there is solid evidence that he did not win — while among those Republicans who do not want Trump to lead the Party, 57% say Biden won legitimately."[88]

Most amazing about the continued Republican belief that the election was stolen from President Trump is the utter lack of reliable evidence supporting the claim; a pandemic-laden election raised the risk of serious errors in election administration[89] that could have been parlayed into false charges of malfeasance. But this was perhaps the best administered presidential election in American history.[90]

Given the new Republican orthodoxy of a stolen 2020 election, it is no wonder that false claims of voter fraud costing Republicans election victories have spread beyond President Trump. Other Republican politicians preemptively and without evidence have raised claims of stolen elections before polls have even closed, including former state Attorney General Adam Laxalt, running for a U.S. Senate seat in Nevada,[91] and Larry Elder, who ran unsuccessfully in the recall election against

---

[85] CNN Poll Conducted by SSRS 10 (Sept. 12, 2021, 8:00 AM), http://cdn.cnn.com/cnn/2021/images/09/12/rel5c.-.partisanship.pdf [https://perma.cc/D5EZ-53SH].

[86] Jennifer Agiesta & Ariel Edwards-Levy, *CNN Poll: Most Americans Feel Democracy Is Under Attack in the US*, CNN (Sept. 15, 2021, 12:01 PM), https://www.cnn.com/2021/09/15/politics/cnn-poll-most-americans-democracy-under-attack/index.html [https://perma.cc/MTE5-YX6M].

[87] *Id.*

[88] *Id.*

[89] *See* Eugene D. Mazo, Essay, *Voting During a Pandemic*, 100 B.U. L. REV. ONLINE 283, 287–294 (2020).

[90] *See* Nathaniel Persily & Charles Stewart III, *The Miracle and Tragedy of the 2020 Election*, 32 J. DEMOCRACY 159, 159, 165–170 (2021).

[91] Nick Corasaniti, Blake Hounshell & Leah Askarinam, *A Republican Fights Voter Fraud in His Race (231 Days Before Election Day)*, N.Y. TIMES (Mar. 22, 2022, 7:01 PM), https://www.nytimes.com/2022/03/22/us/politics/adam-laxalt-election-fraud.html [https://perma.cc/CY9K-WXPD].

California's Democratic governor,[92] Gavin Newsom.[93] (After the election in which the recall vote failed by an almost 2–1 margin,[94] Elder quietly abandoned those claims on his website.[95]) As Greg Sargent writes: "So is this really how it's going to be? Are more and more Republican candidates across our great land going to treat it as a requirement that they cast any and all election losses as dubious or illegitimate by definition?"[96]

II. THREE PATHS TO ELECTION SUBVERSION IN THE UNITED STATES

It is a long way from thinking that an American President was illegitimately elected to the possibility of election subversion. After all, millions of Democrats and others did not accept the legitimacy of George W. Bush's presidency after the disputed 2000 election ended up in the United States Supreme Court,[97] with the Court's conservatives siding with then–Governor Bush and ending Vice President Al Gore's attempt to recount some ballots following Bush's razor-thin lead in Florida.[98] But I am unaware of anyone arguing after the 2000 election that the lack of Democrats' acceptance of President Bush's victory would lead to the demise of American democracy.

There is much more reason for concern this time, in part because President Trump has galvanized a popular movement around his stolen election claim, while Vice President Gore was willing to accept the Supreme Court's determination regarding his request for a recount and

---

[92] John Myers & Phil Willon, *California's Recall Election Officially Ends as Newsom Prepares for 2022*, L.A. TIMES (Oct. 22, 2021, 2:30 PM), https://www.latimes.com/california/story/2021-10-22/california-recall-election-official-results-gavin-newsom-prepares-for-2022 [https://perma.cc/M5P8-3V6J].

[93] Greg Sargent, Opinion, *A Dangerous Trend Among GOP Candidates Shows the Trump Threat Is Here to Stay*, WASH. POST (Sept. 10, 2021, 11:03 AM), https://www.washingtonpost.com/opinions/2021/09/10/dangerous-trend-among-gop-candidates-shows-trump-threat-is-here-stay [https://perma.cc/63JE-FS8D].

[94] *See* Myers & Willon, *supra* note 92.

[95] Lara Korte, *Larry Elder's Voter Fraud Messaging Depressed Republican Turnout, GOP Consultant Charges*, SACRAMENTO BEE (Sept. 16, 2021, 5:28 AM), https://www.sacbee.com/news/politics-government/capitol-alert/article254265763.html [https://perma.cc/FPB4-WSA8] ("When asked why the language claiming voter fraud was removed from Elder's website, as The Sacramento Bee and others noted on Tuesday, [Elder advisor Jeff] Corless said to his knowledge, nothing had been changed. That is incorrect; The Bee has screenshots of content referring to the 'twisted' results of the recall, which no longer appears on the site.").

[96] Sargent, *supra* note 93.

[97] *See* Joseph Carroll, *Seven out of 10 Americans Accept Bush as Legitimate President: Seventeen Percent Continue to Say Bush "Stole" Election*, GALLUP (July 17, 2001), https://news.gallup.com/poll/4687/seven-americans-accept-bush-legitimate-president.aspx [https://perma.cc/MER9-HG3P].

[98] *See* Bush v. Gore, 531 U.S. 98, 110, 123, 129 (2000) (per curiam).

conceded defeat when the Court ruled against him.[99] The terrorist attacks on the United States on September 11, 2001, also blunted political forces against President Bush.[100]

Trump's actions also must be considered in the context of his entire presidency, which featured consistent attacks on institutions of civil society and government that help preserve order and promote legitimacy, including not just the opposition Democratic Party but also the judiciary, the free press, and the FBI.[101] Scholars such as Professors Larry Diamond, Steven Levitsky, and Daniel Ziblatt who study how democratic countries backslide and move toward authoritarianism, like Prime Minister Viktor Orbán's Hungary, see serious warning signs for the United States.[102] Manipulating election outcomes is a key component in many states' slides into authoritarianism. Indeed, in July 2021, Levitsky and Ziblatt penned an essay for *The Atlantic* entitled, *The Biggest Threat to Democracy Is the GOP Stealing the Next Election*,[103] in which they explained that:

> Elections require forbearance. For elections to be democratic, all adult citizens must be equally able to cast a ballot and have that vote count. Using the letter of the law to violate the spirit of this principle is strikingly easy. Election officials can legally throw out large numbers of ballots on the basis of the most minor technicalities (e.g., the oval on the ballot is not entirely penciled in, or the mail-in ballot form contains a typo or spelling mistake).[104]

Of greatest concern is that the activities of President Trump and his allies from the November 2020 election through January 7, 2021, served as dress rehearsal for how to subvert election results in 2024 or in other

---

[99] HOWARD GILLMAN, THE VOTES THAT COUNTED 151–52 (2001).

[100] Hannah Hartig & Carroll Doherty, *Two Decades Later, The Enduring Legacy of 9/11*, PEW RSCH. CTR. (Sept. 2, 2021), https://www.pewresearch.org/politics/2021/09/02/two-decades-later-the-enduring-legacy-of-9-11 [https://perma.cc/JB68-PR7N] ("George W. Bush, who had become president nine months earlier after a fiercely contested election, saw his job approval rise 35 percentage points in the space of three weeks. In late September 2001, 86% of adults — including nearly all Republicans (96%) and a sizable majority of Democrats (78%) — approved of the way Bush was handling his job as president.").

[101] *See* Michael J. Klarman, *The Supreme Court, 2019 Term — Foreword: The Degradation of American Democracy — And the Court*, 134 HARV. L. REV. 1, 20–45 (2020).

[102] The already-classic works drawing lessons from other countries to warn of the risk of authoritarianism in the United States are STEVEN LEVITSKY & DANIEL ZIBLATTT, HOW DEMOCRACIES DIE (2018) and LARRY DIAMOND, ILL WINDS (2019). Professor Michael Klarman nicely summarizes this literature, obviating the need for a restating here. *See* Klarman, *supra* note 101, at 11–19. *See also* Jacob M. Grumbach, Laboratories of Democratic Backsliding 24–26 (Apr. 5, 2021) (unpublished manuscript), https://t.co/O4DJAxizHY [https://perma.cc/BXG4-H4M7].

[103] Steven Levitsky & Daniel Ziblatt, *The Biggest Threat to Democracy Is the GOP Stealing the Next Election*, THE ATLANTIC (July 9, 2021), https://www.theatlantic.com/ideas/archive/2021/07/democracy-could-die-2024/619390 [https://perma.cc/GA53-6GW2].

[104] *Id.*

future elections. This Part describes three ways in which election subversion may emerge in the United States as demonstrated by the post–2020 election period.[105]

A. Usurpation of Voter Choice for President

By far the most likely way in which election subversion would infect United States elections in the near term is through a respectable bloodless coup dependent upon technical legal arguments overcoming valid election results. These arguments would be based on state courts or others usurping the power of state legislatures to set the manner for choosing presidential electors.[106] The benefit of technical arguments to subvert election results is that they have an aura of respectability and expertise. Lawyers in fine suits making legalistic arguments are much more appealing than desperate lawyers making unsubstantiated claims of ballot-box stuffing and other chicanery.

President Trump and his allies began to make such arguments in 2020, and this path is much simpler than the bogus claims of voter fraud that failed to work for Trump in 2020. Indeed, in a March 2021 interview with *Washington Post* journalists Carol Leonnig and Phil Rucker, President Trump sounded the same themes about the 2020 election:

> [T]he legislatures of the states did not approve all of the things that were done for those elections. And under the Constitution of the United States, they have to do that. And the Supreme Court, they didn't find fact — don't forget, they didn't say well, we disagree — they said we're not going to hear the case. I'm very disappointed in the Supreme Court. Had Mike Pence had the courage to send it back to the legislatures, you would have had a different outcome, in my opinion. . . . And before you even start about the

---

[105] In the interest of space, this Essay does not address the related question of voter suppression, in which a state or locality makes it harder for people to register or to vote. I believe concerns about voter suppression are serious, and I have devoted two books to that topic, HASEN, *supra* note 4; and HASEN, *supra* note 6. Voter suppression is about laws and rules that make it harder for people to register and to vote. Election subversion is about attempts to mess with the counting or aggregation of ballots, or to prevent an election winner from taking office. The two are related because successful attempts to suppress votes also can alter election outcomes. *See infra* notes 137–139 and accompanying text (describing how unscrupulous state legislatures can interfere with county election officials to suppress voter registration in certain areas). But primary strategies to combat voter suppression are different, such as through court cases brought under the Voting Rights Act, and they deserve their own treatment elsewhere.

Until the Trump presidency, election subversion was not a serious concern in the modern United States; the events following the 2020 presidential election now make it the most urgent concern facing American democracy even as the threat of voter suppression remains serious.

[106] I first advanced an argument along these lines in Richard L. Hasen, *Trump Is Planning a Much More Respectable Coup Next Time*, SLATE (Aug. 5, 2021, 11:48 AM), https://slate.com/news-and-politics/2021/08/trump-2024-coup-federalist-society-doctrine.html [https://perma.cc/KRC5-PEUQ]. *See also* Barton Gellman, *Trump's Next Coup Has Already Begun*, THE ATLANTIC (Dec. 9, 2021, 3:21 PM), https://www.theatlantic.com/magazine/archive/2022/01/january-6-insurrection-trump-coup-2024-election/620843 [https://perma.cc/6GDG-NRCG].

> individual corruptions, . . . when you are handed these votes, and you know that the legislature of any one of those states did not approve those vast changes — hours, days, when to vote — it was all done by local politicians and local judges — right there you should have sent them back to the legislatures. And I can show you letters . . . from legislatures. They wanted them back. . . . [H]ad they gotten them, it would have been a much different story.[107]

The technical legal argument depends upon arcana of federal statutory law and the Constitution's rules for choosing presidential electors and counting their votes. It begins with Article II of the Constitution, which gives each state "Legislature" the power to set the manner for choosing presidential electors.[108] A parallel provision in Article I, section 4 gives each state "Legislature" the power to set the rules for congressional elections, subject to congressional override.[109]

Although each state and Washington, D.C., allow voters to vote directly for President, with the winner of the state's election entitled to that state's Electoral College votes,[110] the Supreme Court affirmed in its 2000 *Bush v. Gore*[111] decision ending the 2000 election controversy that a state legislature could reclaim its Article II power directly to appoint presidential electors in future elections.[112] In 2020, when voters cast

---

[107] Hasen, *supra* note 106 (quoting Carol D. Leonnig & Philip Rucker, *Audio: Trump Says He Spoke to a "Loving Crowd" at Jan. 6 Rally*, WASH. POST, at 03:22 & 05:42 (July 21, 2021, 10:48 PM), https://www.washingtonpost.com/politics/2021/07/21/trump-interview-i-alone-can-fix-it [https://perma.cc/NMS3-BMQV]).

[108] U.S. CONST. art. II, § 1, cl. 2.

[109] *Id.* art. I, § 4, cl. 1.

[110] All states aside from Maine and Nebraska award the state's Electoral College votes to the plurality winner of the presidential election in the state; Maine and Nebraska assign a portion of each state's Electoral College votes by congressional district. Meilan Solly, *Why Do Maine and Nebraska Split Their Electoral Votes?*, SMITHSONIAN MAG. (Nov. 5, 2020), https://www.smithsonianmag.com/smart-news/why-do-maine-and-nebraska-split-their-electoral-votes-180976219 [https://perma.cc/3HVE-NL9B]. With the Biden victory in one of Nebraska's congressional districts in 2020, the state is considering moving to a winner-take-all system. Jon Kipper, *NE Bills Would Combine Electoral Votes and Require Voter ID; NE-02 Would Not Be Counted Separately*, KMTV (Jan. 9, 2021, 2:14 PM), https://www.3newsnow.com/news/local-news/ne-bills-would-combine-electoral-votes-and-require-voter-id-ne-02-would-not-be-counted-separately [https://perma.cc/TMY6-V6TE].

[111] 531 U.S. 98 (2000).

[112] *Id.* at 104 ("The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors.").

Once the election process has begun, however, the state legislature has selected "the manner" for its conduct, and it cannot be taken back from the people for *that* election. Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 545–46 (2021). Post-election appointment of electors by a state legislature raises serious due process concerns. Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. 1052, 1071 (2021) ("[T]he Due Process Clause would be implicated in any attempt to replace, after the election had begun, the popular election processes currently authorized by statute with another means of elector selection."); Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 706–07 (2001). Some commentators also have suggested that a legislature's

their ballots for President, each state followed its own procedures to certify President Biden or President Trump as the winner of the state's Electoral College votes.[113] State officials then sent those ballots to be opened and counted in Congress, and despite some Republican objections to accepting the Electoral College votes from Arizona and Pennsylvania, a majority in both the House and Senate accepted the Electoral College votes cast for each candidate, confirming that President Biden had won by a vote of 306 to 232.[114]

While it would be perfectly constitutional for a state like Arizona to give back to the legislature the power to appoint directly the state's presidential electors in future elections, it is a political nonstarter: it would be profoundly antidemocratic to take away voters' ability to vote for the most important office in the United States, and legislators who sought to do so would likely face the voters' wrath.

But a provision of the ECA provides that a state legislature may send in a slate of presidential electors when the state has "failed" to make a choice of President on Election Day.[115] This section of the ECA applies to something like a natural disaster that prevents voters from casting their ballots.[116] President Trump and his allies sought to use that section as a hook for state legislatures to flip Electoral College results for political reasons. In particular, Trump's lawyers and allies argued that in states where President Biden won, the election had "failed" because other actors besides state legislators were involved in making rules for implementing the 2020 elections, thereby allowing state legislatures to appoint a rival slate of electors to be sent to Congress.[117]

---

appointment of its own electoral slate after Election Day would violate the federal statute establishing a uniform day for the appointment of electors on the first Tuesday after the first Monday in November, 3 U.S.C. § 1. NAT'L TASK FORCE ON ELECTION CRISES, A STATE LEGISLATURE CANNOT APPOINT ITS PREFERRED SLATE OF ELECTORS TO OVERRIDE THE WILL OF THE PEOPLE AFTER THE ELECTION 2, https://static1.squarespace.com/static/5e70e52c7c7272oed714313f/t/5f625c790cef066e940ea42d/1600281722253/State_Legislature_Paper.pdf [https://perma.cc/X7B7-PNAS].

113 *See generally* NAT'L ASS'N OF SEC'YS OF STATE, SUMMARY: STATE LAWS REGARDING PRESIDENTIAL ELECTORS (2020), https://www.nass.org/sites/default/files/surveys/2020-10/summary-electoral-college-laws-Oct20.pdf [https://perma.cc/X5C5-5TZ6].

114 *See* Mascaro, Tucker, Jalonick & Taylor, *supra* note 47.

115 3 U.S.C. § 2.

116 This part of the ECA dates to 1845, and Congress apparently passed it in part to accommodate the fact that New Hampshire and Massachusetts had majority-threshold provisions for their elections such that if voters failed to elect a candidate on Election Day by a majority vote, there would be a separate process for appointing the electors. Levitt, *supra* note 112, at 1076–77; Richard H. Pildes & G. Michael Parsons, *The Legality of Ranked-Choice Voting*, 109 CALIF. L. REV. 1773, 1829 (2021).

117 *See* Levitt, *supra* note 112, at 1054 nn.6–7 (collecting sources); Steve Coll, *The Outdated Law that Republicans Could Use to Upend the Electoral College Vote Next Time*, NEW YORKER (Dec. 18, 2020), https://www.newyorker.com/news/daily-comment/the-outdated-law-that-republicans-could-use-to-upend-the-electoral-college-vote-next-time [https://perma.cc/5ZXR-PXEY].

The lawyers also argued in reliance on the ECA provision that federal courts could throw out or reverse election results if a state's election rules deviated in any way from statutory requirements enacted by the state legislature.[118] The argument that Article II and Article I, section 4 give state legislatures virtually unlimited powers over the rules for running presidential and congressional elections — even if their use means violating the state's own constitution and ignoring its interpretation by the state supreme court — has come to be known as the "independent state legislature" theory.

This Essay is not the place for a full exploration of the theory, but there are serious reasons to doubt the muscular reading put forward by President Trump and his allies in 2020 to allow courts or state legislatures to overturn election results.[119] Indeed, even one of the most prominent advocates for a strong reading of the theory, Professor Michael Morley,[120] cautions against a reading that would turn it into a political weapon:

> [M]ost disturbingly — a legislature might attempt to claim power to simply disregard the results of a popular presidential election and appoint a slate

---

[118] *See, e.g.*, Trump v. Wis. Elections Comm'n, 506 F.3d 620, 624, 637–38 (2020).

[119] For a detailed historical account debunking much of this muscular reading, see Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3923205 [https://perma.cc/NG7P-HMTM]. *See generally* Levitt, *supra* note 112; Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1 (2020); Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731 (2001); Michael Weingartner, Liquidating the Independent State Legislature Theory (Sept. 25, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4044138 [https://perma.cc/2GTR-G5N7].

Four Justices on the Supreme Court recently signalled an interest in reviewing a case raising the independent state legislature theory. The application for stay concerned a North Carolina Supreme Court decision striking down the legislature's congressional redistricting plan as an unconstitutional partisan gerrymander under the state constitution. Moore v. Harper, No. 21A455, slip op. at 2 (U.S. Mar. 7, 2022) (Alito, J., dissenting from denial of application for stay). Justice Alito, for himself and Justices Thomas and Gorsuch, would have granted a stay of the state supreme court's order on grounds it likely violated the independent state legislature theory. *Id.*, slip op. at 1–5. Justice Kavanaugh did not agree with issuing a stay given the timing of the request but stated that he would vote to hear the case on the merits once a petition for writ of certiorari had been filed. *Id.*, slip op. at 1–2 (Kavanaugh, J., concurring in denial of application for stay). *See* Adam Liptak, *Supreme Court Allows Court-Imposed Voting Maps in North Carolina and Pennsylvania*, N.Y. TIMES (Mar. 7, 2022), https://www.nytimes.com/2022/03/07/us/supreme-court-voting-maps.html [https://perma.cc/QSG7-FNDL] ("[I]n the North Carolina case, there were signs that at least four of the court's more conservative justices could later rule that state courts are powerless to change congressional maps adopted by state legislatures.").

[120] *See, e.g.*, Morley, *supra* note 112, at 502–03 ("[The independent state legislature] doctrine teaches that a state legislature's power to regulate federal elections does not arise from its state constitution (like most of the legislature's other powers) but rather from an independent grant of authority directly from the U.S. Constitution. The doctrine is rooted in the fact that states lack inherent authority to regulate federal elections; their only power over such elections comes from the U.S. Constitution.").

> of electors reflecting its own partisan preferences. Such a step would be historically unprecedented, fly directly in the face of our democratic traditions, and likely destabilize the entire presidential election. Once a legislature has made the decision to award presidential electors based on a popular vote and the election has been conducted, it would be both unjustifiable and disastrous for the legislature to unilaterally decide to ignore the will of the people.[121]

Despite these dangers, the theory could have upended the 2020 election results from Pennsylvania. There, the state supreme court, applying a Pennsylvania constitutional provision guaranteeing "free and equal" elections, agreed with voting rights plaintiffs that COVID-related problems with voting justified extending the deadline for the receipt of mail-in ballots from the Election Day deadline set by the state legislature to three days after Election Day.[122] Republican lawyers argued that the state supreme court ruling violated the powers of the state legislature.[123]

Justice Alito, seeing at least some merit in the argument, required Pennsylvania officials during the 2020 election to set aside mail-in ballots that arrived in the three days after Election Day for possible exclusion from the count.[124] Mercifully, the Supreme Court did not have to address this issue in the midst of a presidential election: there were only about 10,000 such ballots, and Biden had won the state by about 80,000 votes, rendering the legal dispute moot as to the presidential election.[125]

---

[121] *Id.* at 545–46.

[122] Pa. Democratic Party v. Boockvar, 238 A.3d 345, 371 (Pa. 2020). Similarly, in North Carolina, Trump-allied lawyers argued that state election administrators usurped the North Carolina General Assembly's power in setting rules for conducting the election during the COVID-19 pandemic. They dropped the argument once it was clear that President Trump had won the state. *See* Moore v. Circosta, 141 S. Ct. 46, 46–48 (2020) (Gorsuch, J., dissenting from denial of application for injunctive relief); Rick Hasen, *Before the Election, Republicans Complained to the Supreme Court About Ballot Deadlines in Pennsylvania and North Carolina Under the Same Theory, But Now They Are Perfectly Fine with Counting Late Ballots in NC Where They Are Leading*, ELECTION L. BLOG (Nov. 11, 2020, 7:40 AM), https://electionlawblog.org/?p=118482 [https://perma.cc/4DJR-8XBD].

[123] *See* Hasen, *supra* note 122.

[124] *See* Republican Party of Pa. v. Boockvar, No. 20A84, 2020 WL 6536912, at *1 (U.S. Nov. 6, 2020). An alternative way to usurp voter choice is by seeking to have broad swaths of legitimately cast ballots set aside, without necessarily asking for the state legislature to take over the role of selecting presidential electors. For example, in *Hotze v. Hollins*, No. 20-cv-03709, 2020 WL 6437668 (S.D. Tex. Nov. 2, 2020), *aff'd in part, vacated in part sub nom.* Hotze v. Hudspeth, 16 F.4th 1121 (5th Cir. 2021), Steve Hotze, a well-known Republican activist in Texas, joined by three Republican candidates for election, filed a lawsuit in the Southern District of Texas seeking to have 127,000 votes disqualified because they were cast in "drive-thru" voting sites, which allegedly violated a Texas election statute. *See Recent Case:* Hotze v. Hollins, HARV. L. REV. BLOG (Nov. 14, 2020), https://blog.harvardlawreview.org/recent-case-_hotze-v-hollins [https://perma.cc/9JRD-4T9N]. Even if such a theory for disqualifying votes is without merit, a state court could order disqualification of such ballots, and a federal court could decline to second-guess that determination, potentially changing the outcome of an election.

[125] *See* Jonathan Lai, *Only 10,000 Pa. Mail Ballots Arrived After Election Day — Far Too Few to Change the Result if Thrown Out*, PHILA. INQUIRER (Nov. 11, 2020), https://

Had the election been closer and the results turned on Pennsylvania, it is possible the Supreme Court would have relied on the theory in flipping election results or throwing the matter back to the state legislature.[126]

In all, four conservative Justices on the Supreme Court at one point or another during the 2020 Term expressed at least some support for the theory,[127] and the other two Court conservatives could embrace some form of the theory as well.[128] It is unclear what will happen with the theory in the courts in 2024 and beyond.

Although the federal judiciary was largely unsympathetic to Trump's baseless election challenges in 2020,[129] this historical fact was contingent on judges maintaining some fidelity to judicial independence. Such independence is not guaranteed in the future given the fact that the President is in the unique position of picking who will adjudicate future challenges. While he was challenging the results of the 2020 election, President Trump seemed to publicly ask the Justices he appointed to rule in his favor as a sort of quid pro quo for being put on the bench. At a Hanukkah reception in 2020, President Trump told supporters: "All I ask for is people with wisdom and with courage, that's all," because

---

www.inquirer.com/politics/election/pennsylvania-mail-ballots-counted-deadline-supreme-court-20201111.html [https://perma.cc/97MZ-BBGH]; Jonathan Tamari & Jonathan Lai, *With the Vote Count Now Over, Here's How Pennsylvania Broke for Joe Biden,* PHILA. INQUIRER (Nov. 29, 2020), https://www.inquirer.com/politics/election/pennsylvania-2020-election-biden-trump-20201129.html [https://perma.cc/9A32-HMPB].

126 Aziz Huq, Opinion, *The Roberts Court Is Dying. Here's What Comes Next.*, POLITICO MAG. (Sept. 15, 2021, 4:30 AM), https://www.politico.com/news/magazine/2021/09/15/the-roberts-court-is-dying-heres-what-comes-next-511784 [https://perma.cc/S8GT-9CXF].

127 *See* Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 732–33 (2021) (Thomas, J., dissenting from denial of certiorari); *id.* at 738 (Alito, J., dissenting from denial of certiorari); Moore v. Circosta, 141 S. Ct. 46, 47–48 (2020) (Gorsuch, J., dissenting from denial of application for injunctive relief); Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 2 (2020) (statement of Alito, J.); Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 34 n.1 (2020) (Kavanagh, J., concurring in denial of application to vacate stay).

128 Justice Barrett, new to the Court during the end of the 2020 election season, has not weighed in on the issue. Chief Justice Roberts was not willing to invoke the independent state legislature theory in the context of the 2020 election, but he was the lead dissenter when a similar issue came up involving the power of Arizona voters to use the initiative process to create a redistricting commission, taking the power to draw congressional districts outside the power of state legislatures. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 825 (2015) (Roberts, C.J., dissenting).

Aside from the risk of subversion, judicial acceptance of the strong reading of the independent state legislature theory would create a potential earthquake in American election law by upending everything from voter initiatives setting the rules for congressional primaries to normal election-administration decisions of state and local election administrators — not to mention, rendering state constitutional protections for voting rights a nullity in congressional and presidential elections.

129 Jan Wolfe, *U.S. Judiciary, Shaped by Trump, Thwarts His Election Challenges*, REUTERS (Dec. 1, 2020, 1:18 PM), https://www.reuters.com/article/us-usa-election-trump-judges/u-s-judiciary-shaped-by-trump-thwarts-his-election-hallenges-idUSKBN28B60O [https://perma.cc/5E6M-EFXT].

"if certain very important people, if they have wisdom and if they have courage, we're going to win this election in a landslide."[130] It is hard not to read this statement as being directed at Justices whom President Trump placed on the bench, like Justice Barrett. A future President may learn from Trump's 2020 failure and seek to identify more explicitly partisan candidates for the Supreme Court.

Even if the courts do not bless use of the theory to subvert elections, however, and even if there were no good reason to believe that state courts or state election officials somehow violated legislative prerogatives to set presidential election rules under Article II, state legislatures could still choose to convene and send to Congress an alternative slate of electors. State legislatures could point to supposed "irregularities" in the conduct of the election that they would claim allow them to choose new electors after declaring a "failed" election.

If enough states with majority-Republican legislatures whose voters chose the Democratic presidential candidate sent in alternative slates of electors (or perhaps blocked the sending in of the electors for the winning Democratic candidate), and if Republicans controlled both houses of Congress, Congress could accept such bogus results and declare a Republican presidential loser the winner. Or, if the houses of Congress are divided, the stalemate could lead to several scenarios under the ECA and the Twelfth Amendment: the Speaker of the House could become temporary President, or, if no candidate received a majority of the electors, state delegations in the House could likely elect a Republican President.

It is not just Democrats who need to worry about holes in constitutional and statutory rules for translating voters' choices into an Electoral College winner. Republicans might fear that the current Democratic Vice President, Kamala Harris, who will preside over the counting of the Electoral College votes in January 2025, could embrace the Eastman theories[131] and attempt to unilaterally reject slates of electors sent in from Republican states (perhaps alternative slates based upon complaints of irregularities), exacerbating a political and constitutional crisis.

B. Election-Official Manipulation of Election Results

The second means by which election results can be subverted is through direct manipulation of the conduct of elections or vote counting by corrupt election officials. The hyperdecentralized election system of

---

[130] Andrew Feinberg, *Trump Wonders Why the Supreme Court Justices He Appointed Won't Support Him. He Shouldn't*, THE INDEPENDENT (Dec. 11, 2020, 4:30 PM), https://www.independent.co.uk/voices/trump-lawsuits-election-supreme-court-gorsuch-b1770104.html [https://perma.cc/3B2F-BD9Y].

[131] *See* Gangel & Herb, *supra* note 41.

the United States creates room for vulnerabilities. Take the 2020 election results: thanks to the Electoral College system, a shift of about 45,000 votes across three states (a relatively small number of votes when vote totals exceed 150 million votes[132]) would have turned President Trump into the election winner and President Biden into the loser.[133] The risk is that a few unscrupulous actors could make minor changes in vote totals that could prove decisive in a very close presidential election.

Elections are already administered in many places by partisan actors who are elected or appointed as Democrats or Republicans, but there has been no evidence of such officials directly manipulating vote totals in federal elections since the 1960s.[134] The new risk is that election officials who have embraced the false claims of a stolen election in 2020 will manipulate election results in a misguided effort to "even the score." Embracing such claims demonstrates a lack of credibility and seriousness of election administration. There is no room for debate about the overall integrity of the 2020 election vote count, and someone who claims there is or who says they are "just asking questions" about the vote counts cannot be trusted to administer a fair election.

Election officials lacking scruples and seeking to manipulate election outcomes might also attempt to interfere with the fair administration of the election by creating conditions for long lines in parts of a jurisdiction

---

[132] Drew DeSilver, *Turnout Soared in 2020 as Nearly Two-Thirds of Eligible U.S. Voters Cast Ballots for President*, PEW RSCH. CTR. (Jan. 28, 2021), https://www.pewresearch.org/fact-tank/2021/01/28/turnout-soared-in-2020-as-nearly-two-thirds-of-eligible-u-s-voters-cast-ballots-for-president [https://perma.cc/WQU3-EEYC].

[133] *See* Paul Waldman, Opinion, *We Came Much Closer to an Election Catastrophe than Many Realize*, WASH. POST (Nov. 18, 2020), https://www.washingtonpost.com/opinions/2020/11/18/how-2020-election-was-closer-than-2016 [https://perma.cc/DH36-YWSF].

[134] I am unaware of any statewide or federal elections since at least 1970 in which there is credible evidence that election officials were involved in illegally manipulating election results to turn an election loser into an election winner. There are isolated examples of such election subversion on the state and local level in recent decades. *See, e.g.*, Jeff Gottlieb, Hector Becerra & Ruben Vives, *Feds Detail Scale of Graft in Cudahy*, L.A. TIMES (July 13, 2012, 12:00 AM), https://www.latimes.com/local/la-xpm-2012-jul-13-la-me-cudahy-20120713-story.html [https://perma.cc/4FSG-NWFC] (describing election officials destroying ballots cast for challengers in Cudahy, California, municipal races); Marks v. Stinson, 19 F.3d 873, 875, 877–78 (3d Cir. 1994) (detailing absentee ballot fraud committed by a candidate's committee in a Pennsylvania state senate race in cooperation with officials on the Philadelphia County Board of Elections).

Earlier periods in U.S. history include examples of such election subversion on the federal level. Professor Ned Foley, who has meticulously studied the history of disputed elections in the United States, concludes that President Lyndon Johnson likely won his U.S. Senate race from Texas in 1948 due to ballot-box stuffing of the infamous "Ballot Box 13" in Alice, Texas. *See* EDWARD B. FOLEY, BALLOT BATTLES 206–17 (2016); *see also id.* at 217–28 (discussing potential but uncertain tampering by election administrators in Illinois and Texas in the 1960 presidential election between then–Senator John F. Kennedy and then–Vice President Richard Nixon). I am aware of no more recent examples, although there are examples of disputed elections in which the losing side was convinced that election rules were manipulated to resolve the dispute. *See id.* at 257–78 (discussing controversies over a 1984 congressional race in Indiana resolved by Congress and a 1994 Alabama state supreme court race).

to dampen turnout or by engaging in aggressive voter purges that remove eligible voters. Such efforts to suppress the vote are not new, but they might be taken to more extreme and potentially illegal levels by those who are not committed to the rule of law and the integrity of the voting system.

One particularly tricky issue concerns state election-administrator oversight and takeovers of local election boards and administrations. Sometimes such actions are completely justified. For example, the State of Michigan made a smart decision to help oversee elections in Detroit in 2020 by putting in place a very experienced former state election official.[135] Detroit had a history of poor election administration and needed help from the state, help that diffused some false claims of election chicanery in 2020.[136]

But the more recent trend has been Republican legislatures changing laws to allow takeovers of local election boards run in Democratic cities, as in Georgia,[137] or removing the ability of local election administrators to offer easier voter registration and voting opportunities, as in Texas.[138] It is hard to understand some of this new state authority over local election administration as anything but an attempt to put in place those who would manipulate election outcomes or at the very least seek to suppress the vote in heavily Democratic areas.[139]

C. Violence or Intimidation Interfering with Election Processes

Even if state legislatures are unwilling to bend or break election rules to overturn voters' choice for President in a state, and even if conspiracy-minded new election administrators refuse to break the law in running fair elections, American elections may still be subverted by violence or intimidation interfering with election processes. The fear was encapsulated in the comments of Trump-ally Representative Madison Cawthorn who told a crowd in August 2021 that "if our

---

[135] *See* Alex Ebert, *Meet the Technocrat Who Keeps Killing Trump Voter Fraud Claims*, BLOOMBERG GOV'T (Aug. 5, 2021, 2:05 PM), https://about.bgov.com/news/meet-the-technocrat-who-keeps-killing-trump-voter-fraud-claims [https://perma.cc/EA88-MRBN].

[136] *See id.*

[137] *See* Stephen Fowler, *State Appoints Bipartisan Panel to Review Fulton Election Board's Actions*, GA. PUB. BROAD. (Aug. 19, 2021, 1:11 PM), https://www.gpb.org/news/2021/08/18/state-appoints-bipartisan-panel-review-fulton-election-boards-actions [https://perma.cc/HT2S-LQCC].

[138] *See* Morales-Doyle, *supra* note 77 ("The bill also makes it a crime for election officials — like our plaintiff Harris County Elections Administrator Isabel Longoria — to encourage eligible voters to apply to vote by mail.").

[139] DEMOCRACY CRISIS IN THE MAKING, *supra* note 75, provides more detailed analysis of the way that state legislatures are seeking to take election-administration powers away from local election officials for partisan reasons.

election systems continue to be rigged and continue to be stolen, then it's going to lead to one place — and it's bloodshed."[140]

The violence surrounding the 2020 election seemed to mark a shift from political violence in the past: it is no longer fringe groups from both sides of the political aisle and is now "older and more established" persons "overwhelmingly from the right."[141] The danger of election-related violence is so palpable that a recent Supreme Court amicus brief filed by well-respected former Fourth Circuit Judge Michael Luttig in a Second Amendment gun rights case raised the connection between easy availability of firearms and future election-related violence:

> Adopting petitioners' "whenever and wherever" right to carry [firearms] would be to throw gasoline on the fires of our Nation's future political conflicts. Although the January 6, 2021, attack on the Capitol itself was unprecedented, political violence in our streets unfortunately is not. Indeed, elected officials and others have continued to make statements long *after* January 6, 2021 that threaten more political violence.[142]

New polling shows that violence to resolve political disputes is becoming more acceptable in American society, particularly among Trump's supporters.[143]

Election-related violence and intimidation could keep voters from the polls or deter them from voting, interfere with the job of election administrators or official bodies in running elections or counting or certifying votes, or prevent lawfully elected officials from taking office.

Legal changes could help facilitate violence and intimidation. For example, the Texas law empowering poll watchers over poll workers

---

[140] Felicia Sonmez, *Rep. Madison Cawthorn Falsely Suggests Elections Are "Rigged," Says There Will Be "Bloodshed" if System Continues on Its Path*, WASH. POST (Aug. 31, 2021, 3:17 PM), https://www.washingtonpost.com/politics/rep-madison-cawthorn-says-there-will-be-bloodshed-if-us-elections-continue-to-be-rigged/2021/08/30/297a9fa2-09c8-11ec-aea1-42a8138f132a_story.html [https://perma.cc/5JJC-AJG8].

[141] Rachel Kleinfeld, *The Rise of Political Violence in the United States*, 32 J. DEMOCRACY 160, 161 (2021); *see also* Rachel Kleinfeld, *The U.S. Shows All the Signs of a Country Spiraling Toward Political Violence*, WASH. POST (Sept. 11, 2020), https://www.washingtonpost.com/outlook/america-political-violence-risk/2020/09/11/be924628-f388-11ea-999c-67ff7bf6a9d2_story.html [https://perma.cc/AHZ6-SQYC]. Note that Kleinfeld wrote the latter article before the January 6, 2021, insurrection.

[142] Brief of J. Michael Luttig, Peter Keisler, Carter Phillips & Stuart Gerson et al. as Amici Curiae in Support of Respondents at 23, N.Y. State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (Sept. 13, 2021), https://www.supremecourt.gov/DocketPDF/20/20-843/192273/20210913145956623_20-843_Amici%20Brief.pdf [https://perma.cc/DU5D-5N3T] (citation omitted); *see also* MICHAEL C. DORF, BRENNAN CTR. FOR JUST., DISAGGREGATING POLITICAL VIOLENCE 2 (2021), https://www.brennancenter.org/sites/default/files/2021-06/Dorf_final.pdf [https://perma.cc/2XKW-JDKW] (tying political violence of January 6, 2021, with debate over Second Amendment firearm rights).

[143] Aaron Blake, *Nearly 4 in 10 Who Say Election Was Stolen from Trump Say Violence Might Be Needed to Save America*, WASH. POST (Nov. 1, 2021, 11:17 AM), https://www.washingtonpost.com/politics/2021/11/01/4-10-who-say-election-was-stolen-trump-say-violence-might-be-needed-save-america [https://perma.cc/G9R9-2RBR].

seems destined to end badly, potentially leading to interference with voters and pollworkers that ends in violence. If anything, our country needs need more laws protecting election workers.

III. MINIMIZING THE RISK OF AMERICAN ELECTION SUBVERSION

Minimizing the risk of American election subversion requires both legal change and political action, especially to enforce norms respecting the rule of law. Legal change alone is not enough because rules for conducting fair elections are not binding without a deeper commitment to the rule of law.[144] What saved American democracy from election subversion in 2020 was not just law but also the refusal of most election and elected officials to disobey or ignore legal constraints, as urged by President Trump. Law still constrains many, and strong law protecting election integrity can help provide roadblocks to an escalation of anti-democratic conduct.

The legal changes described below would promote free and fair elections for all voters, regardless of their political affiliations. Indeed, in a recent CNN poll, fifty-seven percent of Republicans (compared to only forty-nine percent of Democrats) thought it was "very" or at least "somewhat" likely that "in the next few years, some elected officials will successfully overturn the results of an election in the United States because their party did not win."[145] The rules and norm changes proposed here minimize the risks of subversion whether they come from Republicans or Democrats.

A. Legal Change

1. Improved Transparency, Chain of Custody, and Auditing Capacity. — All jurisdictions should run elections that produce paper ballots.[146] Paper is a verified, tangible record that may be examined by

---

144 *See* Levitsky & Ziblatt, *supra* note 103.

145 CNN Poll Conducted by SSRS 12 tbl.066 (Sept. 15, 2021, 12:00 PM), http://cdn.cnn.com/cnn/2021/images/09/15/rel5e.-.elections.pdf [https://perma.cc/4UBA-PYAT].

146 There is a controversy raging over the integrity of ballot-marking devices (BMDs) used for voting. Like direct-recording electronic (DRE) machines, BMDs allow voters to make choices on a computer touchscreen. But whereas a DRE machine stores votes in an electronic format, BMDs produce a printed paper ballot that is subsequently counted by a ballot-reading machine. Typically, these BMDs produce a QR or bar code that the ballot-reading machine reads to record votes, but the ballots also include the voters' choices in a human-readable format that can later be counted in a manual recount. Computer science critics of BMDs believe that not enough voters will check to make sure that the printed ballot accurately reflects their choices, meaning that the code used to record voter choices can be manipulated without voters recognizing it. Supporters of the use of BMDs, who point to their value in providing multiple languages and assistance to disabled voters, believe that risk-limiting audits that hand count a portion of BMD-produced ballots, discussed

courts or others to ensure that there has been an accurate count. Paper ballots not only assure that counts can be verified but also help to bolster public confidence. In 2020, when President Trump attacked the integrity of the vote in Georgia, the state conducted a full hand recount of all the ballots for President, which confirmed the results that President Biden had won the state.[147] Fully electronic voting systems that produce no paper record should be illegal for use in American elections. Imagine the Georgia recount was nothing but vote totals spit out by a computer. Even setting aside any risk that the machines may be hacked, use of these machines can spawn dangerous conspiracy theories that cannot be refuted with adequate physical evidence.[148]

The threat of such conspiracies is not merely hypothetical. In November 2020, fledgling news outlets One America News and Newsmax "saw their standings rise with conservatives after the election . . . while Fox News's ratings dropped after it was the first major

---

below, can ensure that BMDs accurately record voter choices. For the statement of the main argument against the machines, see Andrew W. Appel, Richard A. DeMillo & Phillip B. Stark, *Ballot-Marking Devices Cannot Assure the Will of the Voters*, 19 ELECTION L.J. 432, 432 (2020). The Brennan Center's approach has been more nuanced. Andrea Córdova McCadney, Elizabeth Howard & Lawrence Norden, *Voting Machine Security: Where We Stand Six Months Before the New Hampshire Primary*, BRENNAN CTR. FOR JUST. (Aug. 13, 2019), https://www.brennancenter.org/our-work/analysis-opinion/voting-machine-security-where-we-stand-six-months-new-hampshire-primary [https://perma.cc/T6EP-D2KC]. Concerns over the security of BMDs were heightened after the leak of software for Dominion voting machines carried out in connection with Mike Lindell's activities. *See* Corasaniti, *supra* note 82; John Myers, *Security of Some Ballot-Marking Devices Could Be Vulnerable in California Recall, Researchers Say*, L.A. TIMES (Sept. 3, 2021, 9:09 AM), https://www.latimes.com/california/story/2021-09-03/some-ballot-marking-devices-could-be-vulnerable-in-california-recall-say-researchers [https://perma.cc/J5H2-LF9G].

It is beyond my technical expertise to weigh in on whether risk-limiting audits adequately deal with the risks of BMDs. I can say only that a BMD that produces a paper ballot is far better from the point of view of election subversion than DRE machines, which produce no possible physical evidence from which to conduct a recount or audit.

147 Richard Fausset, *Hand Tally of Georgia Ballots Reaffirms Biden's Win*, N.Y. TIMES (Jan. 20, 2021), https://www.nytimes.com/2020/11/19/us/georgia-recount-biden-trump.html [https://perma.cc/D46A-NNE3].

148 A move toward paper ballots is gaining momentum worldwide. Germany and Brazil, for example, have moved from electric voting machines back to paper ballots. Scott J. Shackelford, Bruce Schneier, Michael Sulmeyer, Anne Boustead, Ben Buchanan, Amanda N. Craig Deckard, Trey Herr & Jessica Malekos Smith, *Making Democracy Harder to Hack*, 50 U. MICH. J.L. REFORM 629, 653–54, 656 (2017). India has enforced a paper-trail audit requirement. Shamika Ravi, *How Electronic Voting Machines Have Improved India's Democracy*, BROOKINGS INST. (Dec. 6, 2019), https://www.brookings.edu/blog/techtank/2019/12/06/how-electronic-voting-machines-have-improved-indias-democracy [https://perma.cc/B762-NWGY]. The EU's Network and Information Systems Cooperation Group has proposed stricter cybersecurity requirements. *See* NETWORK & INFO. SYS. COOP. GRP., COMPENDIUM ON CYBER SECURITY OF ELECTION TECHNOLOGY 38–39 (2018), https://www.ria.ee/sites/default/files/content-editors/kuberturve/cyber_security_of_election_technology.pdf [https://perma.cc/E4RV-NTBJ].

network to project that Mr. Biden had won the election in Arizona."[149] This rise in popularity among Trump supporters was due in part to those outlets' false reporting that Smartmatic and Dominion "altered votes to ensure President Biden won."[150] Although Newsmax walked back some of these statements after being threatened with legal action,[151] the networks still face several lawsuits based on their allegedly defamatory language,[152] as does Fox News for similar reporting.[153]

Paper ballots are only the first step toward transparency and confirmation of election results. States should require the adoption of risk-limiting audits, a procedure to ensure that the vote totals announced by election officials, and often tallied using electronic processes, are accurate. Such audits can help ferret out not only deliberate manipulation of election results but also software glitches and human errors.[154]

Paper ballots and results confirmed by audits are trustworthy only if there are adequate chain-of-custody and transparency requirements for the handling of ballots.[155] Procedures must be in place so that the work of election officials may be monitored by bipartisan and nonpartisan observers to assure fairness in the entire process. The rules must allow

---

[149] Jonah E. Bromwich & Michael M. Grynbaum, *Smartmatic Sues Newsmax and One America News Network, Claiming Defamation*, N.Y. TIMES (Nov. 3, 2021), https://www.nytimes.com/2021/11/03/business/media/smartmatic-newsmax-oan.html [https://perma.cc/8LS5-5QWT].

[150] *Smartmatic Files Defamation Claims Against Newsmax and OANN*, SMARTMATIC (Nov. 3, 2021), https://www.smartmatic.com/us/media/article/smartmatic-files-defamation-claims-against-newsmax-and-oann [https://perma.cc/2LE9-5R9C]; *see* Bromwich & Grynbaum, *supra* note 149.

[151] *See* John Whitehouse (@existentialfish), TWITTER (Dec. 21, 2020, 12:49 PM), https://twitter.com/existentialfish/status/1341078245878472706?s=20 [https://perma.cc/PN53-2L6P].

[152] Erik Larson, *Smartmatic Sues Newsmax, OAN Over Election-Fraud Claims*, BLOOMBERG (Nov. 3, 2021, 4:01 PM), https://www.bloomberg.com/news/articles/2021-11-03/newsmax-oan-sued-by-smartmatic-over-election-fraud-claims [https://perma.cc/QNZ2-85YL].

[153] Michael M. Grynbaum & Jonah E. Bromwich, *Fox News Faces Second Defamation Suit Over Election Coverage*, N.Y. TIMES (Sept. 23, 2021), https://www.nytimes.com/2021/03/26/business/media/fox-news-defamation-suit-dominion.html [https://perma.cc/M4UE-KWUE].

[154] For an introduction, see AD HOC COMM. FOR 2020 ELECTION FAIRNESS & LEGITIMACY, FAIR ELECTIONS DURING A CRISIS 17–19 (2020), https://electionlawblog.org/wp-content/uploads/2020ElectionReport.pdf [https://perma.cc/MP6B-KDSS]; RISK-LIMITING AUDITS WORKING GRP., RISK-LIMITING POST-ELECTION AUDITS (Jennie Bretschneider et al. eds., 2012), https://www.stat.berkeley.edu/~stark/Preprints/RLAwhitepaper12.pdf [https://perma.cc/5LV2-JF6P]; *Post-Election Audits*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/issues/defend-our-elections/election-security/post-election-audits [https://perma.cc/56CY-NUZK]; and *Risk-Limiting Audits*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 16, 2021), https://www.ncsl.org/research/elections-and-campaigns/risk-limiting-audits.aspx [https://perma.cc/MU9A-SD5P].

[155] AD HOC COMM. FOR 2020 ELECTION FAIRNESS & LEGITIMACY, *supra* note 154, at 17 ("[M]aintaining control over the chain of custody of ballots is critical not only to ensure that the initial count is accurate, but to ensure that any disputes that arise are resolved based on the votes cast."); *id.* ("[Risk-limiting audits] require paper ballots or records, and a degree of chain-of-custody over ballots that few states and local jurisdictions currently require.").

observers to observe and not to interfere with or delay legitimate election-administration procedures.[156]

2. Rules Limiting the Discretion of Those Who Certify the Votes, Including Congress. — Transparency and related rules minimize the risk of subversion by those who collect and tally the votes. A different set of actors is involved in certifying the vote totals. Depending on the state, this certifier may be a state or county election board or some other official.[157] When it comes to the presidential election, certification happens first on the state level and then Congress counts the certified votes.[158]

In some jurisdictions, certification is essentially a ministerial act; there is no discretion in the normal decision whether to accept or reject votes as counted by election officials.[159] States should change laws to eliminate any discretion in the certification process;[160] if there is a bona fide dispute about fraud or about who actually won an election, states should have procedures for judicial or administrative review by those empowered to examine facts and evidence and make a determination about election outcomes.

Congress also must amend or replace the 1887 ECA not only to confirm that the Vice President has no unilateral authority to accept or reject Electoral College votes but also to make it harder for Senators or Representatives to raise frivolous objections to Electoral College vote counts. Right now, it takes only one Representative and one Senator to raise an objection and trigger a two-hour debate and vote on the legitimacy of a particular state's electoral votes.[161] Congress should set the threshold higher and otherwise rewrite the rules to bar frivolous challenges. Relatedly, Congress should ensure that the "safe harbor" provision of the ECA precludes Congress from reconsidering Electoral College votes submitted in compliance with a state's law within the time

---

156 *See* Green, *supra* note 77 (manuscript at 59).

157 Anthony Izaguirre, *Explainer: How Does Election Certification Usually Work?*, ASSOCIATED PRESS (Nov. 18, 2020), https://apnews.com/article/donald-trump-local-elections-michigan-elections-36d033a3db637c380e054e867f667d11 [https://perma.cc/TX9G-84N4].

158 *Electoral College Fast Facts*, HIST. ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Institution/Electoral-College/Electoral-College/ [https://perma.cc/M9YX-22SK].

159 *Compare* CAL. ELEC. CODE § 15505 (West 2022) (ministerial certification), *with* M.L. Elrick, Paul Egan & Clara Hendrickson, *What Persuaded the GOP Members of Wayne County Board of Canvassers to Reverse Course*, DET. FREE PRESS (Nov. 20, 2020, 5:00 PM), https://www.freep.com/story/news/local/michigan/wayne/2020/11/19/wayne-canvassing-board-monica-palmer-william-hartmann/3770140001 [https://perma.cc/98FY-6QUW] (describing breakdown of discretionary certification process in Wayne County, Michigan).

160 Richard L. Hasen, *We Can't Let Our Elections Be This Vulnerable Again*, THE ATLANTIC (Jan. 4, 2021), https://www.theatlantic.com/ideas/archive/2021/01/we-cant-let-our-elections-be-vulnerable-again/617542 [https://perma.cc/BP6H-3FUK].

161 *See* 3 U.S.C. §§ 15, 17.

set by the safe harbor provision.[162] It should also clarify that the reference to a "failed election" in the ECA would allow a legislative submission of a slate of electors only in cases such as natural disasters and terrorist attacks that prevent voting.[163]

3. Rules Limiting the Overpoliticization of Election Administration, Especially by State Legislatures. — State legislative takeovers of certification procedures or local election administration present special concerns. On the one hand, state supervision of local election processes is essential when election administrators lack basic competence.[164] On the other hand, many of the recent laws and proposed bills coming from Republican legislatures appear intended to interfere with local election administration for political, not competence, reasons. There is no good reason to criminalize the sending of absentee ballot applications to voters or not to offer voters secure opportunities to vote early, such as through early voting centers. Laws that allow state takeovers of local elections should include safeguards that ensure that the takeovers are not politically motivated and that the actual administration of elections will be done on a fair bipartisan or nonpartisan basis. Any laws allowing for state takeovers of elections that do not ensure fairness should be rejected.

4. Rules Increasing the Criminal Penalties on Those Who Tamper with Federal Elections or Commit Violence or Intimidation of Voters, Elected Officials, or Electoral Candidates. — Elected officials, election officials, or private individuals who tamper with federal election vote totals or election processes should face increased penalties for chicanery.

---

[162] *See id.* § 5.

[163] For some general principles for ECA reform, see NAT'L TASK FORCE ON ELECTION CRISES, CONGRESS MUST UPDATE THE ELECTORAL COUNT ACT TO GUARD AGAINST CRISES DURING FUTURE PRESIDENTIAL ELECTIONS, https://static1.squarespace.com/static/5e70e52c7c7272oed714313f/t/6128044f8b752c57532dfoab/1630012496256/Congress+Must+Update+the+Electoral+Count+Act.pdf [https://perma.cc/8MK6-UPLM]; Matthew A. Seligman, Disputed Presidential Elections and the Collapse of Constitutional Norms 63–90 (Jan. 30, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3283457 [https://perma.cc/3Y5X-E3FM]; and Greg Sargent, Opinion, *How to Prevent the Next Jan. 6, As Revealed in an Important New Analysis*, WASH. POST (Aug. 30, 2021, 10:44 AM), https://www.washingtonpost.com/opinions/2021/08/30/how-prevent-next-jan-6-revealed-an-important-new-analysis [https://perma.cc/EV3U-XAUR]. On how election law should cope with natural disasters, see Michael T. Morley, *Election Emergencies: Voting in Times of Pandemic*, WASH. & LEE L. REV. (forthcoming 2022) (manuscript at 32), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3964186 [https://perma.cc/YU6R-UKH4]; Michael T. Morley, *Postponing Federal Elections Due to Election Emergencies*, 77 WASH. & LEE L. REV. ONLINE 179, 208–14 (2020); and Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 EMORY L.J. 545, 613–17 (2018).

[164] *See* HASEN, *supra* note 4, at 1–4 (describing local election-administration problems in Wisconsin); HASEN, *supra* note 6, at 47–74 (describing problematic local election administrators as the "weakest link," *id.* at 59, in the election-administration process).

These activities are already illegal, but enhanced penalties and a realistic threat of prosecution could deter election-subversion activities on the margin.[165] Increased penalties for election-related violence should be coupled with additional resources provided to law enforcement and DOJ to secure voting, tabulation, certification, and transitions of power.

5. Rules Countering Disinformation About Elections, Particularly Disinformation About When, Where, and How People Vote. — As explained in Part I, future election subversion in the United States is much more likely because of the viral spread of disinformation by President Trump and others that the 2020 election was stolen. Such a widespread belief sets the stage for countermeasures that themselves can undermine election integrity and lead to election subversion.

Several key legal measures may counter disinformation in elections, such as laws making it a crime to spread false information about when, where, and how people vote. Such laws must be carefully crafted to avoid infringing on First Amendment rights of free speech and association. I explore this delicate task and explain why law alone is not enough to counter the risk of disinformation undermining election integrity in a book-length treatment elsewhere.[166]

B. Political Action Enforcing Norms Respecting the Rule of Law

Law can only go so far in protecting American democracy against election subversion, and new laws must be enacted and not just proposed if they are going to counter the risk. Political organization is necessary to pass those laws and to reinforce norms respecting the rule of law and fair election processes.

Political organization can help advance the proposed legal changes advocated above. For example, aside from a paper-ballot requirement, no anti–election subversion provisions appeared in the original version of the For the People Act of 2021,[167] the main Democratic Party–backed election reform measure being considered in the current Congress.[168]

---

[165] *See, e.g.*, 52 U.S.C. § 20511(2)(b) (creating up to five-year penalty for any person in federal election who knowingly and willfully commits fraud in tabulation of ballots). Other statutes that could be amended to provide broader enforcement and harsher penalties include 18 U.S.C. § 241, which criminalizes conspiracies to deprive people of constitutional rights; *id.* § 242, which outlaws depriving persons of constitutional rights under the color of state law; *id.* § 245(b)(1)(A), which criminalizes intimidating someone from voting or qualifying to vote; *id.* § 1512(c)(2), which creates penalties for corruptly obstructing or impeding an official proceeding; 52 U.S.C. § 10307(a), which prohibits the failure to allow voting or counting or tabulating of a ballot while acting under the color of state law; and *id.* § 10307(b), which criminalizes intimidating or threatening someone against voting or attempting to vote.

[166] HASEN, *supra* note 15, at 77–133.

[167] H.R. 1, 117th Cong. (2021); S. 1, 117th Cong. (2021). Section 1502 of both bills contains the paper-ballot requirement.

[168] *See* Nate Cohn, *Georgia's New Law, And the Risk of Election Subversion*, N.Y. TIMES (Aug. 18, 2021), https://www.nytimes.com/2021/04/06/upshot/georgia-election-law-risk.html

The most recent version of the Democrats' proposal, now dubbed the Freedom to Vote Act,[169] does contain important antisubversion provisions, thanks in part to public airing of the dangers of election sabotage. Among those provisions are: a requirement to use paper ballots; chain-of-custody requirements for handling ballots; a guarantee of federal judicial review of vote counting by including a statutory right to have one's vote counted; a prohibition on removing state and local election officials from office without good cause; protection of election workers from intimidation; and a reaffirmation that manipulating election tabulation or results is a federal crime.[170] It is not enough, but it is a good start. The big question now is whether Democrats in an equally divided Senate will find a way around the filibuster to pass such urgent reform or if there is a coalition in the Senate willing to pass bipartisan legislation addressing election subversion.[171]

Political organizing against bad proposed legislation is just as crucial. As states have considered new, restrictive voting legislation, political pushback from corporations, civic groups, nongovernmental organizations, and others can be helpful. The original version of Texas's new voting legislation, for example, would have lowered the legal standards for overturning election results in court based on claims of irregularities.[172] After complaints, Texas Republican legislative leaders dropped that provision from the bill.[173] Although Arizona is the site of

---

[https://perma.cc/D5QK-WWSD]; Richard L. Hasen, Opinion, *Republicans Aren't Done Messing with Elections*, N.Y. TIMES (Apr. 23, 2021), https://www.nytimes.com/2021/04/23/opinion/republicans-voting-us-elections.html [https://perma.cc/L3TV-BQZS].

169 S. 2747, 117th Cong. (2021).

170 A summary from the group Protect Democracy points to the specific provisions of the Freedom to Vote Act providing these protections. Protect Democracy, How the Freedom to Vote Act Stops Election Subversion, https://s3.documentcloud.org/documents/21062171/election-subversion-freedom-to-vote-two-pager.pdf [https://perma.cc/3RL2-GAGW].

171 *See* Claudia Grisales & Juana Summers, *Senate Democrats Offer a New Voting Bill, But a GOP Filibuster Likely Blocks the Way*, NPR (Sept. 14, 2021, 4:36 PM), https://www.npr.org/2021/09/14/1036812609/senate-democrats-offer-a-new-voting-bill-but-a-gop-filibuster-likely-blocks-the [https://perma.cc/T3F8-AVAZ]. On the potential for bipartisan compromise on anti–election subversion legislation, see Jordain Carney, *Manchin, Collins Leading Talks on Overhauling Election Law, Protecting Election Officials* (Jan. 20, 2022, 1:42 PM), https://thehill.com/homenews/senate/590634-manchin-collins-leading-talks-on-overhauling-election-law-protecting-election [https://perma.cc/3NPX-PSXY].

172 Daniel Dale, *Fact Check: Here Are 20 Things Texas Republicans' Elections Bill Would Do*, CNN (June 3, 2021, 12:27 PM), https://www.cnn.com/2021/06/02/politics/fact-check-texas-elections-bill-voting-sb7-republicans-abbott/index.html [https://perma.cc/7FGD-4UCA].

173 Alexa Ura, *Republican Bill Tightening Texas Election Laws Is Headed to Gov. Greg Abbott's Desk*, TEX. TRIB. (Aug. 31, 2021, 6:00 PM), https://www.texastribune.org/2021/08/31/texas-voting-restrictions-bill [https://perma.cc/NES6-Y3L5] ("Left off were controversial provisions from the spring that would've restricted Sunday voting hours and made it easier for judges to overturn elections.").

the sham "audit" that is fueling more conspiracy theories about the integrity of the 2020 election,[174] proposed bills that would have made it easier for that state legislature to overturn the voters' choice of presidential electors did not make it out of committee or get significant support in the state legislature.[175]

Political opposition must be mounted against those who embrace the false claim that the 2020 election was stolen from President Trump and who run for office or seek appointment to run elections. Spreading these false claims shows rejection of a commitment to the rule of law, and those who share the false claims deserve to have their positions on the 2020 election relentlessly challenged during their campaigns. If any of these persons attains office, then oversight from more fair-minded, responsible people will be urgently required. Getting such oversight may require new legislation, lawsuits, or even peaceful protests.

Indeed, the ultimate safeguard of American democracy during this period of democratic instability may be millions of people taking to the streets for peaceful protests to demand fair vote counting and adherence to the rule of law. In 2020, it was enough to avoid election subversion that some heroes stepped up to assure that elections ran smoothly, votes were fairly counted, and a peaceful transition of power took place. Next time, a few heroes in the right places may be inadequate. I fear that only concerted, peaceful collective action against an attempt to subvert election results stands between American democracy and nascent authoritarianism.

---

174 Wines, *supra* note 63.

175 *See* DEMOCRACY CRISIS IN THE MAKING, *supra* note 75, at 9–10 (describing and criticizing proposed Arizona laws); H.B. 2720, 55th Leg., 1st Reg. Sess. § 3(B) (Ariz. 2021) (granting legislature authority to overturn presidential election results); Laurie Roberts, Opinion, *Rep. Shawnna Bolick Says Your Vote for President Shouldn't Count (But Hers Should)*, AZCENTRAL (Jan. 29, 2021, 3:13 PM), https://www.azcentral.com/story/opinion/op-ed/laurieroberts/2021/01/28/arizona-legislator-wants-veto-your-vote-president/4302254001 [https://perma.cc/N7FT-NB5K] (describing H.B. 2720); *Bill History for HB2720*, ARIZ. STATE LEGISLATURE, https://apps.azleg.gov/BillStatus/BillOverview/77783 [https://perma.cc/EK9S-GP35] (showing that HB2720 died in committee); Laurie Roberts, Opinion, *Sen. David Gowan's Plan to Veto Your Presidential Vote Dies. That's a Darn Shame*, AZCENTRAL (Feb. 25, 2021, 5:29 PM), https://www.azcentral.com/story/opinion/op-ed/laurieroberts/2021/02/25/arizona-senate-plan-veto-your-presidential-vote-dies-bring-back/6818371002 [https://perma.cc/45ER-XTMZ] (describing false start for proposed state constitutional amendment declaring "plenary power" of legislature to appoint presidential electors).

A THEORY OF CONSTITUTIONAL NORMS

*Ashraf Ahmed**

The political convulsions of the past decade have fueled acute interest in constitutional norms or "conventions." Despite intense scholarly attention, existing accounts are incomplete and do not answer at least one or more of three major questions: (1) What must all constitutional norms do? (2) What makes them conventional? (3) And why are they constitutional?

This Article advances an original theory of constitutional norms that answers these questions. First, it defines them and explains their general character: they are normative, contingent, and arbitrary practices that implement constitutional text and principle. Most scholars have foregone examining how norms are conventional or have relegated them to coordinating behavior, like rules requiring drivers to stick to one side of the road. By contrast, this Article argues that constitutional norms are constitutive conventions, which concretize values into practices; they are akin to conventions of etiquette that concretize concepts like "politeness." Constitutional norms implement abstract principles, like the separation of powers, or indeterminate text, such as "advice and consent," into specific behavior and action.

By understanding constitutional norms as constitutive conventions, this Article explains norms' salient features, basic functions, and relationship to the Constitution. Norms are normative because they command respect and allegiance; they are contingent because they depend on political, social, and intellectual conditions to emerge and endure; they are arbitrary because they represent one of many possible ways of realizing constitutional text and principle; and they are constitutional because the values they implement arise from the Constitution itself. This Article animates its theory through case studies of three constitutional norms: blue slips, the norm against court-packing, and executive noninterference in law enforcement. It concludes by questioning the use of historical practice in constitutional interpretation. It suggests that when

---

* Academic Fellow and Lecturer in Law, Columbia Law School. I am grateful for comments from Dhruv Aggarwal, Akhil Amar, Kate Andrias, Anya Bernstein, Josh Chafetz, Richard Friedman, Jonathan Gould, Maeve Glass, Jamal Greene, David Grewal, Michael Heller, Daniel Hornung, Jeremy Kessler, Issa Kohler-Hausmann, Jane Manners, Lev Menand, Samuel Moyn, Robert Post, David Pozen, Arjun Ramamurti, Aziz Rana, Daphna Renan, Daniel Richman, Cristina Rodríguez, Ganesh Sitaraman, Oren Tamir, Karen Tani, John Witt, Josh Zoffer, and participants in the Columbia Academic Fellows Workshop. Many thanks as well to the careful and conscientious editors of the *Michigan Law Review*, in particular Latazia Carter, Ruby Emberling, Dashaya Foreman, Michaela Olson, Ahmed Rizk, Julianna St. Onge, Emily Statham, Nia Vogel, and Lauren Yu.

 doi:10.36644/mlr.120.7.theory

scholars and judges draw on norms that are intrinsically contingent and arbitrary, they embed unstated normative assumptions about the past and how it should constrain the future.

TABLE OF CONTENTS

INTRODUCTION

The political convulsions of the past decade have fueled acute interest in constitutional norms. Also known as "conventions" or "customs," constitutional norms are common and recognizable. For example, from 1937 to the present, neither of the political branches has attempted to enlarge the size of the Supreme Court beyond nine justices.[1] Similarly, presidents have, since the Founding, appointed principal officers during both intra- and inter-session

1. *See infra* Section IV.B; JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10562, "COURT PACKING": LEGISLATIVE CONTROL OVER THE SIZE OF THE SUPREME COURT (2020).

Senate recesses and have not, until recently, interfered with agency adjudications or directed criminal investigations from the White House. Each of these practices constrains government officials, yet enjoys, at best, shallow textual foundations. Their prominence suggests that the Constitution in action is composed of, and sustained by, more than just the law on the books. Norms, in other words, form a central part of the "constitutional order": the broader "set of rules, doctrines, and practices that structure political decisionmaking."[2]

Norm erosion, already a scholarly concern, accelerated during the Trump presidency, and public alarm about the future of democracy became routine.[3] Although often associated with political and legal liberals, these anxieties have a conservative cast, as they reflect a commitment to the status quo and conviction about what interbranch comity or the rule of law should look like.[4] The same preservationist instinct drives interpretive theories that transform historical practice into constitutional law.[5] And in four different cases during

2. SANFORD LEVINSON & JACK M. BALKIN, DEMOCRACY AND DYSFUNCTION 21 (2019).

3. There are countless examples, and these span the political spectrum: see, for example, Emily Bazelon, *How Do We Contend with Trump's Defiance of 'Norms'?*, N.Y. TIMES (July 11, 2017), https://www.nytimes.com/2017/07/11/magazine/how-do-we-contend-with-trumps-defiance-of-norms.html [perma.cc/P7AR-2LXS] ("Trump's flouting of norms . . . has become a defining feature of his presidency. Along the way, he has exposed flaws in the structure of American governance that haven't surfaced in modern times, mainly because no other president has probed them."); Tom McCarthy, *Donald Trump and the Erosion of Democratic Norms in America*, GUARDIAN (June 2, 2018, 8:24 AM), https://www.theguardian.com/us-news/2018/jun/02/trump-department-of-justice-robert-mueller-crisis [perma.cc/W3Z9-Z39E] (asking from the left whether Trump's disregard for the Department of Justice's independence represents "a constitutional crisis of some kind or even an erosion of the rule of law"); Michael Sean Winters, Opinion, *Trump Threatens Norms That Make the Constitution Work*, NAT'L CATH. REP. (Nov. 6, 2017), https://www.ncronline.org/news/opinion/distinctly-catholic/trump-threatens-norms-make-constitution-work [perma.cc/VP42-QH7E] ("Perhaps the most damage done to the Constitution this year has less to do with any specific flouting of the rule of law than the president's general disregard for that rule, and for the constitutional and democratic norms that make the rule of law possible.").

4. Dissenting voices were few but important. *See* Jedediah Britton-Purdy, *Normcore*, DISSENT, Summer 2018, https://www.dissentmagazine.org/article/normcore-trump-resistance-books-crisis-of-democracy [perma.cc/DA63-FH47] (critiquing recent scholarship for its fixation on norms and comparative neglect of ideology); Corey Robin, *Democracy Is Norm Erosion*, JACOBIN (Jan. 29, 2018), https://www.jacobinmag.com/2018/01/democracy-trump-authoritarianism-levitsky-zillblatt-norms [perma.cc/QKK2-YSYZ] (critiquing scholars of norms for prioritizing stability over democracy).

5. *See infra* Conclusion.

its October Term 2019, on issues ranging from agency structure[6] and the electoral college,[7] to the constitutionality of state[8] and congressional subpoenas,[9] the Supreme Court relied on past practice in precisely this way.

Such intense attention makes it all the more peculiar that we lack a general account of constitutional norms. This is not to say we lack definitions; we have many. Consider several leading ones:

- "Conventions" are "maxims, beliefs, and principles that guide officials in how they exercise political discretion."[10]
- "Structural norms" are "unwritten or informal rules that govern political behavior" that "insulat[e] certain types of decisions from certain types of actors; [] limit[] self-dealing or . . . corruption . . .; [] structur[e] decisionmaking to make it less arbitrary; [] allocat[e] authority among the different branches . . .; and [] structur[e] the role of politics in governance."[11]
- "Conventions are, at bottom, equilibria of mutual expectations among political actors and institutions."[12]
- Constitutional norms are "sanction-based" practices that "regulate . . . the relation between the main branches of government, their prerogatives, and the limitations on their powers."[13]

These definitions are incomplete and inadequate because they do not answer at least one or more of three major questions. First, if norms or conventions play so many different roles in a constitutional order, is there something

---

6. In striking down the Consumer Financial Protection Bureau's single director structure with for-cause removal protection as unconstitutional, the Court split 5–4 over whether the agency was a "historical anomaly." Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2202 (2020).

7. A unanimous Court emphasized that independent electors are historical "anomalies only" and held that states can penalize electors who break their pledge and vote for a presidential candidate other than the one who wins the state's popular vote. Chiafalo v. Washington, 140 S. Ct. 2316, 2328 (2020).

8. The majority, citing "200 years of precedent establishing that Presidents, and their official communications, are subject to judicial process," rejected the president's claim that Article II and the Supremacy Clause barred or required a heightened standard for state subpoenas. Trump v. Vance, 140 S. Ct. 2412, 2418 (2020).

9. "[A] significant departure from historical practice" pushed the majority to craft a new four-part standard for judicial review of congressional subpoenas. Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2020).

10. Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1860.

11. Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2195–96 (2018).

12. Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1193 n.127 (2013).

13. Jon Elster, Unwritten Constitutional Norms 21, 43 (undated) (unpublished manuscript) (on file with the *Michigan Law Review*).

they all must do? Second, what, aside from informality, makes them conventional? Or are they just catch-all terms for non-legal rules? Third, what makes these practices constitutional?

This Article advances an original theory of constitutional norms that answers these questions. It defines them and explains their general character: they are normative, contingent, and arbitrary practices that implement constitutional text and principle. This definition is simple but powerful. It identifies a constitutional norm's salient features, its basic function, and its relationship to the Constitution. And it expands on and distills intuitions either absent from or present but submerged in existing accounts. Drawing on this definition, this Article not only clarifies a fundamental aspect of the constitutional order, it also reveals deep tensions in the use of historical practice in constitutional interpretation.

The Article proceeds as follows. Part I critiques the recent literature on constitutional norms. In many precincts of the legal academy, the importance of norms has long been recognized. Private law scholars, for instance, have emphasized the ways that norms (or conventions as they are more often known in private law scholarship) help coordinate behavior in contracts, family law, and criminal law.[14] And for legal positivists—the dominant school of contemporary jurisprudence—law itself is grounded in convention. H.L.A. Hart famously placed conventions at the heart of modern legal systems,[15] and many of his successors have remained committed to the same conventional approach.[16] American constitutional law scholarship, by contrast, has given conventions sporadic attention. While the British jurist A. V. Dicey observed nearly a hundred fifty years ago that conventions accompanied written and unwritten constitutions alike,[17] the existence of norms or conventions is, as Adrian Vermeule wryly noted, a "revelation" that "bursts upon American constitutional scholars every other generation or so, and is lost in the succeeding generation."[18]

---

14. *See, e.g.*, ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); ERIC A. POSNER, LAW AND SOCIAL NORMS 72, 89 (2002) (explaining the logic of family and criminal law through informal game theory); Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209 (2009) (encouraging scholars to adopt coordination games in legal analysis); Ian Ayres, *Playing Games with the Law*, 42 STAN. L. REV. 1291 (1990) (reviewing ERIC RASMUSEN, GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY (1989)).

15. H.L.A. HART, THE CONCEPT OF LAW (3d ed. 2012).

16. *E.g.*, JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM (2d ed. 1980); JOSEPH RAZ, PRACTICAL REASON AND NORMS (Oxford Univ. Press 3d ed. 1999) (1975); Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165 (1982). The most important critique of legal positivism's conventionalist picture of law is chapter four in RONALD DWORKIN, LAW'S EMPIRE (1986). While Dworkin's critique has been generative, it has not displaced legal positivism as the dominant theory of law.

17. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (Liberty Fund 1982) (1885).

18. Adrian Vermeule, *Conventions in Court*, 38 DUBLIN U. L.J. 283, 283–84 (2015).

The current renaissance in norm scholarship, Part I argues, has taken three forms: strategic approaches, democratic alarmism, and thick institutional description. Each comes with characteristic limits. Strategic approaches embrace a game-theoretic view of constitutional norms that narrowly focuses on their role in coordinating the behavior of governmental agents. Democratic alarmists defend the necessity of norms but often ahistorically and without marking the boundaries between political and constitutional norms. And thick descriptivists offer rich accounts of norms within particular branches yet stop short of a broader definition. As a result, the existing literature lacks a general theory of norms that explains their functions, features, and relationship to the Constitution.

This Article addresses these issues by adopting a different strategy from current approaches. While recent work is uniformly inductive—it begins by describing examples of norms and then tries to distill their essence—this Article is primarily deductive. It treats the question "what is a constitutional norm?" as two separate inquiries. First, what makes a constitutional norm or convention (indeed, any social practice) conventional?[19] Second, what makes it constitutional? This strategy has important advantages over a more inductive approach. Focusing on particular examples can obscure what they share with conventions more generally; an exclusively inductive approach thus risks exceptionalism about constitutional norms, exaggerating their distinctiveness and inviting alarm when they begin to change or fade. Inductive approaches also lack specific criteria for identifying when a norm is constitutional. This problem flows downstream from confusion about conventionality. Explaining why a constitutional norm or convention is conventional provides an antecedent conceptual framework in which to place constitutionality. In this view, a constitutional convention is a convention first, constitutional second.

Part II explains what makes a norm or a convention conventional. Drawing on the philosophy of social conventions, this Part lays out what conventions do and what their common features are. Conventions generally fall into

19. "Norm" and "convention" are used interchangeably in this Article. I stick primarily to "norm" to avoid confusion since "convention," at least in American constitutional law, is often associated with the events of 1787 or any formal process for drafting a constitution. Because I want to surface and map the relationship between the philosophy of social conventions and constitutional theory, I use the terms "conventions" and "conventional" only in their philosophical sense. Nor is there is any systematic distinction between "norm" and "convention" in the literature. Scholars either use them as perfect substitutes or choose one for semantic reasons. *See, e.g.*, Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1434 n.14 (2018) ("[N]othing important hangs on the distinction (to the extent it exists) between constitutional norms and constitutional conventions."); Renan, *supra* note 11, at 2196 n.34 (using "norm" instead of "gloss" or "convention" because "scholars have sometimes used [the latter two terms] to distinguish legally enforceable norms from extralegal norms"). As this Article shows, rejecting the term "convention" also means losing the philosophical insight the concept provides. Moreover, "gloss" and interpretive theories that rely on "historical practice" must be carefully distinguished from the practices themselves. The former endows the latter with significance that they do not independently possess.

two categories: they either coordinate action or concretize values into practices. Coordinating conventions are famous; a familiar example is a rule requiring drivers to stick to one side of the road. Until now, scholars have either assumed that constitutional norms are coordinating conventions or have foregone asking what makes them conventional at all.[20] Both approaches are mistaken. Constitutional norms are always constitutive conventions. Just as the conventions of etiquette concretize the concept of "politeness," constitutional norms implement otherwise abstract principles, like the separation of powers, or indeterminate text, such as "advice and consent," into specific practices. Norms translate constitutional word into deed. The complete absence of constitutive conventions in recent work is therefore notable since constitution, much more so than coordination, helps make sense of what norms do in constitutional politics and why change provokes turmoil.[21]

Understanding what norms do—concretizing values into practices—illuminates their key features. First, these practices, as their names suggest, are *normative*. By operationalizing constitutional text and principle, norms command respect and allegiance. And because constitutional norms are constitutive conventions, they are normative in a *thicker* sense than coordinating conventions; norms are not, or are not just, rules that meet functional needs, but rather practices that create the terrain of constitutional morality.[22] A given era's constitutional norms reflect how people think constitutional text or principles *should* work.

Second, norms are *contingent*. If and when a norm emerges and how long it survives depends on a variety of historical forces. As others have observed, "constitutional norms are perpetually in flux."[23] Because they are both weaker than law and depend on various intellectual, political, and social conditions for their survival, constitutional norms are inherently provisional.

---

20. *See infra* Part I.

21. This sense of "constitution," as a verb rather than a noun, also reflects an historical meaning that has been lost. Constitutional thought until the American Revolution often referred to the substance of a social order, not just a set of formal legal rules. *See* Graham Maddox, "Constitution," *in* POLITICAL INNOVATION AND CONCEPTUAL CHANGE 50, 50 (Terence Ball, James Farr & Russell L. Hanson eds., 1989); *see also* Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDUC. 167, 168 (1987) ("[O]ur constitution is neither something we have nor something we are so much as something we *do*—or at any rate *can* do."); *cf.* David Singh Grewal & Jedediah Purdy, *The Original Theory of Constitutionalism*, 127 YALE L.J. 664, 669–81 (2018) (reviewing RICHARD TUCK, THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY (2016)) (outlining the modern theory of constitutionalism). Earlier thinkers imagined legal orders as established through practices. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 9–13 (2004) (discussing the persistence of this view in English legal culture on the eve of the American Revolution). By shifting our focus from text to practice, the Article recovers this more expansive and richer view of a "constitution." What this Article achieves through conceptual analysis, others have done through careful historical work. *See, e.g.*, JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018).

22. A constitutional norm *can* also coordinate action, but it *must* concretize values into practices.

23. Chafetz & Pozen, *supra* note 19, at 1430.

Third, and most importantly, constitutional norms are *arbitrary*. A given norm represents only one of many possible ways of concretizing a principle into practice. Arbitrariness results directly from the indeterminacy of constitutional text and principles. It is no coincidence, for instance, that the separation-of-powers scholarship has been dominated by norm-talk. Conceptually amorphous,[24] with weak textual foundations,[25] separation-of-powers principles can be plausibly, if contestably, implemented by different norms. This constellation of features—normative, yet contingent and arbitrary—also suggests why constitutional norms have engendered both fascination and alarm. How could such a pervasive part of the constitutional order be intrinsically arbitrary? I postpone that question and its implications for constitutional interpretation until the conclusion.

Part III explains how constitutional norms are constitutional. It uses the conceptual structure built in the previous Part to define constitutional norms. They are normative, contingent, and arbitrary practices that implement constitutional text and principle. The latter half of the definition shows how these norms are constitutional: by virtue of the particular values they instantiate. For instance, a norm that required presidents to show respect for political opponents would not count as a *constitutional* norm under this Article's theory. Even though the norm guides a constitutional actor's—the president's—behavior, it has little connection to the Constitution. And theories that connect a norm's constitutionality to the identity of the actors they constrain risk being overinclusive since they do not offer a way of distinguishing between political and constitutional norms.[26] By contrast, this Article's theory is *practice-centric*. Constitutionality stems from the nature of the practice itself, not those it directs. So while all constitutional norms channel a constitutional actor's behavior, not every norm these actors follow is constitutional. Only when the practice itself is understood to implement constitutional text and principle is it a constitutional norm.

Part III then briefly considers a potential challenge to the distinction between constitutional law and norm. Conventionalist theories of law hold that law itself is a type of convention; why, then, keep the distinction between constitutional law and norm at all? This Part offers a modest defense of the distinction based on the difference between law as a "deep" convention and constitutional norms as "surface" conventions, as well as the ways each are enforced.

---

24. *See, e.g.*, Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 577–78 (1984) (discussing three different models of understanding the separation of powers).

25. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011) (underlining the lack of clear textual guidance in many areas of separation-of-powers issues).

26. *See infra* Part I.

Part IV shows this Article's theory in action through three case studies: blue slips, the norm against court-packing ("anti-court-packing"), and executive noninterference with law enforcement. Each of these norms implements constitutional text and principle, from senatorial "advice and consent"[27] (blue slips), to judicial independence (anti-court-packing), to the president's duty to "take [c]are that the [l]aws be faithfully executed"[28] (executive noninterference). As the case studies show, each is normative, contingent, and arbitrary. And they have all come under heavy pressure. Part IV also traces these norms' trajectories—from their origins to their current crises—to expose their conventional characters. This historical approach is helpful for two reasons. First, these examples animate the Article's theory; they show concretely how norms are contingent and arbitrary by tracking change over time. Second, the case studies illustrate the relationship between a norm's contingency and arbitrariness. Because a norm's underlying text and principle are indeterminate, the practices that emerge depend on context. Political events, ideology, and sheer chance shape the development of constitutional norms.[29] As conditions change, so do norms. When a norm transforms or collapses, it reveals the arbitrariness of prior arrangements: alternatives that we had previously rejected or not considered now become imaginable or even compelling.

The Article concludes by briefly considering its implications for the use of historical practice in constitutional interpretation. Practice-based theories presuppose that a practice should enjoy a legal status by virtue of its conventional one. From originalism in the "construction zone,"[30] to "liquidation"[31] and "historical gloss,"[32] to "unwritten constitutionalism,"[33] these theories all share this basic structure; they move from institutional "is" to constitutional "ought." And just as in ethics,[34] the shift from "is" to "ought" in constitutional law is dubious and raises two critical questions: first, *the descriptive question*: What makes a constitutional norm or convention conventional? And second,

---

27. U.S. CONST. art. II, § 2.

28. *Id.* art. II, § 3.

29. As Richard Primus has suggested, the practical stakes of constitutional cases can drive interpretation. Richard Primus, *The Cost of the Text*, 102 CORNELL L. REV. 1649, 1658 (2017).

30. *See, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION (1999); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 65–72 (2011); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013).

31. William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019).

32. *E.g.*, Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012); Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1 (2020).

33. *See, e.g.*, AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION (2012); CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (Ox Bow Press 1985) (1969); DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010); LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION (2008).

34. *See, e.g.*, Rachel Cohon, *Hume's Moral Philosophy*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2018), https://plato.stanford.edu/entries/hume-moral/#io [perma.cc/W6YL-PCTL].

the normative question: Why should a practice's conventional status make it constitutional?

This Article answers the descriptive question, laying the foundation for addressing the normative one. The answer flows from an uncontroversial assumption: the nature of a potential source of law shapes our usage of it. That premise underlies, for instance, the turn to the philosophy of language to understand the character of statutory and constitutional text.[35] Because the current work has foregone asking what makes a norm conventional, practice-based theories have proliferated without a clear view of their legal materials. This Article's philosophical investigation both fills that gap and extends beyond academic debate. As the Court's October Term 2019 revealed, the political battles of the Trump era often led to litigation that required judicial resolution.[36] Even if conflict abates under a new president, in a world where courts routinely consult past practice, contestation over norms risks turning into legal battles.

This Article's theory suggests that when scholars and judges draw on historical practice, they build their theories and decisions on vexed foundations. Once we recognize that constitutional norms are arbitrary and contingent, we realize that interpretive theories that privilege practice do so for reasons beyond the practices themselves. Whether it is judges applying "historical gloss" or scholars searching for "liquidated" meanings, all are implicitly relying on independent theories of legal normativity to ground their claims. In constitutional law and theory, something other than a practice itself is needed to justify its elevation into law. After all, how can we reliably turn to practices that themselves are historically contingent and conceptually arbitrary? Having raised this concern, this Article leaves a fuller reckoning for future work.

I. UNDERSTANDING NORMS: CURRENT APPROACHES

Recent legal scholarship on norms is marked by diversity in mood and method. There are three primary modalities: game theory, democratic alarmism, and thick institutional description.[37] This Part first maps this scholarly

35. *See, e.g.*, Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555 (2006) (using Gottlob Frege's distinction between the "sense" and "reference" of words); John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063 (2015) (applying Gricean philosophy of language to constitutional theory); Lawrence B. Solum, *Semantic Originalism*, (Ill. Pub. L. Rsch. Paper, Paper No. 07-24, 2008), https://doi.org/10.2139/ssrn.1120244 (advancing a set of theses about the semantic content of the Constitution). In fact, the relevance of linguistic philosophy is so well accepted that a recent Court decision featured a debate about the "conversational conventions" of Title VII. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1745 (2020).

36. *See supra* notes 6–9 and accompanying text.

37. There are two bodies of scholarship I do not include here for different reasons: (1) American political development (APD) literature on norms and (2) legal scholarship on historical gloss and constitutional interpretation. The first group is vast and better understood as a subset of political science. For this Article, the most relevant scholars of the genre share much in common with thick descriptivists. APD includes rich descriptive and theoretically informed

terrain, placing the present burst of interest in norms in context and describing the different approaches and priorities of these three modes. It then explains the two principal shortcomings with current work: (a) incomplete theory and (b) historically blinkered anxiety about conventional change. While these problems arise unevenly, they are connected: the lack of a general theory makes it hard to explain both conventional change and the reactions that attend it.

A. *Norms Scholarship: Past and Present*

In the broader Anglophone world, scholarly interest in norms is longstanding. Dicey provided the first major account in his classic, *Introduction to the Study of the Law of the Constitution*. Dicey distinguishes between "the law of the constitution" and "conventions of the constitution."[38] The former, he explains, "are in the strictest sense 'laws' since they are rules which (whether written or unwritten, whether enacted by statute or derived from the mass of

work on particular branches of government. For exemplary work, see JOSH CHAFETZ, CONGRESS'S CONSTITUTION (2017) (exploring Congress's various "hard" and "soft" powers and the way the successful exercise of these powers bolsters it institutional power against the other branches); JOSH CHAFETZ, DEMOCRACY'S PRIVILEGED FEW (2007) (comparing the special powers and privileges enjoyed by British and American legislators); Keith E. Whittington, *Partisanship, Norms, and Federal Judicial Appointments*, 16 GEO. J.L. & PUB. POL'Y 521 (2018) (tracking the escalating battles over judicial appointments and offering possible solutions given continued polarization). *See also* Julia R. Azari & Jennifer K. Smith, *Unwritten Rules: Informal Institutions in Established Democracies*, 10 PERSPS. ON POL. 37 (2012) (explaining that "informal institutions" complete, parallel, or coordinate). Despite their importance, I exclude this work largely because of a difference in emphasis. The project here is almost entirely theoretical and its results bear directly on modes of constitutional interpretation. Even Smith and Azari's piece, which importantly highlights that informal practices can "fill gaps," pays no attention to the normativity and arbitrariness of conventions and the implications for constitutional theory. This is the result of an important difference in audience. They speak to political scientists and their analysis is steeped in the language of rational choice theory. I am interested in a related but different question: what sort of practice is a constitutional convention and how do the features and functions of conventions bear on constitutional theory. The second excluded group—historical gloss and unwritten constitutionalism—includes both classic and recent work. For classics of unwritten constitutionalism, see, for example, sources cited *supra* note 33. For recent work on historical gloss, see, for example, Baude, *supra* note 31; Bradley & Morrison, *supra* note 32; Bradley & Siegel, *supra* note 32; Stephen M. Griffin, *Against Historical Practice: Facing Up to the Challenge of Informal Constitutional Change*, 35 CONST. COMMENT. 79 (2020); Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75 (2013); Samuel Issacharoff & Trevor Morrison, *Constitution by Convention*, 108 CALIF. L. REV. 1913 (2020); Katherine Shaw, *Conventions in the Trenches*, 108 CALIF. L. REV. 1955 (2020); Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. 1119 (2020). For an example of practice-based interpretation that *is* transparent about its normative analysis, see Jonathan S. Gould, *Codifying Constitutional Norms*, 109 GEO. L.J. 703 (2021). Except for the brief discussion in the conclusion, I leave the relationship between historical practice and constitutional interpretation for other work. Much of this scholarship is focused on courts and how they should handle historical, non-legal precedent. This can often bypass—Baude excluded, perhaps—what a constitutional norm is.

38. DICEY, *supra* note 17, at cxli.

custom, tradition, or judge-made axioms known as the Common Law) are enforced by the Courts."[39] By contrast, constitutional conventions comprise "understandings, habits, or practices which, though they may regulate the conduct of the several members of the sovereign power, of the Ministry, or of other officials, are not in reality laws at all since they are not enforced by the Courts."[40] One famous British example is "The King must assent to, or (as it is inaccurately expressed) cannot 'veto' any bill passed by the two Houses of Parliament."[41] This rule has no explicit textual basis.

For Dicey, "[i]t [was] to be regretted that these maxims must be called 'conventional,' for the word suggests a notion of insignificance or unreality."[42] While some of these conventions could be "trivial," many are "as important as any laws"[43] and make up what he calls "constitutional morality."[44] Conventions, Dicey continues, are just as potent in a written constitution like America's, where "stringent conventional rules, which, though they would not be noticed by any Court, have in practice nearly the force of law."[45] As Part II will show shortly, Dicey's phrase—"constitutional morality"—is telling. It states, ipse dixit, the normativity of conventions.

Dicey's work did not go unnoticed. Contemporaries on both sides of the Atlantic—Woodrow Wilson[46] and James Bryce[47]—shared Dicey's conviction that norms were central in American government. And no less an authority than James Thayer cited Dicey to critique judicial review.[48] But this early awareness of conventions and their importance did not endure. In the subsequent century, norms largely faded from legal consciousness.[49]

---

39. *Id.* at cxl–cxli.

40. *Id.* at cxli.

41. *Id.* at cxlii (footnote omitted). Dicey includes other practices in his list of examples including "the House of Lords does not originate any money bill" and "[m]inisters resign office when they have ceased to command the confidence of the House of Commons." *Id.*

42. *Id.* at cxliii.

43. *Id.*

44. *Id.* at cxli.

45. *Id.* at cxliv. Examples of such norms included the traditions of presidents not running for a third term prior to the passage of the Twenty-Second Amendment and a state's electors casting their votes for the winner of a state's popular vote. The latter convention, of course, was at issue in *Chiafalo v. Washington*, 140 S. Ct. 2316, 2320 (2020).

46. *See* WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 22 (1908).

47. *See* James Bryce, *Flexible and Rigid Constitutions*, *in* 1 STUDIES IN HISTORY AND JURISPRUDENCE 145, 233–34 (1901); James Kirby, *A.V. Dicey and English Constitutionalism*, 45 HIST. EUR. IDEAS 33, 42, 44 (2019).

48. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 130 (1893).

49. Possible exceptions include several articles from the mid-1970s and 1980s exploring the idea of an "unwritten constitution." *See, e.g.*, Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984); Thomas C. Grey, *The Uses of an Unwritten*

Scholars have now returned to norms with enthusiasm. Mark Tushnet prefigured recent interest in his 2004 article, *Constitutional Hardball*. "[C]onstitutional hardball," Tushnet explains, are practices "that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing *pre*-constitutional understandings."[50] Tushnet's intervention was prompted by political battles in the early 2000s between Democrats and Republicans, in both state and federal government, that departed from time-honored practices.[51] These episodes, he argued, could be traced all the way back to *Marbury v. Madison*.[52] In exploring this tradition of conflict, Tushnet advanced a preliminary hypothesis: constitutional hardball was "a symptom of the possibility of a shift in the governing assumptions of a constitutional order."[53] Norm erosion, in other words, accompanied political convulsion. This idea anticipated key themes of subsequent work: the language of games, the historicity of conventions, and the force of political incentives.

The literature has developed fitfully since Tushnet's piece, with the bulk of it published this decade.[54] Its timing, from the tail end of the Obama Administration to the Trump Administration, is telling: scholarly interest followed the rise of political conflict and associated conventional breakdown. The academic reaction has been thoughtful but unprogrammatic. Scholars have thrown the kitchen sink at a phenomenon that sits squarely at the intersection of law and politics, defying either category. The resulting work can be parsed into three major strands: game theory-inspired work, thick institutional description, and democratic alarmism.[55]

Constitution, 64 CHI.-KENT L. REV. 211 (1988); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987); Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107 (1989). These articles were part of a vibrant debate about constitutional interpretation in the wake of the Due Process Revolution. They emerged alongside and later responded directly to originalism. They were squarely focused on first-order interpretive questions, such as the existence of implicit normative principles in the Constitution or the sources judges might permissibly consult in deciding a constitutional case. These are related but different questions from the one I focus on here and Dicey and others considered a century ago: how to understand long-standing practices of constitutional government. The relationship between historical practice and constitutional interpretation, in my view, requires first sorting out the former.

50. Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004).

51. Two of Tushnet's examples include Senate Democrats' filibuster of President George W. Bush's judicial nominations in 2002–03 and attempts by Colorado and Texas to redistrict between censuses. *Id.* at 524–27.

52. *Id.* at 538–543.

53. *Id.* at 544.

54. *See, e.g.*, Joseph Fishkin & David E. Pozen, Essay, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018); Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177 (2018).

55. These labels do not track differences along one particular axis. Game theory-inspired articles deploy a common language, while thick institutional descriptions share a method of studying similar objects, and alarmists are united by sensibility. Nevertheless, the categories track common themes and help organize an otherwise disorganized field.

1. Strategic Approaches

Strategic treatments of constitutional norms share a common premise about the behavior of agents. While none of the scholars who write in this vein explicitly use models, their work is informed by game theory. First, they all borrow the language of game theory. Second, by emphasizing strategy, they focus solely on coordinating conventions, which I explore further in Part II.

On the strategic view, constitutional actors are best understood as utility-maximizers. Their interactions with each other resemble a game. Norms exist because they redound to the benefit of everyone involved. They break down due to changed incentives. These scholars tend to focus on pitched constitutional battles, where the relevant actors, conventions, and political motives are relatively clear. Most work in this style imposes clarity on norms by flattening them. There is no need to prove that a given situation is a coordination game, let alone consider whether the convention is doing something other than solving a game. The result is often entirely functionalist: norms exist and survive only because agents think they are useful. When the incentives change, so do the norms.

There is diversity within this camp. Some scholars owe much to game theory, while others note its explanatory limits. Three examples illustrate the shared assumptions of the framework and its family differences. First, Adrian Vermeule's work: in a 2005 piece, Vermeule revisits the court-packing battle of 1937 in an effort to explain why Supreme Court reform is so difficult.[56] His analysis is steeped in the language of game theory, as he attributes FDR's failure to pack the Court to a "widespread perception that the court-packing plan was a disingenuous proposal," and draws the broader lesson that "*any political actor who seeks to change the rules in the middle of the game is untrustworthy*, presumptively motivated by partisan advantage or a desire for unchecked power."[57] Vermeule's subsequent scholarship sounds a similar message, from his co-authored theory of "constitutional showdowns"[58] to his comparative study of judicial enforcement of conventions, at home and abroad.[59]

Second, David Fontana, in his work on judicial politics during the Obama presidency, follows Vermeule, albeit less expansively. He explains the relative moderation of Obama judicial appointees and Obama's missed opportunity to reshape the courts as failures of strategic action: "excessive cooperation with

56. Adrian Vermeule, Essay, *Political Constraints on Supreme Court Reform*, 90 MINN. L. REV. 1154 (2006).

57. *Id.* at 1163.

58. Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1033 (2008) ("In general, the most plausible case for the emergence of efficient custom involves conditions of symmetry and reciprocity, in which agents know that they will be on both sides of similar transactions over time and thus have an incentive to follow the rule that maximizes aggregate welfare for all concerned.").

59. *See* Vermeule, *supra* note 12.

political forces that do not manifest the same behavioral patterns of cooperation."[60] The Obama Administration and Senate Republicans were simply playing two different games, a mismatch the latter exploited. Fontana stops well short of Vermeule, however, in limiting his analysis to a specific context; he neither has nor purports to have a broader theory of norms.

Third, Josh Chafetz, Joey Fishkin, and David Pozen offer a careful use of the strategic style. Their contributions consider norms with greater generality than Fontana but with less abandon than Vermeule. For instance, Chafetz and Pozen, in a recent article, observe that constitutional norms break down, "[i]f changes in the institutional environment, the wider world, or the views of the relevant segments of the public raise the expected cost of adherence to a norm, such circumstances may arise with greater frequency and thereby weaken the norm's regulative force."[61] While using a strategic register, they also note the normative uncertainty of conventional breakdown: "After all, the mere fact that members of a community conform to certain behavioral regularities . . . does not make those behavioral regularities *good*."[62] As I show in Part II, this sort of claim is only possible when we move beyond purely coordinating conventions.

Fishkin and Pozen show similar care in their work. On the one hand, they extend Tushnet's idea of constitutional hardball to the present day. They argue that as political polarization has deepened, hardball has had a partisan tilt, with Republicans more likely to "play hardball" than Democrats.[63] And when explaining why Democrats should avoid reciprocating Republican tactics, they turn to "two basic game theoretic models," one of which predicts that "[r]amping up constitutional hardball . . . is a dangerous game to play over any extended period of time."[64] On the other hand, they wisely note that "[g]ame theory itself cannot answer which model"—one counseling escalation and the other against—"is more plausible."[65] These scholars thus couch their claims in game theory, while underlining its analytic and descriptive limits. Their concessions highlight the limitations of the strategic view.

60. David Fontana, *Cooperative Judicial Nominations During the Obama Administration*, 2017 WIS. L. REV. 305, 307.

61. Chafetz & Pozen, *supra* note 19, at 1442.

62. *Id.* at 1445. Indeed, this entire section in Chafetz and Pozen's piece—"Some Normative Implications of Norm Instability"—is one of the few instances in the literature where a general view of the normative consequences of conventional breakdown is considered. My project here is importantly different; I am interested in how a convention becomes normative in the first place. In other words, how does a norm make up our constitutional morality? *See infra* Section II.A.3.

63. Fishkin & Pozen, *supra* note 54.

64. *Id.* at 979–80.

65. *Id.* at 980 n.261.

2. Democratic Alarmism

If the strategists buy clarity at the cost of completeness, democratic alarmists provide an account of constitutional norms without bounds. Instead of a common language, democratic alarmists are united by a shared sensibility: urgency fueled by the rise of domestic and global populism. To authors in this camp, the breakdown of constitutional norms represents not only a change in political culture but a threat to democracy itself. For example, when Majority Leader Mitch McConnell and Senate Republicans refused to hold any hearings on the Supreme Court nomination of Merrick Garland, these scholars saw an attack on the separation of powers, the divide between law and politics, and the uniformity of law. Democratic alarmists thus come closest to the journalistic register, as they try to make sense of the current presidency in both historical and theoretical terms. In the process, however, they tend to elide the difference between constitutional norms and broader political norms, which makes it hard to see what makes any given norm constitutional.

Neil Siegel is the primary exponent of this view among constitutional law scholars. In a pair of recent articles, Siegel has argued that President Trump's consistent flouting of norms has exposed their importance and precarity.[66] Indeed, for Siegel, the "[i]ncreasing disregard of political norms and constitutional conventions by candidates and elected officials" during the Trump era "is one indication that we have lost our way, and figuring out how to encourage greater respect for them may help us find our way back."[67] Siegel not only diagnoses our present ills but prescribes remedies. One of his articles develops a "constitutional role morality," a set of ethical principles for guiding and constraining the behavior of elected officials.[68] These principles are drawn from various sources; Thomas Hobbes, Jean-Jacques Rousseau, Edmund Burke, James Madison, and Robert Post are all enlisted in the cause of constitutional democracy.[69] For Siegel, both the work of these diverse authors and the Constitution itself embody certain principles: "democracy as collective self-governance" and the pursuit of "well-functioning federal government."[70]

Other alarmists share Siegel's diagnosis but take a more global view. Comparative political scientists Steven Levitsky and Daniel Ziblatt offer the most provocative account in *How Democracies Die*. Levitsky and Ziblatt draw on case studies from twentieth-century Latin America and Western Europe (their

66. Neil S. Siegel, *supra* note 54; Neil S. Siegel, *After the Trump Era: A Constitutional Role Morality for Presidents and Members of Congress*, 107 GEO. L.J. 109 (2018) [hereinafter Siegel, *Constitutional Role Morality*].

67. Siegel, *supra* note 54, at 179.

68. Siegel, *Constitutional Role Morality*, *supra* note 66.

69. *Id.* at 127–137.

70. *Id.* at 127–144. What either of those principles means remains fairly underdeveloped in theory or in practice, and Siegel acknowledges concerns about implementation. Nevertheless, he stresses the urgency of his project since "in a deeply polarized country in which politicians who hold high office too often act as if there are no non-legal role restraints, the immediate task is to develop the vision itself." *Id.* at 170.

respective areas of expertise) to conclude that American democracy is under threat because of "[t]he erosion of our democratic norms."[71] They claim that two norms in particular, "mutual toleration" and "forbearance," have sustained democracy in America since its inception and that these are the very norms most threatened in the current moment.[72] To their credit, they do not present these norms as distinctly constitutional. Instead, they argue that these norms are basic principles of political morality, and the election of Trump has hastened their decline.[73] Just as their decline is due to political causes, their restoration must also be political, requiring both elite cooperation and popular mobilization. Aziz Huq and Tom Ginsburg sound a similar alarm. While they describe the erosion of norms as specifically "constitutional retrogression,"[74] they too locate the revival of these norms in the "intersubjective understandings of elites and citizens" and American "[i]nstitutional pluralism."[75]

The alarmists' diagnoses and prescriptions thus vary. Levitsky and Ziblatt, perhaps because of their disciplinary bent, identify a *political* problem with *political* solutions. Siegel and Huq and Ginsburg instead cast the current moment as a *constitutional* crisis that requires *political* theory and action. These differences are important. They show that we lack a consistent way of distinguishing between constitutional norms and desirable political practices more generally. That lack of clarity makes it hard to tell whether a given crisis reveals cracks in the constitutional structure or merely political upheaval and transition since the evidence relied on—conventional breakdown—is itself unspecified.

The alarmists, at the same time, suggest something urgent about conventions—their normativity. For them, norms shape how people should behave,[76] something discounted or bracketed by many strategic approaches.[77] Yet, because the alarmists are so concerned with fashioning solutions to present crises, they barely examine why and how these practices command our respect and what they have to do with the Constitution. Normativity and constitutionality are assumed but unexplained. These concerns are different from asking whether the collapse of particular norms is troubling. The latter question is more specific and presentist than the former and only underlines the need for a more robust general theory.

---

71. STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 9 (2018).

72. *Id.* at 102.

73. *Id.* at 8.

74. Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 94–96 (2018).

75. *Id.* at 166–67.

76. *E.g.*, Siegel, *supra* note 54, at 179–180.

77. *See supra* Section I.A.1.

3. Thick Institutional Description

The third and final group stands apart. Thick descriptivists do not purport to diagnose a contemporary crisis of democracy or offer a general theory of norms. Instead, they use a common method—the close study of norms of particular episodes or branches—that reveals the ubiquity of norms. These scholars proceed inductively, as nearly every piece in this genre focuses on the behavior of certain actors in order to draw larger, tentative conclusions about the separation of powers or the Constitution more broadly. And because they work inductively, members of this group are the most historically minded of the three. In paying attention to change over time, they give a sense, if not an outright statement, of the contingency and arbitrariness of norms.

Thick descriptivists have studied all three of the coordinate branches, examining both the actors within them and the interactions between them. The result is a rich and broad-ranging body of work, with deep dives into previously obscure terrain and fresh reexaminations of well-trodden ground. Several scholars have opened a window into, for instance, the previously opaque Office of Legal Counsel (OLC), showing how executive branch lawyers understand their institutional role and interpret constitutional and statutory issues for the president.[78] Others have studied norms internal and external to the judiciary, from political restraint in jurisdiction stripping,[79] to practices that undergird judicial independence.[80] And most recently, Daphna Renan has written pathbreaking work on the norms governing the modern presidency.[81]

Professor Grove's most recent work on the norms of judicial independence evinces the characteristic strengths and limits of this approach. In revisiting important episodes of interbranch conflict, she shows that "even when the constitutional text does not explicitly protect the judiciary from a court-curbing measure, a political norm has filled the gap."[82] Nevertheless, she warns that "it is crucial to recognize the historically contingent nature of these conventions."[83] Her project demonstrates the idea that conventions are subject to change. If her empirical claim—that norms are contingent—is right,

78. *See, e.g.*, Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097 (2013) (defending a view of the executive as constrained by the publicity of legal discourse and recognition of historical practice); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010) (cataloguing the use of stare decisis in the OLC and making a case for an effective but bounded role for it in executive legal interpretation); Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805 (2017) (arguing that presidential control shapes the legal culture and practices of the OLC).

79. *E.g.*, Tara Leigh Grove, *Article III in the Political Branches*, 90 NOTRE DAME L. REV. 1835 (2015).

80. *E.g.*, Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465 (2018).

81. Renan, *supra* note 11; *see also* Renan, *supra* note 37.

82. Grove, *supra* note 80, at 517. The similarity in language to Azari and Smith's—"fill gaps"—is notable. Azari & Smith, *supra* note 37, at 41.

83. Grove, *supra* note 80, at 517.

then we still have to answer further questions: Why are they contingent? And if they are, how does a constitutional order persist given this contingency?

The rest of this Article complements thick descriptive work and responds to theoretical issues raised and left unresolved by game theorists and alarmists alike. It provides a conceptual account that explains the structure and character of norms thick descriptivists have indexed. The theory and practice unearthed go hand in hand. The theory illuminates the forces driving conventional change, and the empirical work highlights the ubiquity and importance of norms in our constitutional order.

B. *The Need for a General Theory*

The current approaches have two significant limitations. First, they offer an incomplete theory of norms. Second, they consider norms ahistorically and thus view conventional change with deep concern. These problems are joined at the hip. If the theories we have on offer cannot give a full picture of the nature and function of norms, then it is unsurprising that we are alarmed when conventions do change, since we lack a standpoint to evaluate the erosion of any particular norm. This Section examines these problems in greater detail; the next Part addresses them.

The first problem is incompleteness. Consider the mismatch between the strategists and the alarmists. When the latter worry that norm erosion is a sign of crisis, the former respond by pointing out changed incentives. The problem is that describing how context shapes the life of a norm does not make anxiety about its death intelligible. In fact, if we take a cynical view of the matter, explaining norms purely in terms of costs and benefits makes anxiety about their demise seem either naive or disingenuous.[84]

Another way of getting at the problem of incompleteness is to press current theories to explain what problems norms are actually solving. This question is especially hard for game theory-inspired work, which trades on the language of instrumental reason. Adrian Vermeule makes the strongest version of this argument when he claims that "[c]onventions always have a coordination component . . . . Requiring that there be 'a reason for the rule' . . . assumes away the problem of *disagreement over good reasons* that creates the need for rule-based coordination in the first place."[85] In essence, any focus on normative argument is at best ancillary, since the point of a norm is to coordinate behavior.

---

84. My criticism here parallels Bernard Williams's criticism of evolutionary psychologists and invisible hand explanations of ethics. Put simply, functional explanations that explain morality as a survival mechanism for the species are limited in two major ways: they can neither explain the persistence of many different moral rules that seem to have no connection to survival, and they have no account of how people themselves understand the norms they follow. BERNARD WILLIAMS, TRUTH AND TRUTHFULNESS: AN ESSAY IN GENEALOGY 27–35 (2002).

85. Vermeule, *supra* note 18, at 289.

But what exactly are norms coordinating? While some norms do solve so-called coordination problems,[86] it is hard to identify the relevant problem or game for many of the norms we are interested in. Consider, for instance, the norm against court-packing.[87] When President Franklin Delano Roosevelt proposed drastically enlarging the Court, the resulting debate had nothing to do with a game. Instead, critics charged him with attacking the Constitution itself, despite the fact that he was on firm legal ground.[88] As I will show, these commentators were primarily concerned with preventing a practice they thought violated a constitutional value—judicial independence—rather than preserving a coordination equilibrium. Moreover, our historical memory of the showdown and its lessons is distinctly normative. The episode is taught as an example of presidential "overreach"[89] and a moment that threatened but ultimately bolstered judicial independence.[90] Or take the battle over Merrick Garland's nomination to the Court: Mitch McConnell's actions triggered a national debate over the role and nature of the confirmation process.[91]

These examples matter because they illustrate the limits of any approach that places incentives and strategy at the heart of norms. When norms are being built or dismantled, actors invoke constitutional values in their cause. These values may vary in their proximity to constitutional text, from disagreement about the meaning of the Appointments Clause,[92] to structural concepts like judicial independence, but they remain recognizably constitutional. Accounts that do not explain the role of constitutional values risk reducing debates over norms to Kabuki theater. Agents might couch their arguments in constitutional language, but they are primarily motivated by political gain for

86. Later on in the Article, I discuss a convention—blue slips—that likely solved coordination problems, at least at its inception. *See infra* Section IV.A.

87. One important wrinkle to this example is the convention against court-packing does not seem to have been in place at the time the event occurred. Of course, participants at the time invoked previous historical practice as evidence of the convention, but if the lack of a certain practice *X* necessarily means that there is a convention *against doing* X, then this threatens to stretch the idea of a convention too thin. Instead, conventions of forbearance are often actively forged, not born. *See infra* Sections IV.B–C.

88. *See, e.g.*, WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 137–39, 146 (1995).

89. William E. Leuchtenburg, *When Franklin Roosevelt Clashed with the Supreme Court—and Lost*, SMITHSONIAN MAG. (May 2005), https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994 [perma.cc/AKH7-2ZDG].

90. *See* John Yoo & Robert J. Delahunty, *The Foolish Court-Packing Craze*, NAT'L REV. (July 19, 2018, 6:30 AM), https://www.nationalreview.com/2018/07/court-packing-ideas-threaten-judicial-independence [perma.cc/8R97-KP39].

91. Lana Ulrich, *Tracking the Controversy over Judge Garland's Nomination*, NAT'L CONST. CTR. (May 27, 2016), https://constitutioncenter.org/blog/tracking-the-controversy-over-judge-garlands-nomination [perma.cc/TCU7-ZLQ8].

92. U.S. CONST. art. II, § 2, cl. 2.

a party[93] or branch. By contrast, this Article takes agents' normative positions seriously. We can, at the same time, grant that actions taken in "bad faith"[94] are less likely to succeed as a political matter and that normative argument over a practice is irreducibly normative. We need a theory that connects the structure of norms to the claims people make in their defense.

The second issue in current work is its blinkered approach to change. History, or its absence, poses theoretical and empirical problems for current approaches. Theoretically, we can ask especially hard questions of the democratic alarmists. Is it the fact that norms change that should worry us? Or should we be worried about the breakdown of a particular norm? If the former, then we need an explanation of why conventional change is a bad thing, or at least deviant in some way. If the latter, we need both a specific defense of the particular norm at stake and reasons why the convention's aftermath is worse than the status quo. At the very least, a blanket statement that norm erosion is either alien or inimical to democracy will not do.

The problem is also practical. As we have seen, scholars like Siegel, Levitsky, and Ziblatt are sharply presentist.[95] To the extent that constitutional alarmists turn to history, they do so in service of what is in their view a bleak present.[96] While this is a common way of using history, it misses an important lesson of historical inquiry—contingency. The norms they defend float free of their origins and are reified into permanent features of our constitutional order. And when these practices erode, we are told, it is symptomatic of broader decay.[97]

Yet the problem of ahistoricism is not limited to constitutional alarmists. Among those who use a strategic approach, only Chafetz and Pozen view conventional change as plausible.[98] Their examination thoughtfully lays out different forms of norm erosion ("destruction" and "decomposition") and describes the conditions of change.[99] And they rightly encourage future normative and historical work precisely because of the "inherent instability of

93. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

94. David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885 (2016).

95. *See supra* Section I.A.2.

96. *See* Josh Chafetz, Essay, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96 (2017) (explaining the challenges in crafting meaningful historical analogies).

97. Jack Balkin, *Constitutional Rot and Constitutional Crisis*, BALKINIZATION (May 15, 2017, 2:02 PM), https://balkin.blogspot.com/2017/05/constitutional-rot-and-constitutional.html [perma.cc/DKG9-LBU3].

98. Chafetz & Pozen, *supra* note 19. In an important recent article, Tamir extends Chafetz and Pozen's work on the different ways norms change and offers his own account of how to counter it. *See also* Oren Tamir, *Constitutional Norm Entrepreneuring*, 80 MD. L. REV. 881 (2021). I part ways with Tamir on the analogy between convention and law on a Hartian model. *See infra* Section III.B.

99. Chafetz & Pozen, *supra* note 19, at 1435–45.

such norms."[100] Nevertheless, even their article explains change in largely functional terms. Whether and what sort of relation values might bear to conventional change remain open questions.

The gaps in our understanding of norms are not limited to intramural academic debate. Given the importance of historical practice in constitutional interpretation, incomplete theory has high stakes. Indeed, Larry Tribe's description of certain rules and principles as the Constitution's "dark matter" applies equally to norms.[101] Like dark matter, norms are pervasive. The next Part begins developing an account of them.

II. WHAT MAKES A NORM CONVENTIONAL?

This Part explains what makes a practice conventional.[102] Recent literature bypasses this question and goes directly to theorizing constitutional norms. This Part, by contrast, takes seriously the idea that a constitutional norm is first a *convention*. Understanding conventionality lays the groundwork for explaining how norms are *constitutional*.

This strategy also helps show why norms are valued for reasons beyond their utility. It does so by introducing the concept of a constitutive convention: practices that *concretize* principles. Current work either assumes that constitutional norms coordinate action or ignores their conventionality altogether. The former reduces their normativity to solving coordination problems, and the latter obscures the ways constitutional norms remain contingent and arbitrary.

I use philosophy to approach these issues. While scholars have sometimes drawn from other disciplines, such as economics or history, to discuss a particular norm, philosophy has gone untapped. This is a significant omission. Philosophers have long been alive to conventions[103] and have clarified their conceptual structure. While this might not matter in other areas of legal scholarship—you do not have to revisit Hart on the nature of law every time you discuss the Fourteenth Amendment—the lack of conceptual clarity is an issue for norms. Treating norms philosophically addresses that problem. When we grasp the basic structure of a convention, we can more easily see the seemingly confusing or unexplained aspects of norms.

---

100. *Id.* at 1458–59.

101. TRIBE, *supra* note 33, at 38.

102. Recall that norms are conventions. I stick to the term "norm" only to avoid the confusion that the term "constitutional convention" might cause.

103. As early as 1738, David Hume explained both property and justice in conventional terms. Each emerged, he observed, from "a general sense of common interest; which sense all the members of the society express to one another, and which induces them to regulate their conduct by certain rules. . . . And this may properly enough be called a convention or agreement betwixt us, though without the interposition of a promise." DAVID HUME, 1 A TREATISE OF HUMAN NATURE 314–15 (David Fate Norton & Mary J. Norton eds., Oxford Univ. Press 2007) (1739).

This Part proceeds in three sections. First, it discusses coordinating conventions—practices that help coordinate action—and their analytic limits. It then introduces the idea of a constitutive convention, practices that help *concretize* principles. Finally, it explores norms' features. It illustrates how constitutive conventions are *normative* in a thicker way than merely being useful. It shows how conventions are *contingent*. And it concludes by explaining how conventions are *arbitrary*.

A. *Coordination*

The first thing conventions do is *coordinate* behavior. This function so dominates our understanding of them that David Lewis's foundational book, *Convention*, is entirely devoted to it.[104] In his view, conventions exclusively solve coordination games. The latter "are situations of interdependent decision by two or more agents in which coincidence of interest predominates and in which there are two or more proper coordination equilibria."[105] Put more simply, coordination problems arise when actors have a mutual interest in acting the same way. This definition is intentionally broad. It describes equally well everyday situations like a couple's decision about how to spend an evening[106] or figuring out how to row a two-person boat[107] and more complex social problems such as choosing a common currency or language.

Coordinating conventions solve these games and make cooperation possible. They are "coordination equilibria"—non-exhaustive solutions to situations where parties benefit more from working together than against each other.[108] The classic example is the convention of driving on the right side of the road. Driving on the left side, so long as everyone does it, would work just as well. Conventions thus solve problems that permit multiple solutions. These solutions do not have to be equally effective to be conventions; instead,

104. *Convention* is the urtext in philosophy. It began as an intervention in a highly technical debate on the philosophy of language. The central question was whether language itself was conventional. In response, the philosopher W. V. Quine famously offered a naturalistic account. Quine's arguments set the stage for Lewis's monograph, which rejected Quine's approach and advanced a conventionalist view of language. Lewis's argument first defines conventions and then explains how language functions as a type of convention. I focus only on the first half of Lewis's argument, which contains his definition. W.V. Quine, *Foreword* to DAVID LEWIS, CONVENTION, at xi (1969); *see also* THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT (2d ed. 1980) (providing the classic account of focal points from which Lewis drew); DAVID SINGH GREWAL, NETWORK POWER: THE SOCIAL DYNAMICS OF GLOBALIZATION 60–62 (2008) (drawing on Schelling and Lewis to explain the conventionality of different practices of globalization).

105. LEWIS, *supra* note 104, at 24.

106. This refers to the canonical "Battle of the Sexes" coordination game, in which two players (a couple) are trying to decide how to spend an evening. While each partner prefers a different activity, both prefer spending time together to doing their preferred activities apart. ANATOL RAPAPORT, TWO-PERSON GAME THEORY 95–96 (1966); *see also* Russell Cooper, Douglas V. DeJong, Robert Forsythe & Thomas W. Ross, *Communication in the Battle of the Sexes Game: Some Experimental Results*, 20 RAND J. ECON. 568 (1989).

107. HUME, *supra* note 103, at 315.

108. *See* Postema, *supra* note 16, at 174–75 (describing features of coordination equilibria).

an equilibrium needs to be "only good enough so that everyone is ready to do his part if the others do."[109]

A general definition of a coordinating convention has two parts, a description of what they do and the conditions under which they emerge. Accordingly, a convention is regular behavior by members of a community among whom it is common knowledge that in a particular type of recurring situation, people generally follow the convention.[110] Moreover, a convention persists *because* people expect each other to follow it. If this expectation were absent or people started converging on a different practice, the convention would no longer exist.

Each of these four conditions—preferences, mutual expectations, regularities of behavior, and common knowledge—are necessary for the existence of a convention. First, agents must have preferences. This is the uncontroversial idea that agents facing a coordination problem think some outcomes are better than others. Second, conventions require agents to share mutual expectations about their behavior. Only if an actor is sufficiently confident that others will act a certain way will they also conform their behavior. While a stylized economic model can specify exactly the level of confidence agents need to form a convention, real-world coordination problems are often too complex to give concrete thresholds. Instead, the level of certainty required for a convention will vary depending on the type of situation agents face.

Regularity of behavior and common knowledge—the third and fourth conditions—are explained by the idea of precedent.[111] When agents reach a convention by way of precedent, they rely on their shared awareness that a

---

109. LEWIS, *supra* note 104, at 50.

110. *Id.* at 78. Lewis's formal definition is the following:

> A regularity *R* in the behavior of members of a population *P* when they are agents in a recurrent situation *S* is a *convention* if and only if it is true that, and it is common knowledge in *P* that, in almost any instance of *S* among members of *P*,
>
> (1) almost everyone conforms to *R*;
>
> (2) almost everyone expects almost everyone else to conform to *R*;
>
> (3) almost everyone has approximately the same preferences regarding all possible combinations of actions;
>
> (4) almost everyone prefers that any one more conform to *R*, on condition that almost everyone conform to *R*;
>
> (5) almost everyone would prefer that any one more conform to *R'*, on condition that almost everyone conform to *R'*,
>
> where *R'* is some possible regularity in the behavior of members of *P* in *S*, such that almost no one in almost any instance of *S* among members of *P* could conform both to *R'* and to *R*.

Id.

111. "Precedent" here means a prior, observed pattern of behavior. It differs from the legal meaning of the word.

previous form of coordinated behavior achieved the desired outcome. From that shared awareness, agents facing an analogous situation in the future behave similarly if the knowledge is sufficiently widespread.[112] Together, the third and fourth conditions teach us the following: over sufficiently long stretches of time, agents observe regularities of behavior that license analogical reasoning in similar future situations, and it becomes a part of the "common knowledge" in a community that you do *X* in situations of type *Y*.[113]

Legal scholarship, like the game-theoretic approaches discussed in Part I, pays close attention to coordinating conventions, and rightly so. Coordination is vital to social ordering, including law. Social life is fraught with problems that require solutions that are "good enough," if not perfect. In these situations, it is more important that everyone settles on a solution, than that a solution be optimal in all respects.[114]

Yet for all its explanatory value, coordination does not exhaust our understanding of conventions. We still lack an explanation of how values relate to conventions. Lewis acknowledges as much: "The definition I gave of convention did not contain normative terms . . . . '[C]onvention' itself, on my analysis, is not a normative term. . . . [C]onventions may *be* a species of norms: regularities to which we believe one ought to conform."[115] On this view, a convention might endure because people think they *should* adhere to it, but that is the extent of its normativity.

Just as this view is deficient in the constitutional realm, it also falls short at a general level. Social life is full of practices we find meaningful beyond the convenience they provide. While we might not care which side of the road we drive on, we attach value to conventional practices in areas like art and etiquette. And for constitutional theory in particular, a general theory has to make sense of the characteristic alarm that norm erosion provokes. This is

---

112. As Lewis notes:

> Coordination by precedent . . . [is the] achievement of coordination by means of shared acquaintance with a *regularity* governing the achievement of coordination in a class of past cases which bear some conspicuous analogy to one another and to our present coordination problem. Our acquaintance with this regularity comes from our experience with some of its instances, not necessarily the same ones for everybody. . . . We acquire a general belief, unrestricted as to time, that members of a certain population conform to a certain regularity in a certain kind of recurring coordination problem for the sake of coordination.

LEWIS, *supra* note 104, at 41.

113. *Id.* at 57 ("Precedents also are a basis for common knowledge that everyone will do his part of a coordination equilibrium; and, in particular, past conformity to a convention is a basis for common knowledge of a tendency to go on conforming.").

114. In fact, pernicious conventions can endure because of compliance dependence even if people think a different practice would be better. *See, e.g.*, Leonardo Bursztyn, Alessandra L. González & David Yanagizawa-Drott, *Misperceived Social Norms: Women Working Outside the Home in Saudi Arabia*, 110 AM. ECON. REV. 2997 (2020) (providing experimental and survey data showing that women's participation in Saudi labor markets is limited because their husbands wrongly believe other men disapprove of women working outside the home).

115. LEWIS, *supra* note 104, at 97.

especially important since few constitutional norms resemble solutions to coordination games; executive noninterference in administrative adjudication is not the same type of rule as driving on the right side of the road. These practices are often distinct from picking on which side of the road to drive. Happily, Andrei Marmor's notion of constitutive conventions helps fill in the other half of our account.

B. *Constitution*

Conventions do not only coordinate behavior; they also concretize principles into practice. These functions are not mutually exclusive.[116] A convention can conceivably do both. For our purposes, however, implementing a principle as a practice is especially important. Andrei Marmor develops this idea in response to Lewis.[117] His theory better tracks what conventions do in daily life and how people understand them. And it trains our attention on the salient features of conventions for constitutional theory.

Constitution is intimately linked to normativity. Constitutive conventions are practices we recognize that we *should* follow. The operative question here is where that "*should*" comes from. What does a convention do, beyond making cooperation possible, that commands our respect?

Constitution answers that question by highlighting the link between practices and their underlying values. Constitutive conventions are a type of constitutive rule[118]—rules that make up a particular sort of activity or social practice. Constitutive rules are ubiquitous: the rules of chess, the structure of

---

116. *See infra* Section IV.A.

117. Indeed, Marmor begins with a definition that is essentially Lewisian: a convention is a social rule agents follow in a particular set of circumstances for a particular set of reasons, and there is at least one alternate rule they could follow in the same situations for the same reasons. More formally:

> A rule, R, is conventional, if and only if all the following conditions obtain:
>
> 1. There is a group of people, a population, P, that normally follow R in circumstances C.
> 2. There is a reason, or a combination of reasons, call it A, for members of P to follow R in circumstances C.
> 3. There is at least one other potential rule, S, that if members of P had actually followed in circumstances C, then A would have been a sufficient reason for members of P to follow S instead of R in circumstances C, and at least partly because S is the rule generally followed instead of R. The rules R and S are such that it is impossible (or pointless) to comply with both of them concomitantly in circumstances C.

ANDREI MARMOR, SOCIAL CONVENTIONS: FROM LANGUAGE TO LAW 2 (2009).

118. The philosopher John Searle discussed the concept of a constitutive rule in his book *Speech Acts*. JOHN R. SEARLE, SPEECH ACTS (1969). *See also* John R. Searle, *Constitutive Rules*, 4 ARGUMENTA 51, 51 (2018) ("Constitutive rules create new forms of reality, with new powers, they typically require language, and they are the basis of human civilization.").

a Greek tragedy, or the clauses of a written constitution.[119] Nevertheless, they all play the same role: they bring into being and make a certain type of practice intelligible. They do so by linking together an underlying principle and a corresponding practice. For instance, consider the notion of etiquette or politeness. Telling someone to be polite, on its own, is vague and unhelpful. Instead, we have sets of practices that embody the idea of respect for another person. They comprise the conventions of etiquette. These practices often vary significantly. In one culture, etiquette might require taking off your shoes before entering a home, and in another, removing footwear may seem rude and perplexing. In either context, however, the structure of the convention remains the same: the convention constitutes its underlying value.

It is important to clarify what "constituting" means. This is not the strong ontological claim that these rules "create" certain actions or behavior. We could be dancing the waltz without knowing it. Rather, constitutive rules create the "particular social meaning or significance of the action in question."[120] In other words, unless the social convention of a waltz is in place, our dancing cannot be understood *as a waltz*. Constitutive rules thus make forms of social behavior meaningful. Nor do these rules exist only in isolation. Most social activities consist of many different constitutive rules that together form the "structure of rule-governed activity."[121] This, as we will see, is important in the constitutional order, where a variety of conventions together guide and constrain behavior. Actors following constitutional conventions understand and defend their actions in constitutional terms.

Constitutive conventions are different from institutional rules, a distinction that is very important for constitutional norms.[122] The former includes "structured conventional games (like chess, tennis, soccer), forms of art, some practices of etiquette, [and] social ceremonies and rituals," while the latter are "legal institutions (like legislatures, courts, administrative agencies), quasi-legal institutions (like political parties, sports leagues), and religious institutions (like a church)."[123] Both constitute meaningful social activity, but they diverge in terms of their strength.

---

119. Stephen Holmes importantly observed that constitutions themselves are a set of constitutive rules for a democracy. Against prevailing theories of constitutionalism that view these documents as purely constraints on action, Holmes argues that constitutions are enabling devices. Stephen Holmes, *Precommitment and the Paradox of Democracy*, *in* PASSIONS AND CONSTRAINT 134, 163 (1995). The idea that law enables freedom, rather than merely constraining it, is an old and distinguished one. *See, e.g.*, John Locke, *The Second Treatise of Government* § 57, *in* TWO TREATISES OF GOVERNMENT 265, 305 (Peter Laslett ed., Cambridge Univ. Press 1988) ("[T]hat ill deserves the Name of Confinement which hedges us in only from Bogs and Precipices.").

120. MARMOR, *supra* note 117, at 34.

121. *Id.*

122. Constitutional norms are a type of constitutive convention.

123. MARMOR, *supra* note 117, at 35 (cleaned up).

The line between the two is porous. Conventions, when recognized by the relevant institutions, are replaced by institutional practices.[124] When this happens, a convention loses its characteristic informality (and flexibility) and is transformed into an authoritative rule. As an example, consider the Court's decision in *NLRB v. Noel Canning*.[125] There, the Court, after surveying the practice of past presidents, decided that the Recess Appointments Clause embraced both inter- and intra-session appointments.[126] The decision exemplifies institutional codification. A legal institution, the Supreme Court, empowered to declare law, turned past practice into a decisive rule.[127] This rule was then enforced by the relevant authorities: law enforcement and courts. A convention was thus transformed into law.

In contrast to institutional rules, conventions are informal. They lack the pedigree of institutional rules and therefore make weaker, more tentative claims to authority. Even when conventions command broad obedience and respect, we cannot point to a particular locus of power or procedure that makes a convention binding.[128] In constitutional politics, the difference between conventions and institutional rules roughly tracks one between conventions and law. Constitutive rules in our constitutional order sort into conventions and law, with the latter enunciated by the typical actors (courts, legislatures, agencies) in the typical ways (judicial decisions, statutes, regulations).

Given how common constitutive conventions are and the central role they play in social life, it is easy to lose track of "what makes such rules conventional at all."[129] The vast difference between what coordinating and constitutive conventions do make it hard to see what they share in common. Yet conventions, regardless of their function, are united by a shared quality: "compliance dependen[ce]."[130] A convention is compliance dependent because one of the reasons we follow it is that others follow it too.[131] Consider again, the

---

124. *See id.* ("[S]ometimes conventional practices are replaced by institutional codification, and thus they may become institutional practices.").

125. 573 U.S. 513 (2014).

126. *Id.* at 538.

127. *See* MARMOR, *supra* note 117, at 50–51. The transformation of convention into law is also central to the theory of common law. Oliver Wendell Holmes made this very argument in recounting the history of the law of contracts in *The Common Law*. *See* OLIVER WENDELL HOLMES, THE COMMON LAW 223–60 (Harvard Univ. Press 2009) (1881). I thank Lev Menand for this point.

128. This fact, of course, squares with a key feature of conventions: compliance dependence, which I take up in the later discussion of arbitrariness. Keith Whittington is the rare mainstream constitutional theorist who cites Marmor's work, and only for the idea of compliance dependence.

129. MARMOR, *supra* note 117, at 41.

130. *See id.* at 11.

131. Again, the formal definition of compliance dependence is:

> A reason for following a rule R is compliance dependent if and only if, for a population P in circumstances C,

example of a coordinating convention: driving on the right side of the road. In that case, a different rule—driving on the left side—could equally solve the coordination problem. The reason we drive on the right side is that everyone else is doing it. The value of a pure coordinating convention is thus entirely connected to the problem it solves. The same only partly applies to constitutive conventions, perhaps less obviously. There might be various reasons why we follow a rule of etiquette, but one major reason is that others follow the rule.

Compliance dependence is also important for understanding the arbitrariness of conventions since it explains the nature of the relationship between a rule and our reasons for following it. I turn to that shortly. But for now, it is enough to observe that compliance dependence makes clear why one rule prevails over other satisfactory ones. The successful rule simply enjoys enough support to become self-sustaining.

Finally, the notion of a constitutive convention carries with it several important observations about how conventions emerge and their flexibility over time. First, people do not always exercise equal influence over the construction of a convention. Some actors, by virtue of their social position, are better situated to construct and shape conventions. Take the law: "The conventions that determine what counts as law in the relevant legal system, are, first and foremost, the conventions of judges, particularly in the higher courts. . . . [O]ther legal officials can also play various roles in determining the content of such conventions."[132] These other actors include agencies, police officers, and the like, and together they suggest a "division of labor" in the formation of conventions.[133] In this way, constitutive conventions, like coordinating conventions, emerge from the interaction of various agents, sometimes similarly situated but often not.

This view of a "division of labor" applies equally well to the constitutional context. There is a vast set of actors who are responsible for the construction of constitutional conventions including not only the obvious ones—the Supreme Court, the president, and Congress—but also other agents in and out

---

1. there is a reason for having R, which is also a reason for having at leas[t] one other alternative rule, S, and,

2. part of the reason to follow R instead of S (in circumstances C) consists in the fact that R is the rule actually followed by most members of P in circumstances C. In other words, there is a reason for following R if R is generally complied with, and the same reason is a reason for an alternative rule if that alternative is the rule generally complied with.

Id. at 11.

132. *Id.* at 46.

133. *Id.* at 46–47.

of the government. These range from the OLC and the press to powerful institutions like law schools and their faculties.[134] Indeed, much recent scholarship can be understood as an active attempt by legal academics to influence the force and meaning of norms. By highlighting and defending constitutional norms, some scholars have tried to sustain, with varied success, the authority of past practice and to moor in place a constitutional order in flux. The politics of norms is part and parcel of constitutional politics writ large.

C. *Features of Norms*

1. Normativity

Conventions are normative. They prescribe behavior that "must be regarded as binding by the relevant population."[135] This is equally true for coordinating and constitutive conventions. While we do not attach any special value to driving on the right side of the road, we do think it is a rule we should follow, even if it is just because everyone else does. Similarly, when agents respect a constitutive convention, they do so partly because they think the behavior is socially required.[136] This explains why, for instance, we wear a suit to a job interview: it is just what you wear to those things. Both of these examples highlight the previous idea of compliance dependence—the fact that one of the reasons we follow a convention is the expectation that others will too.

Yet compliance dependence only gets us a thin notion of normativity. If the only reason we followed a convention were the expected compliance of others, then there would be little separating coordination and constitution. Even if a convention did either of those things, people would respect it for the *same* reasons. This would leave us with the same view of conventions as the strategic approaches: value depends entirely on function. This view implies that any concern about the collapse of constitutional conventions is mere handwringing.

Happily, conventions enjoy a thick idea of normativity. This thick view helps make sense of the anxiety of constitutional alarmists. Recall a central problem with an exclusively coordinating account of conventions: finding the relevant game. While conventions can serve as solutions to coordination games, "[f]or many types of familiar conventions . . . , this story does not make sense" since "there is no coordination problem that we can identify."[137] And even in those cases where we can trace the emergence of a convention to a historical coordination problem, once the convention is in place it can persist for reasons "that are quite independent of the story of why and how the

134. *See* Liora Lazarus, *Constitutional Scholars as Constitutional Actors*, 48 FED. L. REV. 483, 487, 491 (2020).

135. MARMOR, *supra* note 117, at 3.

136. *Id.* at 41.

137. *Id.* at 22.

game . . . emerged."[138] This exact problem prompted Marmor to add constitution as a separate function.[139] Constitution helps explain the relationship between a convention and its underlying value: the former embodies the latter in practice.[140]

Once the central role of values is kept in view, the broad conclusion is that conventions are irreducibly normative beyond mere compliance dependence. Constitutive conventions are thickly normative. We follow them because we attach importance to them beyond the way they enable cooperation. Failing to follow a convention, then, is not (or not just) bad strategy or being "foolish or wrong."[141] It is also understood as transgression. Since "[c]onventions are rules of conduct, and they are normatively significant as such,"[142] when we fail to follow them—say by wearing pajamas to a funeral—we offend.[143] This more expansive view of conventions better makes sense of the "wide variety of social functions" they serve, including but not limited to coordination.[144] Thus, pajamas to a funeral not only evinces irrationality (why self-sabotage?) but also warrants condemnation (your outfit was disrespectful).

The idea that conventions are thickly normative also begins to explain why constitutional alarmists have reacted so strongly to the breakdown of long-standing practices. If constitutional norms only coordinated action, then alarmists bemoan the loss of a functional regime and nothing more. If, however, constitutional norms are constitutive, then alarmists are worried about the breakdown of a practice and its underlying value. Widespread norm erosion thus reflects the breakdown of a particular form of constitutional morality.

2. Contingency

Conventions are *contingent* because their existence and survival depend on the state of the world.[145] As the world changes, so do conventions. This

---

138. *Id.* at 24.

139. *Id.* at 31.

140. *Id.* at 36–37.

141. *Id.* at 15.

142. *Id.*

143. As we will see shortly, constitutional norms are normative because they implement constitutional values; these underlying values imbue the practice with normativity. While American constitutional theorists have not recognized the limits of coordinating conventions for constitutional norms, comparative law scholars have noted the limits without fleshing out alternatives. *See, e.g.*, Joseph Jaconelli, *The Nature of Constitutional Convention*, 19 LEGAL STUD. 24, 44 (1999) ("If we consider for a moment the examples of convention that are given by David Lewis, . . . [i]t could be argued . . . that conventions of this type—where the element of underlying reason is exiguous—are not typically to be found in matters constitutional.").

144. MARMOR, *supra* note 117, at 25.

145. Contingency might suggest that the Constitution makes complete internal sense, with values that are eternal and fixed but subject to the vagaries of a fickle and unprincipled real world. I reject such constitutional Platonism and do not mean to imply it (nor do I think these other authors take a Platonist view). Instead, my account tethers principles to concrete practices.

explains why conventional change is both possible and normal. A pure coordinating convention is the clearest example of this idea. When agents are not normatively attached to a convention—few people find meaning in driving on the right side of the road—it is easier to change their behavior. Pure coordination conventions do not "stick" any longer than the time it takes for a community to learn that people are behaving differently.[146]

Coordination games in the real world are not static. Imagine a warm-weather society where the convention of a mid-afternoon nap develops.[147] If the climate begins to cool and some actors realize they can forego the afternoon nap and conduct more business, others might follow, and the napping convention will collapse. Whenever any convention dissipates, it might or might not be replaced by another one. In each case it depends, and in many circumstances, it might take time for the common knowledge and mutual expectations necessary for a new convention to develop.[148] But the underlying point remains: conventions are contingent because the world is.

That applies equally well to constitutional politics where constitutive conventions abound. A particular practice, say, executive noninvolvement in the Department of Justice, can be normatively important and also depend on political incentives for its survival. When these incentives change—a president discovers that they can flout them with impunity—the practice can also erode. When the world changes, we begin questioning past practices and can more easily imagine new ones.

3. Arbitrariness

Conventions are *arbitrary* for two reasons.[149] First, conventions, coordinating and constitutive, are arbitrary because they are compliance dependent. Compliance dependence refers to the fact that one of the reasons we follow a

---

That connection denies that principles can be cleanly distinguished from the practices that embody them; to the extent that these principles are fixed, they are empty. In other words, "separation of powers" and federalism simply *are* the practices that define them at any given time.

146. *See, e.g.*, LEWIS, *supra* note 104, at 49–51.

147. The siesta has evolved since its Roman origins when high mid-day heat and a primarily agricultural economy made it a useful practice. *It's Time to Put the Tired Spanish Siesta Stereotype to Bed*, BBC: WORKLIFE (June 9, 2017), https://www.bbc.com/capital/story/20170609-its-time-to-put-the-tired-spanish-siesta-stereotype-to-bed [perma.cc/C234-5RPG].

148. Highly salient events can scramble people's common knowledge and upset previous conventions. *See, e.g.*, Leonardo Bursztyn, Georgy Egorov & Stefano Fiorin, *From Extreme to Mainstream: The Erosion of Social Norms*, 110 AM. ECON. REV. 3522 (2020) (providing experimental support for the claim that the election of Donald Trump has relaxed adherence to previous conventions against expressing xenophobic views publicly).

149. Arbitrariness as defined here does not mean unreasoned or unjustified. As I explain below, a norm is arbitrary for different reasons than say, agency action under the Administrative Procedure Act. An "arbitrary and capricious" decision by an agency is one that does not offer reasons that can withstand judicial scrutiny. Motor Vehicle Mfrs. Ass'n. v State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–43 (1983). There might be many reasons to sustain a norm, even if other ones could plausibly concretize the same underlying principle or text. Thanks to Todd Aagaard for pointing out the administrative law context.

convention is because others follow it too.[150] It describes the relationship between the reasons we have for following a practice and the practice itself. Nothing inherent about driving on one side of the road or wearing a suit marks it as the governing practice.

Second, constitutive conventions are arbitrary because of the nature of the underlying values and how they are cashed out in practice. These "needs, functions, or values . . . radically *underdetermine* the content of the rules that constitute the relevant social practice."[151] While certain "[n]orms of rationality, and basic moral norms" do not qualify as conventions since "they do not admit of alternatives," many other values and principles can be realized through a variety of ways.[152] Social conventions implement values in intelligible action. To return to an earlier example, the basic norm of "being polite" can be practiced through shaking hands or making eye contact. As we know, however, etiquette ranges wildly between cultures, and being polite elsewhere might involve a downward gaze. "Politeness" is thus too abstract to specify the type of conduct required.

Arbitrariness does not imply, however, that the relationship between principle and practice is unidirectional. Instead, people enact principles in certain practices and then understand the principle in light of those very same practices. The relationship is dialectical. As Marmor puts it, "constitutive conventions tend to be in a constant process of interpretation and reinterpretation that is partly affected by external values, but partly by those same values that are constituted by the conventional practice itself."[153] Moreover, conventions develop over long periods of time even if, as in constitutional politics, we can identify discrete moments in time when a previous convention was abandoned or a future convention was first adopted.

Because constitutive conventions take time to develop, they typically have "a history, and the history tends to be socially significant."[154] It is no surprise, then, that arguments from history feature prominently during moments of constitutional change. Actors who challenge long-followed conventions usually meet resistance from defenders of the status quo. The former often insist that their changes are entirely consistent with the current practice, while the latter will assert a necessary connection between the status quo and the relevant constitutional principle. This pattern is played out in the examples considered in Part IV.

Arbitrariness is especially important for constitutional practices, where the underlying values are multiply realizable.[155] The idea of a separation of

---

150. *See supra* Section II.B.

151. MARMOR, *supra* note 117, at 41.

152. *Id.* at 9–10.

153. *Id.* at 48. Ironically, this view of conventions strongly resembles Dworkin's theory of interpretive concepts. *See* DWORKIN, *supra* note 16, at 45–86.

154. MARMOR, *supra* note 117, at 49.

155. *See, e.g.*, Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 352 (2016) (noting that, in the separation-of-powers context, doctrinal

powers, for instance, can be implemented in many different ways. The fact that much of the recent scholarship on conventions has concentrated in this area and the perennial divide between hard and fast allocations of power and functionalism speaks to the indeterminacy of this principle.[156] Conventions are practices that address that indeterminacy without dissolving it. Taken together, arbitrariness and normativity suggest something important about conventions and constitutional norms in particular: there are many norms that actors follow because they think such norms are right, without recognizing that alternate practices could work just as well if not better.

That conventions are at the same time arbitrary and normative may seem like a problem. Arbitrariness often has a negative normative valence. This likely stems from a view of morality as analogous to mathematics: we start with accepted normative premises and step by valid inferential step reach a sound conclusion. Arbitrariness destroys that picture. It suggests that a current practice, value, or rule could be otherwise. Yet just because we can do things differently does not mean that the current rule is not valuable. Rather, arbitrariness means that our normative imagination cannot be bound by the status quo. Defense of a convention, to wit, cannot simply rest on it being the way we have done things before. When alarmists warn us about norm erosion, they miss that a given constitutional morality is always particular and nonexhaustive because it is both the product of history and a single expression of capacious values.

III. CONSTITUTIONAL NORMS

This Part answers a second question: when is a norm constitutional? The answer lies in the fact that constitutional norms are a type of constitutive convention. These conventions concretize values into practices. Constitutional norms are normative, contingent, and arbitrary practices that implement constitutional text and principle.[157] And they enjoy the respect of actors in and out of government because they recognize them as constitutional. So, while they share the same features as all other conventions, constitutional norms are distinct because the things they concretize are constitutional.

After explaining what makes a norm constitutional, this Part concludes by defending the distinction between constitutional norm and law. Despite their importance to everyday constitutional practice, norms enjoy respect that falls short of the obedience individuals pay to law. Unconventional behavior

---

approaches that are "sensitive to the multiplicity of normative values . . . might well take the seemingly incoherent form of oscillating rules and standards").

156. *See id.*, for an example of this recent scholarship tracking the "zigzagging" between rules and standards in separation-of-powers law, and David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2 (2014), for a discussion of the limits of constitutional text for understanding separation-of-powers dynamics. *See also* Manning, *supra* note 25 (underlining the lack of a baseline in many areas of separation-of-powers issues).

157. Since I have defined constitutional conventions as constitutive conventions, I use "implement" instead of "constitute." While constitutional conventions *do* concretize constitutional text and principle in practice, that formulation, for obvious reasons, is ponderous.

is more common than lawbreaking precisely because unconventional acts are not illegal. And when we do want to stem conventional change, we often turn to law. For both conceptual and practical reasons, the distinction remains important.

A. *When Is a Norm Constitutional?*

Part II explained that practices are conventional when they are normative, contingent, and arbitrary and either coordinate or concretize. As I have noted throughout, coordination fits poorly with constitutional norms. We rarely, if ever, can identify a coordination problem the practice solves.[158] Instead, constitutional norms are constitutive. They link principle and practice. So, what makes these norms constitutional?

There are two possible answers: actor-centric and practice-centric. An *actor-centric* view holds that a given norm is constitutional when it involves constitutionally identifiable actors discharging a constitutional role. Given its breadth, the actor-centric view potentially covers a large swath of government. For instance, the rules and practices of executive branch lawyers[159] are constitutional norms because they shape the presidency. Similarly, the conduct of a textually specified actor—the Senate—in fulfilling a particular textual duty—advice and consent for treaties—qualifies as a constitutional norm, especially in the absence of applicable law.[160] This definition also allows scholars to declare sets of practices as the "norms" of a particular branch, like Daphna Renan has done with the presidency.[161] Thus, under Renan's framework, there is a shift from the Framers' norm[162] against the president speaking directly to the public to today's "rhetorical presidency."[163] The *practice-centric* view focuses more squarely on the norm itself. It holds that a norm is constitutional when it implements constitutional principle or text. Constitutional norms are constitutive. These conventions concretize values, the way a handshake embodies politeness. Constitutional norms also instantiate constitutional principles. For example, executive noninvolvement in administrative adjudication respects at least two different principles—due process and judicial independence.[164] The first has an explicit textual basis;[165] the latter belongs to that category of constitutional values Charles Black called structural principles.[166]

158. *See* MARMOR, *supra* note 117, at 34.

159. *See* sources cited *supra* note 78.

160. *See, e.g.*, AMAR, *supra* note 33, at 310–18; Whittington, *supra* note 10, at 1859.

161. Renan, *supra* note 11.

162. *Id.* at 2231.

163. *See generally* JEFFREY K. TULIS, THE RHETORICAL PRESIDENCY (Princeton Classics ed. 2017).

164. Vermeule, *supra* note 12. *See also* William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1521 (2020) (emphasizing executive branch adjudication as subject to Due Process constraints).

165. U.S. CONST. amend. V.

166. *See* BLACK, *supra* note 33.

As the previous example shows, constitutional norms and their underlying principles do not need one-to-one correspondence. A given practice can implement multiple constitutional values. Conventions, more generally, operate the same way. The convention of a performer bowing in front of an audience after applause can represent several different principles at the same time: etiquette in showing gratitude, an appreciation of the hierarchy of patron and artist, and respect for the tradition of performance. Because conventions are both common and vital in making normative action possible, their multivalence is expected. Our ordinary lives are full of practices that are normatively significant in a number of ways at the same time. For our purposes, this means many norms are complex practices that can bear varied constitutional meanings.

The two ways of defining constitutional norms—actor-centric and practice-centric—are not mutually exclusive, but I use the latter for three reasons. First, the actor-centric view risks sweeping too broadly and pitching the relevant practice at too high a level of abstraction. It is hard to limit both who counts as "constitutional actor" and what qualifies as the discharge of a duty. Take, for instance, the shift to the "rhetorical presidency." The president is obviously a constitutional actor.[167] But what is the relevant constitutional duty they are discharging? The Take Care Clause[168] is a possible option, but also a highly capacious one. If the rhetorical presidency is a constitutional convention since it involves a constitutional actor, the president, fulfilling their constitutional duty under the Take Care Clause, then an entire style of governance is a norm. This is not a decisive problem for this definition since we might want a theory of norms to capture shifts in the way politics works. After all, the idea of a "constitutional order" is a broad one.[169] Yet range comes at the cost of precision; when a practice is defined too expansively, it is hard to see what the practice actually means.[170]

---

167. In this case, the president sits comfortably in the "core" of the rule. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV 593, 607 (1958).

168. "[H]e shall take [c]are that the [l]aws be faithfully executed." U.S. CONST. art. II, § 3, cl. 5.

169. *See supra* note 2 and accompanying text.

170. The choice between a broader and more specific definition of a constitutional convention is analogous to the decisions different scholars of administrative constitutionalism have made in defining that concept widely or narrowly. On one end of the spectrum is Sophia Lee, who defines administrative constitutionalism "to include only agencies' interpretation and implementation of the United States Constitution." Sophia Z. Lee, *From the History to the Theory of Administrative Constitutionalism*, *in* ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW 109, 109 (Nicholas R. Parrillo ed., 2017). Others have taken much more expansive views. *See, e.g.*, Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1899 (2013) (expanding the notion to include "the statutes and legal requirements that create and govern the modern administrative state"). Like Lee, I opt for the narrower definition. It is more useful for grasping the interpretive issues reasoning from historical practice raises.

Second, the practice-centric view trains our attention on the structure of the norm. As I argued in Part II, constitutive conventions—of which constitutional norms are an example—have two parts: a practice and the underlying value it constitutes. The practice-centric view conditions a norm's constitutional status on the nature of the value at stake. When the underlying value is either a recognizable constitutional principle, like federalism or the separation of powers, or constitutional text, then the practice is a constitutional norm. A practice-centric view expresses the following intuition: a norm is constitutional if a reasonable viewer seeing the practice thinks it may be required by the Constitution.[171] Constitutional norms enjoy this respect from reasonable viewers because they form part of the constitutional morality of a given era. Taking the practice-centric view, then, has the virtue of showing how constitutional norms track the structure of conventions generally.

The final reason in favor of the practice-centric view involves constitutional interpretation. Sometimes courts have to decide whether a norm should inform their decisions. The practice-centric view focuses our attention on what this involves: judges using norms as a source of law. This reason, again, is not decisive. If the goal is to give a rich account of how the constitutional order works, the actor-centric view is sociologically attractive. But if we are interested in the interpretive consequences of using norms as law, the practice-centric model makes more sense. It tethers the practice to a constitutional principle or text and asks us how that relationship should bear on legal reasoning.[172]

The distinction between the two views is not hard and fast since application and limits overlap. Any norm under the practice-centric view will also satisfy the actor-centric one. And many actor-centric norms will count as practice-centric ones. This means some constitutional norms can be framed either way. Presidential noninterference with the Department of Justice is one example. That norm is constitutional because it constitutes important constitutional principles and text like due process,[173] equal protection,[174] and free speech and association[175] and because it informs how the president enforces federal law.

The practice-centric view can still be vulnerable to the charge of excess abstraction, though less so than the actor-centric view. Constitutional norms,

---

171. I thank Arjun Ramamurti for this formulation.

172. The interpretive consequences of this approach are only considered in the final Section of this paper. *See infra* Conclusion.

173. U.S. CONST. amend. V.

174. *Id.* amend. XIV.

175. *Id.* amend. I. All of these amendments are plausible textual hooks for this convention. PROTECT DEMOCRACY, NO "ABSOLUTE RIGHT" TO CONTROL DOJ: CONSTITUTIONAL LIMITS ON WHITE HOUSE INTERFERENCE WITH LAW ENFORCEMENT MATTERS (2018), https://s3.documentcloud.org/documents/4498818/2018-Protect-Democracy-No-Absolute-Right-to.pdf [perma.cc/6HYV-HYUF]. Historically, however, those who have followed the convention have linked it to the Take Care Clause. *See infra* Section IV.C.

even when we identify them in a practice-centric way, can vary in their normative and practical complexity. A norm can range from something as prosaic as attaching a slip of paper to a nomination to something as grand as respecting the structure and powers of a coordinate branch. Moreover, these norms can be *nested*: a relatively broad convention can be composed of smaller, constituent conventions. We can thus specify norms at various levels of abstraction. That analysis turns on several factors such as the complexity of the actors involved (a particular office within a branch or the branch itself), the relevant function (coordination or concretization), and the history and development of the practice.[176] The practice-centric view, unlike its counterpart, requires us to identify the underlying constitutional text or principle for a given practice. When we cannot (or the connection between practice and principle is highly attenuated), this counts against labeling it constitutional. So, while the shift to a "rhetorical presidency" is very important, the practice is better understood as a political norm, not a constitutional one.

Both approaches, however, recognize that constitutional norms are fundamentally constitutive conventions. The issue for constitutional scholarship is that normativity and arbitrariness sit together uneasily. Constitutional law scholars, understandably enough, are often focused on questions with clear and usable answers. Examples include "can a sitting president be indicted?"[177] or "is West Virginia unconstitutional?"[178] And law professors have a comparative advantage in answering these questions. The questions are distinctly legal and invite traditional forms of analysis drawing from familiar sources: constitutional text, doctrine, statutes, and regulations. The question of normativity is either built into the question—what is normative is what is constitutional—or bracketed and addressed separately—what is constitutional and what is desirable? By contrast, I argue arbitrariness is an inherent feature of practices that remain normative. Just because a norm is, in a basic sense, arbitrary does not mean we should stop honoring it. Instead, constitutional conventions challenge us to live with contingency and uncertainty as facts of our constitutional order. They cannot be wished away.

B. *Constitutional Norms vs. Law*

This Section considers the distinction between constitutional norm and law, which matters for several reasons. First, it is one of the few consistent threads in the norm scholarship. Despite its diversity, all recent scholars either

176. This Article does not give a full account of what makes a constitutional convention complex or simple. For our purposes, it is enough to observe the complexity of constitutional conventions, describe relevant examples, and connect their character to that of conventions generally.

177. Laurence H. Tribe, *Yes, the Constitution Allows Indictment of the President*, LAWFARE (Dec. 20, 2018, 11:55 AM), https://www.lawfareblog.com/yes-constitution-allows-indictment-president [perma.cc/N632-9JUQ].

178. Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291 (2002) (cleaned up).

recognize or assume that norm is different from law. If that assumption is unsound, then we are not analyzing anything special. Second, that distinction must hold for any consideration of the relationship between historical practice and constitutional interpretation. If norms—a form of historical practice—are not meaningfully distinct from laws, then there is nothing unique about reasoning from historical practice. Third, the distinction is yoked to the difference between conventions and institutional rules.[179] Conventions are different from institutional rules because the latter are ratified by authoritative institutions. If institutional imprimatur does not matter, then it is hard to explain why norms can be violated without regular penalties but laws cannot.

Conventionalist theories of law, however, put pressure on the border between norm and law. It is easy to see the problem in relation to Hart's rule of recognition. In any given legal system, a rule of recognition solves the problem of what counts as law by "specify[ing] some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts."[180] Put simply, a legal system's rule of recognition tells us how to identify a law as law.[181] Picking out what the rule of recognition is in any given legal system is hard because these rules "may take any of a huge variety of forms, simple or complex," but Hart maintains that every legal system will have a rule of recognition.[182]

The problem is that many legal positivists think the rule of recognition itself is conventional. Their arguments take different forms, variously stressing the coordinating,[183] epistemic,[184] and constitutive[185] functions of the rules of recognition. Whichever view we choose, the resulting challenge is the same: if the very foundation of a legal system is a convention, can we meaningfully distinguish between law and norm?

We can respond in four ways. First, law might be conventional, but it is in a special way. Hart's discussion of pre-law and law-bound societies suggests

---

179. *See supra* Section II.B.

180. HART, *supra* note 15, at 94.

181. *Id.* Scott Shapiro offers a simple example of a rule of recognition. Consider a village society with a legal system. In such a society, "[i]f there is a doubt about, say, how many mates are acceptable, the rule of recognition can direct the parties to the authoritative list of rules on the rock in the town square, the past pronouncements of the village elder, the practice of other villages and so on, to determine the answer." Scott J. Shapiro, *What Is the Rule of Recognition (and Does It Exist)?* (Yale L. Sch. Pub. L. & Legal Theory Rsch. Paper Series, Paper No. 181, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1304645 [perma.cc/KP62-8QFG].

182. Scholars have long tried to identify the rule of recognition in the American legal system. Indeed, Hart himself claims in passing that the American legal "system of course contains an ultimate rule of recognition and, in the clauses of its constitution, a supreme criterion of validity." HART, *supra* note 15, at 94, 106. Others have followed Hart's suggestion and offered complex descriptions of the American rule of recognition. *See* Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621 (1987).

183. MARMOR, *supra* note 117, at 164.

184. *See id.* at 162 n.17.

185. *Id.* at 165.

there are alternative forms of social ordering to law.[186] But conventions are not monolithic either. Marmor himself distinguishes between "deep" and "surface" conventions. The former include bedrock parts of social life, including language, art, and games; the latter include more specific examples such as English, Bauhaus, and chess.[187] Deep conventions make surface conventions possible, and "in following surface conventions one also follows, albeit indirectly, the deep conventions that underlie it."[188]

If we accept this view, it explains the relationship between constitutional norms and law as one of entailment: when you practice a constitutional norm, you are, in an attenuated sense, obeying a constitution and its law. Nevertheless, constitutional norms and law, even if they are fundamentally conventional, have different pedigrees—laws are created by authoritative institutions, while norms often emerge organically. This difference explains their disparate social strengths. So when we deploy the law–norm distinction, we do not commit ourselves to any strong position on the nature of law. And if law is in fact conventional, then the distinction is merely a shorthand for the difference between deep and surface conventions.

Second, if the distinction is not sound, then that result does not square with our ordinary experience at all. We know there are distinct differences in how we identify things like statutes and court decisions, which have defined institutional contours, and how we pick out norms, whose outlines are far less clear. If the problem of a stable divide between laws and norms still survives, then it applies equally to all legal scholarship. Every scholar of constitutional norms depends on this distinction. Without it, judicial decisions and statutes become the same as the norm against court-packing.

Third, abandoning the law–norm distinction deprives us of the ability to develop a more finely grained picture of our constitutional order. The very point of introducing the distinction is to account for patterns and regularities in constitutional politics that are governed by rules that are not laws. We need the concept of a constitutional norm as distinct from law in order to explain these practices.

Finally, law is one of our few tools for stemming norm erosion, and collapsing the distinction between the two can obscure that. This Article does not give a way of sorting between "good," "bad," and "neutral" conventional breakdowns. The answer always depends. But the theory developed so far does take conventional change as a given. Sophisticated analysts have argued that one effective response to harmful conventional change is "anti-hardball," which encases norm in law.[189] For this response to work, law and norm must be meaningfully different. Even if it is a difference of degree and not kind, the

186. *See* HART, *supra* note 15, at 90–93.

187. MARMOR, *supra* note 117, at 59–62.

188. *Id.* at 63.

189. *See* Fishkin & Pozen, *supra* note 54, at 981–82.

fact that disobeying law comes with regular and effective penalties while flouting norm does not is meaningful for prescriptive purposes.[190] For these reasons, philosophical and practical, I retain the distinction.

IV. NORMS AT WORK

Thus far, my argument has been theoretical. Now the theory is put to work. This Part animates constitutional norms through three case studies: blue slips, the convention against court-packing (anti-court-packing), and presidential noninterference with the Justice Department. Despite ostensible differences, all share the same underlying character: they are normative, contingent, and arbitrary practices that implement constitutional text and principle.

Here, I offer three further observations. First, when a convention is constitutional, it is also normative.[191] This is a premise of constitutional theory: if we think the Constitution requires us to do something, then it is something we think we should do. As each of the following examples shows, actors following a constitutional norm defend the practice in constitutional terms. If a widely respected practice is justified in constitutional language, then it is good evidence that the practice may be a norm.[192]

Second, constitutional norms, like all conventions, have irregular "life cycles." They can emerge organically during relatively calm political periods or at moments of political upheaval. They can endure undisturbed for a long time or undergo small changes while keeping the broader practice intact. And norms can end. They can die out or be transformed into institutional practices, exchanging their malleability for greater endurance and authority.

Third, a norm's contingency and arbitrariness require a historical lens. For contingency, this is obvious. If a norm changes over time, then it is clearly contingent. Arbitrariness, however, is harder to see. In theory, we should be able to see how a practice is arbitrary since internal arbitrariness is a purely conceptual relation between principle and practice. Yet arbitrariness is not always obvious; in any given period, the convention often reflects the prevailing wisdom about how constitutional government *should* work.

Fortunately, a norm's contingency reveals its arbitrariness. When norms come under pressure, the relationship between principle and practice unravels. This can happen in several different, but related, ways. First, an underlying

190. *See* Tamir, *supra* note 98, at 887–88, 945 (observing the analogy between formal law and conventions and suggesting the latter clarifies the former). I part with Tamir on what bears emphasis in the comparison between law and convention. Where he stresses similarity, I press difference.

191. The converse, of course, is not true.

192. This is neither a sufficient condition nor always true. For instance, no one under age 35 has ever become president. This is not a convention. Instead, people are following a clear legal rule. U.S. CONST. art. II, § 1, cl. 5 ("[N]either shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years . . . .").

value may be reinterpreted in a way that decouples it from past practice. Second, an alternative norm may be proposed that purports to better fit the underlying value. Third, the political world that made compliance not only appropriate but also attractive can change, creating incentives for actors to discard the practice. Whichever way a norm erodes, the resulting insight is the same: the norm bears no necessary relation to its underlying value and other ways of realizing constitutional text or practice are possible.

A. *Blue Slips for Judicial Nominations*

The senatorial blue slip is a constitutional norm that has implemented the Advice and Consent Clause[193] and separation of powers and federalism values since the early twentieth century. It is a practice of the Senate Judiciary Committee by which home-state senators exert influence in the selection of federal judges.[194] When the Senate Judiciary Committee is considering a judicial nominee for either a circuit or district court vacancy, the home-state senators are provided with blue slips of paper on which they can indicate approval or disapproval. The practice is an "informal custom"[195] of the Senate and is not codified in its rules.[196] The basic procedure—the use of a blue slip by home-state senators—has remained intact throughout its recorded existence. Its effect on the committee's decision on whether to advance a nominee to a full vote by the Senate, however, has varied with different committee chairs.[197]

The origins of the blue slip are obscure. The few archival studies date the practice as far back as 1913, with the first confirmed blue slip appearing in the sixty-fifth Congress in 1917.[198] The best account—Sarah Binder's—suggests

193. "The President . . . shall nominate, and by and with the Advice and Consent of the Senate . . . appoint . . . Judges of the supreme Court, and all other Officers of the United States . . . ." U.S. CONST. art. II, § 2, cl. 2.

194. Senate blue slips are different from blue slips in the House. House blue slips are grounded in Article I, Section 7 of the Constitution—the Origination Clause—which provides that "All Bills for raising Revenue shall originate in the House of Representatives." U.S. CONST. art. I, § 7, cl. 1; JAMES V. SATURNO, CONG. RSCH. SERV., RL31399, THE ORIGINATION CLAUSE OF THE U.S. CONSTITUTION: INTERPRETATION AND ENFORCEMENT 1 (2011). Blue slips in this paper refer exclusively to the Senate's, unless otherwise indicated.

195. Scholars have linked it to the broader tradition of "senatorial courtesy." Brannon Denning, for example, has called the blue slip a "result of the Senate Judiciary Committee's institutionalization of 'senatorial courtesy.' " Brannon P. Denning, *The "Blue Slip": Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75, 76 (2001). Senatorial courtesy refers to a set of informal practices that shape interactions among senators and between the Senate and the president. *Id.* Whether blue slips are best seen as a form of senatorial courtesy—one where executive deference crosses party lines—or as a separate practice altogether, they are still conventions.

196. COMM. ON RULES & ADMIN., STANDING RULES OF THE SENATE, S. DOC. NO. 113–18 (1st Sess. 2013).

197. *See, e.g.*, Denning, *supra* note 195, at 78.

198. Sarah A. Binder, *Where Do Institutions Come From? Exploring the Origins of the Senate Blue Slip*, 21 STUD. AM. POL. DEV. 1, 7–8 (2007) (observing that solicitations of home-state

that it first emerged as a tool for reducing uncertainty in the Senate (a coordination device).[199] The 1910s were a period of robust institutionalization and formalization as congressional workloads "burgeoned." The blue slip was nonpartisan—home-state senators could be from either party—and fit with the idea of a unified government trying to develop a "clear record of the home senators' views on pending nominees" in an effort "to facilitate confirmation."[200]

While the blue slip may have begun as an attempt to make the nomination process more efficient, it was transformed into a constitutive norm. Senator James Eastland gave the blue slip its modern shape. Before Eastland, a negative blue slip did not, on its own, sink a nomination.[201] But when Eastland became chair of the Judiciary Committee in 1956, he turned the blue slip into a veto: the committee would not move forward on a nominee without positive blue slips from both home state senators.[202] Eastland's reasons for adopting this policy are unclear,[203] but his successors entrenched it. Depending on their priorities and the broader ideological climate, chairs have adjusted the practice

---

senators for judicial nominations "became routine in 1913" at the start of the sixty-third Congress); MITCHEL A. SOLLENBERGER, CONG. RSCH. SERV., RL32013, THE HISTORY OF THE BLUE SLIP IN THE SENATE COMMITTEE ON THE JUDICIARY, 1917–PRESENT 5 (2003). I follow Binder's 1913 dating since she is the only scholar who has tracked solicitation of home-state senators—and not just the blue slip as a proxy—in the executive dockets of the Senate Judiciary Committee. Binder, *supra*, at 7.

199. Binder, *supra* note 198, at 1.

200. *Id.* at 10.

201. BARRY J. MCMILLION, CONG. RSCH. SERV., R44975, THE BLUE SLIP PROCESS FOR U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS: FREQUENTLY ASKED QUESTIONS 3 (2017). Negative blue slips during this period still carried weight but did not prevent a nominee from going to the Senate floor. For instance, in 1917, Senator Thomas W. Hardwick's objected to U.V. Whipple's nomination to the U.S. District Court for the Southern District of Georgia as "personally offensive and objectionable," and although Whipple made it out of committee, he was voted down in the Senate. Alex Seitz-Wald, *The Dubious Century-Old U.S. Senate 'Blue Slip' Custom May Finally End*, NBC NEWS (Oct. 14, 2017, 7:05 AM), https://www.nbcnews.com/politics/congress/dubious-century-old-u-s-senate-blue-slip-custom-may-n810571 [perma.cc/T2SM-BMLC]. Similarly, Senator Paul Douglas's objections to two district court nominations by President Truman—a fellow Democrat—in 1951 led to the committee siding with Douglas but still sending the nominations to the Senate floor, where they were also rejected. This is a particularly notable pre-1956 example since Douglas was a consistent supporter of President Truman's legislative agenda. *Paul H. Douglas Award for Ethics in Government*, INST. GOV'T & PUB. AFFS., https://igpa.uillinois.edu/ethics#section-1 [perma.cc/F793-AER3]; SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 75 (1997).

202. MCMILLION, *supra* note 201, at 3.

203. I suspect that Eastland sought to control judiciary appointments in the wake of *Brown v. Board of Education*, 347 U.S. 483 (1954). First, leading civil rights groups, including the National Association for the Advancement of Colored People (NAACP) and Americans for Democratic Action (ADA) both directly petitioned then-Senator Lyndon B. Johnson to abandon the seniority rule that gave Eastland control of the committee after the death its previous chair, Senator Kilgore. 3 ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE 783 (2002). Second, Eastland fiercely opposed civil rights legislation and used procedural maneuvers in the Senate to combat it. *Id.* at 842–43, 874–875, 902–903 (documenting Eastland's efforts in delaying and defanging the 1957 Civil Rights Act). Finally, Eastland used his position as chair to

while retaining its basic shape. Senator Kennedy briefly restored the blue slip to its pre-1956 strength[204] to push through confirmations of more minorities, women, and liberals to the federal bench during the Carter presidency,[205] but from the 100th Congress until our current 116th Congress, the blue slip has remained a fixture of senatorial judicial politics.

Historically, senators have invoked three different *constitutional* grounds to justify the norm: the Advice and Consent Clause,[206] the separation of powers, and federalism. Senator Paul Douglas of Illinois gave one of the clearest statements of the perceived relationship between the blue slips and underlying constitutional text and principle during a nomination battle with President Truman. First, Douglas insisted that debates at the Founding made clear that "[t]he phrase 'with the advice and consent of the Senate' was not intended to be lightly construed."[207] The history, on Douglas's construal, showed that the Advice and Consent Clause was a "relatively late . . . compromise" in which "the Senate was expected to play an active part in selecting Federal judges."[208] The blue slip thus implemented advice and consent, helping the Senate play its "active part." Later senators have rehearsed the same claims. During Obama's second term, Senator Patrick Leahy explicitly invoked constitutional text. In language that seemingly nearly repeated the definition of a constitutive norm, Leahy claimed that blue slips "help[ed] make constitutional 'advice and consent' a reality."[209] And Senator Orrin Hatch, at virtually the same time, maintained that the blue slip helped "make meaningful 'advice and consent' a reality."[210]

---

bargain with liberal presidential administrations over judicial appointments. Eastland most famously opposed President Kennedy's nomination of then-lawyer Thurgood Marshall to the Second Circuit. According to one contemporary account, Eastland bargained over Marshall's nomination by telling Attorney General Robert Kennedy, "You tell your brother if he gives me Cox, I will give him his [******]." Robert Shogan, *Ex-Mississippi Sen. Eastland Dies at Age 81*, L.A. TIMES (Feb. 20, 1986, 12:00 AM), https://www.latimes.com/archives/la-xpm-1986-02-20-mn-9797-story.html [perma.cc/C7LY-2FBT].

204. *See* MITCHEL A. SOLLENBERGER, JUDICIAL APPOINTMENTS AND DEMOCRATIC CONTROLS 100 (2011).

205. Ryan C. Black, Anthony J. Madonna & Ryan J. Owens, *Qualifications or Philosophy? The Use of Blue Slips in a Polarized Era*, 44 PRESIDENTIAL STUD. Q. 290, 294 n.8 (2014); *see also* SOLLENBERGER, *supra* note 198, at 11 (documenting Sen. Kennedy moving forward with the nomination of James E. Sheffield, an African-American attorney, for a West Virginia district court seat, despite Senator Harry Byrd's negative blue slip).

206. "The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States . . . ." U.S. CONST. art. II, § 2, cl. 2.

207. 97 CONG. REC. 12,838 (1951) (statement of Sen. Paul Douglas).

208. *Id.*

209. Patrick Leahy, *'Blue Slips' Help Make Constitutional 'Advice and Consent' A Reality*, U.S. SEN. PATRICK LEAHY OF VT. (Apr. 7, 2014), https://www.leahy.senate.gov/press/blue-slips-help-make-constitutional-advice-and-consent-a-reality [perma.cc/32RW-RDYY] (cleaned up).

210. Orrin Hatch, *Protect the Senate's Important 'Advice and Consent' Role*, HILL (Apr. 11, 2014, 8:00 AM), https://thehill.com/opinion/op-ed/203226-protect-the-senates-important-advice-and-consent-role [perma.cc/3PCY-GYZB].

Second, Douglas defended the blue slip on separation-of-powers grounds. Given the role of the judiciary as "the arbiter of grave and basic disputes" between the political branches, the blue slip helpfully divided authority between them.[211] Third, Douglas and later senators urged that the blue slip embodied important federalism values. "However excellent [the president's] general knowledge," Douglas asserted, "[he] does not have the detailed knowledge of the qualifications, background, and record of judges in a particular State" that the Senators from that state have.[212]

Senators after Douglas have made similar arguments from federalism. For instance, even as he tinkered with the blue slip, Senator Kennedy acknowledged the unique role of home-state senators in the nominations process: "Appointments to [lower federal] courts . . . have been of special interest to individual Senators because Federal judicial districts are drawn within the boundaries of individual States."[213] During that same hearing, Senator Paul Laxalt, who opposed the change, framed the blue slip less as a senatorial privilege and more as a "responsibility" for home-state senators "to call these tough shots within our States."[214]

As the blue slip has become obsolete, last-ditch defenses of the practice have again sounded in federalism. In opposing a Ninth Circuit nominee to a seat in California, both Senator Dianne Feinstein and former Senator and current Vice President Kamala Harris underlined that the nominee was "not a part of California's legal community," and added that "[h]e attended law school and clerked for two federal judges on the East Coast."[215] According to the senators, the nominee was "not familiar with the complicated, California-specific issues that regularly come before the Ninth Circuit."[216]

---

211. 97 CONG. REC. 12,838 (1951) (statement of Sen. Paul Douglas). Senator Richard M. Russell made nearly identical arguments a year before Douglas in rejecting the nomination of M. Neil Andrews to a Georgia district court. He maintained that disregard for senatorial courtesy and the blue slip as an "action taken to be in derogation of the rights of individual Senators and of the dignity of the Senate as a coordinate branch of the Government. It is contrary to custom, and in defiance of the constitutional powers of the Senate." 96 CONG. REC. 12,105 (1950) (statement of Sen. Richard Russell).

212. 97 CONG. REC. 12,838 (1951) (statement of Sen. Paul Douglas).

213. *The Selection and Confirmation of Federal Judges: Hearing Before the S. Comm. on the Judiciary*, 96th Cong. 3 (1979) (statement of Sen. Edward M. Kennedy, Chair, S. Comm. on the Judiciary).

214. *Id.* at 26 (statement of Sen. Paul D. Laxalt, Member, S. Comm. on the Judiciary).

215. Press Release, U.S. Sen. for Cal. Dianne Feinstein, Feinstein, Harris on Daniel Bress Nomination (June 19, 2019), https://www.feinstein.senate.gov/public/index.cfm/press-releases?id=495F52C1-2247-441F-89A7-A354E0FF9EC1 [perma.cc/H72Q-JWDP]. The nominee, Daniel Bress, was confirmed despite two negative blue slips. *See* Hailey Fuchs, *Senate Confirms Trump Judicial Nominee to California-based 9th Circuit*, WASH. POST (July 9, 2019), https://www.washingtonpost.com/politics/senate-confirms-trump-judicial-nominee-to-california-based-9th-circuit/2019/07/09/34671d6c-a27f-11e9-b8c8-75dae2607e60_story.html [perma.cc/RSP8-977P].

216. U.S. Sen. for Cal. Dianne Feinstein, *supra* note 215.

The historical development of the blue slip shows it was clearly *contingent*. From its initial shift from a coordinating to a constitutive convention to its later iterations under different chairs to its recent obsolescence,[217] the blue slip has evolved. Depending on the ideologies of various norm entrepreneurs[218] and the political environment of a given era, the blue slip varied in strength until polarization rendered it untenable.

The blue slip's contingency also reveals that it is *arbitrary*. The various obituaries written about the blue slip are telling, as critics of both political persuasions have celebrated its death. David Lat, for instance, has highlighted the need for more federal judges and greater judicial efficiency given that "the vast majority of cases heard by federal courts are not political."[219] And Kevin Drum cast recent developments as part of a "long, crooked road" to more robust majority rule in Congress.[220]

Notably, the emphasis on silver linings is not accompanied by any suggestion that something of constitutional importance has been lost. This absence makes sense. Blue slips represented only one way of implementing the "Advice and Consent" Clause and bore a tenuous relation to federalism values. After all, appellate judges often hear claims arising from different states because circuit courts encompass multiple states. The blue slip is thus a prototypical constitutional norm: a normative, contingent, and arbitrary practice that has implemented constitutional text and principle.

B. *Anti-Court-Packing*

Anti-court-packing is roughly the norm against "manipulating the number of Supreme Court seats primarily in order to alter the ideological balance

217. John Crawley & Patrick L. Gregory, *Senate Blue Slip Custom 'Essentially Dead,' Feinstein Says*, BLOOMBERG L. (Mar. 28, 2019, 11:00 AM), https://news.bloomberglaw.com/us-law-week/senate-blue-slip-custom-essentially-dead-feinstein-says [perma.cc/4PRZ-BBA2].

218. *See* Tamir, *supra* note 98.

219. David Lat, Opinion, *Good Riddance to Blue Slips*, N.Y. TIMES (May 9, 2018), https://www.nytimes.com/2018/05/09/opinion/senate-judicial-nominees-blue-slips.html [perma.cc/PW5K-UJ47].

220. Kevin Drum, *Blue Slips Are Finally Dead*, MOTHER JONES (Feb. 28, 2019), https://www.motherjones.com/kevin-drum/2019/02/blue-slips-are-finally-dead [perma.cc/C2MH-L2J2].

of the Supreme Court."[221] Born during the climax of the New Deal Revolution,[222] anti-court-packing has implemented a nearly century-long commitment to judicial independence.[223] As Grove has persuasively shown, anti-court-packing is one among several practices that constitute this principle.[224] When the political branches forbear from expanding the Court for partisan purposes, they express respect for judicial independence. Judicial independence is an uncontroversial constitutional principle, even if its exact content is contested. Whether we define it as noninterference from the political branches or a statement that judicial decisionmaking is itself apolitical, it is clearly a constitutional principle and connected to the separation of powers. And contemporaries warn that violating the norm would be "anti-constitutional"[225] and would leave a "semi-permanently tainted Supreme Court."[226] For defenders of the norm, judicial independence seems to entail anti-court-packing.

The perceived entailment makes it hard to see how the norm is *contingent* and *arbitrary*. But as with so many norms, anti-court-packing's past and present are instructive.[227] First, *contingency:* anti-court-packing was hard-won and its birth was by no means guaranteed. The conflict over the Court had both long-term and proximate causes. Seen in the longue durée, the events of 1937 are unsurprising. Criticism of the judiciary was common in the various

221. Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. REV. 2747, 2748 (2020). My account here does not challenge Braver's learned argument about the novelty of Roosevelt's plan. *See id.* at 2802. Through a careful examination of previous historical episodes when the Court's size was changed, Braver claims that there never was a tradition of "court-packing." *See id.* at 2750–51. He is up against what he terms the "standard history of court-packing," which highlights several instances of court-packing during the nineteenth century. *See id.* at 2753. If Braver is right, then 1937 was the first constitutional showdown over court-packing. *See id.* at 2802. This leaves the conceptual argument that the anti-court-packing convention was forged at that moment, untouched. Braver concedes as much since he observes Tara Grove's argument "that there was no norm against court-packing until the 1950s . . . may still hold," regardless of the credibility of the "standard history." *See id.* at 2753 n.11.

222. *See* Alan Brinkley, *The Debate over the Constitutional Revolution of 1937: Introduction*, 110 AM. HIST. REV. 1046 (2005).

223. *See* Grove, *supra* note 80, at 532.

224. *Id.* at 467–68. Other conventions here include compliance with federal court orders and respect for judicial tenure. *Id.*

225. *E.g.*, Neil Siegel, *The Anti-Constitutionality of Court-Packing*, BALKINIZATION (Mar. 26, 2019, 10:29 AM), https://balkin.blogspot.com/2019/03/the-anti-constitutionality-of-court_36.html [perma.cc/SMC9-8FFL].

226. *See* Braver, *supra* note 221, at 2798.

227. The court-packing crisis boasts its own impressive body of secondary work. This Section draws primarily from four major accounts of the genesis and timeline of the 1937 crisis. *See* WILLIAM E. LEUCHTENBURG, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, *in* THE SUPREME COURT REBORN, *supra* note 88, at 82; WILLIAM E. LEUCHTENBURG, *FDR's "Court-Packing" Plan*, *in* THE SUPREME COURT REBORN, *supra* note 88, at 132; MARIAN C. MCKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937 (2002); JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT (2010).

quarters of the American left[228] as early as the 1890s.[229] This early burst of outrage was fueled by judicial decisions invalidating labor reforms and redistributive legislation.[230] Despite ebbs and flows,[231] voices ranging from the socialist lawyer and failed judicial candidate Louis B. Boudin[232] to establishment figures like Roscoe Pound[233] and Felix Frankfurter[234] all expressed frustration with a conservative judiciary.

Alongside academic commentary were serious political proposals backed by a coalition of labor, populists, and Progressives all critical of courts.[235] These proposals included popular recall of state judges,[236] the elimination of the labor injunction, and a constitutional amendment allowing congressional override of federal judges.[237] The political, social, and intellectual currents that

228. I use the term "left" to capture a broader range of the American political spectrum than the term "progressive." As more than a half-century of historical scholarship has shown, the Progressives comprised a diverse and often times loosely organized group of reformers drawn from various elements of American society, concerned with the social, political, and economic consequences of industrialization. The movement's internal diversity and its lack of a discrete institutional form thus make it hard to describe it as "leftist" in a conventional sense (there were, after all, Republican Progressives) or use it as a catchall term for antijudicial sentiment. Arthur S. Link, *What Happened to the Progressive Movement in the 1920's?* 64 AM. HIST. REV. 833, 836 (1959). *See generally* ROBERT H. WIEBE, THE SEARCH FOR ORDER, 1877–1920 (1967) (situating the Progressives in a broader transformation of the United States from localism to an organized, industrial society); David M. Kennedy, *Overview: The Progressive Era*, 37 HISTORIAN 453 (1975) (reviewing scholarly attempts to conceptualize the Progressive movement); Daniel T. Rodgers, *In Search of Progressivism*, 10 REVS. AM. HIST. 113 (1982) (arguing debates over the elusive characteristics of progressivism provide less insight than inquiries into the context of surrounding progressivism).

229. WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937, at 1 (2016).

230. Stuart S. Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925, 928–30 (1965). Court crises have been a regular feature of American politics since the early Republic. *Id.* at 925–26. What perhaps distinguishes 1937 is its extended prelude, during which discontent with the judiciary became a part of the country's political vocabulary.

231. *See* Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, Y.B. SUP. CT. HIST. SOC'Y, 1983, at 68–70 (observing that the White Court did reluctantly embrace a large role for government in the 1910s).

232. L.B. Boudin, *Government by Judiciary*, 26 POL. SCI. Q. 238, 238, 264 (1911) (warning that judicial review had pushed the nation into "the condition of 'judicial despotism' ").

233. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, *in* REPORT OF THE TWENTY-NINTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION HELD AT ST. PAUL, MINNESOTA 395 (1906) (urging that judicial doctrine be more responsive to public opinion).

234. Felix Frankfurter, Diary Entry of Felix Frankfurter (Oct. 27, 1911), *in* FROM THE DIARIES OF FELIX FRANKFURTER 113 (Joseph P. Lash ed., 1975) (calling the judiciary the "meanest, most selfish force in resisting just reforms and perpetuating public abuse in [the] administration of [our] laws").

235. ROSS, *supra* note 229, at 28–29.

236. Stephen Stagner, *The Recall of Judicial Decisions and the Due Process Debate*, 24 AM. J. LEGAL HIST. 257, 265 (1980).

237. *See* DAVID P. THELEN, ROBERT M. LA FOLLETTE AND THE INSURGENT SPIRIT 172–73 (Oscar Handlin ed., 1976); NANCY C. UNGER, FIGHTING BOB LA FOLLETTE 289–90 (2000).

converged in 1937 thus suggest an alternate narrative that might have emerged had FDR "won" the battle, along with the war: in overturning important pieces of the New Deal, the Court pushed its luck too far and a president armed with sufficient political will realized a dream a half century in the making, the reassertion of democracy over juristocracy.

In any event, Roosevelt's court-packing plan failed, albeit narrowly, due to a series of political blunders, shrewd maneuvers by his opponents, and sheer accident. The basic timeline is well-known.[238] In response to decisions striking down liberal state and federal legislation,[239] Roosevelt introduced the "Judicial Procedures Reform Bill" in February, and the battle lasted until July, when he eventually relented after Justice Roberts's "switch" in *West Coast Hotel Co. v. Parrish*.[240] Several factors conspired together to sink the plan. First, Roosevelt erred in framing the plan as a response to phantom docket congestion.[241] Even after the botched delivery and remedial honesty about the bill's motivations, the public split evenly for and against the bill.[242] Second, Roosevelt's opponents, in the judiciary in particular, countered his plan in several ways. Chief Justice Charles Evans Hughes, an accomplished politician in his own right, provided a letter to the Senate Judiciary Committee exposing docket congestion as a sham;[243] Justice Van Devanter—a conservative stalwart—retired;[244] and finally, Justice Roberts joined the four liberals in *Parrish*.

---

238. *See, e.g.*, Brinkley, *supra* note 222.

239. No single case, but rather a large set of them, persuaded Roosevelt and his attorney general, Homer Cummings, to pursue court-packing. They included *Panama Refin. Co. v. Ryan*, 293 U.S. 388 (1935); *Norman v. Balt. & Ohio R.R. Co.*, 294 U.S. 240 (1935); *United States v. Bankers' Tr. Co.*, 294 U.S. 240 (1935); *Nortz v. United States*, 294 U.S. 317 (1935); *Perry v. United States*, 294 U.S. 330 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935); *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935); *United States v. Butler*, 297 U.S. 1 (1936); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Morehead v. New York ex. rel. Tipaldo*, 298 U.S. 587 (1936).

240. 300 U.S. 379 (1937). The leading historical accounts emphasize that Roberts's "switch" occurred in late 1936 during a judicial conference that preceded the court-packing plan. *See, e.g.*, BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT (1998); Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891, 1950 (1994). For Felix Frankfurter, the timing of Roberts's switch was evidence of the Court's independence. *See* Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311 (1955). And despite subsequent attack, the authenticity of Roberts's 1945 memo explaining his decisions in *Tipaldo* and *Parrish* remains intact. Richard D. Friedman, *A Reaffirmation: The Authenticity of the Roberts Memorandum, or Felix the Non-Forger*, 142 U. PA. L. REV. 1985 (1994). For the purposes of this Article's argument, the fact that the "switch" happened several weeks before the court-packing plan was announced is less important than the fact that *Parrish*, along with other events, undermined Roosevelt's case for Court reform.

241. *See* SHESOL, *supra* note 227, at 325.

242. *Id.* at 330–31.

243. JAMES F. SIMON, FDR & CHIEF JUSTICE HUGHES: THE PRESIDENT, THE SUPREME COURT, AND THE EPIC BATTLE OVER THE NEW DEAL 390 (2012).

244. SHESOL, *supra* note 227, at 446–48.

Even with these moves, however, a compromise bill[245] that would have tipped the Court in Roosevelt's favor was viable well into the summer. The nail in the proverbial coffin was the death in July of Senate Majority Leader Joe Robinson, who took any chance of passage with him.[246]

Roosevelt's plan, then, lost in the court of public opinion and the halls of Congress, but not in the forum of principle. From the ill-advised decision to frame court-packing as a solution to a nonexistent problem, judicial retrenchment, and Chief Justice's Hughes deft politicking, anti-court-packing owed its birth to a blend of skill and luck. And it took a literal act of God—the death of Robinson—to bring it into being. The norm we have today, while durable and venerated, has been *contingent* from its very conception. And as it is often the case, it is better for a convention to be lucky than to be good.

But is anti-court-packing *arbitrary*? This is often the hardest condition to satisfy, especially when we have associated a practice with a principle for as long as we have anti-court-packing with judicial independence. It is even more so when the line between the two is so direct so as to seem deductive. As renascent arguments for court-packing show, however, shifting political conditions can help us question received truths. From the refusal to hold hearings for Judge Garland's nomination to the bitter battle over Justice Brett Kavanaugh's confirmation,[247] judicial reform is once again a serious concern for

245. *See* William E. Leuchtenburg, Comment, *FDR's Court-Packing Plan: A Second Life, A Second Death*, 1985 DUKE L.J. 673.

246. Even in mid-June, Robinson likely had the necessary votes for the compromise bill. SHESOL, *supra* note 227, at 474–76.

247. *See* Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now*, NPR (June 29, 2018, 5:00 AM), https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now [perma.cc/S64V-LFFE]; Tom McCarthy, *Q&A: Brett Kavanaugh's Controversial Confirmation Battle Explained*, GUARDIAN (Oct. 5, 2018, 9:55 AM), https://www.theguardian.com/us-news/2018/oct/05/kavanaugh-confirmation-battle-explainer [perma.cc/9UT3-J72Q].

legal liberals. This burgeoning interest has taken various forms, including proposals for changing the docket of the Supreme Court,[248] stripping its jurisdiction,[249] setting term limits[250] and voting rules,[251] and even expanding the Court.[252]

If anti-court-packing has endured because the interbranch bargain it reflects has been tolerable, then the recrudescence of arguments for court-packing suggests that compromise has grown less attractive. One prominent strand of this thinking is nakedly partisan. It assumes the Court is as political as any other branch and justifies court-packing as a corrective to conservative judicial power.[253] By rejecting judicial independence as mere ideology, it attacks anti-court-packing at its roots. On this view, even the principle underlying the practice is dubious.

To see arbitrariness, however, a second view is more illuminating. Daniel Epps and Ganesh Sitaraman's recent Court reform proposals exemplify this position. Both the "Supreme Court Lottery" and "the Balanced Bench" would

---

248. *See, e.g.*, Jack Balkin, *Constitutional Rot Reaches the Supreme Court*, BALKINIZATION (Oct. 6, 2018, 10:50 AM), https://balkin.blogspot.com/2018/10/constitutional-rot-reaches-supreme-court.html [perma.cc/G3JP-6J48]; *Reforming the Court*, NEW AM., https://www.newamerica.org/political-reform/events/reforming-court [perma.cc/U7XM-ACGZ].

249. *See, e.g.*, Samuel Moyn, *Resisting the Juristocracy*, BOS. REV. (Oct. 5, 2018), https://bostonreview.net/law-justice/samuel-moyn-resisting-juristocracy [perma.cc/AS2E-EFZL]; Eric Segall, *Yes, It's Time to Reform the Supreme Court—but Not for the Wrong Reasons*, SALON (Dec. 4, 2018, 7:00 AM), https://www.salon.com/2018/12/04/its-time-to-reform-the-supreme-court-but-not-for-the-wrong-reasons [perma.cc/R2YE-7F3E].

250. *See, e.g.*, Bruce Ackerman, Opinion, *Trust in the Justices of the Supreme Court Is Waning. Here Are Three Ways to Fortify the Court*, L.A. TIMES (Dec. 20, 2018, 3:15 AM), https://www.latimes.com/opinion/op-ed/la-oe-ackerman-supreme-court-reconstruction-20181220-story.html [perma.cc/RGR9-Y3QJ]; Ezra Klein, *Ruth Bader Ginsburg's Death Is a Tragedy. The Supreme Court's Rules Made It a Political Crisis*, VOX (Sept. 18, 2020, 9:25 PM), https://www.vox.com/policy-and-politics/2018/12/26/18155093/ruth-bader-ginsburg-supreme-court-term-limits [perma.cc/8S2Q7342]; David Leonhardt, Opinion, *The Supreme Court Needs Term Limits*, N.Y. TIMES (Sept. 18, 2018), https://www.nytimes.com/2018/09/18/opinion/columnists/brett-kavanaugh-supreme-court-term-limits.html [perma.cc/XW57-8Y8Y].

251. *See, e.g.*, Moyn, *supra* note 249; Jed Shugerman, *Balanced Checks*, SLATE (June 20, 2012, 6:19 PM), https://slate.com/news-and-politics/2012/06/supermajority-voting-on-the-supreme-court.html [perma.cc/ARW7-TCGD].

252. *See, e.g.*, Ian Ayres & John Fabian Witt, Opinion, *Democrats Need a Plan B for the Supreme Court. Here's One Option*, WASH. POST (July 27, 2018), https://www.washingtonpost.com/opinions/democrats-need-a-plan-b-for-the-supreme-court-heres-one-option/2018/07/27/4c77fd4e-91a6-11e8-b769-e3fff17f0689_story.html [perma.cc/3DKS-3AK5]; Jamelle Bouie, Opinion, *Mad About Kavanaugh and Gorsuch? The Best Way to Get Even Is to Pack the Court*, N.Y. TIMES (Sept. 17, 2019), https://www.nytimes.com/2019/09/17/opinion/kavanaugh-trump-packing-court.html [perma.cc/84UT-ZFCQ]; Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, VOX (Oct. 10, 2018, 11:25 AM), https://www.vox.com/the-big-idea/2018/9/6/17827786/kavanaugh-vote-supreme-court-packing [perma.cc/2V6R-CUX7]; Michael Klarman, *Why Democrats Should Pack the Supreme Court*, TAKE CARE (Oct. 15, 2018), https://takecareblog.com/blog/why-democrats-should-pack-the-supreme-court [perma.cc/7GWX-RUNT].

253. Bouie, *supra* note 252.

enlarge the Court, either directly or by expanding the eligible roster of judges.[254] They pitch their plans as a "hardball" means toward "anti-hardball" ends that would "lower the temperature of political disputes."[255] The "balanced bench" approach, in particular, is cast as an attempt to "bring[] back the possibility of a Supreme Court that is not wholly partisan" and elevate judges with a "reputation for fairness, independence, and centrism."[256]

Their proposals are interesting because they invoke judicial independence in the name of expanding the Court. In other words, the very value that anti-court-packing is meant to concretize is enlisted to pack the Court.[257] Of course Epps and Sitaraman's proposal, if implemented, might fail to deliver. This could happen because they misjudge the tit-for-tat dynamics of Court expansion or because judges dig further into partisan positions instead of moderating their views. But their claims are serious and intelligible. And for *arbitrariness*, that is what counts. Anti-court-packing might ultimately prove more effective at constituting judicial independence than a finely tuned court-packing proposal, but a norm can be better than other plausible options and still be arbitrary. It is the existence of other plausible ways—indeed, even opposite ones—of construing the underlying value that is characteristic of norms.

C. *Executive Noninterference in the Department of Justice*

Executive noninterference in the Department of Justice (DOJ) is just as conventional as the blue slip or anti-court-packing but more complex. Whereas the prior two conventions consisted of one discrete practice, executive noninterference comprises several. It is thus a good example of a *nested*

254. Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 181–205 (2019). The argument that follows could equally work with a different argument for court-packing in service of judicial independence. Rivka Weill, *Court Packing as an Antidote*, 42 CARDOZO L. REV. 2705 (2021) (arguing for court-packing as a way to defend the legitimacy and independence of the Supreme Court); *see also* Thomas M. Keck, *The Supreme Court Justices Control Whether Court-Packing Ever Happens*, WASH. POST (Nov. 19, 2018), https://www.washingtonpost.com/outlook/2018/11/19/supreme-court-justices-control-whether-court-packing-ever-happens [perma.cc/LK9F-69VT] (rejecting the idea that "tinkering" with the size of the Court threatens judicial independence); DANIELLE ROOT & SAM BERGER, CTR. FOR AM. PROGRESS, STRUCTURAL REFORMS TO THE FEDERAL JUDICIARY 13 (2019), https://americanprogress.org/wp-content/uploads/2019/05/JudicialReform-report-1.pdf [perma.cc/2QZF-PFA8] (similarly floating the idea that an expanded Court would be less partisan); *cf.* Marin K. Levy, *Packing and Unpacking State Courts*, 61 WM. & MARY L. REV. 1121 (2020) (cataloguing important examples of court-packing in state courts).

255. Epps & Sitaraman, *supra* note 254, at 172.

256. *Id.* at 193.

257. With respect to this inversion, arbitrariness is similar to the phenomenon of ideological drift, where "an argument or trope" shifts from one political valence to another over time. Both concepts reveal the indeterminacy of political and legal concepts in practice. *See, e.g.*, J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869, 870 (1993); David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 105–07 (2018).

convention: a relatively broad convention composed of constituent practices.[258]

Executive noninterference refers to long-standing presidential forbearance from involvement in specific cases and investigations. This norm implements the president's duty to "take [c]are that the [l]aws be faithfully executed."[259] Noninterference consists of a set of White House and law enforcement agency policies channeling and restricting communications between them. For example, the White House can learn information about a criminal investigation only on a need-to-know basis when it is required for the "performance of the President's duties."[260]Similarly, only specific members of the Office of the Counsel to the President, the vice president, and the president themself can begin contact with the Justice Department about ongoing criminal cases. In addition, direct legal advice to the Executive Office of the President[261] must be channeled through the Office of Legal Counsel.[262] And White House staff have been prohibited from "even [asking] for a status report" about some "pending matter[s]" in the Justice Department.[263]

In practice, these policies mean that informal communications, like a call from a White House official to the DOJ inquiring about specific matters, are forbidden. These restrictions are self-imposed and "prophylactic" and are meant to create procedural regularity and formality between the White House and the country's chief law enforcement arms.[264] By contrast, communications between the president and the Justice Department over general policy matters such as enforcement priorities are open and informal, as they are with other executive branch agencies.[265]

From its inception, executive noninterference has been defended in *constitutional* terms. When he first articulated the norm, Attorney General Griffin B. Bell explicitly framed it as way to effectuate the president's Take Care duties. Observing that the president is "charged by the Constitution with the

---

258. *See supra* Section III.A.

259. U.S. CONST. art. II, § 3.

260. U.S. Dep't of Just., Just. Manual § 1-8.600 (2021).

261. The Executive Office of the President includes the Council of Economic Advisers, the Council on Environmental Quality, the Domestic Policy Council, the Gender Policy Council, the National Economic Council, the National Security Council, the Office of Intergovernmental Affairs, the Office of Management and Budget, the Office of National Drug Control Policy, the Office of Public Engagement, the Office of Science and Technology Policy, and the Office of the United States Trade Representative. *Executive Office of the President*, WHITE HOUSE, https://www.whitehouse.gov/administration/executive-office-of-the-president [perma.cc/7D89-SGWE].

262. *See* U.S. Dep't of Just., Just. Manual § 1-8.600 (2021).

263. *See* Memorandum from Jack Quinn, Counsel to the President, Kathleen Wallman, Deputy Counsel to the President, and Stephen Neuwirth, Associate Counsel to the President, to White House Staff, Contacts with Agencies (Jan. 16, 1996), https://clinton.presidentiallibraries.us/items/show/27001 [perma.cc/Q3N4-B9NL].

264. *See White House Communications with the DOJ and FBI*, PROTECT DEMOCRACY (Mar. 8, 2017), https://protectdemocracy.org/agencycontacts [perma.cc/R9M8-MK85].

265. *Id.*

duty to . . . 'take care that the laws be faithfully executed,' " Bell linked it to an institutional division of labor, in which "the President has delegated certain responsibilities to the Attorney General."[266] "Although true institutional independence [was] . . . impossible," Bell insisted the president "[was] best served if [government lawyers were] free to exercise their professional judgments."[267] Subsequent attorney generals and White House counsels[268] have made similar arguments. They continue to link these policies to the Take Care Clause, explaining that noninterference "recognizes the President's ability to perform his constitutional obligation to 'take care that the laws be faithfully executed' while ensuring that there is public confidence that the laws . . . are . . . enforced in an impartial manner."[269] And the policy has been taken very seriously in both the White House and the Justice Department.[270] In other words, these norms form a crucial part of the constitutional culture of the presidency.[271]

Noninterference, as a product of its time, is *contingent*. Forged and articulated in the wake of Watergate, the norm has endured for more than forty years, despite moments of pressure. While the Reagan, Clinton, and Obama presidencies all restricted communications with senior officials in the agencies and the White House, the George W. Bush Administration significantly relaxed them, allowing the White House far greater access to the Justice Department. Political pressure returned the norm to its historical strength late in the Bush Administration, but the brief interregnum is revealing.[272] Like the blue slip, then, noninterference has endured but with moments of real change.

---

266. Griffin B. Bell, Att'y Gen. of the U.S., An Address Before the Dep't of Just. Laws. (Sept. 6, 1978), transcript available at https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/09-06-1978b.pdf [perma.cc/4AFF-X7FK], at 4–5.

267. *Id.* at 5.

268. Memorandum from Donald F. McGahn II, Counsel to the President, to All White House Staff, Communications Restrictions with Personnel at the Department of Justice (Jan. 27, 2017), https://www.politico.com/f/?id=0000015a-dde8-d23c-a7ff-dfef4d530000 [perma.cc/LXS7-W8TB] (White House Counsel for the Trump Administration reiterating commitment to the convention as consistent with "the President's constitutional obligation to take care that the laws of the United States are faithfully executed.").

269. Memorandum from the Att'y Gen. to Heads of Dep't Components and United States Att'ys, Communications with the White House (Dec. 19, 2007), https://www.justice.gov/sites/default/files/ag/legacy/2008/04/15/ag-121907.pdf [perma.cc/65DE-7XE5].

270. U.S. Dep't of Just., Just. Manual § 1-8.100 (2019) (noting that it is "a fundamental duty of every employee of the Department to ensure that these principles are upheld"); Quinn, Wallman & Neuwirth, *supra* note 263 (urging that these policies "must be strictly enforced" with clear guidelines on things White House staff "should" or "should not" do).

271. *See* Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 UCLA L. REV. 1728, 1730 (2017) (observing that "[c]onstitutional culture, on this account, includes the understandings about role" that guides action).

272. *See* Isaac Arnsdorf, *Sessions Faces Decision on Politicizing Justice Department*, POLITICO (Jan. 9, 2017, 9:05 PM), https://www.politico.com/story/2017/01/jeff-sessions-attorney-general-justice-233382 [perma.cc/4J3Q-XS95].

Current and past pressure on the norm also show how it is *arbitrary*. When Attorney General Alberto Gonzales expanded White House access, he defended the move by invoking an expansive vision of executive power inspired by Justice Antonin Scalia.[273]As the norm has been violated repeatedly in the Trump Administration,[274] critics of the norm have sought to delegitimize the practice altogether.[275] As they see it, the very idea that the president could unlawfully interfere with law enforcement, even in specific matters, is a solecism. Instead, they envision a "unitary executive,"[276] whose power as the Constitution's highest law enforcer includes the ability to intervene in specific cases and investigations.

273. *Id.*

274. *Protecting Independent Law Enforcement*, PROTECT DEMOCRACY, https://protectdemocracy.org/protecting-independent-law-enforcement/tracker [perma.cc/W4H5-UC8N] (listing examples of White House interference with Justice Department enforcement actions during the Trump era).

275. *See, e.g.*, Mario Loyola, *Trump's DOJ Interference Is Actually Not Crazy*, ATLANTIC (Feb. 27, 2020), https://www.theatlantic.com/ideas/archive/2020/02/trumps-doj-unitary-executive/607141 [perma.cc/UY28-2HP9]; Carson Holloway, Opinion, *No Easy Task for a President to 'Abuse' His Authority over the Justice Department*, HILL (Mar. 2, 2018, 11:00 AM), https://thehill.com/opinion/white-house/376434-no-easy-task-for-a-president-to-abuse-his-authority-over-the-justice [perma.cc/SR6T-EPT9].

276. The literature on the unitary executive is vast and now spans both originalist statements of the position and historiographical surveys. *See, e.g.*, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE (2008); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); *see also* STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, PHANTOMS OF A BELEAGUERED REPUBLIC (2021) (outlining the history of the theory); *cf.* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836 (2015) (emphasizing an executive duty to foster effective administration); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014) (taking a limited view of the president's enforcement discretion). For recent work critiquing the historical foundations of unitary executive theory, see Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175 (2021); Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1 (2021) (recovering the origins of removal protections as removal permissions); Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323 (2016).

Their position, though by no means uncontested,[277] is not out of the legal mainstream. Even opponents concede that noninterference is ultimately conventional[278] and depends on a legal and political culture to sustain it.[279] When critics of a constitutional norm attack it in terms that their opponents concede as intelligible, that is a clear sign the practice is arbitrary. The practice might still be worth fighting for and defending, but it cannot rest its case on its "constitutionality." Other glosses on the underlying text and principles are now firmly "on the wall"[280] and the norm's ultimate survival up for grabs.

CONCLUSION

A theory of constitutional norms does not tell us everything about their consequences. But this Article is an important first step. Just as constitutional theory has turned to the philosophy of language to understand the nature of constitutional text,[281] this Article has enlisted the philosophy of conventions to grasp the character of constitutional practice. It explains that norms are normative, contingent, and arbitrary practices that implement constitutional text and principle. And it shows this theory in action, animating norms in

277. Many have pushed back strongly against the Trump Administration's attack on noninterference. For academic arguments questioning the legality of such behavior, see, for example, Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1 (2018) (collecting historical evidence of prosecutorial independence); Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CALIF. L. REV. 1277 (2018) (defending the applicability of obstruction of justice statutes to the president); Andrew McCanse Wright, *The Take Care Clause, Justice Department Independence, and White House Control*, 121 W. VA. L. REV. 353 (2018) (linking the convention of noninterference to prevention of unconstitutional conduct). The opposition has also included former Justice Department officials in Republican administrations. *Statement in Response to Attorney General Barr's Address at Federalist Society*, CHECKS & BALANCES (Nov. 22, 2019), https://checks-and-balances.org/statement-from-co-founders-and-additional-members-of-checks-balances [perma.cc/E7RR-3ELA] (rejecting the historical credibility of an "autocratic vision of executive power").

278. Vikram David Amar, *Two Constitutional Lessons Worth Remembering: Norms Are Different from Legal Rules; and Improper Intent Matters but Is Hard to Establish*, VERDICT (Feb. 18, 2020), https://verdict.justia.com/2020/02/18/two-constitutional-lessons-worth-remembering [perma.cc/7EXB-VTBG] (explaining that non-interference is ultimately a nonlegal practice).

279. Jack Goldsmith, *Independence and Accountability at the Department of Justice*, LAWFARE (Jan. 30, 2018, 2:16 PM), https://www.lawfareblog.com/independence-and-accountability-department-justice [perma.cc/Y464-RB7Q] (explaining the various nonlegal and cultural bases of Justice Department independence).

280. "On the wall" refers to constitutional arguments within the mainstream of legal and academic discourse at any point in time. J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703, 1710, 1735 (1997) (using the terms "off the wall" and "on the wall" to describe constitutional arguments); Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012), https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040 [perma.cc/FJ6G-23FS] (discussing the terms "off the wall" and "on the wall" as they pertain to constitutional arguments).

281. *See supra* note 35 and accompanying text.

various institutional settings. For judges and scholars who increasingly look to historical practice as a source of law, this Article raises hard questions.

First, reasoning from norms means relying on a practice that is not, on its own, the final word on constitutional text or principle. After all, norms are intrinsically arbitrary. They remind us that just because things have always been one way does not mean they have to be and vice versa.[282] When norms are litigated, then, it is rarely a simple question of deciding whether the practice is permissible under the Constitution. Instead, institutional role matters. For instance, there is the initial question of *when* conventions can be litigated. This will turn on justiciability, touching factors like standing ("Can an institutional actor like Congress bring this claim?")[283] and political question doctrine ("Is this a question courts are best suited to answer?").[284]

If a norm does end up in court and a judge points to it as a source of law, then its institutional role is pivotal. History is rarely decisive on its own, until a court deems it so. Decisions that ratify a norm as the authoritative gloss on constitutional text are a quintessential example of courts creating law. This also means that in such cases, invoking history can obscure the exercise of judicial discretion. Given that a particular norm is an arbitrary way of realizing constitutional text and principle, this Article's theory suggests that when judges transform a norm into law, they do so for policy decisions about institutional design and democratic theory. Clarifying the persistence of that discretion and the factors that guide it is an important next step.[285]

Second, the theory has implications for theories of constitutional interpretation. In particular, originalism and unwritten constitutionalism[286] consult historical practice in deciding thorny constitutional questions. Yet they do so in different ways and with different understandings of what consultation entails. For originalism, historical practice is common in the "construction zone."[287] Originalists, however, disagree about what exactly should happen there.[288] Unwritten constitutionalists similarly vary on fundamentals: is the

282. *See* Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1407 (2017) (rejecting judicial skepticism of novelty as assuming either "the mistaken Madisonian premise that Congress reliably exercises the full scope of its constitutional powers" or that prior failures to enact statutes are clear signs of constitutional doubt).

283. WILSON C. FREEMAN & KEVIN M. LEWIS, CONG. RSCH. SERV., R45636, CONGRESSIONAL PARTICIPATION IN LITIGATION: ARTICLE III AND LEGISLATIVE STANDING 6–13 (2019).

284. Compare the majority opinion and dissent in *Zivotofsky v. Clinton*, 566 U.S. 189 (2012).

285. *See* David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 731 (2021) (describing forms of constitutional argument "no reputable constitutional decisionmaker wishes to be associated with" because they run counter to constitutional norms.).

286. *See* sources cited *supra* note 33.

287. *See* sources cited *supra* note 30.

288. ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM 26 (2011).

unwritten constitution purely conceptual[289] or does it also comprise historical practice?[290] Insofar as both originalism and unwritten constitutionalism rely on norms, this Article's theory challenges any strong claims to constitutional authority and determinacy by both camps.

Third, this Article underlines the interaction between ideology and politics in the constitutional order. Historical practices inform and are shaped by the constitutional culture they inhabit. Some of our most important and hallowed traditions depend on constitutional theories to sustain them. When their conditions of possibility change, they do too. Just as the norms against executive noninterference in law enforcement came of age during a period of skepticism of presidential authority, it has been endangered by the rise of unitary executive theory. So while these practices are normative, they can only be so when actors justify them in terms that others recognize. This means when ambient constitutional assumptions change, as they might in our era, the roster of possible responses also expands or narrows. If unitary executive theory triumphs, then saving the norm of noninterference by trying to further legalize it will be difficult. Under a strong unitary executive, after all, presidents cannot "interfere" with investigations, they only "intervene." The interaction between ideology and institutions is thus a key dynamic of the constitutional order.

The Article's theory means that the Constitution, in practice, is always a developing project. This might trouble any vision of constitutionalism that sees its only virtues as fixity and stability. But for those less wedded to formalism and more congenial to pragmatism, who understand the Constitution as "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs"[291] this Article's theory throws new light on an old truth.

289. *See* STRAUSS, *supra* note 33; TRIBE, *supra* note 33.

290. *See* AMAR, *supra* note 33.

291. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

CASS R. SUNSTEIN AND
ADRIAN VERMEULE

THE UNITARY EXECUTIVE: PAST, PRESENT, FUTURE

I. A Bracingly Simple Idea

It is a bracingly simple idea.

Article II, section 1 of the U.S. Constitution vests the executive power in "a president of the United States." Those words do not seem ambiguous. Under the Constitution, the President, and no one else, has executive power. The executive is therefore "unitary."[1] It follows, as the night follows the day, that Congress lacks the power to carve up the executive—to say, for example, that the Secretary of Transportation is a free agent, immune from presidential control, or that the Secretary of Commerce can maintain their job unless the President is able to establish some kind of "cause" for removing them.[2]

Cass R. Sunstein is the Robert Walmsley University Professor, Harvard University. Adrian Vermeule is the Ralph S. Tyler, Jr. Professor of Constitutional Law, Harvard Law School.

Authors' note: We are grateful to David Strauss for excellent comments and to Eli Nachmany for exceptional research assistance and valuable comments.

[1] *See* Steven Calabresi and Christopher Yoo, The Unitary Executive (2008).

[2] We are speaking here only of the removal power, not the directive power, that is, the power to issue orders to those who implement the law.

The Supreme Court Review, 2021.
© 2021 The University of Chicago. All rights reserved. Published by The University of Chicago Press. https://doi.org/10.1086/714860

On this view, the Supreme Court's unambiguous embrace of the idea of the unitary executive in *Myers v. United States*[3] was a golden moment in constitutional law, a ruling on which diverse people ought to be able to agree, and indeed one that they should enthusiastically embrace. And on this view, the Court's messy, confusing, neologism-based, indefensible rejection of the unitary executive in *Humphrey's Executor v. Federal Trade Commission*,[4] upholding the independence of the Federal Trade Commission, was a dark stain, one of the lowest moments in the Court's history and a prime candidate for inclusion in the "anticanon" of constitutional law. If that is so, the only serious question in the removal debate, for many decades, has been simple: Should *Humphrey's Executor* be flatly overruled, or should it be confined as much as possible simply in deference to a longstanding precedent on which much of American government has been built?

A. MINIMALISM AND MAXIMALISM

In *Seila Law LLC v. Consumer Financial Protection Bureau*,[5] the Court invalidated the provision guaranteeing that the Director of the CFPB could not be removed by the President except for cause. But the Court did not overrule *Humphrey's Executor*; it distinguished it, confining it to its facts. The resulting opinion, however, is deeply ambiguous, because it is not obvious what the legally relevant description of *Humphrey's Executor* should now be taken to be.

On one reading, which we will call the "minimalist reading," the Court's opinion might be read to say: "We have made some mistakes in the past, and we may or may not overrule them, but if we can find any minimally plausible ground for distinguishing them, that is exactly what we will do." On this view, the Court distinguished *Humphrey's Executor* principally on the ground that the CFPB is headed by a single person, not a multimember commission, along the lines of then-Judge Kavanaugh's earlier opinion for a D.C. Circuit panel.[6] In simpler words: "Go forth, and sin no more."

---

[3] 272 U.S. 52 (1926). We believe that the phrase "unambiguous embrace" is accurate, but as we shall see, the Court did not conclude that all those who operate within the executive branch are unequivocally subject to the President's will.

[4] 295 U.S. 602 (1935).

[5] Seila Law v. Consumer Fin. Protection Bureau, 140 S. Ct. 2183 (2020).

[6] PHH Corp. v. Consumer Fin. Protection Bureau, 839 F.3d 1 (D.C. Cir. 2016), *vacated and remanded on rehearing en banc*, 881 F.3d 75 (D.C. Cir. 2018).

But in fact, there are significant strands of the Court's opinion that seem far more ambitious; call these "the maximalist reading." This reading arises because the Court repeatedly described the exception derived from *Humphrey's Executor* as not extending to independent agencies that exercise significant executive power, as by rulemaking or enforcement in internal agency proceedings. In a crucial passage, the Court said that the baseline rule of *Myers*, granting the President at-will removal authority for all officers exercising executive power, is subject to "two exceptions—one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority."[7] The Court continued that these two exceptions "represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power"[8] and refused to expand or add to them. Justice Thomas, who joined the majority opinion in relevant part, also wrote a separate opinion, joined by Justice Gorsuch, saying unambiguously that *Humphrey's Executor* was wrong and that he would overrule it.[9] In his words, "*Humphrey's Executor* does not comport with the Constitution."[10]

The maximalist reading, if pursued in future cases, would effect radical changes in administrative law and indeed the fabric of modern government. The main independent agencies with multiple heads wield broad rulemaking and enforcement powers; the Court's ruling thus casts a legal cloud over the removal provisions for the commissioners and heads of the FTC, the FCC, the SEC, the NRC, the NLRB, and others. The constitutionality of those removal provisions would seem to depend on what, particularly, those agencies are authorized to do. Whether the maximalist reading is in fact pursued depends on many contingencies, but it is nonetheless significant that the Court read *Humphrey's Executor* so narrowly that it might well be taken to have thrown the independence of most of the current independent agencies, and longstanding understandings of that decision, into grave doubt.

---

[7] *Seila Law*, 140 S. Ct. at 2199–2200.

[8] *Id.* at 2200 (internal quotation marks and citation omitted).

[9] *See Seila Law*, 100 S. Ct. at 219–21 (Thomas, J., concurring in part and dissenting in part).

[10] *Id.* at 2216.

B. ORIGINALISM AND DWORKINISM

There is also a major methodological ambiguity in *Seila Law*. Some of its defenders are likely to understand the ruling as a clear vindication of the Constitution itself, understood in terms of the original understanding of the text. Indeed, we predict that the decision will be taken as an originalist triumph and in two different ways: as an enthusiastic embrace of originalism as the proper method of constitutional interpretation and as an unquestionably proper use of originalism. *Seila Law* might even take its place with *District of Columbia v. Heller*[11] as a defining example of originalism at work and as a vindication of that method.

We shall explore that possibility and raise some doubts about it. Taken in purely originalist terms, the decision might or might not be correct. For our purposes, the more fundamental point is that in our view, the Court's opinion is not only, or not principally, an originalist one. The Court does not refer to the "original public meaning," as many originalists do, and it does not work hard with the text and the history to show that in 1789, a widely shared understanding of the executive power would compel its conclusion. Indeed, there are major nonoriginalist strands to the opinion. To put things in slightly provocative terms, one might even call the majority's opinion frankly Dworkinian, in the sense that it rests on an effort to put the existing fabric of law in the best constructive light by reference to considerations of political morality.[12]

In that respect, *Seila Law* can be illuminatingly understood as a form of constitutional common law[13] and as responsive to emphatically contemporary concerns. The decision reflects anxiety about the powers of unaccountable bureaucrats freed from the constraining arm of the President (and hence We the People). Even while confining *Humphrey's Executor* to its facts, it appeals throughout to high-level principles, such as "liberty" and "accountability," to decide which of those facts are legally relevant. Is the number of agency heads, one versus many, relevant? The Court sometimes says it is not only relevant, but crucial; elsewhere, as we have described, the Court's focus is

---

[11] 554 U.S. 570 (2008).

[12] *See* Ronald Dworkin, Law's Empire (1986).

[13] *See* David A. Strauss, The Living Constitution (2010).

on whether agencies wield executive power. The important thing is that on the terms of the Court's own analysis, emphasizing those high-level principles—that is, which features of the history and caselaw are critical—is not simply read off from any previous precedent or from the original understanding. Rather, the Court arrives at its conclusions through high-level structural reasoning from what it sees as defining constitutional principles, and it expressly defends that structural reasoning as such.[14]

In other words, the conclusion and the analysis in *Seila Law* are rooted in large part in rich interpretations of abstract, contested principles of self-government and liberty. That is why the decision can be understood not only in originalist terms but also as a species of constitutional common law, or, more precisely, as a reflection of Dworkin's notion of law as "integrity," by which judges attempt both to "fit" existing legal materials and to "justify" them by making them the best that they can be.[15] So understood, *Seila Law* is an exercise in fit, and an unusually creative one; it is also an exercise in justification, and an especially bold one.

In what follows, we explore these two ambiguities about the opinion, which involve respectively the scope of its holding and its methodology. Our exposition comes in four parts. Part II explores the idea of a unitary executive with reference to text and history and also with reference to changed circumstances. We attempt to show the ambiguities in the founding era that gave rise to reasonable, competing understandings of what was and was not settled. We also attempt to show that the emergence of the modern administrative state can be taken both to fortify and to undermine the argument for the idea of a strongly unitary executive. Part III discusses the Court's disparate, inconclusive encounters with that idea. Part IV turns to *Seila Law* and its striking treatment of *Humphrey's Executor*, which it simultaneously preserves (for now) and perhaps hollows out, thus endangering many contemporary independent agencies. Part V discusses implications and constitutional method, showing that the decision rests crucially on contested normatively laden views about the meaning of high-level principles. In the end, *Seila Law* is best seen as part of a much broader effort, in prominent circles, to constrain the operation of the regulatory

---

[14] *See Seila Law*, 140 S. Ct. at 2202–04.

[15] *See* Dworkin, *supra* note 12.

state in general and of apparently unaccountable institutions in particular by referencing a distinctive understanding of constitutional principles.

II. Two Kinds of Unitariness

In a sense, everyone agrees that the Constitution creates a "unitary executive."[16] There is one President, not an executive council, and the President is broadly in charge of the executive branch. But reasonable people strenuously disagree about what a unitary President entails.[17] We begin by distinguishing two ways of thinking about the unitary executive and then we turn, respectively, to originalist and nonoriginalist disputes about which way is best. The result is a map with four possible positions.

A. Strong and Weak

Some people believe in a strongly unitary presidency; others believe in a weakly unitary presidency. The former insist that at a minimum, the President has the constitutional authority to remove all noninferior policymaking officials who exercise executive power (and also to control their decisions).[18] On this view, the executive power is the President's alone, and any congressional effort to compromise that principle by limiting the President's ability to fire executive branch officials is forbidden. All those who implement the law, including all those who exercise administrative authority, must be controlled by the President, at least in the sense of being at-will employees.[19] The

---

[16] *See* Calabresi and Yoo, *supra* note 1; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1 (1994).

[17] For different views, *see, e.g.*, Elena Kagan, *Presidential Administration*, 114 Harv L. Rev. 2245 (2001); Steven Calabresi & Saikrishna Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541 (1994).

[18] *See* Calabresi & Prakash, *supra* note 17. We are bracketing here the definition of "inferior officers" and the precise relationship between them and the President. As noted, an important issue, not explored here. is whether the President is able to control them by issuing directions they are obligated to obey, even if they are not his at-will employees.

[19] As discussed below, those who believe in a strongly unitary President might accept some limits on this principle; they might not believe in the directive power. On that issue, *see* Cass R. Sunstein and Adrian Vermeule, *Presidential Review: The President's Statutory Power Over Independent Agencies*, Geo. L. J. (forthcoming 2021); Robert V. Percival, *Who's In Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 Fordham L. Rev. 2487 (2011).

Court's opinion in *Seila Law* seems to embrace this view, certainly as a matter of constitutional text and history.

By contrast, those who believe in a weakly unitary presidency insist that under the Necessary and Proper Clause, Congress has significant authority to limit the President's authority of removal (and also supervision).[20] They are likely to agree that with respect to some executive officers—the Secretary of Defense, the Secretary of State, the Attorney General—the President must have plenary removal authority. The President must have that authority where specific constitutional texts that make grants of power to the President, such as the Commander-in-Chief Clause, are implicated, and where tradition holds that core executive powers and prerogatives involving war, diplomacy, and foreign affairs are at issue. But they also believe that as a general matter, Congress has considerable room to structure the administrative state as it sees fit, especially where tradition suggests that agency independence is essential, as with respect to agencies that engage in financial regulation.[21] Justice Kagan's dissenting opinion in *Seila Law* embraces this position.[22]

Those who believe in a weakly unitary executive insist that Congress is able to immunize adjudicative officers from presidential control[23]; they add that some administrative functions might be exercised by people who are not subject to the President's policy preferences.[24] They believe that multiple authorities, including rulemaking and even prosecution, might be taken out of plenary presidential control so long as doing so does not prevent the President from exercising constitutionally specified functions, defined not broadly to mean control of all executive or administrative powers but more narrowly to include specific ones, such as the Commander-in-Chief power.[25] Of course it is true that those who believe in a weakly unitary executive have to do considerable work to spell out what their position particularly entails. The general point is that under the Necessary and

---

[20] *See* Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 Wm. & Mary L. Rev. 211 (1989); Lessig & Sunstein, *supra* note 16.

[21] *See id.*

[22] *See Seila Law*, 140 S. Ct. 2224–45 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

[23] Wiener v. United States, 357 U.S. 349 (1958).

[24] Morrison v. Olson, 487 U.S. 654 (1988).

[25] *Id.* at 691.

Proper Clause, Congress is permitted to carve out some important functions from presidential control.

Some participants in these debates speak in originalist terms; others do not.[26] We can therefore identify four positions:

	Originalist	Non-Originalist
Strongly unitary	(1)	(2)
Weakly unitary	(3)	(4)

B. TEXT AND HISTORY

1. *Strongly unitary: the original meaning.* Seeking to uncover the original public meaning of the founding document, those in Cell (1) begin with the text.[27] Article II vests the executive power in "a President of the United States."[28] It also grants the President the power to "take Care that the Laws be faithfully executed."[29] On one view, these terms are exceedingly clear.[30] They demonstrate that the President, and no one else, is in charge of execution of the laws. Invoking history, those in Cell (1) add that the contemporaneous debates show that the strongly unitary view reflects the original public meaning.[31] In their view, those debates demonstrate that the framers and ratifiers sought to ensure that the executive branch would be accountable, coordinated, and energetic.[32] The concentration of the relevant authorities in a single person was deemed necessary to achieve those goals. On this view, the original public meaning of the constitutional text compels Cell (1).

Cell (1) is often thought to have compelling structural justifications, as emphasized in the founding period. As Hamilton put it in The Federalist No. 70: "Decision, activity, secrecy, and dispatch will

---

[26] Some influential and informative work on this topic distinguishes between "formal" and "functional" approaches, where the former term refers to constitutional text and the latter term refers to constitutional goals and purposes. *See* Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions: A Foolish Inconsistency*, 72 Cornell L. Rev. 488 (1987). It is not clear that this distinction easily maps onto recent decisions, discussed below.

[27] *See* Calabresi & Prakash, *supra* note 17, at 551.

[28] U.S. Const. art. II, § 1.

[29] U.S. Const. art. II. § 3.

[30] *See* Calabresi & Prakash, *supra* note 17, at 576–77.

[31] *See id.* at 617.

[32] *See* Joseph Postell, Bureaucracy in America 49–57 (2017).

generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number."[33] In addition, "one of the weightiest objections to a plurality in the executive . . . is that it tends to conceal faults, and destroy responsibility."[34] A unitary executive is more clearly subject to the people and therefore well-suited to a self-governing nation. If Congress were authorized to divide the executive power—for example, by creating independent officials charged with implementing important aspects of federal law—all of the Constitution's structural commitments, as specified by Hamilton, would be gravely undermined.

If there were any doubts (the Cell (1) view asserts), the Decision of 1789, as it is called, resolves them.[35] In that year, an early Congress debated the President's removal power and the unitariness of the executive at great length in the context of determining the legal relationship between early cabinet heads (Treasury, War, and Foreign Affairs) and the President.[36] Various views were represented in that debate, but Congress ultimately concluded that, by Constitutional compulsion, those who execute the laws must be at-will employees of the President, at least if they work at sufficiently high levels.[37] That conclusion, clearly emerging from the historical materials, is, on this view, authoritative with respect to the original public meaning of the Constitution.[38]

2. *Weakly unitary: the original public meaning*. Those in Cell (3) respond either that the text is murky and inconclusive or that it rejects the strongly unitary view.[39] In their view, the original understanding

---

[33] The Federalist No. 70 (Alexander Hamilton).

[34] *Id.*

[35] *See* Myers v. United States, 272 U.S. 52 (1926); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 492 (2010); Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Cornell L. Rev. 1021 (2006).

[36] *See id.* at 1026.

[37] *See* Geoffrey P. Miller, *Independent Agencies*, 1986 S. Ct. Rev. 41, 47.

[38] See Prakash, *supra* note 35, at 1026 ("In passing three acts in 1789 that assumed the President enjoyed a preexisting removal power, majorities in the House and Senate affirmed the executive power theory on three separate occasions. Members of Congress understood that votes in favor of the acts were votes favoring the executive power theory. Following these votes, members of Congress and newspaper accounts repeatedly described the final acts as endorsing the theory that the Constitution granted the president a removal power").

[39] *See* Casper, *supra* note 20; Jerry Mashaw, Creating the Administrative Constitution (2012); Peter Shane, *The Originalist Myth of the Unitary Executive*, 19 U. Pa. J. Const. L. 322 (2016).

does not call for Cell (1). With respect to the text itself, Justice Holmes put it briskly but memorably: "The arguments drawn from the executive power of the President, and from his duty to appoint officers of the United States (when Congress does not vest the appointment elsewhere), to take care that the laws be faithfully executed, and to commission all officers of the United States, seem to me spider's webs inadequate to control the dominant facts."[40] Justice Holmes did not spell that out, but on one view, the vesting of executive power in a President says essentially nothing about Congress' capacity to insulate certain officials from presidential control. (It is a spider's web.) The general idea that there is one President, and the general idea that the President has the executive power, need not be taken to resolve the specific question whether Congress can declare that some officials, executing the laws, are not his at-will employees.

If this proposition seems puzzling or provocative, those in Cell (3) add that tellingly, Hamilton himself, a strong believer in a unitary executive, specifically rejected Cell (1) in *The Federalist* and concluded that the removal power followed from the Appointments Clause. In his view, that meant that officials who were subject to advice and consent for their appointment could be made removable only with the consent of the Senate.[41] In his words, "the consent of [the Senate] would be necessary to displace as well as to appoint."[42] Remarkably, he added this, in a passage that is much less well-known than it ought to be:

> A change of the Chief Magistrate, therefore, would not occasion so violent or so general a revolution in the officers of the government as might be expected, if he were the sole disposer of offices. Where a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favor of a person more agreeable to him, by the apprehension that a discountenance of the Senate might frustrate the attempt, and bring some degree of discredit upon himself. Those who can best estimate the value of a steady administration, will be most disposed to prize a provision which connects the official existence of public men with the approbation or disapprobation of that body which, from the greater permanency of its own composition, will in all probability be less subject to inconstancy than any other member of the government.[43]

---

[40] *Myers*, 272 U.S. at 177 (Holmes, J., dissenting).

[41] The Federalist No. 77 (Alexander Hamilton).

[42] *Id.*

[43] *Id.*

Thus far, the claim is not that Hamilton necessarily had the original public meaning right. It is only that the textual vesting of the executive power in the President, by itself, need not be taken to resolve the question at hand. Hamilton's views would seem to be decisive on that particular question—and a strong point in favor of Holmes's claim that the relevant words of the constitutional text are "spider's webs inadequate to control the dominant facts."[44]

The same conclusion holds for the Take Care Clause.[45] One can wholeheartedly agree that the President is authorized and obliged to execute the laws faithfully while also insisting that Congress has the capacity to immunize some officials from the President's plenary control. The duty of faithful execution need not entail the conclusion that the President can discharge law-implementing officials in the President's discretion. On one view, the laws that limit their power to do that must themselves be faithfully executed.[46] In any case, the Clause can be taken as a statement of a duty, phrased in the passive voice, not speaking to the particular question whether Congress can limit the President's removal power. Hamilton's views are relevant here as well. Hamilton had no problem with the Take Care Clause, but he also believed that Congress could condition removal of cabinet officials on the advice and consent of the Senate.

Consider in this regard the Opinions in Writing Clause: "The President … may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[47] On one view, this clause is hard textual evidence against the strongly unitary view, taken as an originalist matter. If the President is fully in control of the operations of all those who administer federal law, why would the framers and ratifiers deem it necessary to specify this particular power? The question might be taken to be rhetorical. Though the Opinions in Writing Clause raises many questions and can be understood in different ways, it takes some work to explain how it sits comfortably with the strongly unitary view of the presidency.[48]

---

[44] *Myers*, 272 U.S. at 177 (Holmes, J., dissenting).

[45] *See* Andrew Kent et al., *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111 (2019).

[46] *See id.*

[47] U.S. Const. art. II, § 2.

[48] *See* Akhil Reed Amar, *Some Opinions on the Opinions Clause*, 82 Va. L. Rev. 647 (1996); *see also* Peter L. Strauss, *Overseer, or "The Decider?": The President in Administrative Law*, 75 Geo. Wash. L. Rev. 696 (2007).

As for post-ratification history, the Decision of 1789 contained a range of competing strands, with influential figures explicitly rejecting the strongly unitary view.[49] The debates were complicated and messy—far more so than they might initially appear.[50] Those outcomes, and the Decision itself, could be read in different ways. It would be possible to read them as rejecting the proposition that the strongly unitary view is constitutionally mandatory and instead as revealing a discretionary congressional *choice*, not compelled by the Constitution, to confer unrestricted removal authority over particular officials. After a careful study of the debates, for example, Jed Shugarman refers to "the legend of the Decision of 1789," and concludes, "A majority of the first Congress opposed the powers cited by unitary theorists . . . On whether the president had exclusive removal power, the first Congress decisively answered no."[51]

On another view, also based on a careful analysis of the debates, there was no clear Decision of 1789 that authoritatively settled the question whether Article II establishes a strongly or weakly unitary executive. On that view, "the outcome was not nearly as decisive as later actors would claim. The process by which the removal issue was settled produced only a murky, very tenuous precedent in favor of the president's constitutional removal power."[52] Note too that any settlement, if it even counts as one, involved just three departments (State, War, and Treasury), whose particular functions might be thought to be essentially indistinguishable from the President's own.[53] If so, the Decision of 1789 might have no bearing on congressional efforts to immunize from presidential control the decisions of agencies with other sorts of authorities; consider the Federal Reserve Board, the Securities and Exchange Commission, the National Labor Relations Board, the

---

[49] This point is acknowledged in Prakash, *supra* note 35, at 1024–25, 1039 even though he finds the general conclusion authoritative. For a rejoinder, *see* Postell, *supra* note 32, at 84–89.

[50] See Jed Shugarman, The First Congress Rejected Unitary Presidentialism: The Indecisions of 1789: Strategic Ambiguity and the Imaginary Unitary Executive (June 22, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3596566; Jed Shugarman, The Decisions of 1789 Were Non-Unitary: Removal by Judiciary and the Imaginary Unitary Executive (June 22, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=359656.

[51] *Id.* at 3, 1.

[52] See Postell, *supra* note 32, at 84. Note, however, that Postell adds that "the practice of removals largely followed the Decision of 1789 during the first several decades of American history." *Id.* at 89.

[53] For discussion on some of the complexities with the example of the Treasury Department, *see* Lessig & Sunstein, *supra* note 16.

Social Security Administration, and the Nuclear Regulatory Commission. Even if there was a Decision of 1789, it might not speak to the question whether Congress can immunize those agencies, and assorted others, from plenary presidential removal authority.

In addition, prominent legal historians have read both theory and practice during the founding era as an endorsement of the weakly unitary view, at least in some form.[54] Some historians have agreed that first, some department heads (such as the Secretaries of State and Defense) must be subject to presidential control, so that the President can exercise their own constitutional authority but that others need not be, and second, that the Necessary and Proper Clause gives Congress considerable discretion to decide on the appropriate allocation of authority between the President and the administrative state.[55] Those in Cell (3) can easily insist that their opponents in Cell (1) turn out to be living constitutionalists, motivated by emphatically present-day concerns and fears (about, say, accountability and liberty) while proclaiming a clear constitutional settlement that cannot, in fact, be traced to the original understanding and the founding generation.

c. nonoriginalist approaches

For various reasons, many people are not originalists.[56] They do not believe that the original public understanding is binding. They too commit to following the text, of course, but they insist that structural principles and inferences, institutional roles, changed circumstances, unanticipated problems, judicial precedents, longstanding practices, the views of Congress and the President, and new or emerging values are a legitimate part of constitutional interpretation, part of how the text's meaning is best understood.[57]

In the context at hand, the rise of the modern administrative state, arguably an unanticipated development, might be taken to motivate nonoriginalist approaches to separation of powers questions.[58] Nonoriginalist approaches can of course take diverse forms. In the context

---

[54] *See* Mashaw, *supra* note 39; Casper, *supra* note 20.

[55] Casper, at 235.

[56] *See* Strauss, *supra* note 13; Stephen Breyer, Active Liberty (2006); Dworkin, *supra* note 12; John Hart Ely, Democracy and Distrust (1980).

[57] *See* Breyer, *supra* note 56; NLRB v. Noel Canning, 573 U.S. 513 (2014).

[58] On the relevance of changing circumstances in general, *see* Strauss, *supra* note 13; Lawrence Lessig, Fidelity and Constraint (2019).

at hand, one form involves constitutional common law.[59] Another form involves "translation": efforts to understand the Constitution's commitments in circumstances that the founding generation could not have anticipated.[60] Yet another form, elaborated by Dworkin, suggests that constitutional interpretation requires judges to put the existing legal materials in the best constructive light.[61]

Cell (2) can be seen as an exercise in constitutional common law in translation[62] or in Dworkinian law-as-integrity. The basic idea is that in a period in which the executive branch is wielding unanticipatedly expansive power that touches so many domains of domestic affairs, the founding commitments to accountability, dispatch, coordination, and energy call for strong unitariness, even if those commitments authorized weak unitariness two centuries earlier.[63] It is one thing to say that in (say) 1800, Congress had the constitutional authority to immunize certain agencies and institutions, not so fundamental to national life, from plenary presidential control. It is quite another to say that Congress can carve out an assortment of crucial agencies affecting the economy in multiple ways, such as the Federal Communications Commission, the Federal Trade Commission, the Nuclear Regulatory Commission, and the CFPB, and let them do their work without control from the constitutionally specified executor of the laws. In the modern era, fidelity to constitutional commitments calls for insistence on presidential primacy, even if it did not quite do that in the founding era, when the administrative state was so much smaller and less central to people's lives.

It is true that this approach to constitutional interpretation might seem looser and more speculative than originalism, supposing, quite controversially, that the latter yields straightforward answers. But because many areas of constitutional law have unmistakable common-law features, with new judgments emerging from the case-by-case process,[64] we might want to insist that careful attention to the most central founding commitments, as opposed to particular founding-era

---

[59] See Strauss, *supra* note 13.

[60] *See* Lessig, *supra* note 58.

[61] *See* Dworkin, *supra* note 12.

[62] *See* Lessig & Sunstein, *supra* note 16, at 88.

[63] *See id.* at 101.

[64] *See* Strauss, *supra* note 13.

understandings and practices, is an honorable way to engage in constitutional interpretation. And if we attend to those commitments, strong presidential oversight of the administrative state, including agencies now characterized as independent, might seem essential if we are to avoid devastating damage to the very principles invoked by Hamilton in defense of a unitary presidency.

The ironic conclusion, embraced by those in Cell (2), is that even if the founding generation did not believe that a strongly unitary presidency was necessary to promote their own deepest commitments, such a presidency is necessary now, given the sheer size and nature of the contemporary administrative state. Those in Cell (2) think that those in Cell (1) do not have the original understanding right. But for reasons of principle, they are happy to make common cause with them.

A firm rejoinder comes from Cell (4).[65] Perhaps Cell (2) gets it exactly wrong. If fidelity is the goal, perhaps we should emphasize the risks of concentrated power and the importance of checks and balances—and the need to allow Congress to have some flexibility given the diversity of circumstances that give rise to new agencies. Perhaps the real concern, highlighted by changed circumstances, is the capacity of just one person, acting on their own, to move the government in their preferred direction. It should not be necessary to mention that that capacity is anathema to founding commitments; it raises the specter of monarchy.[66] As James Landis put it in a famous translation-based defense of expert administrative tribunals:

> The administrative process is, in essence, our generation's answer to the inadequacy of the judicial and the legislative processes. It represents our effort to find an answer to those inadequacies by some other method than merely increasing executive power. If the doctrine of the separation of power implies division, it also implies balance, and balance calls for equality. The creation of administrative power may be the means for the preservation of that balance, so that paradoxically enough, though it may seem in theoretic violation of the doctrine of the separation of power, it may in matter of fact be the means for the preservation of the content of that doctrine.[67]

---

[65] *See* Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. Chi. L. Rev. 123 (1994).

[66] On that specter, *see* Cass R. Sunstein, Impeachment: A Citizen's Guide (2017).

[67] James Landis, The Administrative Process 46 (1925). For discussion, *see* Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe and Kagan on the Administrative State*, 130 Harv. L. Rev. 2463 (2017).

Or, as Abner Greene puts it in a sustained modern defense of Cell (4), "if we accept sweeping delegations of lawmaking power to the President, then to capture accurately the framers' principles—principles that deserve our continuing adherence—we must also accept some (though not all) congressional efforts at regulating presidential lawmaking."[68]

To compress what might be turned into a lengthy argument: If executive power is concentrated in the President, and if they are able to oversee everything now included in the immensely broad category of administration, we would see a kind of Madisonian nightmare.[69] Given the risk of a discretion-wielding, immensely powerful set of administrative authorities concentrated in a single person, Congress should have the authority to insulate at least some such authorities from presidential control, simply in order to preserve diffusion of power.

The strongest example may well be the Federal Reserve Board: If Presidents could control it, they could promote their own short-term political interests by reducing interest rates to the detriment of the economy's long-term health. In the year before an election, for example, the President might manipulate the Board's decisions in such a way as to promote the President's own prospects for reelection. A similar argument might apply to the Federal Communications Commission, whose independence might be deemed necessary to prevent a situation in which the President is punishing their political enemies and rewarding their political friends. After all, the FCC has the authority to give out and to renew licenses to radio and television stations. If the President is entitled to control its decisions, the President could manipulate the speech market in such a way as to promote their own political interests. These arguments could easily be generalized—for example, to the FTC, which has the authority to approve or disapprove mergers, and to a range of financial authorities whose decisions might bear on the short-term political prospects of the President.

To reach a conclusion on the underlying questions, it would be necessary to begin by deciding on the right approach to constitutional interpretation—that is, to choose between Cells (1) and (3) or Cells (2) and (4). Those who embrace originalism would have to

---

[68] Greene, *supra* note 65, at 124.

[69] *See* The Federalist No. 51 (James Madison).

undertake a careful investigation of history in order to choose between Cell (1) and Cell (3). If one rejects originalism, an assessment of how best to fit with founding commitments would determine the choice between Cell (2) and Cell (4). Our goal here is not to resolve those questions. At the same time, we agree that on originalist grounds, some executive officers—including the Secretary of State, the Secretary of Defense, the Secretary of the Treasury, and the Attorney General—must be at-will employees of the President. But we are not originalists, and we would give substantial weight both to judicial precedents and institutional practices over time, which means that we land in Cell (4), which can easily fit, broadly speaking, with judicial decisions since 1926.[70]

To be sure, general cells do not decide concrete cases,[71] including *Seila Law*. Thus far, our more modest goal has been to offer a concrete sense of why many people believe that a strongly unitary executive is constitutionally mandatory and why many people reject that proposition.

III. The Unitary Executive in the Supreme Court

Before *Seila Law*, the Court's decisions, often adopting the weakly unitary position,[72] are best understood as falling within Cell (4), though they could be defended by reference to Cell (3), and though Cells (1) and (2) make prominent appearances (and very much have come to the fore as a result of *Seila Law*). Here again, our goal is to give a brisk sense of the constitutional background rather than to offer a comprehensive treatment.

---

[70] The reference is to *Myers v. United States*, 272 U.S. 52 (1926), taken up below. Many years ago, one of the present authors (Sunstein) argued in favor of Cell (2). *See* Lessig & Sunstein, *supra* note 16. He remains there, with the proviso that he would not overrule *Humphrey's Executor* and that the statutory standard—inefficiency, neglect of duty, malfeasance—can be interpreted to give the President the requisite authority. *See* Cass R. Sunstein & Adrian Vermeule, *Presidential Review*, 109 Geo. L.J. 637 (2021). But candor compels an acknowledgement that he now believes that the historical evidence on behalf of the strongly unitary executive is somewhat stronger than he once thought and that the structural argument, emphasizing changed circumstances, on behalf of the strongly unitary argument is somewhat weaker than he once thought.

[71] We are playing, of course, on Justice Holmes's famous formulation: "General propositions do not decide concrete cases." Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

[72] *See* Humphrey's Executor v. United States, 295 U.S. 602 (1935); Morrison v. Olson, 487 U.S. 654 (1988); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010).

A. THE EARLY ERA

Myers v. United States,[73] the Court's first sustained encounter with the issue, is essentially Cell (1), urging that the text and the original understanding call for broad presidential control over the executive branch, above all through plenary removal authority. *Myers* offers an elaborate discussion of text, structure, and history, including the Decision of 1789, and thus provides the foundation for much of contemporary analysis.[74] For modern defenders of a strongly unitary executive, *Myers* is the shining and fixed star[75] even though it was written by a former President, Chief Justice Taft, who might be expected to be particularly insistent on presidential prerogatives. It could even be said that for those who believe in a strongly unitary presidency, all of subsequent constitutional theory has been a series of footnotes to *Myers*.[76]

By contrast, the widely reviled opinion in *Humphrey's Executor*,[77] generally understood to validate the independent agency form, deals not at all with constitutional history and barely at all with constitutional text. Mounting a fundamental attack on the very idea of agency independence and asserting a strongly unitary view, President Franklin Delano Roosevelt asserted that the "inefficiency, neglect of duty, and malfeasance in office" standard, which restricted his power to discharge members of the Federal Trade Commission, was an unconstitutional restriction on his Article II authority to discharge them on whatever grounds he chose.[78] Insofar as the Court unanimously rejected that argument, it made no effort to ground its analysis in something akin to Justice Holmes's skepticism about the supposed

---

[73] 272 U.S. 52 (1926).

[74] *See generally id.*

[75] *See* Calabresi & Yoo, *supra* note 1, at 18.

[76] *Cf.* Alfred North Whitehead, Process and Reality 39 (1978) ("The safest general characterization of the European philosophical tradition is that it consists of a series of footnotes to Plato.").

[77] 295 U.S. 602 (1935). On the reviling, *see, e.g.*, Miller, *supra* note 37, at 93. In stating that the opinion in *Humphrey's Executor* is widely reviled, we do not mean to suggest that *Myers* is without its critics, certainly of its sheer breadth. *See, e.g.*, Casper, *supra* note 20. And despite the reviling, it is important to emphasize that *Humphrey's Executor* has had a constitutive effect on the structure of the administrative state, arguably more so than *Myers*. We are grateful to Daphna Renan for pressing this point.

[78] 295 U.S. at 618.

clarity of the text, in constitutional structure, in changed circumstances, or in the ambiguities of the Decision of 1789. Instead, the Court emphasized the need to specify the relevant administrative functions. It held that Congress has the power to immunize members of independent agencies from plenary presidential removal authority insofar as such agencies exercise "quasi-judicial" functions (namely, adjudication) and "quasi-legislative" functions (namely, compiling reports for Congress).[79]

Thus understood, the actual decision was far more modest than it has long been taken to be;[80] as we shall see, *Seila Law* corrects the historical record. *Humphrey's Executor* was hardly a broad endorsement of the independent agency form as it is now understood. Because the Federal Trade Commission made policy only through adjudication (and lacked the authority to issue binding orders at that)[81] and did not even try to exercise rulemaking authority until the 1970s,[82] *Humphrey's Executor* was very limited indeed. It does not hold that Congress may restrict the President's ability to control the exercise of the authority to make rules. Its narrow holding, focused on the distinctive functions of the FTC in 1935, can in fact be defended on originalist grounds.[83] Insofar as it allows Congress to immunize purely adjudicative officials from plenary presidential control, it did not even depart radically from *Myer*s. In that case, the Court had stated:

> Then there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control. But even in such a case, he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer

---

[79] *Id.* at 629.

[80] Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 615 (1984) (noting that President Roosevelt "had given Commissioner Humphrey no particular directive; he had asked no advice that Humphrey then refused to give; he did not, perceiving insubordination, direct [Humphrey] to leave" and therefore the Court did not resolve the question "whether the President could give the FTC Commissioners binding directives . . . or what might be the consequences of any failure of theirs to honor them").

[81] *See* pages 29–30 *infra*.

[82] *See* Nat'l Petroleum Refiners Ass'n v. Fed. Trade Comm'n, 482 F.2d 672 (D.C. Cir 1973).

[83] *See* Mashaw, *supra* note 39.

> by statute has not been, on the whole, intelligently or wisely exercised. Otherwise, he does not discharge his own constitutional duty of seeing that the laws be faithfully executed.[84]

In this passage, the *Myers* Court recognized that adjudicatory authority is distinctive, in the sense that its exercise might be immunized from presidential influence or control. To be sure, *Humphrey's Executor* goes further than *Myers* insofar as it rejects the idea that as a matter of constitutional right, the President may discharge adjudicatory officials simply on the ground that the President does not like their decisions. But that is not exactly a radical shift from *Myers*.

Insofar as the Court ruled that Congress can immunize from presidential control those who compile reports to inform legislation, the Article II objection is hardly at its strongest. After all, Congress can have its own staff; perhaps it can also say that certain officials, compiling those reports within an executive agency, are not at-will employees of the President.[85] Recall *Humphrey's Executor* has absolutely nothing to say about whether Congress has the authority to make rulemaking agencies independent of the President. As of 1935, then, and for the following decades as well, we might say that the Court held that the Constitution allows Congress to immunize adjudicative officers from at-will discharge by the President but did essentially nothing more than that to authorize Congress to exempt policymaking officials from plenary presidential control. This is so even if actual practice by independent agencies, including the Securities and Exchange Commission, the Federal Reserve Board, and the Federal Communications Commission, went far beyond what was necessarily authorized by *Humphrey's Executor*.

B. MODERNITY

Until *Seila Law*, the modern era had been largely defined by a continued endorsement of Cell (4), fortified by longstanding practice and *Humphrey's Executor* as currently understood, butting up hard against Cell (1) and perhaps Cell (3), and on occasion Cell (2) as

---

[84] 272 U.S. at 135.

[85] The reason for the word "perhaps" is that a court could say (1) Congress can have its own staff while also saying (2) Congress cannot immunize executive branch officials, compiling reports for it, from the plenary control of the President.

well. In *Free Enterprise Fund v. Public Company Oversight Board*,[86] for example, the Court clearly accepted *Humphrey's Executor* even as it also signaled a lack of enthusiasm for its decisions authorizing Congress to create independent agencies: "The parties do not ask us to reexamine any of these precedents, and we do not do so."[87] Its holding, invalidating two tiers of insulation from the President (an independent agency within an independent agency), was relatively narrow. But in reaching that holding, the Court also offered a degree of support for strong unitariness, not on originalist grounds but largely by reference to structural principles associated with the Take Care Clause:

> The President cannot "take Care that the Laws be faithfully executed" if he cannot oversee the faithfulness of the officers who execute them. Here the President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly. That judgment is instead committed to another officer, who may or may not agree with the President's determination, and whom the President cannot remove simply because that officer disagrees with him. This contravenes the President's "constitutional obligation to ensure the faithful execution of the laws."[88]

Invoking text and history but also speaking broadly in terms of basic principle, the Court stated plainly: "It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman's famous phrase."[89] In words that could easily be invoked to challenge the very idea of independence, the Court added: "By granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts. The Act's restrictions are incompatible with the Constitution's separation of powers."[90] By emphasizing the need for the President to have the tools with which to take care that the laws be faithfully executed, the Court planted a seed that could grow over time. The central idea is that unitariness within the executive operates mainly through the particular obligation reflected in the Take Care

---

[86] 130 S. Ct. 3138 (2010).

[87] *Id.* at 3174. A valuable treatment is Peter L. Strauss, *On the Difficulties Of Generalization – PCAOB in the Footsteps of* Myers, Humphrey's Executor, Morrison *and* Freytag, 32 Cardozo L. Rev. 2255 (2011).

[88] 130 S. Ct. at 3174.

[89] *Id.* at 3152.

[90] *Id.* at 3155.

Clause, which ensures that the President is ultimately responsible for faithful execution and which means that the President must have the tools to carry out that responsibility. That idea is very different from, or at least more specific than, any organizing principle that the Court had offered before.

Decided decades earlier, *Morrison v. Olson*[91] is by contrast a clear Cell (4) case, allowing Congress to create an independent prosecutor who is empowered to investigate and prosecute wrongdoing on the part of high-level executive branch officials. In *Morrison*, the Court did not much engage constitutional text and history. Instead it spoke in pragmatic and functional terms, emphasizing that so long as the President could carry out their constitutionally assigned tasks, Congress could establish an office with a degree of independence from the President.[92] The Court went out of its way to emphasize that the statutory restriction on the President's removal power—"good cause"—left the President with a great deal of authority:

> This is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the "faithful execution" of the laws. Rather, because the independent counsel may be terminated for "good cause," the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act. Although we need not decide in this case exactly what is encompassed within the term "good cause" under the Act, the legislative history of the removal provision also makes clear that the Attorney General may remove an independent counsel for "misconduct."[93]

Here, then, is an emphasis on the centrality of the Take Care Clause, and an insistence that the "good cause" standard was compatible with it.

Even before *Seila Law*, it would have been fair to say that the view associated with Cell (1) enjoyed strong support on the current Court.[94]

---

[91] 487 U.S. 654 (1988).

[92] *Id.* at 691.

[93] *Id.* at 692.

[94] *See* In re Aiken County, 645 F.3d 428, 440 (D.C. Cir. 2011) (Kavanaugh, J., concurring in the judgment). Consider in particular this passage:

> Reading only the text of Article II, one would assume that the Nuclear Regulatory Commission would report to the President, not the President to the Nuclear Regulatory Commission. If two agencies in the Executive Branch were not on the same

It would have been fair to speculate that a majority believed that the independent agency form is constitutionally illegitimate and that *Humphrey's Executor* was wrongly decided, at least as it is currently understood.[95] For such justices, the only question is whether it should be overruled—which brings us directly to the case at hand.

IV. Strongly Unitary

In some ways, the problem in *Seila Law* was straightforward. The Director of the CFPB was protected from presidential removal by the same statutory formula that was at issue in *Humphrey's Executor*: inefficiency, neglect of duty, or malfeasance in office.[96] The most obvious difference between the CFPB and the vast majority of independent agencies is that the former is headed by a single person whereas the latter are headed by multimember commissions.

A. Options

In these circumstances, the Court had four principal options:

1. It could have upheld the provision apparently guaranteeing independence to the CFPB on the grounds that the number of heads was constitutionally irrelevant and that *Humphrey's Executor* essentially settled the constitutional issue.
2. It could have interpreted the provision apparently guaranteeing independence to the CFPB so as to allow the President to have considerable authority over the bureau's policymaking and concluded that, so interpreted, the provision is constitutionally unobjectionable. An interpretation that would allow the president that authority would have meant that the CFPB was not really

page (as may happen in this case if the Nuclear Regulatory Commission rejects the Department of Energy's withdrawal application), the President presumably would have the authority to resolve that disagreement. If an agency were departing from the President's preferred course (as the Nuclear Regulatory Commission may do), the President presumably would have the authority to prevent that. And if an agency were taking too long to make a critical legal or policy decision (as appears to be the case with the Nuclear Regulatory Commission), the President presumably would have the authority to fix that as well.

[95] Recall the Court's pointed statement in *Free Enterprise Fund*: "The parties do not ask us to reexamine any of these precedents, and we do not do so." Free Enter. Fund v. Pub. Co. Acct. Bd., 561 U.S. 477, 483 (2010).

[96] *See Humphrey's Executor*, 295 U.S. at 623.

independent at all—and hence could have weakened and perhaps met the constitutional objection.
3. It could have overruled *Humphrey's Executor* and thus struck down the independent agency form.
4. It could have struck down the provision apparently guaranteeing independence to the CFPB on the ground that independence is permissible only for agencies headed by a multimember commission and not for agencies headed by a single person.

Each of these options could be accompanied, of course, by opinions with very different emphases. Option (2) is evidently attractive, and it could be written in numerous ways that allowed the President more or less in the way of policy control.[97] The Court chose Option (4), but not with a minimalist opinion that strongly affirmed *Humphrey's Executor*, and concluded, modestly and narrowly, that independence was unacceptable when the agency was headed by a single person. Instead, the Court offered the most forceful embrace of the strongly unitary view since *Myers* itself. In the process, the Court's opinion seems to have gutted *Humphrey's Executor* and in a sense to have confined it to its facts in a way that opens up a great deal of room for contemporary challenges to independent agencies.

B. NOT MINIMALIST

Toward the very beginning, the Court's opinion, by Chief Justice Roberts, signaled the sheer magnitude of the issue in the case: "Under our Constitution, the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'"[98] Just a few paragraphs thereafter, the Court declared categorically, "The President's power to remove—and thus supervise—those who would wield executive power on his behalf follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark decision *Myers v. United States*."[99] As the Court explained, "[L]esser officers must remain accountable to the President, whose authority they wield."[100] Emphasizing what it saw as the Decision of

---

[97] *See* Sunstein & Vermeule, *supra* note 19.

[98] *Seila Law*, 140 S. Ct. at 2191.

[99] *Id.* at 2191–92 (citation omitted).

[100] *Id.* at 2197.

1789, the Court explicitly and fully endorsed the analysis in *Myers*; it put a kind of halo around both the holding and the analysis. By contrast, it did not have a favorable word to say about *Humphrey's Executor*.

With *Myers* as the defining case, the Court said that it had recognized only two exceptions to the strongly unitary executive. The first is "expert agencies led by a *group* of principal officers removable by the President only for good cause"; the second is "certain *inferior* officers with narrowly defined duties."[101] The Court said that it would not "extend these precedents to . . . an independent agency that wields significant executive power and is run by a single individual."[102] Pointedly, it said that it "need not and do[es] not revisit our prior decisions"[103]—which is not the most enthusiastic endorsement.

At this point, it would have been possible for the Court to avoid the constitutional question and to embrace Option (2). The Court might have said that the statutory standard allows the President the kind of policymaking control that Article II requires. That conclusion would have had large implications for the President's relationship to a host of independent agencies and the Court refused to offer it. On this count, at least, the Court's analysis is a ringing endorsement of agency independence—as a statutory matter. More specifically:

> *Humphrey's Executor* implicitly rejected an interpretation that would leave the President free to remove an officer based on disagreements about agency policy. In addition, while both *amicus* and the House of Representatives invite us to adopt whatever construction would cure the constitutional problem, they have not advanced any workable standard derived from the statutory language. *Amicus* suggests that the proper standard might permit removals based on *general* policy disagreements, but not *specific* ones; the House suggests that the permissible bases for removal might vary depending on the context and the Presidential power involved. They do not attempt to root either of those standards in the statutory text. Further, although nearly identical language governs the removal of some two-dozen multimember independent agencies, *amicus* suggests that the standard should vary from agency to agency, morphing as necessary to avoid constitutional doubt. We decline to embrace such an uncertain and elastic approach to the text.[104]

---

[101] *Id.* at 2192 (emphasis in original).

[102] *Id.*

[103] *Id.*

[104] *Id.* at 2206 (citations omitted).

The Court added, "Without a proffered interpretation that is rooted in the statutory text and structure, and would avoid the constitutional violation we have identified, we take Congress at its word that it meant to impose a meaningful restriction on the President's removal authority."[105] These words may or may not mean that the President entirely lacks policymaking control over independent agencies. But they certainly mean that the statutory provision that grants independence is a "meaningful restriction"— which means, in the Court's view, that the constitutional issue could not be avoided.

In an important sense, however, the Court did revisit *Humphrey's Executor*, if only by interpretation. The Court took that decision in accordance with its historical context rather than with modern-day understandings of the authorities of the FTC (including rulemaking). In 1935, it would have been plausible to say that the agency did very little that would qualify as narrowly "executive," and insofar as it engaged in quasi-adjudicative and quasi-legislative actions, its powers were sharply limited (and quasi!). As the *Seila Law* Court had it, all that was central to the Court's ruling.[106] On this count, *Seila Law* is exceedingly important; even in the modern era, the Court had never interrogated or narrowed *Humphrey's Executor* in this way.

The Court emphasized that the FTC had several features: it consisted of five members; it had bipartisan membership; and its members had staggered, seven-year terms.[107] And the Court did not stop there. It added that the agency's functions were quasi-judicial and quasi-legislative and in distinctive ways.[108] They were quasi-judicial insofar as the FTC acted as an adjudicator.[109] They were quasi-legislative insofar as the FTC undertook investigations and compiled reports for Congress.[110] Hence the *Humphrey's Executor* exception was strictly limited to "multimember expert agencies that do not wield substantial executive power."[111] If taken at face value, this reading

---

[105] *Id.* at 2207.

[106] *See id.* at 2198.

[107] *See id.* at 2198–99

[108] *See id.*

[109] *See id.*

[110] *See id.*

[111] *Id.* at 2199–2200. The Court added this qualification in a footnote:

> The Court's conclusion that the FTC did not exercise executive power has not withstood the test of time. As we observed in *Morrison* v. *Olson*, 487 U. S. 654

of *Humphrey's Executor*, while historically accurate, is astonishing, because the major multimember independent agencies assuredly do wield "substantial executive power," however defined, and because the passage seems to raise the possibility that their independence is unconstitutional to that extent. Pointedly, the Court declined to embrace the view that *Humphrey's Executor* allows Congress to make agencies independent because and when they engage in rulemaking.[112]

The second exception, stemming above all from *Morrison*, merely said that Congress can protect an inferior officer "lacking policymaking or significant administrative authority" with a for-cause provision.[113] So understood, that exception seems quite narrow. (It is also puzzling; the power to initiate criminal prosecutions might well be taken to qualify as "significant administrative authority." But we bracket that point.)

By contrast, the Director of the CFPB "is hardly a mere legislative or judicial aid."[114] On the contrary, the Director "possesses the authority to promulgate binding rules fleshing out 19 federal statutes, including a broad prohibition on unfair and deceptive practices in a major segment of the U.S. economy."[115] Nor does the Director merely submit "recommended dispositions to an Article III court."[116] It is worth emphasizing this point; unlike the FTC, "the Director may unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications."[117] In addition, the Director's "enforcement authority includes the power to seek daunting monetary penalties against private parties on behalf of the United States in federal

---

(1988), "[I]t is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." *Id.*, at 690, n. 28. See also *Arlington* v. *FCC*, 569 U. S. 290, 305, n. 4 (2013) (even though the activities of administrative agencies "take 'legislative' and 'judicial' forms," "they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power'" (quoting Art. II, §1, cl. 1)).

Id. at 2198 n.2. The relationship between this paragraph and the Court's main analysis is puzzling. One way to square the two is to say that even if the FTC's adjudicative-type functions and legislative-type functions "must be" executive, they are not the kinds of functions that must be subject to plenary presidential control.

[112] *See id.* at 2200.

[113] *Id.* at 2199 (quoting *Morrison*, 487 U.S. at 691).

[114] *Id.* at 2200.

[115] *Id.*

[116] *Id.*

[117] *Id.*

court—a quintessentially executive power not considered in *Humphrey's Executor*."[118]

In refusing to extend its prior rulings to this new situation, the Court did not speak in originalist terms. Instead, it worked by reference to historical practice and to high-level principles. Thus, the Court emphasized that the CFPB's structure "is almost wholly unprecedented."[119] Single-headed independent agencies have been very rare. The most prominent example is the Social Security Administration, whose independence "is comparatively recent and controversial." Further, the Social Security Administration "lacks the authority to bring enforcement actions against private parties" and is largely an adjudicative agency.[120]

Even more fundamentally, the Court held that the CFPB's structure was incompatible with the constitutional design, understood in the large, which "scrupulously avoids concentrating power in the hands of any single individual," except in the case of the President, "the most democratic and politically accountable official in Government . . . elected by the entire nation."[121] By contrast, the "single-Director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one."[122] The result is to threaten, at once, the core structural principles of self-government and liberty.

Importantly, and in a bow to Cell (4), the Court showed that it was not oblivious to the rise of "'a vast and varied federal bureaucracy.'"[123] In light of that size and variety, the Court said that it had a sharpened "duty to ensure that the Executive Branch is overseen by a President accountable to the people."[124] This is not quite a point about translation, but it is not so far from it, and it can be readily seen as Dworkinian or a form of constitutional common law. The basic idea is that the structural argument for presidential control is strengthened, rather than weakened, by the existence of the modern administrative state.

---

[118] *Id.* (footnote omitted).

[119] *Id.* at 2201.

[120] *Id.* at 2202.

[121] *Id.* at 2203.

[122] *Id.*

[123] *Id.* at 2207 (quoting *Free Enterprise Fund*, 561 U.S. at 499).

[124] *Id.* at 2207.

V. New Doubts, In Brief

It is clear that the CFPB is permitted to continue in operation, now as an executive agency.[125] A noteworthy implication is that it can now be made subject to the review process that is overseen by the Office of Information and Regulatory Affairs, which includes a complex process of interagency review and various analytical requirements, including cost-benefit analysis.[126] For better or for worse, it is permissible to require CFPB regulations to be submitted to OIRA for application of the standard process. It is therefore subject to the control of the Executive Office of the President and ultimately to the judgments of the President personally.

But some fundamental questions are now suddenly open. We have seen that the Court adopted an extremely narrow reading of *Humphrey's Executor*, emphasizing that the FTC (1) did not issue binding rules; (2) merely submitted recommended dispositions to federal courts; and (3) did not wield substantial executive power, which would be wielded if, for example, the FTC were authorized to seek monetary penalties against private parties.[127] Many contemporary independent agencies, including the FTC, exercise much broader powers than that. If the narrow reading of *Humphrey's Executor* is correct, then many of those agencies are in serious constitutional trouble. And indeed, the Court went out of its way to invite that conclusion. In an important footnote, it said that "we take the decision on its own terms, not through a gloss added by a later Court in dicta."[128] It added that "what matters is the set of powers the Court considered as the basis for its decision, not any latent powers that the agency may have had not alluded to by the Court."[129] The Court need not have said all of this, or any of it. It could easily have relied solely on the single fact that the CFPB was a single-headed agency. It could have been silent on the precise authorities of the FTC as the Court understood them in 1935 and thus left the independent status of the multimember commissions unquestioned.

---

[125] This much follows from the Court's analysis of the severability question. That analysis warrants a detailed discussion, but it would take us beyond our topic here.

[126] *See* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 Harv. L. Rev. 1838 (2013).

[127] *See Seila Law*, 140 S. Ct. at 2198.

[128] *Id.* at 2200 n.4.

[129] *Id.*

In this light, it would be possible to mount a serious challenge to many of the current independent agencies, including the Securities and Exchange Commission, the Federal Communications Commission, the Federal Reserve Board, the Nuclear Regulatory Commission, and even the Federal Trade Commission in its current form. The work of each of these agencies—and all other independent agencies—must now be scrutinized to see if they (1) issue binding rules, (2) issue final decisions, in adjudications, ordering relief, (3) seek monetary penalties against private parties, and (4) display other features of concern to the *Seila Law* majority, such as independent budgetary authority. The relationship among these factors is unclear. Perhaps the presence of all four is enough to require an agency to be subject to presidential removal at will; perhaps the presence of even one is enough. It is easily imaginable, at least in principle, that hardly any independent agencies would survive.

We suspect that a majority of the Court would not be prepared to be so aggressive. If it were, the Court would wreak havoc on institutions that have been central to the U.S. government for many decades. But for the first time in decades, the constitutional status of the independent agencies has become insecure.

VI. The Living Constitution

Seila Law claims to be an originalist and textualist opinion—and in some respects, it is. But the Court did not spend a great deal of time on the original public meaning of Article II; it did not engage the competing historical accounts. As is not infrequently the case with originalism, at critical points, the analysis turns to contestable interpretations of abstract principles to decide what the Constitution means. As far as express text is concerned, we have explored the view that the Vesting Clause and the Take Care Clause grant the President unrestricted removal power. But the Constitution says essentially nothing specific about removal as such, and it offers only a few sideways glances at what would today be considered administrative officers. But even if one is inclined to read the Vesting Clause and the Take Care Clause to create a strongly unitary executive, to extrapolate from Article II very specific and reticulated rules—for example, that multimember independent agencies are constitutionally tolerable while single-member independent agencies are intolerable, or that two levels

of for-cause removal are intolerable even if one level is tolerable—requires additional premises. The Court finds such premises in "structural inferences" that yield high-level abstract "principles" such as "liberty," "accountability" and "separation of powers." As Justice Kagan wrote in dissent, acutely on this methodological point[130]:

> It is bad enough to "extrapolat[e]" from the "general constitutional language" of Article II's Vesting Clause an unrestricted removal power constraining Congress's ability to legislate under the Necessary and Proper Clause. It is still worse to extrapolate from the Constitution's general structure (division of powers) and implicit values (liberty) a limit on Congress's express power to create administrative bodies. And more: to extrapolate from such sources a distinction as prosaic as that between the SEC and the CFPB—*i.e.*, between a multi-headed and single-headed agency. That is, to adapt a phrase (or two) from our precedent, "more than" the emanations of "the text will bear." By using abstract separation-of-powers arguments for such purposes, the Court "appropriate[s]" the "power delegated to Congress by the Necessary and Proper Clause" to compose the government.

Our point here is not that Justice Kagan is necessarily right or the majority necessarily wrong. It is that the majority is engaged in a process of reasoning from abstract principles of constitutional-political morality—what the Court calls "first principles"[131]—and adopting contested conceptions of those principles in ways that can reasonably be called Dworkinian. If this is originalism, one wonders what is not originalism.[132] It is not surprising, therefore, that the dissent discusses at some length Dean John Manning's argument[133] that the Constitution contains no general, abstract principles such as "the separation of powers." Nor is it surprising that the Court squarely rejected that argument, stating that although "there [is not a] a 'separation of powers clause' or a 'federalism clause' [in the express constitutional text, t]hese foundational doctrines are . . . evident from the Constitution's vesting of certain powers in certain bodies."[134] For the Court,

---

[130] *Seila Law*, 140 S. Ct. at 2243–44 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (internal citations omitted).

[131] *Seila Law*, 140 S. Ct. at 2206.

[132] We are bracketing, and not necessarily rejecting, the proposition that the strongly unitary understanding, in its purest form, can be justified on originalist grounds; see above for competing views on that proposition. Our claim here is the Court's analysis, and the distinctions that the Court deems critical, cannot be defended simply by reference to originalism.

[133] *See* John Manning, *Separation of Powers as Ordinary Interpretation*, 124 Harv. L. Rev. 1939 (2011).

[134] *Seila Law*, 140 S. Ct. at 2205.

the text's distribution of certain powers to certain bodies are in fact evidence of true, underlying, subsistent constitutional principles that are themselves part of "the law." If this is not a form of structural analysis, and Dworkinian, it isn't clear what would be.

Consider the Court's most critical legal move, seemingly confining *Humphrey's Executor* to its facts and then declaring that new "exceptions" to presidential removal will not be allowed. This turns out to be a normatively complicated exercise, one resolvable only by arguments about the best interpretation of abstract principles of political morality, such as "liberty" and "accountability." The problem is that which facts are legally relevant cannot be read off from *Humphrey's Executor*, let alone from the vesting of the "executive power" or the Decision of 1789, in any simple way. *Humphrey's Executor* happened to involve an agency whose name begins with an "F"; is that legally relevant? Why not? Or to take a somewhat less random fact: *Humphrey's Executor* happened to involve an agency that was concerned with monopoly and fair competition. Is that relevant? Certainly the fact that the agency's name began with F, and that the FTC dealt with monopoly and fair competition, formed no part of the Court's rationale in 1935. Likewise, *Humphrey's Executor* also happened to involve an agency headed by multiple members, but the difference between multiple heads and a single head was also not a part of the Court's rationale in 1935.[135] If that feature is to make a difference, unlike the myriad of other features one might discern in "the facts," there will have to be a normative argument to that effect.

The Court certainly does offer such arguments; it is not true that the Court simply declares, by fiat, that *Humphrey's Executor* is different. It suggests that in a multimember agency, the members check each other in some way, and that this produces a kind of mutual accountability, an additional safeguard for constitutional liberty[136]:

> The CFPB's single-Director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one. . . . [T]he Director may *unilaterally*,

[135] It is true that the Court referred on several occasions to the fact that the FTC was a multimember commission—by way of description, not legal argument. *Humphrey's Executor* did in fact make the point about the seven-year terms of the several commissioners as "necessary to the effective and fair administration of the law" in the sentence just before discussing the insulation from complete change in the leadership. See Humphrey's Ex'r v. United States, 295 U.S. 602, 624 (1935). But that was no part of its holding or rationale, and it would be a stretch even to consider the references to be dicta.

[136] *Seila Law*, 140 S. Ct. at 2203–04.

> without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties. With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans. . . . [T]he agency's single-Director structure means the President will not have the opportunity to appoint any other leaders— such as a chair or fellow members of a Commission or Board—who can serve as a check on the Director's authority and help bring the agency in line with the President's preferred policies.

The point of these arguments is not that, somewhere in the text or original understanding of Article II, a distinction is drawn between single-member-headed agencies and multiple-member-headed agencies. It is that the Court is attributing to the "structure" of the whole Constitution broad principles and then arguing for a particular conception of those principles. Justice Kagan characterized the Court's conception of "liberty," for example, as one of "anti-power-concentration."[137] The Court's particular conception is not some straightforward exercise in originalism; it is closer to political philosophy. It is contestable and premised on a thick, normative view of constitutional liberty.

On the merits, it is hardly obvious, of course, that the Court in fact has the right conceptions of these contested principles. It is hardly obvious that the Court was right to say that a single-headed independent agency is worse, from the constitutional point of view, than an independent agency headed by a multimember commission. Justice Kagan offered a forceful response, based on different conceptions of the same principles[138]:

> If a removal provision violates the separation of powers, it is because the measure so deprives the President of control over an official as to impede his own constitutional functions. But with or without a for-cause removal provision, the President has at least as much control over an individual as over a commission—and possibly more. That means the constitutional concern is, if anything, ameliorated when the agency has a single head.

Ultimately, however, the merits are not the point. The key thing is that the Court's "originalism" ends up deeply engaged in arguments about competing conceptions of abstract principles of political morality.

---

[137] *Id.* at 2243 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

[138] *Id.* at 2255.

In this light, *Seila Law* is best understood not as a vindication of the original understanding, and hence as a Cell (1) case, but in terms of Cell (2), as a response to contemporary fears and concerns, expressed in terms of political morality. Many observers, and several of the justices themselves, have expressed grave concerns about the rise of a powerful administrative apparatus that often exercises broad discretion.[139] Those concerns have been manifested in multiple domains, including heightened interest in the nondelegation doctrine[140] and intense skepticism about judicial deference to agency interpretations of law.[141] Serious concerns about the administrative state seem to define the modern era.[142]

On one view, the rise of the modern administrative state is a kind of constitutional barnacle, raising real threats to core constitutional values. That view could be founded in Cell (2), not Cell (4). The idea of a strongly unitary executive might seem a necessary corrective.[143] If administrative agencies are going to have a great deal of discretion and wield awesome power, a minimal requirement might be that they must act under the constraining arm of an elected President. Perhaps that is an essential way of maintaining continuity with core constitutional commitments under unanticipated circumstances. On this view, *Seila Law* can be seen as the culmination (thus far) of a sustained and emphatically modern effort to insist on the strongly unitary executive as a response to the problem of administrative discretion.[144] Indeed, it can be taken as a close sibling to *District of Columbia v. Heller*,[145] also written in originalist terms but plausibly taken as a response to contemporary concerns.

Here is another way to put the point. We have noted that in his work on legal reasoning, Dworkin urged that judges have a duty to fit the existing legal materials and also to justify them, in the sense of putting them in the best constructive light.[146] *Seila Law* can easily be

---

[139] For a summary, *see* Cass R. Sunstein & Adrian Vermeule, Law and Leviathan (2020).

[140] *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting).

[141] *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2425–48 (2019) (Gorsuch, J., dissenting).

[142] *See generally* Philip Hamburger, Is Administrative Law Unlawful? (2014).

[143] *See* Mistretta v. United States, 488 U.S. 361, 422–27 (1989) (Scalia, J., dissenting).

[144] *See* Miller, *supra* note 37.

[145] 554 U.S. 570 (2008).

[146] *See* Dworkin, *supra* note 12.

seen as a case for which the existing legal materials were indeterminate. As we have seen, plausible opinions could take multiple forms. In choosing the approach it did, the majority claimed to speak in originalist terms, but it quickly turned to judgments, grounded in abstract principles, about what would make the constitutional order the best that it could be. On that view, the Court's emphasis on accountability and liberty, and its sharpened duty under contemporary circumstances, were not throwaway lines. They were essential.

VII. Conclusion

For many decades, there has been a sharp dispute between those who believe in a strongly unitary presidency, in accordance with the idea that the President must have unrestricted removal power over high-level officials entrusted with implementation of federal law, and those who believe in a weakly unitary presidency, in accordance with the view that Congress may, under the Necessary and Proper Clause, restrict the President's removal power so long as the restriction does not prevent the President from carrying out the President's constitutionally specified functions.

Both positions can claim some support from the original understanding of relevant clauses; both can also claim to keep faith with constitutional commitments in light of dramatically changed circumstances, above all the rise of the modern administrative state. In *Seila Law*, the Court wholeheartedly accepted the strongly unitary position, in an opinion that appeared to accept *Humphrey's Executor* but that read the case so narrowly that it left a great deal of room for constitutional challenges to many independent regulatory commissions in their present form. The Court's analysis purports to be rooted in the original understanding of the constitutional text, and its conclusion can certainly claim support from that understanding. But that conclusion might also be understood and defended as a response to contemporary fears and concerns about a powerful, discretion-wielding administrative state—and as reflective of a judgment that a necessary response to those concerns is a firm insistence on firm presidential control.

Back to Good: Restoring the National Emergencies Act

SAMUEL WEITZMAN*

As amended after the Supreme Court's decision in Immigration & Nationality Services v. Chadha*, the National Emergencies Act (NEA) vests the President with crisis powers that cannot be terminated or taken away even by majorities in both Houses of Congress. President Donald Trump's 2019 declaration of a "national emergency" at the southern border of the United States as a pretext to secure funding for his border wall with Mexico threw into sharp relief the perils and shortcomings of this imbalanced arrangement. This Note argues first that the President lacks any inherent emergency powers; any such powers that might exist belong to Congress and are within Congress' discretion to delegate to the President. In turn, this Note contends that the post-*Chadha *change to the emergency termination procedure undermined the statute's basic efficacy in service of formalist constitutional theory. Under a revisionist, functionalist reading of* Chadha*, the original emergency termination procedure was constitutionally permissible as a political legislative veto. Alternatively, the recently proposed ARTICLE ONE Act would help to return the NEA to its original role of constraining executive use of emergency authorities.*

I. INTRODUCTION[1]

On February 15, 2019, President Donald Trump issued Proclamation 9844, declaring a national emergency in response to a "border security and humanitarian crisis that threatens core national

* Managing Editor, Colum. J.L. & Soc. Probs., 2020–2021. J.D. Candidate 2021, Columbia Law School. The author thanks Professor Peter Strauss for his invaluable insight and guidance.

1. Regarding the title of this Note, cf. Faiz Siddiqui, *Is Metro Back2Good? A Year Later, The Answer Seems to Be: "Stand By.,"* WASH. POST (Dec. 16, 2017), https://www.washingtonpost.com/local/trafficandcommuting/is-metro-back2good-a-year-later-the-answer-seems-to-be-stand-by/2017/12/16/fca6565c-dec8-11e7-8679-a9728984779c_story.html [https://perma.cc/T2VP-LJ7A] ("The goal was modest: 'First, we will get back to good.[']").

security interests."[2] The written announcement made no reference to the precipitating political events, including the longest government shutdown in United States history and Congress' repeated refusals to fund the President's long-promised wall along the border with Mexico.[3] Speaking to the press in the Rose Garden, however, President Trump was more candid: "I could do the wall over a longer period of time. I didn't need to do this. But I'd rather do it much faster."[4] The emergency declaration proved highly controversial and provoked a surge of litigation challenging its legality on various grounds.[5]

---

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

3. *Compare id.* at 4949–50 (making no mention of the government shutdown or Congress' deliberate non-acquiescence), *with* Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html [https://perma.cc/88GG-957E] (providing contextual information), *and* Damian Paletta et al., *Trump Declares National Emergency on Southern Border in Bid to Build Wall*, WASH. POST (Feb. 15, 2019, 8:28 PM), https://www.washingtonpost.com/politics/trumps-border-emergency-the-president-plans-a-10-am-announcement-in-the-rose-garden/2019/02/15/f0310e62-3110-11e9-86ab-5d02109aeb01_story.html [https://perma.cc/JCY8-QBRY] (same).

4. President Donald Trump, Remarks on the National Security and Humanitarian Crisis on Our Southern Border (Feb. 15, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-national-security-humanitarian-crisis-southern-border.html [https://perma.cc/7Q86-C8N8].

5. Several national polls conducted in the days and weeks after President Trump's emergency declaration found that the action was unpopular with a majority of Americans. *See, e.g.*, Ariel Edwards-Levy, *Most Americans Disapprove of Trump's National Emergency Declaration: Poll*, HUFFPOST (Feb. 18, 2019, 5:47 PM), https://www.huffpost.com/entry/national-emergency-border-wall-poll_n_5c6af9fde4b01757c36ea872 [https://perma.cc/P9AB-2GYU] (37 percent approve; 55 percent disapprove); Domenico Montanaro, *Poll: 6-in-10 Disapprove of Trump's Declaration of a National Emergency*, NPR (Feb. 19, 2019, 5:14 AM), https://www.npr.org/2019/02/19/695720851/poll-6-in-10-disapprove-of-trumps-declaration-of-a-national-emergency [https://perma.cc/X5EL-VS8K] (36 percent approve; 61 percent disapprove); Steven Shepard, *Poll: Majority Still Opposes Trump Emergency Declaration*, POLITICO (Mar. 13, 2019, 5:11 AM), https://www.politico.com/story/2019/03/13/trump-national-emergency-poll-1218483 [https://perma.cc/T3EP-TXPP] (38 percent support; 52 percent oppose); Gary Langer, *64% Oppose Trump's Move to Build a Wall; On Asylum, Just 30% Support Stricter Rules*, ABC NEWS (Apr. 30, 2019, 7:00 AM), https://abcnews.go.com/Politics/64-oppose-trumps-move-build-wall-asylum-30/story?id=62702683 [https://perma.cc/7XX2-QJMK] (34 percent support; 64 percent oppose). For a partial list of lawsuits challenging the declaration's legality, see Priscilla Alvarez & Joyce Tseng, *Tracking the Legal Challenges to Trump's Emergency Declaration*, CNN (June 5, 2019, 11:05 AM), https://www.cnn.com/2019/02/20/politics/national-emergency-declaration-lawsuit-tracker/index.html [https://perma.cc/RV54-67XY]. On October 19, 2020, the Supreme Court granted the Trump administration's petition for a writ of certiorari to review a decision by the Ninth Circuit in one of these cases. *See* Sierra Club v. Trump, 963 F.3d 874 (9th Cir. 2020), *cert. granted sub nom.* Trump v. Sierra Club, 141 S. Ct. 618 (2020). Following President Joe Biden's entry into office, arguments in the case were canceled. *See* Pete Williams, *Supreme Court Cancels Arguments on Trump's Border Wall, "Remain in Mexico" Policy*, NBC NEWS (Feb. 3, 2021, 10:40 AM), https://www.nbcnews.com/politics/supreme-court/

Proclamation 9844's legal force derived from three statutes.[6] One was the National Emergencies Act (NEA), which "authorize[s] [the President] to declare [a] national emergency."[7] The other two statutes were what this Note calls "secondary emergency statutes": provisions "authorizing the exercise, during the period of a national emergency, of special or extraordinary power[s]."[8] One allowed the Secretary of Defense to call up members of the Ready Reserve into active service for up to two years.[9] The other enabled the Secretary of Defense to "undertake military construction projects . . . not otherwise authorized by law that are necessary to support such use of the armed forces" using funds that Congress had appropriated for military construction.[10]

Twice, majorities of both Houses of Congress voted to terminate the emergency.[11] Yet President Trump vetoed both terminations, and opponents of the border wall emergency declaration failed to muster two-thirds majorities to override those vetoes.[12] In 2019, President Trump diverted $3.6 billion from 127 other planned and appropriated military construction programs to begin wall construction.[13] In 2020, he siphoned twice that amount — another $7.2 billion — from the Pentagon budget, of which $3.8 billion originally was appropriated "to build fighter jets, ships, vehicles[,] and

---

supreme-court-cancels-arguments-trump-s-border-wall-remain-mexico-n1256593 [https://perma.cc/A3GZ-AMDG].

6. *See* Proclamation No. 9844, 84 Fed. Reg. at 4949.

7. National Emergencies Act, Pub. L. No. 94-412, § 201(a), 90 Stat. 1255, 1255 (1976) (codified as amended at 50 U.S.C. § 1621(a)).

8. *Id.*

9. 10 U.S.C. § 12302(a).

10. 10 U.S.C. § 2808(a).

11. *See* Sarah Binder, *The Senate Voted to Block Trump's National Emergency Declaration. Now What?*, WASH. POST (Mar. 15, 2019, 6:00 AM), https://www.washingtonpost.com/politics/2019/03/15/senate-voted-block-trumps-national-emergency-declaration-now-what/ [https://perma.cc/HR5W-ZNEN]; Emily Cochrane, *Senate Again Rejects Trump's Border Emergency, but Falls Short of a Veto-Proof Majority*, N.Y. TIMES (Sept. 25, 2019), https://www.nytimes.com/2019/09/25/us/politics/senate-vote-trump-national-emergency.html [https://perma.cc/KZE4-H4CR]. The respective joint resolutions were H.R.J. Res. 46, 116th Cong. (2019) and S.J. Res. 54, 116th Cong. (2019).

12. *See* Melanie Zanona, *House Fails to Override Trump Veto on Border Emergency*, POLITICO (Mar. 26, 2019, 2:56 PM), https://www.politico.com/story/2019/03/26/house-veto-override-border-emergency-1235896 [https://perma.cc/M3SK-3NN5]; Emily Cochrane, *Senate Fails to Override Trump's Veto, Keeping Border Emergency in Place*, N.Y. TIMES (Oct. 17, 2019), https://www.nytimes.com/2019/10/17/us/politics/senate-veto-override-border.html [https://perma.cc/2DUD-ECE3].

13. *See* Helene Cooper & Emily Cochrane, *Pentagon to Divert Money From 127 Projects to Pay for Trump's Border Wall*, N.Y. TIMES (Sept. 3, 2019), https://www.nytimes.com/2019/09/03/us/politics/pentagon-border-wall.html [https://perma.cc/YH5F-8YNR].

National Guard equipment."[14] At $20 million per mile, President Trump's border wall is estimated to be "the most expensive wall of its kind anywhere in the world."[15] Although President Joe Biden terminated his predecessor's emergency declaration on his first day in office (a move that is estimated to save $2.6 billion),[16] questions have arisen regarding the new administration's ability to cancel existing contracts,[17] and long-term maintenance costs will continue to draw resources from the federal fisc.[18] Various ecological harms will persist as well,[19] unless quick action is taken to

14. *See* Nick Miroff, *Trump Planning to Divert Additional $7.2 Billion in Pentagon Funds for Border Wall*, WASH. POST (Jan. 13, 2020, 7:35 PM), https://www.washingtonpost.com/immigration/trump-planning-to-divert-additional-72-billion-in-pentagon-funds-for-border-wall/2020/01/13/59080a3a-363d-11ea-bb7b-265f4554af6d_story.html [https://perma.cc/9BTK-9ELB]; Connor O'Brien & Caitlin Emma, *Pentagon to Shift $3.8B for Fighter Planes, Ships Toward Border Wall*, POLITICO (Feb. 13, 2020, 12:46 PM), https://www.politico.com/news/2020/02/13/pentagon-to-shift-money-for-fighter-planes-ships-toward-border-wall-114891 [https://perma.cc/99QE-CLEC].

15. John Burnett, *$11 Billion and Counting: Trump's Border Wall Would Be the World's Most Costly*, NPR (Jan. 19, 2020, 7:25 AM), https://www.npr.org/2020/01/19/797319968/-11-billion-and-counting-trumps-border-wall-would-be-the-world-s-most-costly [https://perma.cc/7KBW-KN6J]; *see also* Perla Trevizo & Jeremy Schwartz, *Records Show Trump's Border Wall is Costing Taxpayers Billions More Than Initial Contracts*, PROPUBLICA (Oct. 27, 2020, 12:00 PM), https://www.propublica.org/article/records-show-trumps-border-wall-is-costing-taxpayers-billions-more-than-initial-contracts [https://perma.cc/76CS-58PQ] (detailing cost overruns); Ryan Summers, *"Insecurity": How the Trump Administration is Placing Border Wall Speed Before the Law*, PROJECT ON GOV'T OVERSIGHT (June 5, 2020), https://www.pogo.org/analysis/2020/06/insecurity-how-the-trump-administration-is-placing-border-wall-speed-before-the-law/ [https://perma.cc/WTK3-VPGM] (discussing concerns about procurement process).

16. *See* Proclamation No. 10,142, 86 Fed. Reg. 7225 (Jan. 20, 2021); Josh Dawsey & Nick Miroff, *Biden Order to Halt Border Wall Project Would Save U.S. $2.6 Billion, Pentagon Estimates Show*, WASH. POST (Dec. 16, 2020, 6:07 PM), https://www.washingtonpost.com/immigration/stopping-border-wall-save-billions/2020/12/16/fa096958-3fd1-11eb-a402-fba110db3b42_story.html [https://perma.cc/8U26-ANEE].

17. *See* Priscilla Alvarez, *Trump Administration Locks Down Border Wall Contracts, Complicating Biden's Pledge to Stop Construction*, CNN (Jan. 5, 2021, 6:55 PM), https://www.cnn.com/2021/01/05/politics/border-wall-trump/index.html [https://perma.cc/W9BM-Q7VM]; Perla Trevizo & Jeremy Schwartz, *The Trump Administration Keeps Awarding Border Wall Contracts But Doesn't Own the Land to Build On*, PROPUBLICA (Dec. 23, 2020, 5:00 AM), https://www.propublica.org/article/texas-border-wall-contracts-land-trump-administration [https://perma.cc/PZG8-VPFN].

18. *See* Nick Miroff, *Long-Term Maintenance for Trump's Border Wall Could Cost Billions, But Government Isn't Saying*, WASH. POST (Feb. 5, 2020, 11:34 AM), https://www.washingtonpost.com/national/long-term-maintenance-for-trumps-border-wall-could-cost-billions-but-government-isnt-saying/2020/02/05/8c9f3cfc-2e49-11ea-bcd4-24597950008f_story.html [https://perma.cc/3H6W-E897] (noting multiple sources of long-run upkeep costs).

19. *See, e.g.*, Eliza Barclay & Sarah Frostenson, *The Ecological Disaster That is Trump's Border Wall: A Visual Guide*, VOX (Feb. 5, 2019, 11:22 AM), https://www.vox.com/energy-and-environment/2017/4/10/14471304/trump-border-wall-animals [https://perma.cc/Y3BE-9AH7]; William deBuys, *Trump's Border Wall is an Environmental Disaster*, NATION (Jan. 17, 2020), https://www.thenation.com/article/environment/trump-

remove those portions of the wall that are especially damaging to the environment.[20]

This aberrant series of events is the product of an amendment to the NEA enacted nine years after the law's initial passage that changed the congressional procedure required to terminate an emergency declaration by the President from a concurrent resolution — which takes only simple majorities in the House and the Senate — to a joint resolution — which requires either presidential acquiescence or veto-proof majorities in both chambers.[21] At the time of the amendment, many assumed that this switch to joint resolutions was necessary to ensure the NEA's constitutionality in the wake of *Immigration & Nationality Services v. Chadha*.[22] This Note argues that this reading of *Chadha* — while likely accurate as a prediction of how the Court (given its membership, both then and now) would rule on the NEA's constitutionality — is neither the only nor the best reading of the opinion.[23] Under a narrower, revisionist reading of *Chadha*, the original NEA's emergency termination procedure was constitutionally permissible because it was a political (rather than regulatory) legislative veto.

---

border-wall-climate/ [https://web.archive.org/web/20210217172707/https://www.thenation.com/article/environment/trump-border-wall-climate/].

20. *See, e.g.*, Erik Ortiz, *Trump's Border Wall Endangered Ecosystems and Sacred Sites. Could It Come Down Under Biden?*, NBC NEWS (Nov. 11, 2020, 6:00 AM), https://www.nbcnews.com/science/environment/trump-s-border-wall-endangered-ecosystems-sacred-sites-could-it-n1247248 [https://perma.cc/452Q-NVWT]; April Reese, *Some Ecological Damage from Trump's Rushed Border Wall Could Be Repaired*, SCI. AM. (Jan. 25, 2021), https://www.scientificamerican.com/article/some-ecological-damage-from-trumps-rushed-border-wall-could-be-repaired1/ [https://perma.cc/23Z8-9AM7].

21. Regarding the distinction between concurrent resolutions and joint resolutions, see *Types of Legislation*, U.S. SENATE, https://www.senate.gov/legislative/common/briefing/leg_laws_acts.htm [perma.cc/MLB5-E7VT].

22. 462 U.S. 919 (1983). For evidence of contemporary belief that the NEA's legislative veto likely would be held unconstitutional and inseverable post-*Chadha*, see, e.g., *Legislative Veto After* Chadha: *The Impact of the Supreme Court Decision in the Case of* Immigration and Naturalization Service v. Chadha *Which Found the Legislative Veto Unconstitutional: Hearings Before the H. Comm. on Rules*, 98th Cong. 347 (1983–84) [hereinafter *Legislative Veto After* Chadha] (statement of Rep. Fish) ("Three of the vetoes invalidated by the *Chadha* ruling are contained in laws directly under [the] jurisdiction [of the House Judiciary Committee]. These are the National Emergencies Act — Public Law 94-412 — and two distinct provisions in the Immigration and Nationality Act. . . ."); Thomas M. Franck & Clifford A. Bob, *The Return of Humpty-Dumpty: Foreign Relations Law After the Chadha Case*, 79 AM. J. INT'L L. 912, 929 (1985); Michla Pomerance, *United States Foreign Relations Law After* Chadha, 15 CAL. W. INT'L L.J. 201, 287 (1985); William Alan Shirley, Note, *Resolving Challenges to Statutes Containing Unconstitutional Legislative Veto Provisions*, 85 COLUM. L. REV. 1808, 1830 n.2 (1985).

23. *But see* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

Part II explains that the President has no inherent ability to declare the existence of a national emergency or take emergency actions unauthorized by existing law. Instead, those powers — to the extent that they exist — belong to Congress alone. Accordingly, only by virtue of a statute like the NEA can the President exercise emergency powers. Part III describes the NEA's origins, procedures, and subsequent history. Part IV contends that, contrary to the traditional (and formalist) reading of *Chadha*, one straightforward way of improving the NEA — restoring the concurrent resolution termination procedure — conforms with the Constitution under a revisionist (and functionalist) reading of *Chadha*'s ramifications for legislative vetoes.[24] Alternatively, adopting a version of the recently proposed ARTICLE ONE Act would help restore to Congress some semblance of control over emergency powers.

II. "NO ONE MAN SHOULD HAVE ALL THAT POWER"[25]

Within the American federal government, inherent emergency powers — if they exist at all — theoretically could be distributed in one of three ways: vested in Congress alone, vested in the President alone, or vested in both.[26] This Part shall demonstrate that

24. For a useful summary of the basic contours of the divide between formalist and functionalist approaches to constitutional analysis, see John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1950–52, 1958–61 (2011). Briefly put, "separation-of-powers formalism evinces [a] commitment to categorical lines, with the relevant lines here being constitutional distinctions among legislative, executive, and judicial power, each of which is viewed as formally vested in one branch of government with intermixing limited to those instances expressly sanctioned in the Constitution. By contrast, a more functionalist analysis views powers as overlapping, emphasizes the overall balance among the branches, and focuses on the benefits of a particular governmental structure and that structure's impact on a branch's ability to perform its core functions." Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 44. By "revisionist" is meant something along the lines of the observation that "any later court can always reexamine a prior case, and under the principle that the court could decide only what was before it, and that the older case must now be read with that in view, can arrive at the conclusion that the dispute before the earlier court was much narrower than that court thought it was, call[ing] therefore for the application of a much narrower rule." KARL N. LLEWELYN, THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY 47 (1930); *see also id.* at 66 (distinguishing between the maximum and minimum values of a precedent).

25. KANYE WEST, *Power*, *on* MY BEAUTIFUL DARK TWISTED FANTASY (Def Jam Recs. & Roc-A-Fella Recs. 2010).

26. *See* Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 157 (2004) ("The Framers understood that there would be occasions requiring resort to extraordinary measures that they themselves could not fully delineate. The crucial issue was in which branch they would vest this critical discretion."). This Note presumes that the power to declare an emergency would not have been given to the judiciary.

only the first possibility — vesting Congress alone with emergency powers, including the power to declare the existence of an emergency — comports with the Constitution.

Why make such a claim? Because it establishes that *without* the NEA, the President would lack the inherent constitutional authority to declare an emergency and/or wield emergency powers. This initial point is crucial for at least two reasons. First, when evaluating the legality of specific presidential uses of power in any instance, it matters greatly whether the President is relying solely on his own authority in the absence of congressional action or instead is acting with "all [the authority] that he possesses in his own right plus all that Congress can delegate."[27] Second, if the President has at least some share of constitutional emergency powers, then one's baseline expectations about what arrangements do or do not violate the separation of powers would have to adjust accordingly. Put another way, a statute that strengthens the President's role in a domain in which we expect at least some executive branch involvement or control (such as foreign affairs) is more palatable than one that invites the President to involve herself in a domain typically considered to belong exclusively to the legislature (such as appropriations). Certain congressional attempts to limit or constrain inherent presidential crisis authorities through legislation might even be regarded as unconstitutional interferences with the President's authority to exercise a power committed to her and her alone.[28]

For purposes of this Note, an emergency power is an authority to take an action, in response to a crisis, which falls outside and/or

---

27. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

28. *Cf.* Transcript of Oral Argument, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), *reprinted in* 48 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 988 (Philip B. Kurland & Gerhard Casper eds., 1975) (statement of Jackson, J.) (remarking that if the President "has the inherent power to seize, Congress cannot take it away from him"). Regarding the broader debate about the defeasibility of presidential powers, compare Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215, 217 (2005) (book review) (arguing that Congress "generally cannot regulate the President's constitutional powers"), with Harold J. Krent, *The Lamentable Notion of Indefeasible Presidential Powers: A Reply to Professor Prakash*, 91 CORNELL L. REV. 1383 (2006) (responding to Professor Prakash), and David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 727 n.108 (2008) (same); *see also* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 32 (1993) ("Whatever the extent of congressional authority to regulate in the few areas in which the President has 'specific' authority, no doubt should exist that the congressional will must prevail when the President possesses only concurrent authority.").

contravenes normal constitutional and statutory procedures. This definition consciously mirrors similar descriptions offered by a number of prominent Western political theorists.[29] These conceptualizations share a focus on an actor's ability, right, and/or duty to act in otherwise impermissible ways in response to a calamity. Often overlooked is that — before a political actor can take an action which has the effect of creating, modifying, and/or suspending laws — some individual or entity has to determine that there *is* an emergency happening. Given the indeterminacy of what constitutes an "emergency" in all but the most extreme cases, the ability to declare an emergency is not a normal factfinding authority; it is primarily a political judgment, not a legal one.

Based on considerations of constitutional text, history, and doctrine,[30] the answer is clear: apart from a limited power to protect federal personnel, property, and instrumentalities,[31] the President has no inherent authority to determine that emergency action is required or take such action without legislative authorization. Any statute that suggests, in one way or another, that the President has any emergency declaration authority can only be understood as a delegation of some or all of that authority from Congress to the President.

---

29. *See, e.g.*, JOHN LOCKE, *The Second Treatise: An Essay Concerning the True Original, Extent, and End of Civil Government*, *in* TWO TREATISES OF GOVERNMENT AND *A LETTER CONCERNING TOLERATION* 100, 172 (Ian Shapiro ed., Yale Univ. Press 2003) (1689) ("This power to act according to discretion for the public good, without the prescription of the law, and sometimes even against it, is that which is called prerogative[.]"); NICCOLÒ MACHIAVELLI, DISCOURSES ON LIVY 71 (Harvey C. Mansfield & Nathan Tarcov trans., Univ. of Chi. Press 1996) (1531) ("[I]n urgent dangers, the Romans turned to creating the dictator — that is, to giving power to one man who could decide without any consultation and execute his decisions without any appeal."); CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5 (George Schwab trans., Univ. of Chi. Press 1986) (1922) ("Sovereign is he who decides on the exception.").

30. These areas of consideration constitute three of the six modalities of constitutional argumentation identified by Professor Philip Bobbitt; the other three are structure, prudence, and ethos. *See generally* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982). This Note is not alone in using the modalities as a guide. "Literally hundreds of law review articles have referenced Bobbitt's taxonomy over the years, and two recent cites confirm its enduring influence." Colin Starger, *Constitutional Law and Rhetoric*, 18 U. PA. J. CONST. L. 1347, 1348 n.1 (2016). Independent discussions of structure, prudence, and ethos have been omitted from this Note for reasons of space (especially since the latter two modalities purportedly lack salience among a majority of current members of the Supreme Court, *see infra* note 248 and accompanying text). Nevertheless, on balance they also point towards the same conclusion: the President lacks inherent emergency powers.

31. *See* Monaghan, *supra* note 28, at 61.

A. TEXT

Textual arguments focus on the meaning of specific words and phrases in particular clauses of the Constitution. They "may consider either the historical or the contemporary meaning of constitutional language."[32] Given the absence of explicit language in the Constitution vesting any political actor or entity with something akin to plenary emergency declaration powers, this modality sheds little affirmative light on which branch may wield the prerogative. However, oft-touted clauses in Article II — under both original-textualist and contemporary-textualist lenses — serve only to undermine claims that the Constitution grants the President any inherent powers during emergencies.

At first blush, textual arguments appear unavailing due to the simple fact that there is no general emergency powers clause.[33] The closest candidate — the Suspension Clause — certainly is *an* emergency power, albeit one confined to the writ of habeas corpus.[34] It is not as though the Framers never contemplated the

---

32. Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389, 1425 (2013). With its focus on contemporary meaning, Professor Bobbitt's definition of textualism, *see* BOBBITT, *supra* note 30, at 25–38, differs from Justice Antonin Scalia's originalist-textualist theory of constitutional interpretation, which has an exclusive interest in "the original meaning of the text," ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 45 (1997). As Professor Greene has explained, however, both approaches are possible methods of textual constitutional argument, and thus this Note shall consider both of them. *See* Greene, *supra*, at 1425.

33. *See* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 29 (2020) ("But our Constitution makes no provision for extraconstitutional powers in time of emergency. The pros and cons of those arguments lie in the field of political theory, not constitutional interpretation."); Monaghan, *supra* note 28, at 33 ("The American Constitution contains no general provision authorizing suspension of the normal governmental processes when an emergency is declared by an appropriate governmental authority.").

34. *See* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); *see also* David Cole, *The Priority of Morality: The Constitution's Blind Spot*, 113 YALE L.J. 1753, 1796 (2004) (describing the Suspension Clause as "the Constitution's only explicit 'emergency' provision"). The Founders understood the writ of habeas corpus as "nothing less than 'essential to freedom.'" AMANDA L. TYLER, HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY 6 (2017) (citation omitted); *see also* Boumediene v. Bush, 553 U.S. 723, 739 (2008) (similar). To the extent that the Suspension Clause provides more general guidance about emergency powers, it indicates that such authorities reside with Congress, not the President. The Framers wrote the Suspension Clause using the passive voice, thereby failing to make it absolutely clear by whom the writ may "be suspended." U.S. CONST. art. I, § 9, cl. 2. However, structural analysis elucidates the matter. The Suspension Clause falls in Article I, Section 9, which covers limitations on Congress' powers. Insofar as the word "unless" creates a limitation on a limitation — allowing for suspension only in certain circumstances — that power can only be Congress' to

possibility of special authorities in times of exigency; as discussed more thoroughly below, the founding generation had quite sophisticated and nuanced views about how governments should respond to crises.[35] The absence of a general emergency powers clause from the constitutional text was not an accident.[36] Concededly, the lack of an explicit textual hook does not preclude the existence of an authority: U.S. constitutional law readily recognizes the existence of implied powers even though they are not rooted in discrete and unambiguous text.[37] Rather, the textual silence cautions against aggressively reading expansive emergency powers into other, more general textual provisions without due reference to other factors.

Nevertheless, at various times in American history, Presidents have pointed to several broadly-phrased clauses in Article II — namely the Executive Vesting Clause, the Oath of Office Clause, the Commander-in-Chief Clause, and the Take Care Clause — as

---

exercise. *See Ex parte* Merryman, 17 F. Cas. 144, 148 (C.C.D. Md. 1861); David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 71 (2006). As Chief Justice John Marshall wrote in an early case, albeit in dicta: "If at any time the public safety should require the suspension" of the writ of habeas corpus, "it is for the legislature to say so." *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 101 (1807); *see* Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 687 n.412 (2009) (classifying this passage as dicta). Likewise, as Justice Joseph Story wrote in his *Commentaries*: "It would seem, as the power is given to [C]ongress to suspend the writ of habeas corpus in cases of rebellion or invasion, that *the right to judge, whether exigency had arisen, must exclusively belong to that body*." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES; WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION 27 (Boston, Hilliard, Gray & Co. 1833) (emphasis added).

35. *See infra* Part II.B.

36. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 649–50 (1952) (Jackson, J., concurring) ("[The Founders] knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis."); *National Emergency: Hearings Before the S. Spec. Comm. on the Termination of the Nat'l Emergency*, 93rd Cong. 75–77 (1973) [hereinafter *Special Committee Hearings*] (statement of Prof. Gerhard Casper) ("[T]he refusal to arrange for institutional changes during emergencies expresses the confidence of the Founding Fathers that the ordinary institutions were so designed as to be capable of coping with extraordinary events."); CLINTON J. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 215 (1948) ("The Constitution looks to the maintenance of the pattern of regular government in even the most stringent of crises."). Nor is it difficult to imagine what such a clause might look like in a democratic constitution. *See, e.g.*, 1958 CONST. arts. 16, 36 (Fr.); INDIA CONST. arts. 352–60; C.E., B.O.E. n. 311, art. 116, Dec. 29, 1978 (Spain); Art. 23, CONSTITUCIÓN NACIONAL (Arg.); 2019 SYNTAGMA [SYN.] [CONSTITUTION] 48 (Greece).

37. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 705–06 (1974) (executive privilege); McGrain v. Daugherty, 273 U.S. 135, 173–75 (1927) (congressional contempt).

sources, either individually or conjointly, of presidential emergency powers.[38] This proclivity spans both political parties: the administrations of (among others) Presidents Abraham Lincoln,[39] Franklin Roosevelt,[40] Harry Truman,[41] and George W. Bush[42] have asserted broad crisis powers under one or more clauses in Article II.[43] Some academics have advanced similar arguments in favor of

38. U.S. CONST. art. II, § 1, cl. 1; *id.* art. II, § 1, cl. 8; *id.* art. II, § 2, cl. 1; *id.* art. II, § 3.

39. President Abraham Lincoln invoked the Take Care and Oath of Office Clauses as the sources of his purported authority to suspend habeas corpus unilaterally. *See* Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* 4 COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430 (Roy P. Basler et al. eds., 1953).

40. During World War II, President Roosevelt advanced aggressive claims of prerogative authority under the Commander-in-Chief and Take Care Clauses. *See, e.g.*, Robert H. Jackson, Training of British Flying Students in the U.S., 40 Op. Att'y Gen. 58, 61–63 (1941); Franklin D. Roosevelt, Message to the Congress Asking for Quick Action to Stabilize the Economy (Sept. 7, 1942), *in* 11 FRANKLIN D. ROOSEVELT, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 356, 364–65 (Samuel I. Rosenman ed., 1950); Francis Biddle, Powers of the President Under the War Labor Disputes Act to Seize Props. Affected by Strikes, 40 Op. Att'y Gen. 312, 319–20 (1944); *see also* ROSSITER, *supra* note 36, at 266–69 (describing how President Roosevelt — in justifying actions he took during the lead-up to, and conduct of, World War II — relied in large part on "his own broad reading of his constitutional powers"); Matthew Waxman & Samuel Weitzman, *Remembering the Montgomery Ward Seizure: FDR and War Production Powers*, LAWFARE (Apr. 25, 2020, 8:33 AM), https://www.lawfareblog.com/remembering-montgomery-ward-seizure-fdr-and-war-production-powers [https://perma.cc/3KNL-48GE] (examining the historical context of the Biddle opinion).

41. *See* Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1849 (2016) (President Truman "defended his [seizure of the steel mills] based on his inherent powers under Article II's Vesting Clause, the Commander-in-Chief Power, and (you guessed it) the Take Care Clause."). Years later, President Truman maintained this view of the presidency. *See* Harry S. Truman, On the Constitution, Lecture at Columbia University (Apr. 28, 1959), *in* TRUMAN SPEAKS 31, 53 (1960) ("Whenever the country is in an emergency and it's necessary to meet the emergency, nobody can meet it but the President of the United States.").

42. In the wake of 9/11, members of the Bush administration located the purported authority to torture detainees — even in contravention of express legislative prohibitions — in the Commander-in-Chief and Take Care Clauses. *See, e.g.*, Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., to William J. Haynes, Jr., Gen. Counsel, U.S. Dep't of Def. (Mar. 14, 2003), at 19, 79–80, https://www.aclu.org/files/pdfs/safefree/yoo_army_torture_memo.pdf [https://perma.cc/A7TK-9HJ8]; *see also* Thomas P. Crocker, *Overcoming Necessity: Torture and the State of Constitutional Culture*, 61 SMU L. REV. 221, 238–39 (2008) (discussing the Torture Memos' references to Article II). The Torture Memos "deliberately ignored adverse precedent, misrepresented legal authority, and were written to support a pre-ordained result, namely to 'eliminate any hurdles posed by the torture law.'" Michael P. Scharf, *The Torture Lawyers*, 20 DUKE J. COMP. & INT'L L. 389, 389 (2010) (citation omitted). They were revoked within two years of their issuance. *See* David Johnston & Scott Shane, *Memo Sheds New Light on Torture Issue*, N.Y. TIMES (Apr. 3, 2008), https://www.nytimes.com/2008/04/03/washington/03intel.html [https://perma.cc/HM44-LZD6].

43. *See also* THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 388–90 (1913) (outlining his stewardship theory of presidential power). "Although [President] Roosevelt did not specifically relate this stewardship theory to the Take Care Clause, it, along with the Vesting and Oath Clauses, would be the most likely sources." Joel K. Goldstein, *The Presidency and the Rule of Law: Some Preliminary Explorations*, 43 ST. LOUIS U. L.J. 791, 811 (1999). For

executive authority to act outside or beyond the law, with a few even claiming that the potent brew of Article II confers a prerogative power akin to that possessed by a sovereign monarch.[44]

However, an original-textualist reading of Article II does not support this description of presidential emergency powers. Beginning with the Executive Vesting Clause: the Founders — as devoted students of Sir William Blackstone — understood the "executive power" as just one of over three dozen royal authorities.[45] For them, the "executive power" consisted of "the narrow but potent authority to carry out projects defined by a prior exercise of the legislative power."[46] This power "extended only to the implementation of substantive legal requirements and authorities that were created somewhere else."[47] Even in the realms of national security and foreign affairs, the wielder of the executive power could not "ignore the law."[48] Likewise, the Founders would not have understood the Take Care or Oath of Office Clauses — which share a focus on "faithful execution" — as granting a prerogative power to the President.[49] To the contrary, the Clauses were linked "by a common historical purpose: to limit the discretion of public

---

President Trump's views, see, e.g., President Donald Trump, Remarks at Coronavirus Task Force Press Briefing (Apr. 14, 2020), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-25/ [https://perma.cc/XXY3-JX2M] ("[W]hen somebody is the President of the United States, the authority is total, and that's the way it's got to be."); President Donald Trump, Remarks at Turning Point USA's Teen Student Action Summit 2019 (July 23, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-turning-point-usas-teen-student-action-summit-2019/ [https://perma.cc/BJG7-92LZ] ("Then I have an Article 2 [sic], where I have the right to do whatever I want as President.").

44. *See, e.g.*, JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 143–81 (2005); Candidus Dougherty, *"Necessity Hath No Law": Executive Power and the Posse Comitatus Act*, 31 CAMPBELL L. REV. 1, 22–26 (2008); Gary Lawson, *Ordinary Powers in Extraordinary Times: Common Sense in Times of Crisis*, 87 B.U. L. REV. 289, 303–08, 311–12 (2007); Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1258–67, 1272–74 (2004); *see also* HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION 69–72 (2015) (collecting sources); Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1171–73 & nn.5–10 (2019) (same); Thomas S. Langston & Michael E. Lind, *John Locke & the Limits of Presidential Prerogative*, 24 POLITY 49, 50 n.2 (1991) (same).

45. *See* Mortenson, *supra* note 44, at 1223–30 (cataloguing royal prerogatives discussed by Blackstone). For Blackstone's influence on the Founders, see Ryan Patrick Alford, *The Rule of Law at the Crossroads: Consequences of Targeted Killings of Civilians*, 2011 UTAH L. REV. 1203, 1221–29.

46. Mortenson, *supra* note 44, at 1173.

47. *Id.* at 1174, 1234–43.

48. *Id.* at 1174, 1177.

49. Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2113 n.3, 2118 (2019).

officials."[50] Notably, the Framers "did not borrow the language of the English coronation oaths (which did not include the word 'faithful' or its synonyms), but instead borrowed from the 'faithfulness' oaths of midlevel or lower offices."[51] The difference is crucial: while English monarchs might have had the power to act *ultra vires* (i.e., "beyond the scope of one's office"), lower level officers never did.[52] The implication, in turn, is that the President — though possessing ample "discretion in cases where Congress does not provide adequate funding or guidance" or otherwise "has not clearly spoken on the matter"[53] — "must diligently and steadily execute Congress'[ ] commands."[54] Finally, "the Commander in Chief power was historically subordinate to legislative instructions on military policy, strategy, and tactics alike."[55] Nor does any sort of domestic authority during peacetime necessarily follow from having the power to command troops on the battlefield.[56] Thus,

50. *Id.* at 2117.

51. *Id.* at 2118, 2159.

52. *Id.* at 2118, 2141–59, 2178, 2181–83.

53. *Id.* at 2186 (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984)). Regarding the difference between permissible discretion in implementation and impermissible lawmaking by the executive, see Monaghan, *supra* note 28, at 39–43.

54. Kent et al., *supra* note 49, at 2192. In turn, "these conclusions tend to undermine imperial and prerogative claims for the presidency, claims that are sometimes, in our estimation, improperly traced to dimensions of the Take Care and Presidential Oath Clauses." *Id.* at 2120.

55. Mortenson, *supra* note 44, at 1178 n.29 (citing Barron & Lederman, *supra* note 28, at 696; Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61, 65–66 (2007)).

56. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) ("Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production."); *id.* at 643–44 (Jackson, J., concurring) ("[T]he Constitution did not contemplate that the title Commander in Chief *of the Army and Navy* will constitute him also Commander in Chief of the country, its industries and its inhabitants. . . . That military powers of the Commander in Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history."); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (plurality opinion) ("We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."). Even a potential carveout for situations of actual armed attack on U.S. soil before Congress can convene, *see* The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 668 (1863), hardly admits of broader presidential crisis authorities, given that recognizing the existence of — and responding to — a foreign military invasion does not entail the range of discretion implicit within general grants of emergency powers (including the power to declare emergencies). Regarding the significance of inference-stacking in the emergency context, see Monaghan, *supra* note 28, at 72 ("[S]ome line between direct and indirect interference with the functions of the national government should be maintained, at least presumptively."). It may also be notable that as early as 1789, President George Washington sought and received congressional authorization for the

excavations of the original public meaning of the major Article II clauses indicate that the Framers did not intend to grant an emergency declaration power to the President.

As for a contemporary-textualist reading, the current definitions of words within the broad Article II clauses do not imply a presidential prerogative power. Definitions from legal and popular dictionaries alike classify the executive power as the authority to carry out and enforce legislative commands — not the authority to invent laws of one's own.[57] In the words of Justice Hugo Black (Professor Philip Bobbitt's archetypal textualist)[58]: "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[59]

Overall, the text provides few affirmative clues as to whether Congress, the President, or some combination of the two possesses emergency powers. The Suspension Clause, read in isolation, does not admit of any broader power to create or suspend laws or rights beyond the privilege of the writ of habeas corpus. And the various clauses of Article II, understood either in their original or contemporary senses, argue against a presidential emergency declaration

---

use of military force in clashes with Native American tribes. *See* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1826 (2019). "Likewise, President [Thomas] Jefferson requested congressional authorization to take offensive measures against Tripolitan pirates even after the schooner *Enterprise* had repelled an attack." Alford, *supra* note 45, at 1218–19. This early historical practice suggests a founding-era understanding that — apart from purely defensive measures against currently transpiring attacks — the Commander-in-Chief Clause does not import an independent substantive authority to act without Congress' approval.

57. *See, e.g.*, *Executive*, BLACK'S LAW DICTIONARY (11th ed. 2019) (n.: "The branch of government responsible for effecting and enforcing laws; the person or persons who constitute this branch."); *Executive Power*, BLACK'S LAW DICTIONARY (11th ed. 2019) (n.: "The power to see that the laws are duly executed and enforced."); *Executive*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003) (adj.: "of or relating to the execution of the laws and the conduct of public and national affairs; belonging to the branch of government that is charged with such powers as diplomatic representation, superintendence of the execution of the laws, and appointment of officials and that usu[ally] has some power over legislation (as through veto)"); *Executive*, NEW OXFORD AM. DICTIONARY (3d ed. 2010) (adj.: "having the power to put plans, actions, or laws into effect").

58. *See* BOBBITT, *supra* note 30, at 26.

59. *Youngstown*, 343 U.S. at 587; *see also* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1878 (2015) ("General agreement exists, however, that the [Take Care] Clause at least embodies the principle that the President must obey constitutional laws and lacks a general prerogative or suspension power."); Monaghan, *supra* note 28, at 55 ("[N]o such implied law-making authority can inhere in the general grants of the executive power contained in the Vesting and Take Care clauses. Otherwise, the fundamental premises of the constitutional order would be overturned.").

power. Any analogy to the prerogatives of absolute monarchs errs by conflating offices with functions.[60]

B. HISTORY

Historical arguments seek to adduce "the intent of the draftsmen of the Constitution and the people who adopted the Constitution" by considering "the controversies, the attitudes, and [the] decisions of the period during which the particular constitutional provision to be construed was proposed and ratified."[61] In drafting and ratifying the Constitution, the Founders drew on a number of sources — including classical history, English law, political philosophy, and their own experiences — which collectively weigh against attributing a founding intent to vest the President with emergency powers.

A starting point for many of the Framers — and thus for this analysis — was classical history, with which the most prominent and influential members of the Constitutional Convention were deeply familiar.[62] During the Roman Republic, the Senate could respond to a crisis by permitting the consuls to select a dictator. For a limited period of time, the dictator could wield almost unlimited power in service of the Republic.[63] There is no doubt that the Framers were aware of the Roman example when drafting the Constitution — Alexander Hamilton even praised it in *Federalist* No. 70 — which makes the absence of any comparable position,

---

60. For the office-function distinction, see Matthew Steilen, *How to Think Constitutionally About Prerogative: A Study of Early American Usage*, 66 BUFF. L. REV. 557, 643–44 (2018); *see also Youngstown*, 343 U.S. at 641 (Jackson, J., concurring) ("The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.").

61. BOBBITT, *supra* note 30, at 7.

62. *See* Jack M. Balkin & Sanford Levinson, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1792 (2010) ("Every republic known to the Framers — many of whom were steeped in ancient history — had eventually broken down and led to government by a strongman such as Julius Caesar."); R. A. Ames & H. C. Montgomery, *The Influence of Rome on the American Constitution*, 30 CLASSICAL J. 19, 20–21 (1934) ("The men most active in framing the [C]onstitution were well trained by virtue of an education that we know was almost entirely classical in subject matter and inspiration. . . . [T]he Convention as a whole and its leaders in particular were thoroughly conversant with ancient civilizations and could surely have drawn upon them for political theory. Their classical backgrounds were definitely revealed and exercised in the Convention."); *see also generally* DAVID J. BEDERMAN, THE CLASSICAL FOUNDATIONS OF THE AMERICAN CONSTITUTION: PREVAILING WISDOM (2008).

63. *See* ROSSITER, *supra* note 36, at 19–26; Balkin & Levinson, *supra* note 62, at 1790.

power, or procedure all the more notable.[64] At the very least, this decision by the Framers *not* to duplicate a notable feature of classical republican government weighs against *any* branch of the federal government having inherent emergency powers, let alone the President.

Many of the Founders were also lawyers in the English tradition.[65] They surely knew that the monarch, at least at some previous point in history, had asserted prerogative powers.[66] They were also loyal students of Sir Edmund Coke,[67] whose Petition of Right "stated [in 1628 that] the king or his commissions had no prerogative to violate the boundaries of the ancient liberties of

---

64. THE FEDERALIST NO. 70, at 354 (Alexander Hamilton) (Ian Shapiro ed., 2009). Before reading too much into Hamilton's comment here, one must remember that: (1) praising Rome for having the office of the dictatorship is different from averring that the United States should have it, too; and (2) the procedure of empowering the Senate (rather than the consuls) to decide whether a dictator should be appointed weighs in favor of Congress (rather than the President) having the power to declare the existence of an emergency.

65. "[M]ost of the important drafters of the Constitution were lawyers or at least literate in law and government." Kent et al., *supra* note 49, at 2117 n.30. By one count, 34 of the 55 delegates to the Constitutional Convention were lawyers or "had at least made a study of the law." Sol Bloom, *Constitutional Questions and Answers*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/constitution-q-and-a [https://perma.cc/5V5L-8PD7] (last reviewed Sept. 25, 2018). These lawyers, of course, practiced English common law. *See* Morris L. Cohen, *The Common Law in the American Legal System: The Challenge of Conceptual Research*, 81 LAW LIBR. J. 13, 20 (1989) ("[T]he English common law, or some parts of it, [was] *the* major influence in the early legal history of this country. Every jurisdiction, except Connecticut, expressly received the common law by charter, subsequent legislation, or constitutional provision.").

66. In 1637, for example, the Court of Exchequer Chamber decided the *Case of Ship-Money*, which stemmed from King Charles I's flouting of the Petition of Right. *See* R v Hampden (The Case of Ship-Money) (1637) 3 St. Tr. 825. "Accounts of the [*Case of Ship-Money*], from the opinions of the judges and contemporary pamphlets down to the assessments of twentieth-century historians, leave little doubt that the [*Case of Ship-Money*] generated a great deal of controversy, and that despite the wide range of possible legal technicalities that one could concentrate on, the central issue was who should decide whether there was an emergency and what should be done about it." IOANNIS D. EVRIGENIS, FEAR OF ENEMIES AND COLLECTIVE ACTION 95–96 (2007). Charles I, "through intimidation, obtained the Justices' approval of his argument that he had the power to raise taxes without parliamentary approval, based on his declaration of a national emergency — of which the Crown was allegedly the sole judge." Alford, *supra* note 45, at 1239–40. Of course, Charles I was not very long for the job: after a protracted dispute with Parliament over the distribution of power, he was tried and executed for treason in January 1649. *See* DAVID STARKEY, CROWN & COUNTRY: THE KINGS & QUEENS OF ENGLAND 330–47 (2010).

67. Coke "had an unparalleled popularity among jurists" during the founding era, and he "figured prominently in [the Founders'] ideas of what a constitution did, and more particularly, in their ideas on the rule of law and its role in curbing the dangers of arbitrary power." Alford, *supra* note 45, at 1236, 1240–41; *see also* Julius Goebel, Jr., *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 563 (1938) ("[I]t is upon the methods and constitutional views of Coke that the colonial lawyers were nurtured."); *The Uses of History*, ECONOMIST, Dec. 20, 2014, at 34, 35 (similar).

English subjects, most particularly, freedom from arbitrary arrest, imprisonment, forced billeting of troops, martial law, [ ] the suspension of habeas corpus, and taxation without consent from parliament."[68] Following the English Civil War, the Restoration, and the Glorious Revolution, the Petition of Right "was accepted by the consensus of the legal profession (as reflected by Blackstone's *Commentaries*) as being part of the fundamental laws of England."[69] One would imagine that, having put their own lives at risk to fight back against arbitrary power, the Founders would hold similar views about subjecting the executive to the rule of law.

Meanwhile, the political theorists whom the Founders read were divided on the need for, and the mechanisms of controlling, executive powers.[70] Although advocates for presidential prerogative often make recourse to the writings of John Locke,[71] such arguments rely upon assumptions about Locke's influence on the U.S. Constitution which remain hotly contested.[72] But regardless of Locke's value for understanding the Constitution in other respects, the Framers emphatically did *not* import a Lockean conception of the prerogative.[73] To the contrary, the founding generation

---

68. Alford, *supra* note 45, at 1240–41.

69. *Id.* at 1241.

70. *See* BEDERMAN, *supra* note 62, at 149 ("The Framers thus had a diverse set of ancient models and theories of executive power, combined with the intelligent commentaries of later political thinkers."); Manning, *supra* note 24, at 1993–94 ("[F]ounding-era separation of powers theory supplied no single formula for the details of a properly composed government. . . . [W]hile theorists may have agreed in broad terms about the need to separate the major branches of governmental power, there was significant divergence, even among the most prominent theorists (Blackstone, Locke, and Montesquieu), about how to characterize and classify the powers to be divided."); Mortenson, *supra* note 44, at 1190 (noting that the books which the Founders read contained "wildly varying visions of political legitimacy and good government").

71. *See, e.g.*, YOO, *supra* note 44, at 37–38; William P. Barr, *The Role of the Executive*, 43 HARV. J.L. & PUB. POL'Y 605, 609 (2020); Dougherty, *supra* note 44, at 20–21, 23, 46; Martin S. Sheffer, *Does Absolute Power Corrupt Absolutely? Part I: A Theoretical Review of Presidential War Powers*, 24 OKLA. CITY U. L. REV. 233, 285–90 (1999).

72. *See* Richard Primus, *John Locke, Justice Gorsuch, and* Gundy v. United States, BALKINIZATION (July 22, 2019, 11:27 AM), https://balkin.blogspot.com/2019/07/john-locke-justice-gorsuch-and-gundy-v.html [https://perma.cc/8ATL-DEQB] ("For several decades now, leading scholars have cast considerable doubt on the idea that Locke's political writing was particularly influential for the Founders. . . . In short, even if Locke was influential in the 1770s, he does not seem to have been a major influence in the formation of the Constitution."); MARK GOLDIE, *Introduction* to 1 THE RECEPTION OF LOCKE'S POLITICS, at xvii, xlix–lix (Mark Goldie ed., 1999) (laying out some strands of the debate).

73. *See* EDWARD KEYNES, UNDECLARED WAR: TWILIGHT ZONE OF CONSTITUTIONAL POWER 11 (1982); David Gray Adler, *The Framers and Executive Prerogative: A Constitutional and Historical Rebuke*, 42 PRESIDENTIAL STUD. Q. 376, 388 (2012); Steilen, *supra* note 60, at 562–67, 617.

"regularly distinguished executive power from prerogative" — thereby confirming the disutility of appeals to the Vesting Clause.[74]

Of course, the Framers were not lacking in firsthand experience with politics. Between one-third and one-half of the Framers had previously attended state constitutional conventions,[75] at least one of which — Virginia's — expressly rejected a provision granting emergency powers to the governor.[76] Nor were they unaware of the dangers or emergencies which a government might confront. Indeed, one might describe the early history of the United States as a series of successive crises, from the American Revolution itself to Shays' Rebellion, the latter ending just months before fifty-five men met in the old Pennsylvania State House during the hot Philadelphia summer of 1787.[77] They were not neophytes.

With all this knowledge in mind, the Framers in Philadelphia took the significant step of *not* imbuing their nascent Constitution with explicit grants of emergency powers. They evidently believed that "[t]he provisions of the document and the government which they ordained were to be adequate for war as well as peace, for rebellion as well as internal calm[.]"[78] Moreover, the founding generation had a "collective fear, if not paranoia, of an unscrupulous leader who sought power by any means."[79] The Framers thus

74. Steilen, *supra* note 60, at 562–65; *see supra* Part II.A.

75. Robert F. Williams, *"Experience Must Be Our Only Guide": The State Constitutional Experience of the Framers of the Federal Constitution*, 15 HASTINGS CONST. L.Q. 403, 405 n.9 (1988).

76. Steilen, *supra* note 60, at 609.

77. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425 (1934) ("The Constitution was adopted in a period of grave emergency."); ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763–1789, at 584–601 (1982) (summarizing the crises which enveloped the early republic under the Articles of Confederation); EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 265–67 (1988) (same); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787, at 463–67 (1969) (same).

78. ROSSITER, *supra* note 36, at 212; *see also id.* ("It never seems to have been seriously considered in the Convention of 1787, the *Federalist*, or the debates in the state ratifying conventions that the men who were to govern in future years would ever have to go outside the words of the Constitution to find the means to meet any crisis."); SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 94 (2015) ("With respect to the Constitution, everything that we know about its creation and implementation suggests that it was not read to authorize suspensions or dispensations.").

79. BEDERMAN, *supra* note 62, at 153.

aspired "to create a presidency that would control such impulses toward despotism."[80]

Without a doubt, the Framers — having learned their lesson from the failed Articles of Confederation — sought to create a strong executive with a sufficient degree of independence from Congress.[81] For this reason, Justice Story wrote with confidence in 1833 that "[a]ll America have at length concurred in the propriety of establishing a distinct executive department."[82] But "there is no evidence" that a Lockean conception of executive prerogative power "had any positive influence whatsoever at the Constitutional Convention of 1787."[83] To the contrary, Article I gives "most of the traditional royal prerogatives" to the House, the Senate, or both.[84] And as previously noted, the Constitution which the Framers devised lacks any expressly defined mechanism for suspension of the laws and/or vesting of the executive with emergency authorities. When the possibility of granting the President a power of suspension came up for a vote in Philadelphia, the delegates rejected it.[85]

The Framers' anxiety about an overpowered executive leaked into the post-Philadelphia ratification debates, which "were replete with references to members of the classical rogues gallery of Roman tyrants," as well as "contemporary tyrants" such as Oliver Cromwell.[86] Even Hamilton — who, among the Founders, held one

80. *Id.* at 154; *see also Special Committee Hearings*, *supra* note 36, at 76 (statement of Prof. Gerhard Casper) ("In view of the attitudes prevailing at the Constitutional Convention, it should come as no surprise that no drastic structural changes for coping with national emergencies were contemplated. To confer upon the President extraordinary constitutional authority to deal independently with emergencies, would have only further heightened the widespread fear that the Presidency might be turned into a temporary monarchy or might fall into the hands of a Cataline or Cromwell, and would have jeopardized the adoption of the Constitution.").

81. *See* MCCONNELL, *supra* note 33, at 19; Kent et al., *supra* note 49, at 2121–23.

82. 3 STORY, *supra* note 34, at 279.

83. DONALD L. ROBINSON, *Presidential Prerogative and the Spirit of American Constitutionalism*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 114, 115 (David Gray Adler & Larry N. George eds., 1996); *see also* Steilen, *supra* note 60, at 613–29 (detailing how the Framers at the Constitutional Convention deliberately and repeatedly eschewed investing the President with anything approaching a monarchical and/or Lockean prerogative).

84. FORREST MCDONALD, *Forward* to THE CONSTITUTION AND THE AMERICAN PRESIDENCY, at ix, ix (Martin L. Fausold & Alan Shank eds., 1991).

85. Steilen, *supra* note 60, at 624; *accord* The Confiscation Cases, 87 U.S. (20 Wall.) 92, 112–13 (1874) ("No power was ever vested in the President to repeal an act of Congress.").

86. BEDERMAN, *supra* note 62, at 153–54.

of the strongest positions in support of executive authority[87] — "expressly disclaimed the Crown's powers as a model for the American presidency" in his contributions to the *Federalist* (itself written to rally support in New York for ratification).[88] Nor were scholars of a different mind: none of the era's major legal treatises "even hint that the founding generation envisaged any independent presidential law-making power."[89]

This overview of the Framers' historical influences and contemporary context — taking account of "the controversies, the attitudes, and [the] decisions"[90] of the founding period — provides yet further reason to doubt that the President has any power to declare emergencies.

C. DOCTRINE

Doctrinal arguments center on "principles derived from precedent or from judicial or academic commentary on precedent."[91] Those who employ this modality focus on how case law has introduced, clarified, and/or eliminated various legal doctrines over time, in the typical method of the common law tradition.[92] However, most of the precedent about presidential emergency powers is confounded by Presidents having acted, in those cases, under

87. *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 26 n.119 (1994).

88. Monaghan, *supra* note 28, at 17. For example, *Federalist* No. 69 consists primarily of Hamilton contrasting the powers of the President with those of the king. *See* THE FEDERALIST NO. 69, *supra* note 64, at 347–53 (Alexander Hamilton). Regarding the *Federalist*'s role in the New York ratification debates, see IAN SHAPIRO, *Introduction* to THE FEDERALIST, *supra* note 64, at ix, x.

89. Monaghan, *supra* note 28, at 18 & n.80 (reviewing major works by St. George Tucker, Chancellor James Kent, Justice Story, and William Rawle). At most, some of the Founders preferred an arrangement in which Congress would ratify any illegal-yet-necessary crisis-time behavior afterwards. Simply put, the President would "act extraconstitutionally and thereafter publicly confess such civil disobedience and throw himself on the mercy of the legislature and the public"; if the President's actions were judged to have been justifiable, Congress would indemnify him. Barron & Lederman, *supra* note 28, at 746; *see* David Gray Adler, *The Steel Seizure Case and Inherent Presidential Power*, 19 CONST. COMMENT. 155, 174–80 (2002) (discussing the use of retroactive ratification in the early republic). Although post-hoc ratification by Congress is no longer a common practice, *see* Steilen, *supra* note 60, at 661, its contemplation by the Founders illuminates their view of emergency powers. Importantly, the indemnification — rather than normalization — of illegal executive actions during crises preserves Congress' role in determining whether, indeed, there actually was a crisis worthy of extralegal behavior. *See id.* at 663–64; Lucius Wilmerding, Jr., *The President and the Law*, 67 POL. SCI. Q. 321, 329 (1952).

90. BOBBITT, *supra* note 30, at 7.

91. *Id.*

92. *Id.* at 7, 41–44.

congressional authorizations and/or delegations.[93] Such instances of concurrent action — residing in Zone 1 of Justice Robert Jackson's *Youngstown* framework — tell us very little about the extent of the President's emergency power in isolation, because in those instances the President's authority is at its zenith: it "includes all that he possesses in his own right *plus* all that Congress can delegate."[94] Accordingly, some of the most emphatic assertions of executive power and discretion in the U.S. Reports — including *Martin v. Mott*,[95] *Luther v. Borden*,[96] *United States v. Curtiss-Wright Export Corp.*,[97] *Ex parte Quirin*,[98] *Hirabayashi v. United States*,[99] *Korematsu v. United States*,[100] and *Trump v. Hawaii*[101] — are

93. There are a number of useful surveys of the development of emergency powers across time in the American politico-legal system; this Note will seek neither to upend nor outdo them. *See, e.g.*, S. REP. NO. 93-549, at 2–14 (1973); CHRIS EDELSON, EMERGENCY PRESIDENTIAL POWER: FROM THE DRAFTING OF THE CONSTITUTION TO THE WAR ON TERROR (2013); ROSSITER, *supra* note 36, at 209–87.

94. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) (emphasis added).

95. 25 U.S. (12 Wheat.) 19, 29 (1827) ("The power *thus confided by Congress to the President*, is, doubtless, of a very high and delicate nature." (emphasis added)).

96. 48 U.S. (7 How.) 1, 41–45 (1849) ("*By [the Militia Act of 1795], the power* of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, *is given to the President*." (emphasis added)); *see* Vladeck, *supra* note 26, at 174 ("Just as in *Mott*, the Court [in *Luther*] began and ended its discussion of executive authority by invoking the 1795 statute. For both Courts, it was the Militia Acts, and not any other authority, that had given Presidents [James] Madison and [John] Tyler the authority to act as they d*id*.").

97. 299 U.S. 304, 319–20 (1936) ("[W]e are here dealing not alone with *an authority vested in the President by an exertion of legislative power*, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations. . . ." (emphasis added)); *see also* Amy L. Stein, *A Statutory National Security President*, 70 FLA. L. REV. 1183, 1208 n.141 (2018) (collecting sources criticizing *Curtiss-Wright*).

98. 317 U.S. 1, 29 (1942) ("It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For *here Congress has authorized* trial of offenses against the law of war before such commissions." (emphasis added)).

99. 320 U.S. 81, 92 (1943) ("We have no occasion to consider whether the President, acting alone, could lawfully have made the curfew order in question, or have authorized others to make it. For *the President's action has the support of the Act of Congress*, and we are immediately concerned with the question whether it is within the constitutional power of the national government, through the *joint action of Congress and the Executive*, to impose this restriction as an emergency war measure." (emphasis added)).

100. 323 U.S. 214, 217–18 (1944) ("[W]e are unable to conclude that it was beyond *the war power of Congress and the Executive* to exclude those of Japanese ancestry from the West Coast war area at the time they did." (emphasis added)).

101. 138 S. Ct. 2392, 2403 (2018) ("We now decide *whether the President had authority under the Act* to issue the Proclamation. . . ." (emphasis added)).

unilluminating,[102] even though many of them continue to influence constitutional thinking in certain areas.[103]

In the closest case on point, *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court affirmed a congressional-centric view of constitutional emergency powers. In 1952, at the height of the Korean War, a labor dispute between steel companies and steelworkers led the United Steelworkers of America to call for a national strike.[104] The Truman administration feared that sudden disruption of production would not only exacerbate inflation but also deprive the military of an indispensable resource.[105] Mere hours before the strike was set to begin, President Truman directed his Secretary of Commerce, Charles Sawyer, to seize 86 steel mills and operate them in the name of the United States until the labor dispute could be resolved.[106] In a message sent to Congress the following day, President Truman — though asserting a broad executive prerogative — allowed that Congress could choose a different course of action if it passed legislation to address the situation; otherwise, he would have Sawyer continue to hold the mills.[107] The steel companies swiftly sued to enjoin the seizure, and within weeks, the case reached the U.S. Supreme Court.[108]

---

102. Additionally, *In re* Neagle, 135 U.S. 1 (1890), *In re* Debs, 158 U.S. 564 (1895), and United States v. Midwest Oil Co., 236 U.S. 459 (1915) — three other cases cited by those asserting the existence of a presidential prerogative, *see, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 687–93, 702–03 (1952) (Vinson, C.J., dissenting) (citing all three cases to support President Truman's attempted seizure of the steel mills) — are better understood as standing for the far more limited proposition that the President has the "narrow authority . . . to preserve, protect, and defend personnel, property, and instrumentalities of the national government," Monaghan, *supra* note 28, at 61. As Professor Henry Monaghan has defined it, this protective power — though it "will often arise in emergencies" — "is, strictly speaking, *not* a doctrine of emergency power" or of "presidential law-making." *Id.* at 11, 69.

103. *See, e.g.*, Jack Goldsmith, Zivotovsky II *as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 128 (2015) ("Scholars have excoriated *Curtiss-Wright* since it was decided. Its historical claims and extraconstitutional theory of the U.S. foreign relations power are clearly wrong, and its dicta about presidential exclusivity threaten to swallow up Congress'[] Article I foreign relations powers. And yet the dicta remain influential."); Memorandum from John C. Yoo to William J. Haynes, Jr., *supra* note 42, at 80 (citing *Neagle* to rationalize the torturing of detainees in the aftermath of the 9/11 attacks).

104. *See* DAVID G. MCCULLOUGH, TRUMAN 897 (1992).

105. *See* ROBERT H. FERRELL, HARRY S. TRUMAN: A LIFE 370–71 (1994); MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER 74–75 (1994).

106. *See* Exec. Order No. 10,340, 17 Fed. Reg. 3139 (Apr. 8, 1952); MARCUS, *supra* note 105, at 80, 84; MCCULLOUGH, *supra* note 104, at 898–99.

107. *See* 98 CONG. REC. 3912 (1952); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 142 (1973).

108. MCCULLOUGH, *supra* note 104, at 900.

Crucially, the notion of emergency seizures of private enterprises was not unfamiliar or unimaginable to Americans in 1952. In fact, during World War II, Congress expressly authorized immediate presidential seizure of industrial plants during labor disputes under the War Labor Disputes Act.[109] However, once the war was over, Congress opted to reduce this unilateral executive authority by allowing the War Labor Disputes Act to expire.[110] To replace it, Congress enacted the Taft-Hartley Act of 1947 over President Truman's veto.[111] During the drafting process, Congress deliberately "chose not to lodge this power [of immediate industrial seizure] in the President."[112] Instead, the Act merely allowed the President to "enjoin a strike for eighty days pending an impartial study."[113] Believing that such delay would be unfair to the unions, President Truman declined to follow the procedures prescribed by the Taft-Hartley Act.[114] He also considered two other statutory bases for seizure but rejected them for the same reason, relying instead on his inherent powers.[115]

In a 6-3 decision in *Youngstown Sheet & Tube Co. v. Sawyer*, the Court struck down the steel seizure as beyond the President's constitutional authority.[116] Five of the six members of the majority joined Justice Black's opinion for the Court in full, while a sixth — Justice Tom Clark — concurred in the judgment. Each member of the majority wrote his own opinion in order to — in Justice Felix

---

109. *See* War Labor Disputes (Smith-Connally) Act, Pub. L. No. 78-89, § 3, 57 Stat. 163, 164–65 (1943). Between the declaration of a defense emergency on May 27, 1941 and the formal surrender by Japan on September 2, 1945, the U.S. government seized companies during labor disputes 55 times. *See* JOHN L. BLACKMAN, JR., PRESIDENTIAL SEIZURE IN LABOR DISPUTES 259–75 (1967) (listing seizures). For a discussion of one such seizure, see Waxman & Weitzman, *supra* note 40.

110. *See* CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 60 n.53 (1951).

111. *See* Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (1947); MCCULLOUGH, *supra* note 104, at 566.

112. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 601 (1952) (Frankfurter, J., concurring).

113. MCCULLOUGH, *supra* note 104, at 898; *see* Taft-Hartley Act §§ 206–10.

114. MARCUS, *supra* note 105, at 75–76.

115. *Id.* at 75–82. The significance of the choice not to use statutorily prescribed procedures was confirmed not only by the various opinions in *Youngstown* but also by the fact that when President Dwight Eisenhower, less than a decade later, used the Taft-Hartley Act to enjoin a strike by steelworkers on grounds of "national safety," the Court upheld the injunction. *See* United Steelworkers of Am. v. United States, 361 U.S. 39, 40–44 (1959) (per curiam).

116. *Youngstown*, 343 U.S. at 589.

Frankfurter's words — express "differences in attitude,"[117] while Chief Justice Fred Vinson authored an opinion for the three dissenters.[118]

Justice Jackson's solo concurrence, notwithstanding the fact that it garnered no other Justice's vote, has since become the "canonical" statement of the law associated with *Youngstown*.[119] Most famously, the concurrence outlines a tripartite framework laying out the "practical situations in which a President may doubt, or others may challenge, his powers," depending on whether Congress has spoken on a particular issue and on the respective allotment of inherent powers between the political branches.[120] In Zone 1, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power."[121] In Zone 2, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . . In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[122] In Zone 3, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he

117. *Id.* (Frankfurter, J., concurring). Incidentally, Justice Clark was the only member of the Court to make any mention of an old case that seemed somewhat on point: Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804). *See Youngstown*, 343 U.S. at 660, 662 (Clark, J., concurring in the judgment) (relying on *Little*); Katharine A. Wagner, Note, Little v. Barreme*: The Little Case Caught in the Middle of a Big War Powers Debate*, 10 J. L. SOC'Y 77, 107–12 (2008) (discussing the relationship between *Little* and *Youngstown*).

118. *See Youngstown*, 343 U.S. at 667–710 (Vinson, C.J., dissenting).

119. Stephen I. Vladeck, *The Calling Forth Clause and the Domestic Commander in Chief*, 29 CARDOZO L. REV. 1091, 1105 (2008); *see also Special Committee Hearings*, *supra* note 36, at 23 (statement of Prof. Cornelius P. Cotter) ("[W]e have reached a point at which most people seem to assume that Justice Jackson wrote the majority opinion in [*Youngstown*] rather than a concurring opinion."). The Supreme Court subsequently has adopted Justice Jackson's framework to resolve inter-branch disputes. *See* Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2083–84 (2015); Medellín v. Texas, 552 U.S. 491, 524–25 (2008); Dames & Moore v. Regan, 453 U.S. 654, 668–69 (1981); *see also* Hamdan v. Rumsfeld, 548 U.S. 557, 638 (2006) (Kennedy, J., concurring in part).

120. *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).

121. *Id.* at 635–37.

122. *Id.* at 637.

can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject."[123] With respect to the steel mills, "Congress ha[d] not left seizure of private property an open field but ha[d] covered it by three statutory policies inconsistent with this seizure" — statutes which President Truman had ignored.[124] Accordingly, the President's power was "at its lowest ebb."[125] In turn, Justice Jackson denied President Truman's request that the Court "declare the existence of inherent powers *ex necessitate* to meet an emergency."[126] To the contrary, he inveighed against the vesting of the executive branch with a vast prerogative authority: "[E]mergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them. That is the safeguard that would be nullified by our adoption of the 'inherent powers' formula."[127]

In *Youngstown*, the United States faced a genuine crisis, and President Truman acted with no malintent. In other words, this should have been one of the *easiest* scenarios cases in which to justify a presidential determination of the necessity of extralegal action. Yet President Truman's actions were held unconstitutional and invalid. One can hardly reconcile *Youngstown* with an inherent presidential power to declare emergencies.

D. CONCLUSION OF PART II

In light of text, history, and doctrine, the President lacks any inherent power to declare emergencies or take particular emergency actions not authorized by statute. Accordingly, the only possible arrangement is that Congress has the inherent power to declare an emergency and define the means taken to respond to that crisis. Yet, as a matter of past practice, Congress has been "more than likely to delegate to the President the power to determine

123. *Id.* at 637–38.
124. *Id.* at 639.
125. *Id.* at 637, 640.
126. *Id.* at 649.
127. *Id.* at 652.

whether emergency conditions exist."[128] The question then becomes how best to do so. The NEA was an attempt to provide an answer.

III. DISARMING THE "LOADED GUNS"[129]

Congress did not draft the NEA on a blank slate. To the contrary, the statute was an attempt to bring an end to decades of executive overuse of broadly phrased, badly managed statutory authorities.[130] Resulting from negotiations between both chambers as well as between Congress and the President, the NEA was the imperfect child of compromise.[131] Still, in its original form, the statute was a defensible approach to the problem of emergency powers. However, the Supreme Court's opinion in *Chadha* prompted Congress to hamstring the law.[132]

A. PASSAGE OF THE NEA

1. *Origin and Route through Congress*

In the early 1970s, the state of U.S. emergency powers was one of "disarray."[133] There were four prevailing national emergencies declared by Presidents that had yet to be terminated, dating from 1933, 1950, 1970, and 1971.[134] Meanwhile, from 1933 to 1973, Congress "passed or recodified over 470 significant statutes delegating to the President" powers that could be used during national

128. *Special Committee Hearings*, *supra* note 36, at 25 (statement of Prof. Cornelius P. Cotter); *see also id.* (statement of Sen. Church) ("[O]verall, the common practice has been for the President to declare the national emergency[.]").

129. *Id.* at 65 (statement of Sen. Mathias) ("It seems to me this is a perfect illustration of the kind of danger which exists in a Government like ours when you have loaded guns lying around. They may have been originally loaded in order to fire a salute, but end up being charged with shot and used for other business."); *see also* Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) ("A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.").

130. *See infra* Part III.A.1.

131. *See infra* Part III.A.2.

132. *See infra* Part III.A.3.

133. S. REP. NO. 94-1168, at 9 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 2288, 2295.

134. *Id.*; *see also* S. REP. NO. 93-549, at 594–97 (1973) (texts of the four declarations).

emergencies.[135] Most of these statutes did "not provide for congressional oversight or termination."[136] When employed, they allowed the executive branch to "seize properties, mobilize production, seize commodities, institute martial law, seize control of all transportation and communications, regulate private capital, and . . . [thereby] control the activities of all American citizens."[137] By virtue of these statutes, the President "had at his disposal virtually dictatorial power, ready for use as he desire[d]."[138] Moreover, there was no requirement that the President demonstrate any reasonable (let alone close) relationship between an asserted crisis and the statutory authority invoked to address it. If there were an existing national emergency with respect to *anything*, then *every* statute containing the magic words "national emergency" could be used.[139] Just as troubling was the lack of a formal requirement that the President publicize emergency declarations — or alert citizens about use of particular secondary emergency statutory authorities — in any regular or reliable way.[140]

---

135. S. REP. NO. 93-549, at 6.

136. *Id.* at 7, 10.

137. *See Special Committee Hearings*, *supra* note 36, at 1. For example, the statutory provision used to intern Japanese-Americans during World War II remained on the books for decades after the war had ended. *See* S. REP. NO. 93-549, at 9–10 (discussing 18 U.S.C. § 1383 (1952) (repealed 1976)).

138. 122 CONG. REC. 28,226 (1976) (statement of Sen. Church). Or, to borrow from the Bard of Avon, a President ensconced in pre-NEA secondary emergency statutes could credibly threaten to "bestride the narrow world / Like a colossus." WILLIAM SHAKESPEARE, JULIUS CAESAR act 1, sc. 2, ll. 135–36 (Arthur Humphreys ed., Oxford Univ. Press 1984) (1599).

139. For instance, President Truman's 1950 proclamation of a national emergency during the Korean War, Proclamation No. 2914, 15 Fed. Reg. 9029 (1950), was used in 1970 to justify the embargo of Cuba. *See Special Committee Hearings*, *supra* note 36, at 85 (statement of Prof. Gerhard Casper) (discussing Nielsen v. Sec'y of Treasury, 424 F.2d 833 (D.C. Cir. 1970)). That same declaration served as the basis for promoting Air Force astronauts — never mind the fact that the U.S. had no astronauts in 1950. *See National Emergencies Act: Hearings Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary on H.R. 3884*, 94th Cong. 60 (1975) [hereinafter *Judiciary Subcommittee Hearings*] (statement of Rep. Danielson); *cf.* COLIN BURGESS, SELECTING THE MERCURY SEVEN: THE SEARCH FOR AMERICA'S FIRST ASTRONAUTS 25–40 (2011) (describing how the Eisenhower administration oversaw the recruitment of the first American astronauts beginning in late 1958). The executive branch also used the Korea declaration for even more remotely related policies, such as negotiating contractual set-asides for small businesses and obtaining passports for people who lost them while traveling in Europe. *See Judiciary Subcommittee Hearings*, *supra*, at 74 (statement of Rep. Danielson); *id.* at 76 (statement of Phillip G. Read, Office of Federal Management Policy, United States General Services Administration); *id.* at 83 (statement of Rep. Flowers).

140. *See Special Committee Hearings*, *supra* note 36, at 725–27 (statement of Sen. Mathias); *id.* at 748 (statement of Erwin N. Griswold, former Solicitor General of the United States).

Though more directly implicating constitutional war powers than national emergency powers, the country's harrowing experiences during the Vietnam War spurred Congress to reconsider more generally its broad delegations of authority to the President.[141] Accordingly, on January 6, 1973, the Senate established a Special Committee on the Termination of the National Emergency, later renamed the Special Committee on National Emergencies and Delegated Emergency Powers (collectively, the "Special Committee").[142] Its organization was consciously bipartisan: the committee had two coequal co-chairmen (Democratic Senator Frank Church and Republican Senator Charles Mathias) and the same number of members from each party.[143] After collating the various secondary emergency statutes scattered throughout the U.S. Code,[144] the Special Committee sought to "devise a regular procedure to be followed in all emergency powers legislation" — and, the Senators hoped, thereby bring an end to decades of emergency government.[145] In addition to consulting informally with various scholars and stakeholders, the Special Committee convened a number of hearings featuring venerable and experienced witnesses, including professors of law and political science, former

---

141. *See id.* at 16 (statement of Sen. Church) ("Certainly, if the last 10 years of warfare in Indo-China demonstrate anything at all, they demonstrate that Presidents can make very big mistakes too. That there is no degree of infallibility vested in the Chief Executive of this country, or his advisers."); *National Emergencies Act: Hearing Before the S. Comm. on Gov't Operations on H.R. 3884*, 94th Cong. 14 (1976) [hereinafter *SCGO Hearing*] (statement of Sen. Mathias) ("My own interest in the question of emergency powers developed out of our experience in the Vietnam War and the incursion into Cambodia."). Watergate can only have accentuated concerns about overly powerful executives.

142. S. REP. NO. 94-1168, at 8–9 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 2288, 2294–95; S. REP. NO. 93-1193, at 3 (1974) (citing S. Res. 9, 93rd Cong. (1973) (enacted)).

143. *See Special Committee Hearings*, *supra* note 36, at 1; *id.* at 4 (statement of Sen. Mathias). Senators Church and Mathias took such care to preclude any appearance (let alone actuality) of partisanship that they alternated which co-chairman spoke first at each hearing. *See, e.g.*, *id.* at 497 (statement of Sen. Church) (allowing Senator Mathias to read the first half of the jointly prepared opening statement because it was "his birthday — and his turn").

144. *See* S. REP. NO. 93-549, at 15–16 (1973).

145. *Special Committee Hearings*, *supra* note 36, at 5 (statement of Sen. Mathias); *see also Judiciary Subcommittee Hearings*, *supra* note 139, at 26 (statement of Sen. Mathias) ("This is not trying to wrest any powers away from the President, but to work cooperatively with the President in returning this country to a peaceful state. Both at law and in fact."); *id.* at 35 (statement of Sen. Church) ("The committee intentionally chose language which would make clear that the authority of the Act was to be reserved for matters which are 'essential' to the protection of the Constitution and the people. This authority will not be available for frivolous or partisan matters nor, for that matter, in cases where important but not 'essential' problems are at stake. Only in the most unusual circumstances can the Constitutionally ordained role of the Congress be bypassed.").

attorney and solicitor generals, and even (by then retired) Justice Clark.[146] The Senators and their witnesses recognized that Congress had "abdicated" its responsibility to restrain and oversee the use of emergency powers.[147] It now had the obligation to restore control.

The road to enactment was not without some bumps. Consideration and passage of the bill which the Special Committee ultimately produced — S. 3957 — was delayed by Watergate and the confirmation process for Vice President Nelson Rockefeller. Although an amended version of S. 3957 passed the Senate, the House ran out of time to consider the bill before the end of the 93rd Congress.[148] Nevertheless, the next Congress' House took up the cause with the introduction of H.R. 3884, which was "substantially similar" to S. 3957.[149] While the Special Committee hearings had concentrated more on scholarly views of emergency powers, the House Committee on the Judiciary's Subcommittee on Administrative Law and Governmental Relations (the "Judiciary Subcommittee") focused its energies on receiving input from public officials.[150] Representatives from various executive departments came in front of the Judiciary Subcommittee, both to offer their agencies' views on the NEA's structure and to lobby in favor of retaining particular authorities as necessary to their day-to-day operations.[151] The House Judiciary Committee reported out a marked up version of

146. *See* S. REP. NO. 93-1193, at 3–4 (1973) (listing witnesses who testified in front of the Special Committee).

147. *Special Committee Hearings*, *supra* note 36, at 26 (statement of Prof. Cornelius P. Cotter); *see also, e.g.*, *id.* at 27 ("So, first of all, Congress does not systematically enough and continuously enough reserve for itself such a role. Then, secondly, when Congress has reserved such a role it does not play that role."); *id.* at 28 (statement of Sen. Mathias) ("We indulge in flagellation on the subject ourselves."); *id.* at 53 ("It is a part of what Senator [Sam] Ervin has described, in his own way, as 'being not all homicide, there is a good deal of suicide.'").

148. *See SCGO Hearing*, *supra* note 141, at 17 (statement of Sen. Mathias); S. REP. NO. 93-1193, at 2.

149. *SCGO Hearing*, *supra* note 141, at 1 (statement of Sen. Ribicoff).

150. *Compare* S. REP. NO. 93-1193, at 3–4 (1973) (listing witnesses who testified in front of the Special Committee), *with Judiciary Subcommittee Hearings*, *supra* note 139, at iii (listing witnesses who testified in front of the Judiciary Subcommittee).

151. *See Judiciary Subcommittee Hearings*, *supra* note 139, at 37–39 (statement of Elting Arnold, Senior Counselor to the General Counsel, United States Department of the Treasury); *id.* at 49–53 (statement of Leonard Niederlehner, Deputy General Counsel, United States Department of Defense); *id.* at 71–74 (statement of Phillip G. Read, Office of Federal Management Policy, United States General Services Administration); *id.* at 81–83 (statement of Mark B. Feldman, Deputy Legal Advisor, United States Department of State); *id.* at 88–94 (statement of Antonin Scalia, Assistant General Counsel, Office of Legal Counsel, United States Department of Justice).

H.R. 3884 on May 21, 1975.[152] After the full House amended and passed the bill, the Senate added its own changes, all of which the House accepted.[153] President Gerald Ford finally signed the NEA into law on September 14, 1976.[154]

2. *Give and Take*

The NEA's core mechanism has remained relatively consistent from the start of the drafting process.[155] The statute delegates to the President the authority to declare a national emergency, although the statute — by design — never specifies what exactly constitutes a "national emergency."[156] In that same emergency declaration — or in a contemporaneous executive order, either of which must be "published in the Federal Register and transmitted to the Congress" — the President must also name the specific statutory authorities scattered throughout the U.S. Code upon which she intends to rely in addressing the emergency.[157] The NEA is like an electrical switch sending a current of emergency power throughout the U.S. Code, but that current only "turns on" secondary emergency statutes specifically named in the declaration. Thus, every time the President uses the NEA, she assumes additional statutory powers; all that changes are *which* powers the President unlocks on any given occasion. If the President later wants to use additional secondary emergency statutes to address the same emergency, she must specify them in a subsequent executive order.[158]

Although these elements of the NEA were consistent throughout the drafting process, many other aspects were subject to

---

152. *See* H.R. REP. NO. 94-238 (1975).
153. *See* 122 CONG. REC. 28,227, 28,466 (1976); 121 CONG. REC. 27,646 (1975).
154. *See* National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976).
155. *Compare* National Emergencies Act, S. 3957, 93rd Cong. §§ 201, 401 (1974) (as reported by S. Comm. on Gov't Operations, Sept. 30, 1974), *with* 50 U.S.C. §§ 1621, 1631.
156. *See* 50 U.S.C. § 1621(a) ("With respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency."); S. REP. NO. 94-1168, at 3 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 2288, 2289 ("The Committee decided that the definition of when a President is authorized to declare a national emergency should be left to the various statutes which give him extraordinary powers. The National Emergencies Act is not intended to enlarge or add to Executive power. Rather the statute is an effort by the Congress to establish clear procedures and safeguards for the exercise by the President of emergency powers conferred upon him by other statutes.").
157. 50 U.S.C. § 1631.
158. *Id.*

negotiation and revision. After all, regardless of what Congress might have preferred the NEA to look like in the abstract, the bill actually needed to pass. That goal required drafters to make compromises in exchange for support from the White House and influential heads of executive agencies.[159] For example, S. 3957 originally provided that an emergency would only last beyond six months if Congress affirmatively agreed to continue it until a specific sunset date.[160] Yet the executive branch "took exception to this" arrangement,[161] and so the final version of S. 3957 reversed the presumption: instead of emergencies ending unless Congress extended them, they would *continue* unless terminated by either Congress or the President.[162] The only consolation was a requirement that each House of Congress would meet every six months to consider a vote to terminate the emergency; such a vote would enjoy certain expedited procedures.[163] Similarly, the original version of S. 3957 would have terminated all four existing states of emergencies nine months after the NEA took effect. During this "grace period," the executive branch could review the emergency powers upon which it relied and communicate to Congress which ones should be enacted into regular law.[164] However, by the time the Judiciary Subcommittee began consideration of H.R. 3884, the grace period had been extended to one year.[165] The Judiciary Subcommittee then doubled that time to two years.[166] Furthermore, some laws were exempted entirely: at the prodding of the executive branch, the final version of S. 3957 included a list of secondary emergency statutes whose powers would remain accessible to the

159. *See, e.g.*, *Special Committee Hearings*, *supra* note 36, at 69 (statement of Sen. Church) ("The only thing we can pass over a Presidential veto is an increase in Social Security — something of that nature. I doubt very much whether it is possible, as a practical political matter, to reclaim any of these powers except as the President is willing to relinquish them."); *id.* at 70 ("I am saying we have to solicit and obtain the cooperation of the President to get this job done."); *id.* at 518–19 (similar).

160. *See* National Emergencies Act, S. 3957, 93rd Cong. § 402(2) (1974) (as reported by S. Comm. on Gov't Operations, Sept. 30, 1974); S. REP. NO. 93-1193, at 1–2 (1974).

161. *Judiciary Subcommittee Hearings*, *supra* note 139, at 30 (statement of Sen. Church).

162. *See* National Emergencies Act, S. 3957, 93rd Cong. § 202 (1974) (as passed by Senate, Oct. 7, 1974).

163. *See id.*

164. *See* S. REP. NO. 93-1193, at 2.

165. *See Judiciary Subcommittee Hearings*, *supra* note 139, at 34–35 (statement of Sen. Church).

166. *See* H.R. REP. NO. 94-238, at 14 (1975).

President even after two years had passed.[167] This list of exemptions grew as the process continued with amendments to H.R. 3884.[168]

In return for these various concessions, the executive branch offered an important one of its own: it would sign a version of the NEA which provided that Congress could terminate emergencies through concurrent resolutions. (The President, of course, could terminate an emergency at any time of her own accord.[169]) To be sure, the executive branch repeatedly insisted that such "legislative vetoes"[170] were unconstitutional.[171] But these protestations did not prove fatal. As Senator Church explained, "the opposition of [the Office of Management and Budget] to the use of the concurrent resolution is long standing and well understood. We knew of it in October of 1974 and *we worked out various compromises with the Administration*. That having been accomplished, we were given to understand by the President that *he would accept this legislation*; he recognized the need for legislation in this field."[172] The concurrent resolution provision was the bargain that the two sides struck to pass the law, and it was included in the final version signed by President Ford.[173]

The drafters of the NEA understood the concurrent resolution provision to be essential to balancing two objectives in tension with

---

167. *See Judiciary Subcommittee Hearings*, *supra* note 139, at 28 (statement of Sen. Church) ("But in order to reach an accommodation that would permit unanimous action in the Senate and give the promise of a Presidential signature, we did make these exceptions."); *id.* at 29 (statement of Sen. Mathias) ("We only did it, as Senator Church said, out of our concern that the bill be passed in a posture the President would approve.").

168. *See, e.g.*, *SCGO Hearing*, *supra* note 141, at 17 (statement of Sen. Mathias) ("The [House Judiciary] Committee also increased the number of statutes which would be exempt from the force of the legislation."). For the final list, see National Emergencies Act, Pub. L. No. 94-412, § 502(a), 90 Stat. 1255, 1258 (1976). There were also several statutes which were widely seen as obsolete and/or problematic (and thus were repealed entirely). *See id.* § 501.

169. *See* 50 U.S.C. § 1622(a)(2) ("Any national emergency declared by the President in accordance with this subchapter shall terminate if . . . the President issues a proclamation terminating the emergency.").

170. I.e., congressional actions that countermand or annul executive actions without complying with bicameralism and presentment. *See* William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 540 (1992).

171. *See, e.g.*, *Judiciary Subcommittee Hearings*, *supra* note 139, at 92 (statement of Antonin Scalia, Assistant General Counsel, Office of Legal Counsel, United States Department of Justice); Letter from James M. Frey, Assistant Dir. for Legis. Reference, Comptroller Gen. of the U.S., to Abraham Ribicoff, Chairman, Comm. on Gov't Operations, U.S. Senate (Sept. 15, 1975), *in* S. REP. NO. 94-1168, at 22 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 2288, 2299–2300.

172. *SCGO Hearing*, *supra* note 141, at 3 (statement of Sen. Church) (emphasis added).

173. *See* 90 Stat. at 1255.

one another: (1) granting adequate flexibility to the President to respond to a crisis while also (2) preventing the executive from declaring emergencies for personal or partisan purposes. In view of these objectives, it is unsurprising that Justice Jackson's concurrence in *Youngstown* repeatedly was mentioned, quoted, and/or praised throughout the process as the drafters' "basic guideline."[174] After all, the concurrent resolution provision allowed Congress to make it clear when "the President [had] take[n] measures incompatible with the expressed or implied will of Congress."[175] As Senator Mathias stated, "the President in the exercise of his [e]xecutive function could proclaim a national emergency, and the Congress would then review the facts upon which the proclamation was predicated; and if in effect the facts did not justify the continuation of emergency powers, would not agree to prolong the existence of the emergency."[176] Or, as Senator Church put it, the concurrent resolution provision (and other limitations on the President's ability to declare an emergency) would guarantee "Congress a continuing role to play in determining how long the emergency should last."[177] As such, the NEA balanced presidential flexibility in response to crises with congressional supremacy in legislation.

3. Chadha *and its Aftermath*

This balance shifted dramatically in 1983, when the Supreme Court invalidated a legislative veto provision in *Immigration & Naturalization Services v. Chadha*.[178] *Chadha* centered on a provision of the Immigration and Nationality Act (the "INA"), which — while delegating to the Attorney General the initial authority "to allow a particular deportable alien to remain in the United States" — allowed a single chamber of Congress to override that decision through a simple majority vote.[179] In an opinion by Chief

174. *See, e.g.*, *SCGO Hearing*, *supra* note 141, at 7 (statement of Sen. Church); S. REP. NO. 93-1193, at 4–5 (1974); S. REP. NO. 93-549, at 12 (1973).

175. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

176. *Judiciary Subcommittee Hearings*, *supra* note 139, at 26 (statement of Sen. Mathias); *see also Special Committee Hearings*, *supra* note 36, at 32 (statement of Prof. Cornelius P. Cotter) ("[T]he historical precedent is that Congress does and may incorporate in a generic statute a provision whereby Congress may, by concurrent resolution, declare circumstances to be.").

177. *Special Committee Hearings*, *supra* note 36, at 70–71 (statement of Sen. Church).

178. 462 U.S. 919 (1983).

179. *Id.* at 923–25.

Justice Warren Burger, the Court invalidated that provision of the INA as violative of the Constitution's "finely wrought and exhaustively considered" process of bicameralism and presentment.[180] According to the majority, Congress had attempted to engage in a legislative act when it overruled a decision already delegated to the Attorney General via the INA. Like any other time Congress sought to legislate, it had to comport with the procedural restrictions on its legislative power embedded in the Constitution.[181] Allowing otherwise would undermine the Framers' deliberate choices in designing a system that would not "permit[ ] arbitrary governmental acts to go unchecked."[182]

Three justices did not join the majority opinion. In a solo concurrence in the judgment, Justice Lewis Powell argued that the case *could* have been decided on far narrower grounds: namely, that the deportation procedure impermissibly allowed Congress to "assume[ ] a judicial function in violation of the principle of separation of powers."[183] Meanwhile, Justice Byron White (joined by Justice William Rehnquist) dissented, maligning the majority's formalistic approach for "invalidat[ing] all legislative vetoes irrespective of form or subject."[184] This across-the-board ban eliminated "an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress' control over lawmaking."[185] Taking into consideration "the purposes of Art[icle] I and the principles of separation of powers which are reflected in that Article and throughout the Constitution," Justice White contended that — given the emergence of the modern administrative state — the legislative veto was "a necessary check on the unavoidably expanding power of the agencies, both [e]xecutive and independent, as they engage in exercising authority delegated by Congress."[186]

In response to *Chadha*, Congress in 1985 modified the NEA's emergency termination procedure by replacing concurrent

180. *Id.* at 951; *see* U.S. CONST. art. I, § 7, cl. 2.
181. *Chadha*, 462 U.S. at 944–59.
182. *Id.* at 959.
183. *Id.* at 960 (Powell, J., concurring in the judgment).
184. *Id.* at 974 (White, J., dissenting). Justice Rehnquist also authored a brief opinion (joined by Justice White) criticizing the majority's severability analysis. *See id.* at 1013–16 (Rehnquist, J., dissenting).
185. *Id.* at 972–73 (White, J., dissenting).
186. *Id.* at 976–77, 984–89, 999–1002.

resolutions with joint resolutions.[187] After all, numerous legal observers feared that — were a court to apply *Chadha*'s formalist logic to invalidate the NEA's emergency termination provision — the entire law could be struck down on grounds of inseverability.[188] The alteration came in a provision of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987 (the "FRAA").[189] The FRAA's legislative history makes clear that amending the NEA was far from the forefront of most lawmakers' minds at the time.[190] Not until the second day of Senate debate did Senator Mathias introduce Amendment 299, which proposed (1) adding a sentence to the NEA providing that a joint resolution would terminate a national emergency and (2) replacing every use of the word "concurrent" in the NEA with the word "joint."[191] Senator Mathias spoke

187. For the distinction between concurrent and joint resolutions, see *supra* note 21 and accompanying text.

188. *See* sources collected *supra* note 22. The NEA was not the only statute amended in this way and for this reason. *See* Anthony M. Bottenfield, Comment, *Congressional Creativity: The Post-*Chadha *Struggle for Agency Control in the Era of Presidential Signing Statements*, 112 PENN ST. L. REV. 1125, 1137 (2008) (listing other examples).

189. *See* Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, § 801, 93 Stat. 405, 448 (1985) [hereinafter Finalized FRAA].

190. Neither the original text of H.R. 1931 — the House's first version of the FRAA — nor the House Committee on Foreign Affairs ("HCFA") report accompanying H.R. 1931 when reported out of committee made any mention of the NEA. *See* Department of State Authorization Act, Fiscal Years 1986 and 1987, H.R. 1931, 99th Cong. (1985); H.R. REP. NO. 99-40 (1985). The House's second, and ultimately successful, version of the FRAA was H.R. 2068, which was identical to H.R. 1931 with respect to all but two sections (neither of which remotely pertained to the NEA). *See* STAFF OF H. COMM. ON FOREIGN AFFAIRS, 99TH CONG., SURVEY OF ACTIVITIES 30 (Comm. Print 1987). The NEA did not come up once during the eight days of HCFA hearings on the FRAA. *See Authorizing Appropriations for Fiscal Years 1986–87 for the Department of State, the U.S. Information Agency, the Board for International Broadcasting and for Other Purposes: Hearings on H.R. 2068 Before the H. Comm. on Foreign Affairs*, 99th Cong. (1985). The House considered dozens of floor amendments to H.R. 2068; not a single one made any mention of the NEA. *See All Actions H.R. 2068 — 99th Congress (1985–1986)*, CONGRESS.GOV, https://www.congress.gov/bill/99th-congress/house-bill/2068/all-actions [https://perma.cc/9FFD-U9PW] (listing all floor amendments to H.R. 2068). The Senate's original versions of what became the FRAA — S. 496, S. 659, S. 785, and S. 1003 — contained no references to the NEA, either. *See* Board for International Broadcasting Authorization Act, Fiscal Years 1986 and 1987, S. 496, 99th Cong. (1985); Department of State Authorization Act for fiscal years 1986 and 1987, S. 659, 99th Cong. (1985); United States Information Agency Authorization Act, Fiscal Years 1986 and 1987, S. 785, 99th Cong. (1985); Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, S. 1003, S. REP. NO. 99-39, 99th Cong. (1985). The Senate later struck all of H.R. 2068's text after the enacting clause, inserted the language of S. 1003 as amended, and then passed H.R. 2068. *See* 131 CONG. REC. 15,113 (1985). However, the relative absence of emphasis on amending the NEA in passing the FRAA does *not* mean that Congress was unaware of the significance of *Chadha*, as evidenced by, *inter alia*, the eight hearings conducted by the House Rules Committee of the 98th Congress beginning several months after *Chadha* was decided. *See generally Legislative Veto After* Chadha, *supra* note 22.

191. *See* 131 CONG. REC. 14,861–62 (1985).

briefly about how *Chadha* motivated the change from concurrent to joint resolutions, and then the amendment passed by voice vote.[192] The conference report — which barely mentioned the NEA amendment — sailed through both chambers, and President Ronald Reagan signed the FRAA into law on August 16, 1985.[193]

Although the NEA now was secure from invalidation via inseverability,[194] the 1985 amendment "decimated the policy scheme Congress had created for overseeing the [P]resident's declaration of emergency powers."[195] Because the President can veto any joint resolution terminating an emergency, two thirds of both Houses of Congress must come together to oppose her.[196] Accordingly, it is now "virtually impossible" to "garner the votes needed to block the declaration."[197] A President supported by just one-third plus one

192. *See id.* at 14,947–48. In his floor speech, Senator Mathias stated that he had been "persuaded by the opinion of the Court that the use of a concurrent resolution is constitutionally inappropriate in this case in matters so grave or serious as a national emergency." *Id.* at 14,948 (statement of Sen. Mathias). This claim is not obviously true. Senator Mathias' statements and actions throughout the NEA drafting process suggest that he had a very strong view of the role Congress should play "in matters so grave or serious as a national emergency." *Id.* Maybe Chief Justice Burger's opinion really did "persuade[]" Senator Mathias and change his mind. *Id.* A more likely explanation is that Senator Mathias wanted to save at least part of the law to which he had dedicated years of time and energy (and no small share of political capital), and thus he was willing to briefly praise *Chadha* from the Senate floor in order to ensure the passage of the amendment. *See id.* ("There is no question in my mind that we need to maintain the procedures we have so carefully developed to deal with national emergencies. . . . [The change to joint resolutions] is not a perfect solution to the *Chadha* problems, but it at least brings the emergency powers legislation into line with current law.").

193. *See* H.R. REP. NO. 99-240, at 86 (1985) (Conf. Rep.); 131 CONG. REC. 21,676 (1985) (Senate agreement with conference report); *id.* at 22,540–41 (House roll call vote in favor of conference report); Finalized FRAA, *supra* note 189, at 457 (noting date of presidential approval).

194. It turns out that a group of merchants *did* argue that the legislative veto was inseverable from the rest of the NEA. However, upon the enactment of the FRAA, the First Circuit affirmed the dismissal of the claim as moot in an opinion authored by then-Circuit Judge Stephen Breyer. *See* Beacon Prods. Corp. v. Reagan, 814 F.2d 1, 3 (1st Cir. 1987).

195. Richard H. Pildes, *The Supreme Court's Contribution to the Confrontation Over Emergency Powers*, LAWFARE (Feb. 19, 2019, 11:20 AM), https://www.lawfareblog.com/supreme-courts-contribution-confrontation-over-emergency-powers [https://perma.cc/KMC4-3CFV].

196. *See* Stephen I. Vladeck, *The Separation of National Security Powers: Lessons from the Second Congress*, 129 YALE L.J.F. 610, 611 (2020).

197. Geoffrey Manne & Seth Weinberger, *Time to Rehabilitate the Legislative Veto: How Congress Should Rein in Presidents' "National Emergency" Powers*, JUST SECURITY (Mar. 13, 2019), https://www.justsecurity.org/63201/congress-rein-presidents-national-emergency-power-rehabilitating-legislative-veto/ [https://perma.cc/YB5E-STJK]; *see also* Vladeck, *supra* note 196, at 611–12 (recognizing that heightened partisanship has made veto overrides of emergency declarations "practically impossible").

member of one House of Congress has carte blanche to declare emergencies — and thereby "bypass Congress."[198]

Although President Trump was far from the first resident of the Oval Office to invoke the NEA,[199] the border wall controversy is a perfect example of the precise danger of an overly constrained Congress. Throughout the budget negotiation process, Congress repeatedly chose not to bend to President Trump's demand for border wall funding.[200] As is true of every negotiation, each side had to give up some ground: Democrats passed up the opportunity to secure permanent legal status for undocumented immigrants who came to the U.S. as children in exchange for Republicans acceding to a spending bill without border wall funding.[201] And then — shortly after signing that bill into law — President Trump declared an emergency to get his wall funding anyway.[202] Subsequently, simple majorities in both the House and the Senate voted to terminate the emergency on two separate occasions, which was particularly notable given that Republicans held a majority of seats in the Senate.[203] In response, President Trump vetoed both joint resolutions, and an already polarized Congress could not corral two-thirds majorities in both chambers to override those vetoes.[204] If the NEA had been meant to embody *Youngstown*, then one would think that the political branches were in a strong Zone 3 situation: Congress had directly and repeatedly spoken on an issue over which it has sole authority (appropriations), not only by passing spending bills without wall funding but also by voting twice to terminate the emergency declaration. But President Trump still got

198. Manne & Weinberger, *supra* note 197.

199. *See* Geoffrey A. Manne & Seth Weinberger, *Trust the Process: How the National Emergency Act Threatens Marginalized Populations and the Constitution — And What to Do About It*, 44 HARBINGER 95, 95–96 (2020) ("Including Trump's border wall emergency declaration and four subsequent emergency declarations, Presidents going back to Jimmy Carter have declared a total of 57 emergencies under the NEA. Thirty-four of these are still active.").

200. *See* Linda Sheryl Greene, *Up Against the Wall: Congressional Retention of the Spending Power in Times of "Emergency,"* 51 LOY. U. CHI. L.J. 431, 461–62 (2019); Robert L. Tsai, *Manufactured Emergencies*, 129 YALE L.J.F. 590, 594 (2020); Baker, *supra* note 3; Paletta et al., *supra* note 3.

201. *See* Dean DeChiaro & Camila DeChalus, *Border Wall Funds Elusive Without a Deal on "Dreamers,"* ROLL CALL (Mar. 2, 2018, 5:04 AM), https://www.rollcall.com/news/politics/border-wall-funds-elusive-without-deal-dreamers [https://perma.cc/E53H-4JL8].

202. *Compare* Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, §§ 230–31, 113 Stat. 13, 28 (2020), *with* Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019).

203. *See* Binder, *supra* note 11; Cochrane, *supra* note 11.

204. *See* Cochrane, *supra* note 12; Zanona, *supra* note 12.

his way, and the national emergency declaration only came to an end upon President Biden's ascension to the Oval Office.[205]

The change from a concurrent resolution to a joint resolution has thus undermined a crucial check on presidential emergency power, insofar as Congress' "provision for defense" is not "commensurate to the danger of attack" by the President.[206] The amended NEA allows the President unilaterally to upset legislative compromises and impose policymaking preferences without the meaningful possibility of oversight by Congress or the courts.[207] As several commentators have noted, this arrangement is far from ideal[208] — and, as explained in the next Part of this Note, resulted from a misapprehension of the nature of legislative vetoes.

IV. TWO PATHS FORWARD: REREADING *CHADHA* AND REVISITING THE NEA'S FRAMEWORK

As Parts II and III of this Note establish, the NEA delegates emergency declaration power to the President. Typically, delegations must conform with the intelligible principle test, with the conditions imposed by Congress being "supervised by the courts."[209] This test provides that "so long as Congress provides an administrative agency with standards guiding its actions such that a court could 'ascertain whether the will of Congress has been obeyed,' no delegation of legislative authority trenching on the

205. *See* Proclamation No. 10,142, 86 Fed. Reg. 7225 (Jan. 20, 2021).

206. THE FEDERALIST NO. 51, *supra* note 64, at 264 (James Madison).

207. *See* BRENNAN CTR. FOR JUSTICE, A GUIDE TO EMERGENCY POWERS AND THEIR USE 3–43 (2019), https://www.brennancenter.org/sites/default/files/2019-10/2019_10_15_EmergencyPowersFULL.pdf [https://perma.cc/K6L5-QJDV] (list of 136 statutes available upon declaration of a national emergency). These examples do not include the many *other* statutory authorities of which a President may avail herself "in time of war." *See, e.g.*, 10 U.S.C. §§ 2538, 2644.

208. *See, e.g.*, Michael J. Pastrick, *Reality Check: The Need to Repair the Broken System of Delegating Legislative Power Under the National Emergencies Act*, 2019 CARDOZO L. REV. DE NOVO 20, 31–40; Patrick A. Thronson, Note, *Toward Comprehensive Reform of America's Emergency Law Regime*, 46 MICH. L. REV. 737, 777–85 (2013); Editorial, *Fix America's National Emergencies Law. And Not Just Because of Trump.*, N.Y. TIMES (Mar. 5, 2019), https://www.nytimes.com/2019/03/05/opinion/trump-national-emergency.html [https://perma.cc/WA38-3JWN].

209. Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, 796; *accord* Ethyl Corp. v. Envtl. Prot. Agency, 541 F.2d 1, 68 (D.C. Cir. 1976) (en banc) (Leventhal, J., concurring) ("Congress has been willing to delegate its legislative powers broadly — and courts have upheld such delegation — because there is court review to assure that the agency exercises the delegated power within statutory limits, and that it fleshes out objectives within those limits by an administration that is not irrational or discriminatory.").

principle of separation of powers has occurred."[210] On its face, however, the NEA has no obvious intelligible principle for determining whether the President has properly identified a situation as constituting an emergency.[211] Even if the NEA *did* have an intelligible principle — or to the extent that the phrase "national emergency" and/or phrase(s) within particular secondary emergency statutes could serve as one — the existence of an emergency is one of those questions which are "in their nature political."[212] More specifically, emergency declarations suffer from a "lack of judicially discoverable and manageable standards for resolving" their propriety, as well as from the need for an "initial policy determination of a kind clearly for nonjudicial discretion."[213] Put otherwise, courts often are unwilling and/or unable to entertain challenges to these sorts of decisions by the political branches.[214]

---

210. Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 218 (1989) (quoting Mistretta v. United States, 488 U.S. 361, 379 (1989)); *see also, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2129–30 (2019) (plurality); Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 474–76 (2001); Am. Power & Light Co. v. Sec. & Exch. Comm'n, 329 U.S. 90, 104–06 (1946); J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1926).

211. *See* Pildes, *supra* note 195 (explaining that "[a]ttempting to define 'emergencies' in advance" was not a "pressing" concern for the NEA's drafters because "Congress could decide, after a presidential declaration of emergency, whether it agreed" by passing a concurrent resolution); *see also* Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1888 (2019) ("Neither [the NEA nor the Military Construction Codification Act] provides any decision making criterion to determine when an emergency should be declared and hence to establish a basis for the Secretary[] [of Defense's] exercise of discretion.").

212. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

213. Baker v. Carr, 369 U.S. 186, 216 (1962); *see also* Curran v. Laird, 420 F.2d 122, 129 (D.C. Cir. 1969) (en banc) ("The case involves decisions relating to the conduct of national defense; the President has a key role; the national interest contemplates and requires flexibility in management of defense resources; and the particular issues call for determinations that lie outside sound judicial domain in terms of aptitude, facilities, and responsibility.").

214. *See Special Committee Hearings*, *supra* note 36, at 84 (statement of Prof. Gerhard Casper) ("[C]ourts have been treating emergencies essentially as political questions and have often yielded to the higher wisdom of the Executive or the Congress in evaluating them constitutionally."); Tsai, *supra* note 200, at 593, 599 ("Presidents today realize that open-ended grants of authority, coupled with judicial acquiescence, mean their assertions of emergency power nearly always prevail. . . . [T]oday [the Supreme Court] will rarely, if ever, scrutinize a President's motives or the evidence underlying a crisis claim."); Pildes, *supra* note 195 ("Courts are traditionally reluctant to second-guess presidential judgments in areas such as foreign affairs, national security and emergencies[.]"); *see also, e.g.*, Amanda L. Tyler, *Courts and the Executive in Wartime: A Comparative Study of the American and British Approaches to the Internment of Citizens during World War II and Their Lessons for Today*, 107 CALIF. L. REV. 789, 839 (2019) ("Just as it had one year earlier in *Hirabayashi*, the Court [in *Korematsu*] deferred to the military and declined yet again to 'reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained.'" (quoting Korematsu v. United States, 323 U.S. 214, 218 (1944))); Jamal Greene, *Is* Korematsu *Good Law?*, 128 YALE L.J.F. 629, 638 (2019) (highlighting "[t]he parallel between [the Court's] deferential posture [in Trump v. Hawaii, 138

If courts will not police these sorts of delegations, then the best alternative constraint on executive emergency declarations is a political check. Hence the NEA's original procedure for termination by concurrent resolution: Congress could serve as a check to the President when the courts would not.[215] After *Chadha*, Congress — seeking to avoid total invalidation — amended the NEA to remove this tool. The question is whether they needed to do this. The answer is no, at least under a revisionist reading of *Chadha* enabled by a more functionalist reading of legislative vetoes under the Constitution. As Professor Peter Strauss has explained, "[l]egislative vetoes have been used in a variety of settings," yet both the majority and dissenting opinions in *Chadha* assumed that "the issues [that they] presented were always the same" regardless of context.[216] But not all legislative vetoes are alike. While one type — the regulatory legislative veto — is constitutionally untenable and prudentially unwise, the other — the political legislative veto — can serve as a valuable element of power-sharing arrangements.

These two types of legislative vetoes are distinguishable along three axes. The first point of differentiation is the actor subject to

---

S. Ct. 2392 (2018)] and the Court's performance in *Korematsu*"); United States v. Amirnazmi, 645 F.3d 564, 579 (3d Cir. 2011) ("Mindful of the heightened deference accorded the Executive in this field, we decline to interpret the legislative grant of authority [by the International Emergency Economic Powers Act] parsimoniously."); United States v. Spawr Optical Rsch., Inc., 685 F.2d 1076, 1080 (9th Cir. 1982) ("Wary of impairing the flexibility necessary to such a broad delegation, courts have not normally reviewed 'the essentially political questions surrounding the declaration or continuance of a national emergency' under [the Trading With the Enemy Act]." (quoting United States v. Yoshida Int'l, Inc., 526 F.2d 560, 579 (C.C.P.A. 1975))). This posture reappeared in litigation challenging President Trump's border wall emergency declaration. *See, e.g.*, Ctr. for Biological Diversity v. Trump, 453 F. Supp. 3d 11, 30–34 (D.D.C. 2020) (holding that challenge to border emergency declaration presented a nonjusticiable political question); Washington v. Trump, 441 F. Supp. 3d 1101, 1124–25 (W.D. Wash. 2020) (rejecting invocation of the political question doctrine since the plaintiffs were "not challenging the President's determination that an emergency exists at the southern border that requires the use of armed forces," but instead were "questioning whether the eleven border barrier projects me[t] the definition of 'military construction' set forth in § 2801"). For arguments against "broadly deferential judicial review" during crises, see, e.g., Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 138 HARV. L. REV. F. 179, 182–98 (2020); Tsai, *supra* note 200, at 599–608. The implications of the four Bush-era detainee cases — Rasul v. Bush, 542 U.S. 466 (2004), Hamdi v. Rumsfeld, 542 U.S. 507 (2004), Hamdan v. Rumsfeld, 548 U.S. 557 (2006), and Boumediene v. Bush, 553 U.S. 723 (2008) — for assessments of judicial willingness to defer to the political branches during wartime are beyond the scope of this Note.

215. *See* Pildes, *supra* note 195 ("Through this legislative veto, Congress — not the courts — was designed to be the institutional forum to determine whether the president was right in declaring an emergency.").

216. Strauss, *supra* note 209, at 790–91.

the veto. Regulatory legislative vetoes are often — but not always — attached to statutes which delegate power to someone who is *not* the President (e.g., a department head or an independent agency).[217] In contrast, political legislative vetoes involve situations in which "the President himself takes or directs the action subject to the legislative veto."[218] This distinction is important for at least two reasons. First, regulatory legislative vetoes effectively "operate as a device for evasion of the President's participation in governance" by assigning authority to someone within the executive branch who is *not* the President and then subjecting that assignment to congressional override without any direct executive participation in the process.[219] This problem is avoided if the President is the subject of the veto. Second, the need for a post-enactment congressional check is less pertinent in the context of administrative agencies because many agency actions are subject to judicial review in one form or another.[220] By contrast, the President enjoys a much broader range of discretion, including, but not limited to, exemption from the scope of the Administrative Procedure Act.[221] Therefore, from the outset, the judicial checks on presidential activity are far less robust than they are for other members of (or entities within) the executive branches or for independent agencies.

The second difference between regulatory and political legislative vetoes is their subject matter. Regulatory legislative vetoes "have as their principal purpose and effect 'altering the legal rights, duties[,] and relations of persons' outside government."[222] In such situations, there is a genuine risk that Congress will act arbitrarily to oppress individuals, contrary to "both the separation of powers notion generally and the [Constitution's] attainder prohibition in particular."[223] Additionally, judicial review "is readily available" when individual interests or obligations are at stake

217. *Id.* at 807, 817.
218. *Id.* at 817.
219. *Id.* at 808.
220. *See* Administrative Procedure Act, Pub. L. No. 79-404, § 10, 60 Stat. 237, 243–44 (1946) (codified as amended at 5 U.S.C. §§ 701–06).
221. *See* Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992).
222. Strauss, *supra* note 209, at 819 (emphasis deleted) (quoting Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 952 (1983)).
223. *Id.* at 804; *see* U.S. CONST. art. I, § 9, cl. 3.

because it is relatively easy to establish a plaintiff's standing.[224] By contrast, for political legislative vetoes, "the subject matter principally concerns the internal arrangements of government rather than rules of conduct applicable to the public, and judicial consideration at any stage is unlikely."[225]

The third point of differentiation between regulatory and political legislative vetoes is their pertinence to maintaining interbranch checks and balances. Political legislative vetoes are used in situations in which Congress and the President reach "an accommodation . . . often mutually desired . . . on matters of legitimate interest to each."[226] Particularly in areas of "national security and foreign affairs" where courts are reluctant to tread, these political legislative vetoes allow Congress to "transfer greater authority to the President . . . while preserving its own constitutional role."[227] As part of the "horse-trading" inherent in the "continuing political dialogue between [the] President and Congress, on matters having high and legitimate political interest to both," Congress may grant a greater amount of power to the President while still "preserving balance" between the branches.[228] Such balance is essential to the health of the American constitutional system. By design, no one branch is made supreme over, or entirely dependent upon, another. Each has the "necessary constitutional means and personal motives to resist encroachments of the others."[229] By "pitt[ing the branches] against [one] another in a continuous struggle," the Constitution denies each "the capacity ever to consolidate all governmental authority in itself, while permitting the whole effectively to carry forward the work of

224. Strauss, *supra* note 209, at 817; *see* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) ("For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 n.1 (1992))).

225. Strauss, *supra* note 209, at 817.

226. *Id.* at 806.

227. *Chadha*, 462 U.S. at 969 (White, J., dissenting); *see* Strauss, *supra* note 209, at 806 (explaining that political legislative vetoes are apt in situations where judicial review is unlikely).

228. Strauss, *supra* note 209, at 791–92, 806; *see also* Samuel W. Cooper, Note, *Considering "Power" in Separation of Powers*, 46 STAN. L. REV. 361, 380 n.134 (1994) ("[F]rom almost the beginning, the veto facilitated efforts by both Congress and the President to create flexibility in executive-legislative relations."); Bernard Schwartz, *Curiouser and Curiouser: The Supreme Court's Separation of Powers Wonderland*, 65 NOTRE DAME L. REV. 587, 598 (1990) (cataloguing insertions of concurrent resolution termination provisions into statutes during 1970s as part of a broader congressional effort to rein in presidential power); Gerhard Casper, *The Constitutional Organization of Government*, 26 WM. & MARY L. REV. 177, 187–89 (1985) (classifying these statutes as "framework legislation").

229. THE FEDERALIST NO. 51, *supra* note 64, at 264 (James Madison).

government."[230] This concern about checks and balances is all the more acute because during times of potential danger, judges sit "with intrepid Oedipus eyes and sealed Odysseus ears," unwilling and/or unable to entertain legal challenges to assertions of necessity.[231] In the emergency context more than almost any other, a political check is the *only* means of constraining a congressional delegation.

However, no such theory of checks and balances justifies regulatory legislative vetoes. Rather, they are defended "only in terms of Congress' performance of its own legislative function."[232] By reserving for Congress an ex post power to cancel individual agency actions with which it does not agree, regulatory legislative vetoes "provid[e] a mechanism whereby difficult issues can be cheaply revisited."[233] This "cheap" revisitation comes at the cost of imprecision in the drafting of delegatory statutes, an undesirable outcome given that precision both "facilitate[s] judicial review" and "protect[s] the citizen against arbitrary action."[234] In these situations,

---

230. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984); *see* THE FEDERALIST NO. 51, *supra* note 64, at 264 (James Madison) ("But 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. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.").

231. FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL 161 (Walter Kaufmann trans., Vintage Books 1966) (1886); *see* sources cited and discussed *supra* note 214.

232. Strauss, *supra* note 209, at 817–18.

233. *Id.* at 810. *But cf.* Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing* Auer *Deference's Effects on Agency Rules*, 119 COLUM. L. REV. 85, 164 (2019) (finding, in a vaguely analogous context, "no empirical evidence" that agencies are any more likely to "promulgate vague rules that expand agency discretion" merely because they enjoy deference to their interpretations of their own rules).

234. Strauss, *supra* note 209, at 810. This particular critique of casual congressional drafting should not be understood as a broader attack on the essential and valuable practice of delegation in the modern administrative state. Some degree of delegation is not only inevitable; it is useful. *See, e.g.*, Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) ("Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred."); Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7 (2017) ("Even further, the administrative state today is constitutionally obligatory, given the broad delegations of authority to the executive branch that represent the central reality of contemporary national government. Those delegations are necessary given the economic, social, scientific, and technological realities of our day."); Keith E.

the "reservation of an unconditional congressional negative" is not essential to restraining the power of the executive branch or maintaining Congress' fundamental role in the legislative process; to the contrary, it serves only to excuse "political self-aggrandizement."[235] Nor is there a risk of an executive branch unbound in the absence of regulatory legislative vetoes, not least because — in situations not involving war and national security — courts are willing and able to hold government actors accountable to intelligible principles and invalidate administrative actions which run afoul of statutory and/or constitutional obligations.[236]

Applying this dichotomy to the provisions at issue in the INA and the NEA illustrates why the former was an impermissible regulatory legislative veto while the latter was an admissible political legislative veto. The removal provision struck down in *Chadha* was a regulatory legislative veto. First, it undid an action taken by the Attorney General, not the President.[237] Second, the INA provision did not pertain directly to "the internal arrangements of government."[238] Rather, by allowing one chamber of Congress to choose which particular people would not be able to benefit from canceled deportation orders, the provision had the "principal purpose and effect [of] 'altering the legal rights, duties[,] and relations of persons' outside government."[239] Third, the provision invalidated in *Chadha* had no broader connection to a power-sharing agreement between Congress and the President or to upholding basic checks and balances. The INA provision merely was an outlet for Congress to "control, in random and arbitrary fashion, [a] matter[ ] customarily regarded as the domain of administrative law": i.e., whether an individual meets the statutorily prescribed standards for relief from deportation.[240] Thus, *Chadha*'s result is defensible even under the revisionist reading.

Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 381 (2017) (arguing that "there was never a time in which the courts used the nondelegation doctrine to limit legislative delegations of power").

235. Strauss, *supra* note 209, at 807, 811.

236. *See id.* at 809 ("We permit Congress to delegate notably open-ended rulemaking authority to agencies, subject only to the now limited constraints of the delegation doctrine: that the authority has been clearly delegated; and that the authority be described with clarity sufficient to permit a court to assess whether it has been exceeded.").

237. *See* Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 924–28 (1983).

238. Strauss, *supra* note 209, at 817.

239. *Id.* at 819 (emphasis deleted) (quoting *Chadha*, 462 U.S. at 952).

240. *Id.* at 792.

In contrast, a concurrent resolution to terminate a President's emergency declaration qualifies as a political legislative veto under Professor Strauss' framework. First, the actor subject to the legislative veto is "the President himself."[241] Second, the NEA's "subject matter principally concerns the internal arrangements of government rather than rules of conduct applicable to the public, and judicial consideration at any stage is unlikely."[242] To be sure, a legislative veto terminating a presidential declaration of an emergency would have the indirect effect of "'altering the legal rights, duties[,] and relations of persons' outside government."[243] Yet that was ancillary to the NEA concurrent resolution procedure's "*principal* purpose and effect": structuring congressional-executive relations in times of crisis by granting Congress the ability to curb improper presidential exercise of emergency powers.[244] Third, the NEA's concurrent resolution provision was designed to share power with the President while not eliminating Congress' role during crises. The NEA's original legislative veto emerged from the "horse-trading" inherent in the "continuing political dialogue between [the] President and Congress, on matters having high and legitimate political interest to both."[245] This point is key: Congress sacrificed a number of limits on presidential use of secondary emergency statutes in exchange for retaining its ability to terminate emergencies via concurrent resolutions.[246] In light of this legislative history, the original NEA's termination procedure was defensible as a means of "preserving balance" between the branches.[247] For these reasons, that provision was a political legislative veto, and thus constitutionally permissible under a more functionalist reading of *Chadha*.

Is such a reading likely to find purchase in the current Court? Almost certainly not. Given the decidedly formalist disposition of the Nine nowadays, there is virtually no likelihood that the Court will revisit, let alone overrule, *Chadha* any time soon.[248] But, at

---

241. *Id.* at 817; *see* National Emergencies Act, Pub. L. No. 94-412, § 202, 90 Stat. 1255, 1255–57 (1976).

242. Strauss, *supra* note 209, at 817.

243. *Id.* at 819 (emphasis deleted) (quoting *Chadha*, 462 U.S. at 952).

244. *Id.* (emphasis added).

245. *Id.* at 791–92, 806.

246. *See supra* notes 159 to 173 and accompanying text.

247. Strauss, *supra* note 209, at 806.

248. *See, e.g.*, Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380, 385 & n.28 (2015) (describing how "close observers have noticed a more general trend towards formalism in the rhetoric of the Roberts

the very least, this choice to adhere to a particular formalist view of the separation powers is just that: a choice, one that neither *Chadha*'s holding nor the Constitution compels.[249]

Accordingly, the next-best option is to revisit the balance of power *within* the statutory framework. For example, the recently proposed Assuring that Robust, Thorough, and Informed Congressional Leadership is Exercised Over National Emergencies ("ARTICLE ONE") Act would modify the existing framework in several ways, most notably by forcing a presidentially declared emergency to conclude within thirty days unless affirmatively approved by Congress through a joint resolution.[250] If Congress did not do so, the emergency would end and the President would be unable to "declare a subsequent national emergency . . . with respect to the same circumstances" for the rest of her term.[251] And even if Congress *did* grant its consent, the national emergency would terminate one year from the date that President transmitted her declaration to Congress unless both the President and Congress granted their approval in the same manner and under the same constraints (i.e., lasting only thirty days unless Congress passed a joint resolution approving the declaration of the emergency).[252] Alternatively, the emergency would end even sooner if terminated by the President or by "an Act of Congress."[253]

The ARTICLE ONE Act, in essence, would seek to reinstate some elements of the draft versions of the NEA which were altered or eliminated before its passage.[254] Concededly, the former would likely run into the same roadblock as the latter did: executive recalcitrance. No matter how one designs statutory solutions to the

---

Court"; collecting publications from those observers). The three changes to the Court's composition since that Article's publication — Justice Neil Gorsuch replacing Justice Scalia, Justice Brett Kavanaugh replacing Justice Anthony Kennedy, and Justice Amy Coney Barrett replacing Justice Ruth Bader Ginsburg — have served only to tilt the Court in a more formalist direction.

249. For a somewhat similar criticism of separation of powers formalism in a different context, see Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2244–45 (2020) (Kagan, J., dissenting).

250. *See* Assuring that Robust, Thorough, and Informed Congressional Leadership is Exercised Over National Emergencies (ARTICLE ONE) Act, S. 764, 116th Cong. § 202(a)(1) (2019) (as reported by S. Comm. on Homeland Sec. & Governmental Affs., Nov. 18, 2019), https://www.congress.gov/116/bills/s764/BILLS-116s764rs.pdf [https://perma.cc/AHZ5-DMD5].

251. *Id.* § 201(c)(1).

252. *See id.* § 202(b).

253. *Id.* § 202(c).

254. *See, e.g.*, *supra* notes 160 to 163 and accompanying text (describing the removal of an automatic sunset provision).

Chadha problem, the same conundrum arises: Congress' virtual inability, as a "practical political matter, to reclaim any of these powers except as the President is willing to relinquish them."[255] Overriding a presidential veto would require the cooperation of a substantial number of the members of the President's party, a prospect which seems unlikely to materialize no matter which party holds each branch. Still, these difficulties are worth attempting to surmount for the sake of moving towards the restoration of parity between the political branches.

V. CONCLUSION

In the legendary words of Chief Justice John Marshall, the U.S. Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."[256] The original NEA was one such adaptation: it allowed Congress to delegate part of its emergency declaration power to the President while also "building in opportunities for congressional participation and checks."[257] Restoring the concurrent resolution termination procedure or adopting a variant of the ARTICLE ONE Act would promote these purposes by preventing one person from "decid[ing] on the exception."[258]

255. *Special Committee Hearings*, *supra* note 36, at 69 (statement of Sen. Church).
256. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).
257. *Special Committee Hearings*, *supra* note 36, at 33 (statement of Prof. Cornelius P. Cotter).
258. SCHMITT, *supra* note 29, at 5.

Putting the "Shadow Docket" in Perspective

Stephen I. Vladeck†

The First Monday of the Supreme Court's October 2022 Term is an opportune moment to reflect upon both recent developments on, and the growing public attention being paid to, what University of Chicago law professor Will Baude dubbed the Court's "shadow docket."[1] Baude didn't intend the term as a pejorative; rather, he used it as a catch-all for everything the Justices do *beyond* the lengthy, signed rulings the Court hands down each spring on the "merits docket"—in cases that have received multiple rounds of briefing and oral argument. From grants and denials of certiorari to grants and denials of emergency relief, and everything in between, the "shadow docket" was meant simply as a descriptor—in which the "shadow" metaphor is a reference to the obscurity and inscrutability of the Justices' output, and not (necessarily) to any nefariousness.[2]

That's not how it's been received by other conservatives. In a September 2021 speech, Justice Alito, for instance, complained that "the catchy and sinister term 'shadow docket' has been used to portray the Court as having been captured by a dangerous cabal that resorts to sneak and improper methods to get its ways."[3] Alito's speech tried to re-brand the topic as the Supreme Court's "emergency docket," even though that reduces to a very small subset the actual universe of unsigned, unexplained orders to which Baude was originally referring.[4] Likewise, Texas Senator Ted Cruz suggested that "Democrats are fond of concocting ominous terms like 'dark money' and 'shadow docket.'"[5] And the editorial board of the *Wall Street Journal*, not to be outdone, wrote that "what is formally known as the 'orders list'" became a "lightning rod" only because "the Supreme Court has moved in a conservative direction, so Democrats and the legal establishment have ramped up the volume on their criticism."[6] Even Justice Kavanaugh, in a February 2022

† Charles Alan Wright Chair in Federal Courts, University of Texas School of Law. This essay is an edited version of remarks delivered as part of a joint *Harvard Law & Policy Review* / American Constitution Society event at Harvard Law School on October 3, 2022. I'm grateful to Kevin Bendesky, Christina Coleburn, Justin Gillette, and Amika Singh both for the invitation and for their efforts in bringing that event to fruition.

[1] William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & Liberty 1, 5 (2015).

[2] *See* William Baude, *The Supreme Court's Secret Decisions*, N.Y. Times, Feb. 3, 2015, at A23.

[3] Hon. Samuel A. Alito, Jr., "The Supreme Court's Emergency Docket," Speech at Notre Dame Law School (Sept. 30, 2021) (transcript on file with the author).

[4] For instance, Baude's 2015 article was focused primarily on summary reversals at the certiorari stage—orders that do not fall within Alito's "emergency docket" framing. *See* Baude, *supra* note 1, at 18–40.

[5] Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary, 117th Cong., 1st Sess. (2021) (statement of Sen. Cruz), *available at* https://www.judiciary.senate.gov/meetings/texass-unconstitutional-abortion-ban-and-the-role-of-the-shadow-docket [https://perma.cc/R7WF-JKB3].

[6] Editorial, *The "Shadow Docket Diversion,"* Wall St. J., Oct. 2, 2021, at A12.

concurring opinion joined by Justice Alito, complained about the "catchy but worn-out rhetoric" surrounding the term.[7]

These critiques are themselves a response to mounting public criticism of what the Court has *done* on the shadow docket—to the perception, if not the reality, that the Justices in recent years have used unsigned and unexplained procedural orders in both substantive ways and absolute numbers that go beyond historical practice; in ways that have had massive effects on millions of Americans; often in defiance of the rules and norms governing these technical orders; and, perhaps most importantly, *inconsistently* in ways that have tended to favor Republicans and/or hurt Democrats. Indeed, it's no coincidence that the Alito, Cruz, and the *Wall Street Journal* responses all came at the end of September 2021—a month that began with the Supreme Court's highly visible and deeply controversial 5-4 ruling refusing to block Texas's "Heartbeat Act," a ban on all abortions after the sixth week of pregnancy.[8]

The ruling about Texas's Senate Bill 8 was, for many, the first public exposure to the modern Court's use of unsigned and, in that case, thinly explained orders in ways that directly affect the rights of millions of Americans. And it was the first time that any of the Justices had publicly criticized the majority's use—and abuse—of these procedural rulings. As Justice Elena Kagan closed her short but fiery dissenting opinion, "the majority's decision is emblematic of too much of this Court's shadow-docket decisionmaking—which every day becomes more unreasoned, inconsistent, and impossible to defend."[9]

But the real debate over the shadow docket has nothing to do with its name. We could call it the "banana docket," and it would raise the same questions. And so my goal in our time together today is to ask—and attempt to answer—two questions about the shadow docket. First, is Justice Kagan's descriptive charge accurate? That is to say, is the current Court's use of the shadow docket "more" unreasoned and inconsistent from its predecessors? And second, if so, is the current Court's use of the shadow docket "impossible to defend"? Perhaps not surprisingly, I aim to demonstrate that the answer to both questions is an emphatic "yes."

***

For as long as there has been a Supreme Court, the Court has issued unsigned procedural orders shaping and structuring how the Justices process and ultimately resolve each of the cases before (and perhaps in lieu of ever) reaching the merits. If the Justices grant a party more time to file a brief, that happens on the shadow docket. If they reallocate how much time parties have to argue, that happens on the shadow docket. If they refuse to take up

[7] Merrill v. Milligan, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring).
[8] Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021) (mem.).
[9] *Id.* at 2500 (Kagan, J., dissenting).

an appeal, that happens on the shadow docket, too. The effects of individual orders may sometimes have elicited public interest, as when Justice Douglas attempted to stop the bombing of Cambodia.[10] But the shadow docket itself is longstanding, and its output has historically been, with some notable but limited exceptions, largely uncontroversial. The Court's output on the shadow docket may be larger than the merits docket in terms of sheer number of cases disposed of, but at least traditionally, it has been far less significant.

But things have changed. Since the mid-2010s, there has been a radical shift in how (and how often) the Justices use the shadow docket—not just to manage their workload, but to change the law both on the ground and on the books. From immigration to elections; from abortion to the death penalty; from religious liberty to the power of federal administrative agencies; the Supreme Court has, with increasing frequency, intervened preemptively, if not prematurely, in some of our country's most fraught political disputes through decisions that are unseen, unsigned, and almost always unexplained. In the process, these rulings have run roughshod over long-settled understandings of both the formal and practical limits on the Court's authority. Because they are unsigned and unexplained, shadow docket orders are supposed to be exceedingly limited in what they can accomplish. And yet, dozens of times each Term, we're now seeing shadow docket orders that fly in the face of those understandings.

Consider, in this respect, the Justices' February 2022 intervention in a dispute over congressional redistricting in Alabama. Shortly after Alabama adopted new maps for its seven U.S. House seats in response to the 2020 Census, two different federal district courts blocked the maps, concluding that the way the new districts were drawn diluted the voting power of Black Alabamians in violation of the Voting Rights Act of 1965.[11] These rulings were based upon the Supreme Court's own prior interpretations of the Voting Rights Act, specifically the standard that the Justices had articulated for proving such "vote-dilution" claims.[12] The district courts ordered Alabama to redraw the maps, this time with a second "majority-minority" district. Such a map would almost certainly have created a second safe Democratic seat in Alabama's 6-1 Republican-majority House delegation.

Alabama immediately appealed those rulings, arguing that the Supreme Court was likely to, and should, revisit its prior interpretation of the Voting Rights Act. In the ordinary course, if the Justices wanted to, they would have taken up the appeal and set it for plenary consideration, including oral argument, sometime in the fall of 2022. While that happened, the district court's rulings, requiring Alabama to re-draw its maps, would have remained in effect for the 2022 primary and general elections. But Alabama also asked

[10] Holtzman v. Schlesinger, 414 U.S. 1316 (1973).

[11] Singleton v. Merrill, No. 2:21-cv-1291, 2022 WL 265001 (N.D. Ala. Jan. 24, 2022) (three-judge court); Caster v. Merrill, No. 2:21-cv-1536, 2022 WL 264819 (N.D. Ala. Jan. 24, 2022).

[12] *See* Thornburg v. Gingles, 478 U.S. 30 (1986).

the Justices to short-circuit that entire process. Specifically, Alabama applied for "emergency" relief in the form of a stay that would freeze the effects of both district court rulings, so that the state could continue to use the invalidated maps throughout the 2022 election cycle.

A few minutes after 5:00 p.m. on Monday, February 7, 2022, the Supreme Court acquiesced. By a 5-4 vote, but with no opinion or even cursory explanation on behalf of the majority, the Court issued stays that guaranteed that the challenged maps would remain in place until the Justices decided Alabama's appeals, which would not happen before the 2022 elections.[13] (Oral argument would later be scheduled for October 4, 2022.) The February order was as short as it was inscrutable: "The district court's January 24, 2022 preliminary injunctions in No. 2:21–cv–1530 and No. 2:21–cv–1536 are stayed pending further order of the Court."[14]

Chief Justice John Roberts, who had written for the 5-4 majority in *Shelby County* v. *Holder*,[15] a decision that had itself heavily weakened the Voting Rights Act, wrote a rare dissent in which he criticized the other five Republican-appointed Justices for blocking the district courts' rulings. In his words, the lower courts "properly applied existing law in an extensive opinion with no apparent errors for our correction."[16] From his perspective, Alabama might persuade the Court to change the meaning of the Voting Rights Act on appeal, but because the law as it stood supported the lower courts' rulings, the state couldn't come close to making the case for a stay while that appeal unfolded. Emergency interventions from the Supreme Court are supposed to be for emergencies. For obvious reasons, lower courts faithfully following the Justices' existing precedents had not historically qualified as such.

The more acerbic dissent came, as in the Texas Senate Bill 8 case, from Justice Kagan. Writing for herself and the other two more liberal members of the Court, Justices Breyer and Sotomayor, Kagan tore into the majority. "Accepting Alabama's contentions," she wrote, "would rewrite decades of this Court's precedent about Section 2 of the VRA," a change that "can properly happen only after full briefing and argument—not based on the scanty review this Court gives matters on its shadow docket."[17] By overriding the district courts, even temporarily, Kagan concluded, "today's decision is one more in a disconcertingly long line of cases in which this Court uses its shadow docket to signal or make changes in the law, without anything approaching full briefing and argument."[18]

The order in the Alabama cases produced immediate effects not just in Alabama, but elsewhere. Just 10 days after the ruling, for example, a Georgia district court held that it couldn't block Georgia's proposed new district maps, even though they suffered from the exact same legal infirmity as Ala-

[13] Merrill v. Milligan, 142 S. Ct. 879 (2022) (mem.).
[14] *Id.* at 879.
[15] 570 U.S. 529 (2013).
[16] *Merrill*, 142 S. Ct. at 882 (Roberts, C.J., dissenting).
[17] *Id.* at 883 (Kagan, J., dissenting).
[18] *Id.* at 889.

bama's.[19] The problem, the district judge wrote, was the Supreme Court's unexplained order in the Alabama cases—and the assumption that the Justices would likewise allow Georgia's maps to go back into effect if he blocked them.[20]

A few months later, a Louisiana district court blocked Louisiana's proposed congressional maps as violating of the Voting Rights Act, much as the Alabama district court judge had done in that state. Given the Supreme Court's subsequent actions in the Alabama case, the judge in Louisiana wrote a 152-page decision that carefully explained why it was appropriate to issue an injunction requiring Louisiana to re-draw its maps even if it hadn't been appropriate in the Alabama and Georgia cases.[21] The Fifth Circuit, by any measure the most conservative federal appeals court in the country, refused to block the district court's ruling, writing 33 pages of its own affirming the lower court decision.[22] But the Supreme Court once again intervened to put the blocked maps into effect, without providing a single word of explanation for why the voluminous analysis the lower courts had provided was wrong.[23] Together, these rulings all but guaranteed that three House seats that would likely have been safe seats for Democratic candidates in the 2022 midterm elections were instead safe seats for Republicans. A subsequent *New York Times* report concluded that the rulings were likely to impact as many as seven House seats—and, as it would turn out, which party controlled the House in the 118th Congress.[24]

The Justices' interventions in the Alabama and Louisiana cases were emblematic of a much larger pattern. During its October 2019 and October 2020 Terms, the Court granted more than 40 applications for emergency relief—staying lower-court decisions like the ones in the Alabama cases; vacating lower-court stays or injunctions; or reaching out to enjoin state executive action directly.[25] Only in the mid-1980s had the shadow docket ever been quite so active—and the overwhelming majority of that activity involved last-minute appeals by death-row inmates seeking to halt their executions.[26]

For the prisoners involved in those 1980s cases, the matter was literally one of life or death. However, the disputes they brought before the Court,

---

[19] *See* Alpha Phi Alpha Fraternity v. Raffensperger, 587 F. Supp. 3d 1222, 233–34, 1327 (N.D. Ga. 2022).

[20] *See id.* at 1326.

[21] Robinson v. Ardoin, No. 22-211, 2022 WL 2012389 (M.D. La. June 6, 2022).

[22] Robinson v. Ardoin, 37 F.4th 208 (5th Cir. 2022) (per curiam).

[23] Ardoin v. Robinson, 142 S. Ct. 2892 (2022) (mem.).

[24] Michael Wines, *Maps in Four States Were Ruled Illegal Gerrymanders. They're Being Used Anyway*, N.Y. Times, Aug. 9, 2022, at A16.

[25] For the data, see Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary, 117th Cong., 1st Sess. (2021) (testimony of Stephen I. Vladeck), *available at* https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20testimony1.pdf [https://perma.cc/3DXN-W9ZA].

[26] *See* Stephen I. Vladeck, The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic 93–128 (2023) (tracing the evolution of the shadow docket in 1980s-era capital cases).

and the Court's resolution of them, tended not to have broader legal or practical ramifications. The Court halted a prisoner's execution or allowed it to proceed, but in either case, the result applied to that prisoner alone. In contrast, as the redistricting cases underscore, the Court's recent decisions on requests for emergency relief have regularly produced statewide or nationwide effects. During the Trump administration, for instance, many of the Court's grants of emergency relief had the effect of putting back into place immigration policies affecting millions of non-citizens, including some policies that would eventually be deemed unlawful by every court that actually ruled on their merits.[27]

Likewise, the Supreme Court's January 2022 emergency order blocking the Occupational Safety and Health Administration's COVID vaccination-or-testing mandate for large employers directly affected more than 83 million Americans, roughly one-quarter of the country's population.[28] And emergency rulings refusing to intervene have had equally broad impacts, such as the Court's September 2021 ruling allowing Texas's six-week abortion ban, Senate Bill 8, to go into effect, halting almost all legal abortions in the country's second-largest state.[29] Unsigned and unexplained orders that used to do little more than adjust the status quo between the parties are now the difference between whether state and federal policies affecting all of us, and perhaps even depriving us of our constitutional rights, will or will not be enforced for years on end.

Although the beginning of this trend can be dated to early 2017, it accelerated precipitously after Justice Ruth Bader Ginsburg's death in September 2020 and the confirmation of Justice Amy Coney Barrett to replace her. Justice Barrett's impact was especially visible in the context of emergency orders directly blocking state policies that lower courts refused to freeze pending appeal. These orders, known as "injunctions pending appeal," are supposed to be the rarest form of emergency relief because, by the time the matter reaches the Supreme Court, at least two different lower courts have already refused to provide them—and now the Justices are being asked to reach out and directly restrain government actors. During Chief Justice Roberts's first 15 years on the bench, for instance, the Court issued a total of four such orders. In Justice Barrett's first five months on the Supreme Court (from November 2020 to April 2021), the Court issued seven of them. A number of popular and scholarly assessments of the Court's October 2020 Term that focused only on the merits docket wondered if Justice Barrett had really made that much of a difference. On the shadow docket, though, the effects of her confirmation were both immediate and stark.[30]

For generations, law students have been taught that the typical case reaches the Supreme Court only at the end of what is often a lengthy pro-

[27] *See id.* at 129–61.

[28] Nat'l Fed. of Indep. Bus. v. Dep't of Labor, 142 S. Ct. 661, 662 (2022) (per curiam).

[29] Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021) (mem.).

[30] *See, e.g.*, Stephen I. Vladeck, *The Most-Favored Right: COVID, the Supreme Court, and the (New) Free Exercise Clause*, 15 N.Y.U. J.L. & Liberty 699 (2022).

cess, including detailed (and often lengthy) proceedings before a trial court, and an appeal to intermediate courts of review typically at the end of that litigation. Against that backdrop, the Supreme Court's intended (and self-described) role in our system of government is that it goes last. As Justice Robert Jackson put it in 1953, "we are not final because we are infallible, but we are infallible only because we are final."[31] Or as the Justices regularly describe matters today, the Supreme Court is "a court of final review and not first view."[32] Having the last word cements the Court's role as the authoritative interpreter of federal law, but it also gives it a firmer foundation on which to rest those interpretations. The rigors of litigation have a way of sharpening the record and crystallizing the legal dispute, ensuring that by the time a case makes it way to the Supreme Court's merits docket, it truly and fairly presents the legal question that the Justices have been asked to resolve.

The Justices' recent use of the shadow docket is fundamentally inconsistent with this understanding. It inverts ordinary appellate process, having the Justices answer complicated (and, in some cases, hypothetical) questions of statutory or constitutional law at the outset of litigation, rather than after the issue has worked its way through the lower courts. And it almost certainly diverts the Court's finite resources away from the merits docket. Indeed, as the shadow docket has grown, the merits docket has shrunk, giving the Justices less time and ability to conduct plenary review in cases not presenting real or conjured emergencies. The Court issued 53 signed decisions in cases argued during its October 2019 Term, which was the lowest total since 1862. And the 56 signed decisions handed down during the October 2020 Term were the fewest since 1864. The total increased to only 58 during the October 2021 Term.[33] It's hard to believe that these developments are unrelated.

The shadow docket also invites behavior by the Justices that makes the Court look even more sharply partisan in its shadow docket rulings than in its decisions on the merits docket. It is, by default, easier for a Justice to join an unexplained order than a lengthy, reasoned opinion, where joining it is tantamount to endorsing all of its reasoning. Moreover, it is much harder to accuse a Justice of taking inconsistent positions in a future case if they didn't take a position in the prior one. Justice Barrett unintentionally acknowledged this point in an October 2021 concurring opinion, emphasizing that whether the Court intervenes on the shadow docket should turn not only on whether a party has made the requisite showing for emergency relief, but also on "a discretionary judgment about whether the Court should [one day] grant review in the case."[34] No law, rule, or even norm dictates how the Justices exercise that discretion. Instead, the Justices are free to vote for or against

[31] Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

[32] Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012) (quoting Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 110 (2001) (per curiam)).

[33] *See* Testimony of Stephen I. Vladeck, *supra* note 26, at 19.

[34] Does 1-3 v. Mills, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring).

relief for any reason (or no reason) whatsoever. And unlike in cases resolved on the merits docket, they're free to keep those reasons to themselves.

In the context of emergency orders, this has produced unusually rigid ideological homogeneity. During the October 2019 Term, only 12 of the Court's 53 signed merits decisions divided the Justices 5-4, including two with unusual and non-ideological lineups. In contrast, there were 11 decisions on the shadow docket in the same timespan from which four Justices publicly dissented, and perhaps others in which some of the dissents were not public. (One of the other vexing features of the shadow docket is that the Justices are under no obligation to publicly disclose how they voted—so that, unless four Justices publicly note a dissent, it's always possible that there were "stealth" dissents even from rulings that outwardly appear to be unanimous.[35]) In nine of the 11 publicly 5-4 shadow docket cases during the Court's 2019–20 session, the dissenters were the four more liberal Justices—Ginsburg, Breyer, Sotomayor, and Kagan. In the other two, those four were joined by the median Justice, Chief Justice Roberts, to form a majority. Never in its history has the shadow docket produced as many, or as many similar, 5-4 splits as the merits docket in the same Term.[36]

It's one thing when the Court is issuing unsigned orders with dramatic real-world effects where, at least publicly, the Justices appear to be speaking with one voice. It's something else altogether when these orders appear to reflect entirely partisan, or at least ideological, divisions where there's no substantive analysis to rebut that perception. It's difficult to dismiss as a coincidence that the Court's interventions in immigration cases, for example, generally allowed President Trump's policies to go into effect and generally blocked President Biden's policies. Ditto the Court's willingness to block COVID restrictions from New York and California, but not from Texas. Perhaps there are substantive explanations for why one administration's interpretations of immigration law were more valid than another's, or why one state's emergency public health measures were more dubious than another's—but if the Justices have such explanations, they're not providing them.

All the while, this story has flown under the radar. In response to public perception of the Supreme Court as always dividing along ideological lines, numerous media accounts claiming to take stock of the Court's October 2020 Term, for instance, emphasized that only seven of the 56 argued cases produced 6-3 ideological splits, with all of the conservatives in the majority and all of the more liberal Justices in dissent. As these stories explained, the Court was unanimous far more often than readers might expect, and even when it wasn't, the divisions often produced strange bedfellows. All of that is

[35] For an example in which there was clearly a "stealth" dissent, see *Arthur* v. *Dunn*, 137 S. Ct. 14 (2016) (mem.). There, the Court (with eight Justices) granted a stay of execution over only two public dissents, but Chief Justice Roberts wrote to note that he was providing a fifth vote for a stay. *Id.* at 15 (statement of Roberts, C.J.). In other words, the vote was 5-3, even though only Justices Thomas and Alito had publicly dissented.

[36] *See* Testimony of Stephen I. Vladeck, *supra* note 25.

factually correct, but it's an assessment of an increasingly distorted subset of the Court's workload. Including the shadow docket, there were twice as many unsigned rulings (14) during the same Term from which Justices Breyer, Sotomayor, and Kagan all publicly dissented, and no conservative publicly joined them. Accounting for both the number of those rulings and their substance yields a very different—and more ominous—story about the Court. On the shadow docket, the public perception of Justices who are regularly divided into their partisan camps looks far more accurate.[37]

These developments raise increasingly troubling questions about the Supreme Court's legitimacy. The Justices themselves have long insisted that "the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."[38] The point is not that we are all supposed to agree with what the Supreme Court is doing, but that we are at least supposed to be persuaded that the Justices are acting as judges. That doesn't just mean wearing robes to oral arguments; it means giving parties a meaningful opportunity to be heard and resolving their claims through principled decision making in which those principles are publicly accessible.

That understanding can't be reconciled with the shadow docket, on which there's usually no opinion to read. That makes it impossible to know why the Justices ruled the way that they did, or even how they voted. And it also provides no guidance to the parties or anyone else about how they can or should adjust their behavior to comply with the Court's ruling and avoid further judicial scrutiny. If the Supreme Court issues a merits decision adopting a new rule to govern traffic stops, for instance, the analysis in that decision quickly makes its way into police department training manuals nationwide, and not just in the jurisdiction in which that case arose. But the same can't be said of most shadow docket orders. In those cases, no one can truly know what the new rule is, or how it does or should apply to other cases.

While all of this has happened, Congress and the Executive Branch, which had historically taken an active role in shaping the Supreme Court's docket, have sat on the sidelines. Indeed, Congress hasn't meaningfully amended the Supreme Court's jurisdiction since 1988, the longest period without such legislation in the nation's history.[39]

The increasing prevalence and public significance of unsigned and unexplained rulings from unelected and democratically unaccountable judges would be problematic enough if the political branches had demanded it. But one of the most remarkable features of the rise of the shadow docket in recent years is that it has been entirely of the Court's own making, reflecting a series of formal rule and informal procedural and doctrinal changes quietly

[37] Steve Vladeck (@steve_vladeck), TWITTER (Sept. 2, 2021, 12:25 a.m.), https://twitter.com/steve_vladeck/status/1433284987806261250 [perma.cc/AZN2-VWTY].

[38] Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 866 (1992) (plurality opinion).

[39] Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, 102 Stat. 662.

adopted by the Court with no external catalyst. In that respect, the rise of the shadow docket reflects a power grab by a Court that has, for better or worse, been insulated from any kind of legislative response.

In all, then, the more one understands the shadow docket, the more troubling the Court's behavior appears to be. In a few short years, the moniker has gone from a clever name for an obscure academic subject to an unintentionally apt metaphor that captures both the problem itself and the reason why it has been difficult for even legal experts to see.

Making matters worse, unlike merits decisions, many orders on the shadow docket can come anytime and from anywhere. Depending upon what form they take, they can even be posted to any one of five different pages on the Supreme Court's own website, a technical but telling hindrance. In July 2020, for example, when the Bureau of Prisons carried out the first two federal executions in 17 years, it was only able to do so after a pair of 5-4 decisions on the shadow docket, both of which lifted stays of execution that had been granted by lower courts. The first of those rulings came down at 2:10 a.m. Eastern time on Tuesday, July 14;[40] and the second was issued two nights later at 2:46 a.m.[41] Not surprisingly, those rulings garnered far less attention than the much-ballyhooed merits decisions the Justices had handed down just the previous Monday, including in a pair of cases involving subpoenas for President Donald Trump's financial records. Ditto the Court's companion 5-4 rulings in November 2020 blocking New York's COVID restrictions as applied to houses of religious worship, which were handed down at 11:56 p.m. on the Wednesday night before Thanksgiving.[42] Each of these decisions would have been front-page news if handed down the "usual" way or at the "usual" time. Instead, they were left to be parsed almost entirely on social media.

With truncated briefing, no argument, little to no public explanation or vote tally to guide the parties before the Court or to inform lawyers and lower courts in future cases, and decisions that often come down in the middle of the night, it's hard to think of a better term for the great majority of the Supreme Court's output today than a docket that exists in the literal and metaphorical shadows. But whatever it's called, the upshot is that it is increasingly impossible to tell any story about the work of the Supreme Court that does not include the shadow docket—and that story is increasingly problematic.

After all, the same 5-4 majority that refused to intervene in the Texas Senate Bill 8 case because of unresolved procedural concerns (which it would later resolve at least in part in *favor* of the challengers)[43] was willing to ignore procedural obstacles in intervening to block state COVID restrictions on

[40] Barr v. Lee, 140 S. Ct. 2590 (2020) (per curiam). The time mentioned at which the ruling came down is based on timestamps in the e-mails sent from the Court to its press corps, as discussed in VLADECK, *supra* note 26, at 23 & 290 n.40.

[41] Barr v. Purkey, 140 S. Ct. 2594 (2020) (mem.).

[42] Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63 (2020) (per curiam).

[43] *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021).

religious liberty grounds.[44] Ditto the Justices in the OSHA case who were willing to block the vaccination-or-testing mandate *without* balancing the equities.[45] If principled reasons exist for why the Court is intervening in some of these cases but not others, or why it was so willing to stay injunctions of Trump policies but not of Biden policies, the central problem with the shadow docket is that the Court is not providing them.

In an April 2022 speech at the Ronald Reagan Presidential Library, with an eye toward the controversial merits decisions that were coming down the pike in the coming weeks, Justice Barrett urged her audience to judge the Court's work not by the way it was characterized in the press, or by the bottom lines the Justices reached, but by the substance of the Justices' reasoning. "Read the opinion," she insisted.[46] Two days later, in *Louisiana* v. *American Rivers*, hers was the decisive vote in a 5-4 ruling that put back into effect a Trump-era environmental rule (that challengers claimed made it easier for states to authorize pollution of navigable waterways)—in which there was no opinion to read.[47]

[44] *See* Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam).

[45] Nat'l Fed. of Indep. Bus. v. Dep't of Labor, 142 S. Ct. 661, 666 (2022) (per curiam) ("It is not our role to weigh such tradeoffs."); *see also* Stephen I. Vladeck, *Emergency Relief During Emergencies*, 102 B.U. L. Rev. 1787, 1790 (2022) (criticizing the Court's refusal to balance the equities in the OSHA case).

[46] *With Divisive Supreme Court Rulings Coming, Barrett Says: 'Read the Opinion,'* Associated Press (Apr. 5, 2022, 2:53 p.m.), https://apnews.com/article/ketanji-brown-jackson-us-supreme-court-amy-coney-barrett-7aa20b34d9a3e133bf1e2e2a899476f2 [https://perma.cc/6FDY-2G9Z].

[47] 142 S. Ct. 1347 (2022) (mem.).

Fordham Urban Law Journal

Volume 36 | Number 4 Article 1

2009

Public Interest Litigation: Insights From Theory and Practice

Scott L. Cummings

Deborah L. Rhode

Follow this and additional works at: https://ir.lawnet.fordham.edu/ulj

 Part of the Litigation Commons

Recommended Citation

Scott L. Cummings and Deborah L. Rhode, *Public Interest Litigation: Insights From Theory and Practice*, 36 Fordham Urb. L.J. 603 (2009).
Available at: https://ir.lawnet.fordham.edu/ulj/vol36/iss4/1

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Public Interest Litigation: Insights From Theory and Practice

Cover Page Footnote

Professor of Law, UCLA School of Law. Ernest W. McFarland Professor of Law, Director, Center on the Legal Profession, Stanford University.

The comments of Paul Brest and William Simon are gratefully acknowledged.

This article is available in Fordham Urban Law Journal: https://ir.lawnet.fordham.edu/ulj/vol36/iss4/1

PUBLIC INTEREST LITIGATION: INSIGHTS FROM THEORY AND PRACTICE

Scott L. Cummings[*] *& Deborah L. Rhode*[†]

---

[*] Professor of Law, UCLA School of Law.
[†] Ernest W. McFarland Professor of Law, Director, Center on the Legal Profession, Stanford University. The comments of Paul Brest and William Simon are gratefully acknowledged.

INTRODUCTION

In the American struggle for social justice, public interest litigation has played an indisputably important role. Yet over the past three decades, critics from both the left and right have challenged its capacity to secure systemic change. The critiques have varied, but have centered on two basic claims. The first is that litigation cannot itself reform social institutions. The second related concern is that over-reliance on courts diverts effort from potentially more productive political strategies and disempowers the groups that lawyers are seeking to assist. The result is too much law and too little justice.

These critiques, although powerful in their analysis of the limits of litigation, have generally failed to adequately acknowledge its contributions and the complex ways in which legal proceedings can support political mobilization.[1] Against the examples of lawyer domination, there are competing accounts of client empowerment and community-directed lawsuits.[2] Even as liberal critics have disparaged reliance on courts, conservative activists have enlisted them in efforts to block or roll back progressive change.[3]

This Article seeks to situate the debate over public interest litigation in a richer theoretical and empirical context. In essence, our argument is that such litigation is an imperfect but indispensable strategy of social change. Our challenge is to increase its effectiveness through better understanding of its capacities and constraints.

---

1. *See* RICHARD L. ABEL, POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980–1994 (1995); Michael McCann & Helena Silverstein, *Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 261 (Austin Sarat & Stuart Scheingold eds., 1998).

2. *See* MICHAEL MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994); Scott L. Cummings, *Law in the Labor Movements Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 CAL. L. REV. 1927 (2007) [hereinafter Cummings, *Wal-Mart*].

3. *See* ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION (2008); STEVEN TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008); Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2037 (2008) [hereinafter Rhode, *Public Interest Law*].

To that end, we draw on two bodies of work: research on law and social change, and research on social philanthropy. The first literature offers a detailed empirical and theoretical picture of how lawyers mobilize law to change institutional rules and redistribute power.[4] In its empirical dimension, this research explores the ideals and practices of public interest lawyers and how their strategies are informed by where they work—non-profit public interest organizations, large firm pro bono programs, plaintiff-side law firms, and law school clinics.[5] In its theoretical dimension, this literature draws on the sociology of law and social movements to explore the interplay between legal proceedings and political mobilization. A second body of work, which focuses on strategic philanthropy, holds important insights for how public interest organizations and pro bono programs can most effectively direct their social reform efforts.

We draw a number of lessons from this research. The first is that litigation, although a necessary strategy of social change, is never sufficient; it cannot effectively work in isolation from other mobilization efforts. Second, money matters: how public interest law is financed affects the kinds of cases that can be pursued and their likely social impact. A deeper understanding of financial constraints and opportunities in different practice contexts is therefore critical to effective reform. A third key insight is the importance of systematic evaluation. Only through more reflective assessments of the impact of litigation can we realize its full potential in pursuit of social justice.

Any discussion of these issues confronts a threshold definitional issue: what constitutes public interest litigation. The concept of the "public interest" is contested at the level of both theory and practice.[6] Commentators differ over whether there are widely shared criteria for assessing the public's interest as well as whether any particular case meets the definition.[7]

---

4. STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 3 (2004); *see also* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES, *supra* note 1.

5. *See* Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975–2004*, 84 N.C. L. REV. 1591 (2006); Rhode, *Public Interest Law*, *supra* note 3; *see also* DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE (2005); SOUTHWORTH, *supra* note 3; Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1 (2004) [hereinafter Cummings, *The Politics of Pro Bono*]; Scott L. Cummings & Ann Southworth, *Between Profit and Principle: The Private Public Interest Firm*, *in* PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION (Robert Granfield & Lynn Mather eds., forthcoming 2009) [hereinafter Cummings & Southworth, *Between Profit and Principle*].

6. SCHEINGOLD & SARAT, *supra* note 4, at 5-7.

7. Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of Public Interest Law*, 52 UCLA L. REV. 1223 (2005).

Our point here is not to revisit that debate, but rather to suggest that it needs to become part of the process for evaluating social impact litigation. Lawyers who pursue what they consider "public interest" work need concrete criteria for assessing its impact and justifying their priorities. In many contexts, there may be no single "right" answer about what advances social justice but there are better and worse ways of analyzing the question.

I. LAW AND SOCIAL CHANGE

A. Litigation and Its Discontents

The role of law as an instrument of social change rests on a fundamental assumption about its relative autonomy from politics: decision makers are to some extent bound by legal rules irrespective of their political consequences.[8] Although the degree of judicial autonomy varies across contexts, it provides the leverage that public interest lawyers seek to exploit. Litigation is a key strategy for protecting the rights and enlarging the power of subordinated groups, particularly when other channels of influence are unavailable. Groups hobbled by discrimination or collective action problems may turn to courts as allies in the struggle for social justice.

The public interest law movement that emerged in the 1960s and 1970s advanced this vision of court-centered social change,[9] drawing on models from civil rights and civil liberties groups, particularly the test-case strategy of the NAACP Legal Defense and Educational Fund.[10] Early litigation victories brought status and resources to developing public interest organizations, which enlisted courts in progressive social reform.[11] A number of structural factors encouraged this strategy: a federal judiciary receptive to civil rights claims; centralized administrative agencies susceptible to re-

8. ABEL, *supra* note 1, at 1.

9. LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996) (referring to the use of courts promote liberal social change to as "legal liberalism").

10. For an overview, see DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 879-80 (2005); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950 (1987). *See generally* PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS (Burton A. Weisbrod et al. eds., 1978); Louise G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the "New Public Interest Law*", 2005 WIS. L. REV. 455 (2005).

11. *See* JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 1 (1978) [hereinafter HANDLER, SOCIAL MOVEMENTS]; Trubek, *supra* note 10, at 457-60; Burton A. Weisbrod, *Conceptual Perspective on the Public Interest: An Economic Analysis*, *in* PUBLIC INTEREST LAW, *supra* note 10, at 22.

form through impact lawsuits; and a system of welfare entitlements open to enforcement and expansion.[12]

It was, in part, the very success of public interest litigation that threatened its structural foundations. Courthouse victories fueled a conservative reaction seeking to limit federal authority over civil rights and civil liberties, economic and environmental regulation, and social welfare. As the right gained power in the 1980s and 1990s, national governance structures were reshaped. An increasingly conservative federal judiciary became less hospitable to the claims of liberal public interest groups. Federal agencies, long criticized as inefficient and unaccountable, lost authority in the trend toward decentralization and deregulation.[13] Core federal entitlements, particularly those involving welfare, were curtailed.[14] These structural changes foreclosed litigation opportunities for liberal public interest organizations at the federal level, while opening the door to claims by the growing number of conservative advocacy groups.[15] In addition, public interest lawyers faced new procedural and financial constraints: Congress prevented federally-funded legal services lawyers from bringing class actions, lobbying, collecting attorney's fees, and engaging in political advocacy; the Supreme Court limited attorney's fee awards in civil rights and environmental cases; and some states capped attorney's fees and damage awards, and restricted the ability of law school clinics to undertake controversial cases.[16]

This backlash coincided with a scholarly critique of public interest law, which came largely from the left. One strand of criticism questioned the efficacy of litigation strategies. It drew on empirical research to demonstrate the inadequacy of law reform as a vehicle of social change. Joel Handler's assessment of public interest law concluded that litigation alone could not reform field-level practice in the consumer, environmental, civil rights, and welfare rights arenas due to the exercise of vast administrative discretion—what he called the "bureaucratic contingency."[17] Gerald Rosenberg's quantitative study concluded that courts could "*almost never* be

---

12. Michael McCann & Jeffrey Dudas, *Retrenchment…and Resurgence? Mapping the Changing Context of Movement Lawyering in the United States*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS 37 (Austin Sarat & Stuart Scheingold eds., 2006); Trubek, *supra* note 10.

13. JOEL F. HANDLER, DOWN FROM BUREAUCRACY: THE AMBIGUITY OF PRIVATIZATION AND EMPOWERMENT (1996) [hereinafter HANDLER, DOWN FROM BUREAUCRACY]; Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000).

14. JOEL F. HANDLER & YEHESKEL HASENFELD, WE THE POOR PEOPLE: WORK, POVERTY, AND WELFARE (1997).

15. Southworth, *supra* note 7.

16. David Luban, *Taking Out the Adversary: The Assault on Progressive Public Interest Lawyers*, 91 CAL. L. REV. 209 (2003).

17. HANDLER, SOCIAL MOVEMENTS, *supra* note 11, at 18-22.

effective producers of significant social reform" because of their dependence on other political institutions and their lack of enforcement powers.[18]

A second critique emphasized the tradeoffs between litigation and political mobilization. Stuart Scheingold famously warned against the "myth of rights," which diverted attention from the political roots of social problems.[19] On this view, litigation drained scarce movement resources, created confusion between "symbolic" and "substantive" victories, and co-opted potential movement leaders by paying them off with monetary awards. Critical legal scholars further argued that reframing collective grievances in terms of individual rights dissipated collective political energy. Even when litigants prevailed, the result was to legitimize a fundamentally unjust social and legal order.[20] For these critics, collective political struggle was the only effective way to challenge structural inequality.[21]

A third line of criticism revolved around issues of accountability. In one of the most influential expressions of this concern, Derrick Bell challenged the NAACP's school desegregation campaign. In his view, the NAACP's commitment to desegregation—supported by its middle-class white and black constituents—ignored the preferences of black communities for local control and quality initiatives in neighborhood schools.[22] Poverty law scholars in the 1990s, incorporating insights from critical race theory and feminist scholarship, extended this analysis by focusing on the marginalization of clients in traditional litigation strategies.[23]

B. Beyond Critique: The Pragmatic Turn in Law and Social Change Scholarship

The critique of rights associated with first-wave public interest law partly reflected disillusionment with its failure to achieve transformational

---

18. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 338 (1991).

19. STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 3-10 (1974); *see also* GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992); Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007) (cataloging the criticisms of rights strategies).

20. Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1983).

21. Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1053 (1970).

22. Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

23. LÓPEZ, *supra* note 19; Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 BUFF. L. REV. 1 (1990).

change. With time and scholarly distance have come new approaches to understanding the relationship between law and social reform. These approaches reflect varied theoretical and empirical frameworks, but share a pragmatic focus. They start from the premise that litigation has limits, but go on to question how it can best advance social justice. In essence, this literature addresses the tradeoffs of different forms of activism—including litigation—in different social contexts and practice sites. Its key claims are that: (1) litigation is a political tool that, when used strategically, can stimulate meaningful change and complement other political efforts; (2) whether litigation "works" or not must be judged in relation to available alternatives; and (3) in order to evaluate the social change potential of litigation in a given circumstance, it is necessary to examine the conditions—political, economic, cultural, and organizational—within which a lawsuit operates.

1. Law as Politics

Recent scholarly efforts to reassess what lawyers can "do for, and to" social movements tend to offer more positive accounts of impact litigation.[24] This research sees law as politics by another name, and links courtroom battles to political mobilization and community organizing. In these accounts, litigation is shaped by clients and community activists and the objective is political transformation, not doctrinal victory.[25]

This is not, of course, a new conceptualization. Three decades ago, Handler underscored both the direct and indirect ways that legal claims shape social movements.[26] During the same era, Gary Bellow advanced a "focused case" strategy in combination with community organizing and legislative advocacy.[27] Throughout this period, labor lawyers similarly saw litigation as a means of advancing the cause of unionization.[28] What contemporary research offers is a deeper theoretical and empirical foundation for integrating legal advocacy and political mobilization.

At the theoretical level, William Simon has proposed a model of lawyering that promotes flexibility, transparency, evaluation, and inclusive par-

---

24. Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do For, and To, Social Movements: An Introduction*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 12, at 1.

25. Thomas M. Hilbink, *You Know the Type…: Categories of Cause Lawyering*, 29 L. & SOC. INQUIRY 657, 683 (2004).

26. HANDLER, SOCIAL MOVEMENTS, *supra* note 11, at 191-201.

27. Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106, 121-22 (1977).

28. *See* Jennifer Gordon, *A Movement in the Wake of a New Law: The United Farm Workers and the California Agricultural Labor Relations Act*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 12, at 279.

ticipation in institutional decision-making processes.[29] While he raises questions about the winner-take-all approach of traditional impact strategies, he believes that litigation, when combined with inclusive political processes, can be put to pragmatic ends. For example, when deployed strategically, lawsuits can destabilize entrenched institutional structures and subject them to greater accountability.[30] From a social science perspective, Michael McCann argues for a constitutive understanding of the role of law in social transformation. That approach moves beyond a causal analysis of the relationship between court decisions and social outcomes, and instead traces the complex processes by which law shapes social meaning and informs individual and collective action.[31] For example, a lawsuit that receives widespread attention may raise public consciousness and stimulate movement activity by revealing the vulnerability of structural arrangements that once seemed impervious to change.[32] Even lawsuits unsuccessful in the courts may generate public outrage that spurs political action. From this perspective, judicial decisions are not simply legal decrees, but also social signals that are channeled into collective movements.[33] Similarly, legal action may allow activists to leverage gains by putting specific issues on the public agenda and threatening to impose litigation costs if decision makers fail to find political solutions.[34] Assessing the animal rights movement, McCann finds that "[w]hen carefully coordinated with demonstrations, pranks, and other media events, high-profile litigation worked as a double-barreled threat—at once mobilizing public opinion against targeted 'abusers' and threatening both costly legal proceedings and possible defeats in court."[35] Austin Sarat and Stuart Scheingold, who have led a path-breaking investigation into cause lawyering over the past decade, have similarly concluded that in the right circumstances, lawyers can make "seminal contributions to the building of social movements."[36]

---

29. William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 181, 193, 198 (2004).

30. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1021 (2004).

31. McCann & Silverstein, *supra* note 1, at 269.

32. Michael W. McCann, *How Does Law Matter for Social Movements?*, *in* HOW DOES LAW MATTER? FUNDAMENTAL ISSUES IN LAW AND SOCIETY RESEARCH 76, 83-84 (Bryant G. Garth & Austin Sarat eds., 1998) [hereinafter McCann, *How Does Law Matter?*].

33. Marc Galanter, *The Radiating Effects of Courts*, *in* EMPIRICAL THEORIES ABOUT COURTS 117, 125-26 (Keith Boyum & Lynn Mather eds., 1983).

34. McCann, *How Does Law Matter?*, *supra* note 32, at 92.

35. *Id.*

36. Sarat & Scheingold, *supra* note 24, at 10; *see also* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES *supra* note 1; CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (Austin Sarat & Stuart Scheingold eds., 2001); CAUSE LAW-

Empirical research on public interest lawyers suggests that they often view their work as complementing and contributing to political mobilization. McCann and Helena Silverstein's study of the pay-equity and animal rights movements found that lawyers generally did not view lawsuits as "ends in themselves" and were "committed to encouraging, enhancing, and supplementing" movement activity.[37] Similarly, Ann Southworth's study of civil rights and poverty lawyers found that both groups saw litigation as part of multi-dimensional strategies.[38] Many perceived lawsuits as "political assets" that could provoke legislative reform, discourage future wrongdoing, and mobilize community participation.[39] In the same vein, Cummings' project on low-wage worker advocacy in Los Angeles has examined lawyers who view legal advocacy as part of a comprehensive campaign that deploys multiple strategies to advance local policy reforms to strengthen labor rights.[40]

Rhode's recent empirical study of prominent public interest organizations confirms that their leaders generally recognize the need to think strategically and to pursue multiple approaches.[41] Litigation remains important, but it is used strategically in tandem with other initiatives.[42] Some 90% of leading public interest legal organizations bring impact cases, and nearly half devote at least 50% of their efforts to such work.[43] These lawsuits often attempt to maximize effectiveness by targeting practices that require systemic reform.[44] Objectives apart from winning can be critical, such as making a public record, raising awareness, or imposing sufficient costs and delays that will force defendants to adopt more socially responsi-

---

YERS AND SOCIAL MOVEMENTS, *supra* note 12; THE WORLDS THAT CAUSE LAWYERS MAKE (Austin Sarat & Stuart Scheingold eds., 2005); c*f.* HANDLER, SOCIAL MOVEMENTS, *supra* note 11; SCHEINGOLD & SARAT, *supra* note 4.

37. McCann & Silverstein, *supra* note 1, at 269.

38. Ann Southworth, *Lawyers and the "Myth of Rights" in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469, 477 (1999) [hereinafter Southworth, *Lawyers and the "Myth of Rights"*].

39. *Id.* at 470.

40. Cummings, *Wal-Mart*, *supra* note 2, at 1985-88; *see also* Scott L. Cummings, *Hemmed In: Legal Mobilization in the Anti-Sweatshop Movement*, 26 BERKELEY J. EMP. & LAB. L. (forthcoming 2009) (on file with author) [hereinafter Cummings, *Hemmed In*].

41. Rhode, *Public Interest Law*, *supra* note 3, at 2046.

42. The typical effort devoted to litigation fell from 60% of total workload in 1975 to 51% in 2007; during the same period, the typical amount of legislative work increased from 7% to 17% and research, reports, education, and media activities grew from 12% to 265. *Id.* at 2047-48. However, because the figures from 2007 come from a different sample of organizations than the 1975 study, the change reflects broad trends not precise comparisons.

43. *Id.*

44. *Id.* at 2046; *see also id.* at 2046 n.101 (citing interviews with Carole Shauffer, Youth Law Center, Brian Stevenson, Equal Justice Initiative, and Tod Gaziano, Heritage Found.).

ble practices.[45] Many leaders stress the need to maintain litigation as a "credible threat," but also to avoid a "scattergun" approach that would "spread [resources] too thin" for structural change.[46]

2. Relative Efficacy

An important premise of the critique of litigation is that political mobilization, such as organizing and social activism, is generally more effective in producing long-term change. Reforms that come through the legislative process may appear more legitimate than those that come through courts. So too, political mobilization can create the ongoing citizen engagement that is crucial to sustain, consolidate, and build on victories. For this reason, scholars have raised concerns about what Orly Lobel calls "legal cooptation"—the tendency of legal strategies to dissipate activism and limit a movement's transformative potential.[47]

The more pragmatic approach to law and social change, however, suggests that the limits of litigation cannot be assessed in a vacuum. It is, of course, true that—under certain circumstances—litigation may divert activists from sustained mobilization or result in decisions that are susceptible to political reversal. But so can political strategies. A key insight of the recent literature is that evaluations of litigation always need to consider the risks and feasibility of alternatives. Sometimes political strategies are not realistic options because of the strength of the opposition. Even when political strategies are possible, they are not always superior to litigation. Scholars often assume that political mobilization continues over time, but movements are frequently episodic. When successful, they often culminate in legislative actions that can sometimes trigger backlash. Thus, statutory reforms no less than judicial orders are vulnerable to strategic reinterpretation, deliberate non-enforcement, and political reversals.[48] For instance, the crowning achievement of the labor movement in the 1930s—the Na-

---

45. *Id.* at 2046-47; *see also id.* at 2047 n.102 (quoting Anthony Romero, ACLU, regarding the value in making historical record, and Carl Pope, Sierra Club, regarding the value in taking cases to create delay and thus force a shift to more environmentally responsive approaches).

46. *Id.* at 2047-48; *see also id.* at 2048 n.103 (quoting references to "credible threats" from Brian Wolfman, Public Citizen; Richard Rothschild, Western Center on Law & Poverty; Irma Herrera, Equal Rights Advocates; and Carole Shauffer, Youth Law Center; concerns about "scattergun" approaches from Jamine Studley, Public Advocates; and references to "spreading too thin" from Barbara Olshansky, Center for Constitutional Rights).

47. Lobel, *supra* note 19, at 949.

48. *See* Edwin Amenta & Neal Caren, *The Legislative, Organizational, and Beneficiary Consequences of State-Oriented Challengers*, *in* THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS 461 (David A. Snow et al., eds., 2004); Lobel, *supra* note 19, at 939; *see also* Gordon, *supra* note 28, at 277-78.

tional Labor Relations Act—has been consistently eroded through judicial decree, legislative amendment, and administrative interpretation.[49] In short, the legitimacy of a law resulting from democratic processes does not insulate it from subsequent political challenge. This is particularly true when the law benefits a less powerful group.[50] Moreover, in some situations, legal strategies can prove highly effective in changing social practice, as when the rights at issue are relatively self-executing and do not require substantial administrative enforcement. Judicial decrees mandating gay marriage are a case in point.

What the recent literature suggests, therefore, is that the effectiveness of litigation in any given situation depends on a range of complex, contextual factors, and must be evaluated in relation to plausible alternatives. Although, as Scheingold warned, activists must avoid mythologizing rights, so too they must avoid romanticizing political activism.

3. Opportunities and Constraints

Focusing on the potential contributions of litigation—not just its limits—invites analysis of the conditions that shape effective litigation strategies. Law and social movement scholars, in particular, have emphasized political and organizational structures that influence the development and impact of legal efforts. Sarat and Scheingold have labeled this dynamic the "'structure-agency' problematic"—the interaction between structural "opportunities and constraints" and the actions of individual agents, like lawyers, who can sometimes alter the structural terrain.[51] The organizational level—where lawyers work—shapes norms, defines missions, and imposes resource constraints.

Scholars associated with the political process school of social movements emphasize the importance of the "political opportunity structure" in generating movement activities, defining the range of tactics, and identifying goals.[52] Formal political institutions constitute the key structural ele-

---

49. *See* NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR (2002).

50. Indeed, Gordon's recent work on the UFW suggests that legislative victories, such as the passage of the California Agricultural Labor Relations Act in 1975, are "at least as vulnerable to subversion as their judge-made cousins, given their highly public and—in comparison with litigation victories—often potentially more far-reaching character." Gordon, *supra* note 28, at 289.

51. Austin Sarat & Stuart Scheingold, *The Dynamics of Cause Lawyering: Constraints and Opportunities*, *in* THE WORLDS THAT CAUSE LAWYERS MAKE, *supra* note 36, at 4-5.

52. Hanspeter Kriesi, *Political Context and Opportunity*, *in* THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS, *supra* note 48, at 67, 69. On political process versus resource

ment, and their degree of centralization shapes both the possibility for intervention and the ability of the state to meet movement demands.[53] These institutions have the power to reward or sanction movement activities: policy makers can increase the cost of challengers' collective action through repression or assist it through political support.[54] The legal regime shapes the political context both in the sense that it offers an institutional forum for attacking injustice and provides symbolic resources like "rights" for movement activists.[55] A key incentive for movement actors, then, is the emergence of opportunities within the institutional structure that invite challenges. For litigators, these opportunities include a receptive judiciary and statutory or doctrinal developments that allow for systemic change.

Whether a movement can take advantage of such opportunities depends on its access to resources and its ability to marshal them in pursuit of collective goals.[56] Organizations therefore mediate the relationship between legal action and the broader political environment.[57] Resources are necessary not only to overcome the free-rider problem faced by groups seeking to provide collective goods, but also to sustain organizational activity in pursuit of movement goals.[58] Resources often come with strings attached, which both enables and channels movement activities.[59] For example, some public interest legal organizations report that foundations are reluctant to fund litigation, and prefer new "hot" projects promising demonstrable outcomes.[60] Federally-funded legal services organizations are constrained by statutory restrictions. Groups dependent on attorney's fees must gear their activities toward revenue-generating cases.

How resources are mobilized depends, in part, on an organization's governance structure and priorities, which reflect both formal rules and infor-

---

mobilization, see also Steven E. Barkan, *Legal Control of the Southern Civil Rights Movement*, 49 AM. SOC. REV. 552 (1984).

53. Kriesi, *supra* note 52, at 70.

54. *Id.* at 78.

55. McCann, *How Does Law Matter?*, *supra* note 32, at 82.

56. *See* Bob Edwards & John D. McCarthy, *Resources and Social Movement Mobilization*, *in* THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS, *supra* note 48, at 116.

57. HANDLER, DOWN FROM BUREAUCRACY, *supra* note 13, at 20.

58. On resources and collective action, see MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION (1965); *see also* JOHN D. MCCARTHY & MAYER ZALD, THE TREND OF SOCIAL MOVEMENTS IN AMERICA: PROFESSIONALIZATION AND RESOURCE MOBILIZATION (1973); J. Craig Jenkins, *Resource Mobilization Theory and the Study of Social Movements*, 9 ANN. REV. SOC. 527, 537-38 (1983). On resources and group mobilization, see Bob Edwards & John D. McCarthy, *Resources and Social Movement Mobilization*, *in* THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS, *supra* note 48, at 116; Jenkins, *supra*, at 533.

59. *See* Edwards & McCarthy, *supra* note 58, at 135.

60. Rhode, *Public Interest Law*, *supra* note 3, at 2056-57.

mal norms. Groups that operate through staff consensus and loose oversight from a board of directors may have more freedom to allocate resources than institutions subject to more hierarchical decision making, such as large law firms. Organizations may place more or less value on collaboration, political purity, community participation, and public recognition. How these contextual factors play out within public interest organizations—and interact with external opportunities—shapes the frequency and impact of public interest litigation.

C. Lessons for Contemporary Public Interest Litigation

The law and social change literature suggests several key lessons for public interest practice. A central theme is that the effective use of litigation requires a strategic analysis of the forces that shape its outcome, including organizational capacity, the likelihood of success on the merits, the challenges of enforcement, and the possible political responses. This strategic analysis should be informed by two considerations. The first relates to how lawyers can maximize the political impact of litigation. Litigation typically works best when it is strategically embedded in broader political campaigns that help define litigation goals and enforce legal mandates. The second consideration involves which lawyers are most capable of bringing litigation in different circumstances. The way that legal groups are structured affects the content and scope of their litigation dockets—both in terms of the types of substantive cases they can file and the resources they can marshal. It is crucial, therefore, to understand the opportunities and constraints of distinct public interest workplace settings in order to assess when litigation can best serve particular social justice causes.

1. Litigation Integrated with Political Mobilization

A key lesson from law and social change research is the importance of situating litigation within broader political campaigns—of using it as means to an end, rather than an end in itself. Unlike early models of public interest litigation in which lawyers looked for test cases that could establish important principles, this approach explores multiple strategies from the outset, including not just lawsuits but also policy, organizing, and media initiatives. Litigation is attractive only if it is the most effective means of advancing broader objectives. Lawyers do not always take the lead in making that determination, but frequently "appear as supporting players rather than main characters, seeking to help organizations build the power needed

to achieve their goals."[61] This role does not eliminate concerns about accountability, but rather changes their tenor. For instance, commentators note the tensions between lawyers' obligations to clients and the demands of organizing campaigns.[62] And schisms within community groups can make it difficult to determine which stakeholders legitimately speak for the community.[63] Nonetheless, proponents of politically integrated litigation believe that these tensions are a normal byproduct of movement activity and can usually be managed by setting clear expectations at the outset of campaigns. Moreover, the costs of reconciling competing interests are generally offset by the political benefits of coordination.

A growing number of examples across different substantive fields suggest the potential of linking litigation to other forms of advocacy. In the environmental context, some national legal groups stress the importance of addressing issues in a "campaign mode" that combines litigation and other advocacy strategies.[64] Environmental justice lawyers have effectively used litigation, or the threat of litigation, in conjunction with grassroots organizing to prevent low-income communities of color from bearing the burden of environmental hazards.[65]

The gay rights movement has also developed sophisticated linkages between legal and non-legal advocacy.[66] In California, the struggle for same-sex marriage has demonstrated the multiple ways that activists have tried to use litigation to both establish rights and to ignite support for political efforts. There, a 2000 statewide initiate defining marriage as between "a man and a woman" was challenged when San Francisco mayor Gavin Newsom authorized city officials to issue marriage licenses to gay couples. When anti-gay rights groups filed suit to stop the marriages, San Francisco responded by challenging the legality of the prohibition. Gay couples and gay rights organizations like Equality California—represented by lawyers from the National Center for Lesbian Rights, the Lambda Legal Defense

---

61. Jennifer Gordon, *Concluding Essay: The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CAL. L. REV. 2133, 2133 (2007).

62. *See, e.g.*, Cummings, *Hemmed In*, *supra* note 40, at 19-20.

63. Cummings, *Wal Mart*, *supra* note 2, at 1991-97.

64. *See* Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 1016 (2008).

65. *See* Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 474-75 (2001).

66. *See* QUEER MOBILIZATIONS: LGBT ACTIVISTS CONFRONT THE LAW (Scott Barclay, et al. eds., 2009); Scott Barclay & Shauna Fisher, *Cause Lawyers in the First Wave of Same Sex Marriage Litigation*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 12, at 84; Scott Barclay & Anna Marie Marshall, *Supporting a Cause, Developing a Movement, and Supporting a Practice: Cause Lawyers and Sexual Orientation Litigation in Vermont*, *in* THE WORLDS THAT CAUSE LAWYERS MAKE, *supra* note 36, at 171.

and Education Fund, and the ACLU—filed additional lawsuits arguing that the ban on gay marriage violated the state constitution. In May 2008, the California Supreme Court held that gay marriage was a constitutional right, reversing the 2000 initiative, but provoking opponents to launch another anti-gay marriage initiative: Proposition 8. When Proposition 8 passed in November of 2008, amending the state constitution to prevent gay marriage, it drew national attention and galvanized gay rights activists. They again filed suit to overturn Proposition 8 on the ground that it constituted a revision to the state constitution, which required a two-thirds vote of the legislature. The California Supreme Court rejected the challenge, but gay rights groups used the announcement of the court's decision to stage large rallies and mobilize supporters, setting the stage for another effort to reverse Proposition 8 through political channels.

The workers' rights movement has also provided important examples of integrated political and legal campaigns. Cummings's study of anti-Wal Mart activism in Los Angeles is a case in point.[67] In that campaign, a labor-backed community group mounted a "site fight" to prevent the passage of a city initiative that would have approved the development of a Wal-Mart Supercenter in Inglewood. As part of the fight, the group's lawyers filed a pre-election lawsuit to halt the initiative process, arguing that it violated the state constitution. The labor activists understood at the outset that their chances of blocking the initiative before the scheduled city-wide vote were slim, given existing legal precedent. However, they proceeded with the lawsuit in order to undermine the initiative's legitimacy by highlighting the way that that it preempted the local land use and environmental laws that typically governed such developments. Thus, the lawsuit was brought mainly for its public education and organizing impact. And in fact, its filing generated substantial media attention that allowed the activists to get out their message that Wal-Mart saw itself as "above the law." This proved to be a powerful theme: although most community members had initially supported the Supercenter on economic grounds, the lawsuit helped to turn public opinion around and contributed to the initiative's defeat.

Sameer Ashar's account of restaurant worker organizing in New York provides a similar example.[68] There, workers were organized by the union-backed Restaurant Opportunities Center of New York (ROC-NY), which sought to target abuses at high-end chain restaurants in order to set new industry standards. In one prominent campaign, ROC-NY collaborated with the CUNY Law School clinical program to represent "back-of-the-house"

67. *See* Cummings, *Wal-Mart*, *supra* note 2.

68. *See* Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CAL. L. REV. 1879 (2007).

workers who had been denied minimum wage and overtime payments. The litigation was specifically designed to advance broader industry-wide reform objectives and proceeded in tandem with public boycotts of the restaurants and a sophisticated media campaign. The result was an innovative settlement agreement that not only awarded unpaid wages, but also instituted policy changes involving paid vacations, sick leave, and some measure of job security.[69]

Just as litigation has promoted collective action in the workers' rights context, it has also been used to shield worker organizing from repressive responses. The use of litigation to protect activists punished for engaging in civil disobedience has a long tradition in the civil rights, antiwar, and labor movements. In the context of day labor organizing, litigation has been necessary to strike down laws criminalizing the very act of seeking work. Over the last ten years, a number of localities in California have passed ordinances making it illegal to congregate in public for the purpose of soliciting work, on the ground that such activities constitute a public nuisance. In response, activists from the National Day Laborer Organizing Network have launched protest campaigns, but have also strategically enlisted public interest lawyers from the Mexican American Legal Defense Fund and the ACLU to challenge anti-solicitation ordinances on First Amendment grounds.[70] These suits have resulted in courts striking down ordinances in Los Angeles County, Redondo Beach, and Glendale, thus preserving the ability of day laborers to earn a living.[71]

The workers' rights movement has also witnessed innovative efforts to combine litigation and organizing to promote enforcement of legal protections. One of the most prominent enforcement campaigns grew out of activism in the Los Angeles garment industry in the late 1990s, during a time when nearly two-thirds of the city's garment contractors were violating wage-and-hour regulations—underpaying workers by over $70 million per year.[72] A group of lawyers from the Asian Pacific American Legal Center initiated an impact litigation campaign targeting prominent manufacturers and retailers who controlled, and benefited from, sweatshop contractors. The resulting public outrage supported policy and grassroots organizing efforts, which in turn led to the enactment of state legislation holding gar-

69. *Id.* at 1916.

70. Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 N.Y.L. SCH. L. REV. 465, 490-91 (2005-2006).

71. *Id.* at 493-95.

72. EDNA BONACICH & RICHARD P. APPELBAUM, BEHIND THE LABEL: INEQUALITY IN THE LOS ANGELES APPAREL INDUSTRY 3 (2000).

ment manufacturers liable for abuses by their sweatshop contractors.[73] The activists knew that the law's passage would not automatically end labor abuse without a strong enforcement effort. To promote legal compliance, they therefore established the Garment Worker Center, which provided direct assistance to individual workers filing wage-and-hour claims pro se and referred workers with more complicated cases to lawyers for full representation. The goal was both to keep pressure on garment contractors to comply with the law and to promote further community activism. However, activists found that even with this stepped up enforcement program, employers were still refusing to pay, betting that the time, expense, and aggravation of enforcing judgments would cause workers to settle for less than they were owed.[74] In the face of such resistance, another group of lawyers, with seed money from the Echoing Green Foundation, founded the Wage Justice Center, a project dedicated solely to enforcing judgments the garment industry and other low-wage sectors. With the goal of giving "low-income workers the same power to collect their wages as commercial entities have to collect their claims against other businesses," the Center has taken low-wage worker cases on referral and successfully pursued collection strategies borrowed from business litigation.[75] Although these efforts have by no means eliminated enforcement challenges in the garment sector, they show how lawyers and activists can use multiple tactics to mount a coordinated response.

2. Litigation Across Diverse Practice Sites

The second lesson from the literature on law and social change relates to the way money influences legal advocacy. Although funding constraints are most explicit in the context of federal support for civil legal assistance, they operate across all practice sites, and shape the dockets of public interest organizations, law firm pro bono programs, private public interest law firms, and law school clinical programs. Understanding these constraints enables us to think strategically about which organizations offer the most promising contexts for different types of cases.

---

73. Cummings, *Hemmed In*, *supra* note 40.

74. *Id.* (referring to a report stating that, five years after the law's enactment, workers were recovering on average less than one-third of the total amount of unpaid wages and seldom were receiving any liquidated damages or penalties authorized by statute).

75. The Wage Justice Center, Waging Justice for Exploited Workers, http://www.wagejustice.org/advocating-low-income-workers-rights.html (last visited June 23, 2009); The Wage Justice Center, Wage Justice Delivered, http://www.wagejustice.org/wage-claim-success-stories.html (last visited June 23, 2009) (reporting that the Center helped to recover $100,000 for five garment workers who had been unable to collect a judgment by the California Labor Commissioner in 2005).

a. Legal Services

No public interest institution has been more vulnerable to funding restrictions than the federal legal services program.[76] The political backlash to the early law reform agenda of the legal services program brought significant budget cuts that resulted in a 50% decline in federal funding for legal aid between 1980 and 2003.[77] In addition, the government has steadily curtailed the advocacy of legal services lawyers by prohibiting an array of activities, including most lobbying and organizing efforts, class action and fee-generating lawsuits, representation of prisoners and undocumented individuals, and litigation related to welfare reform.[78] Most drastically, this legislation prohibited lawyers in federally funded organizations from using non-federal funds to engage in any of the banned activities.[79]

The impact of these restrictions has been dramatic. Some organizations chose to forgo federal aid to avoid the restrictions and many legal aid lawyers left organizations that continued to receive federal funds. Until the recent recession, overall financial support for civil legal aid remained relatively stable due to the increase in funding from other sources, such as Interest on Lawyer Trust Accounts, foundation grants, and private lawyer contributions.[80] However, the reliance on these revenue sources has increased the time and effort that legal aid programs need to devote to fundraising at the expense of other substantive activities. The diversification of funding sources has also required programs to structure activities in ways that will attract private or foundation support, sometimes at the expense of more urgent programmatic priorities.[81] Moreover, the reduction of federal support has made legal services to the poor deeply vulnerable to market fluctuations, reducing aid at precisely the moments that low-income people

76. Cummings, *The Politics of Pro Bono*, *supra* note 5, at 130; *see also* EARL JOHNSON, JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM 188-91 (1978).

77. ALAN W. HOUSEMAN & LINDA E. PERLE, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 36 (2003).

78. Omnibus Consolidated Rescissions and Appropriations Act § 504(a) (1996).

79. 45 C.F.R. §§ 1610.1-1610.9 (1997).

80. As of 2005, LSC funds constituted only about one-third of the total legal services budget in the United States, with state and local government funds contributing about one-third, Interest on Lawyer Trust Accounts about 10%, foundations about 7%, and private lawyers roughly 4%. ALAN W. HOUSEMAN, CIVIL LEGAL AID IN THE UNITED STATES: AN OVERVIEW OF THE PROGRAM IN 2005, at 4 (2005), *available at* http://www.clasp.org/publications/us_overview_program_2005.pdf.

81. *See* Rhode, *Public Interest Law*, *supra* note 3, at 2056-58 (providing a general discussion of these effects on public interest organizations, including those that serve low-income clients).

need it the most—a problem underscored by the current economic downturn.[82]

By design, the substantive restrictions on legal services advocacy have undermined the effectiveness of legal services programs in bringing impact litigation or engaging in political tactics likely to result in systemic reform. In particular, the restriction on class actions and fee-generating cases prevents legal services lawyers from pursuing large-scale resource-intensive lawsuits, while withdrawing an important bargaining chip against defendants who can litigate without the threat of a large fee payout. Proposed federal legislation would increase funding for legal services back to 1980 levels and remove many of the programmatic restrictions, including the ban on class actions and attorney's fees.[83] Without such reforms, federally-funded legal aid organizations will remain severely constrained in efforts to pursue systemic justice through litigation.

b. Pro Bono

The decline in the federal legal services program has been met by the rise in pro bono—indeed, the two have been sometimes linked. Opponents of the reformist agenda of legal services championed pro bono as an acceptable alternative, knowing that it would not pose a comparable threat to business interests. This linkage was codified in the early 1980s in a program known as "private attorney involvement," which earmarks a portion of federal funding to programs that recruit and train pro bono volunteers. As a result, the number of such programs over the past quarter century has increased from about fifty to roughly 900, and lawyer participation constitutes an estimated one-quarter to one-third of full-time equivalent lawyer staff within the entire U.S. civil legal aid system.[84]

Other factors also have encouraged expansion of the pro bono system, including the growth of large firms, which contributed over 3.5 million hours of pro bono services in 2005 (up nearly 80% from 1998); the support of the organized bar for increased pro bono in response to declining federal resources; the emergence of media ranking structures, which make contribution levels more transparent and more important in recruitment and public relations; the growing use of unpaid cases to train associates as mentor-

82. *See* Marcia Coyle, *FDIC, Heeding Attorneys, Heads off a Potential IOLTA Disaster*, NAT'L L.J., Dec. 1, 2008; Bill Myers, *Economic Collapse Will Affect Legal Aid to Poor*, WASH. EXAMINER, Feb. 16, 2009.

83. *See* Brennan Center for Justice, Civil Access to Justice Act of 2009, http://www.brennancenter.org/content/resource/civil_access_to_justice_act_of_2009.

84. Rebecca L. Sandefur, *Lawyers' Pro Bono Service and American-Style Civil Legal Assistance*, 41 L. & SOC'Y REV. 79, 85 (2007).

ing in paid work declines; and the cultural pressure for firms to give back during periods of financial success.[85] The recent economic downturn has also encouraged many large firms to expand their programs as a way to provide valuable professional experiences for lawyers or new recruits who lack sufficient paid work.[86]

The rise of pro bono as a delivery structure creates a distinct set of opportunities and constraints for public interest litigation. Law firm pro bono programs are able to take on cases where federally funded legal services programs cannot, and have the resources to handle complex, discovery-intensive lawsuits that would overwhelm the staffs of nonprofit groups.[87] Law firms also underwrite litigation that supplements legal services in key areas such as immigration and civil rights. Yet the reliance on pro bono efforts also raises important distributional and quality concerns. Certain categories of cases are less likely to receive attention because of firms' bottom-line considerations. In particular, positional conflicts of interest often prevent firms from taking cases that could antagonize corporate clients.[88] Thus, labor, employment, and consumer claims are unlikely to receive significant support from firms that regularly defend business clients in these areas. Legal services and public interest groups that rely on volunteers may find that difficult clients and unpopular causes too often fall through the cracks.[89] In joking with his firm's managing partners about the issue, one lawyer catalogued all the cases against powerful business and government clients that positional conflict policies prevented and concluded, "pretty soon the only people we are going to be able to represent are the poor against other poor people."[90]

---

85. Cummings, *The Politics of Pro Bono*, *supra* note 5, at 5; *see also* Steven A. Boutcher, *The Institutionalization of Pro Bono in Large Law Firms: Trends and Variation Across the AmLaw 200*, *in* PRIVATE LAWYERS AND THE PUBLIC INTEREST, *supra* note 5.

86. Susan Dominus, *$80,000 for Year Off From Law? She'll Take It!*, N.Y. TIMES, Apr. 13, 2009, at A1; Karen Sloan, *Trying To Make Deferrals into Something Positive*, NAT'L L.J., Apr. 13, 2009, at 6.

87. For example, law firms can undertake large-scale impact cases against governmental entities, such as a recent case brought by the ACLU and Morrison & Foerster on behalf of a class of California public school students forced to attend schools lacking books and trained teachers. *See* Cummings, *The Politics of Pro Bono*, *supra* note 5, at 126.

88. *Id.* at 116-21; Stephen Daniels & Joanne Martin, *Legal Services for the Poor: Access, Self-Interest, and Pro Bono*, 12 SOC. CRIME, L. & DEVIANCE 145, 161 (2009); Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395, 1421-22 (1998).

89. Deborah L. Rhode, *Rethinking the Public in Lawyers' Public Service: Pro Bono, Strategic Philanthropy, and the Bottom Line*, 77 FORDHAM L. REV. 1435, 1445 (2009) [hereinafter Rhode, *Rethinking the Public*].

90. Daniels & Martin, *supra* note 88, at 163.

Another significant constraint involves the inability of most pro bono lawyers to connect cases to broader social reform or political organizing efforts. Few of these lawyers have the time to gain the substantive expertise and familiarity with the major players in the field that are necessary to meet the long-range goals of client groups. Rather, firm lawyers often use pro bono cases to *train themselves*. There is, of course, an irony in this: underserved clients are asked to accept pro bono lawyers seeking to hone their skills, which are then deployed on behalf of private clients, often in the pursuit of contrary ends.

c. Private Public Interest Law Firms

When public interest groups are unable to find large firm pro bono assistance in impact litigation, they frequently turn to smaller plaintiff-side firms, which rely on attorney's fees to underwrite their services. These private public interest law firms have positioned themselves as an alternate site for "doing well by doing good." They support resource-intensive impact litigation that nonprofit groups cannot afford to pursue on their own, and that large firm pro bono programs will not pursue because of conflicts of interest. No systematic data on these firms are available, but some evidence suggests that they have grown in number. Handler and his colleagues identified approximately twenty private firms in the late 1970s.[91] A recent compilation of private public interest and plaintiff's firms put the number at over 200.[92] Although this recent list includes firms involved in personal injury and commercial matters, the majority pursue cases that have analogues in the non-profit sector, such as employment and civil rights.[93]

The evolution of private public interest law firms reflects distinctive structural opportunities and constraints. On the opportunity side, the use of the class action form and the availability of fee-shifting statutes and contingency fees have permitted cause-oriented lawyers to build powerful litigation practices around issues such as employment and housing discrimination, wage-and-hour violations, human rights, and police abuse. For many of these attorneys, private practice avoids the problems associated with

---

91. JOEL F. HANDLER ET AL., LAWYERS AND THE PURSUIT OF LEGAL RIGHTS (1978).

92. CTR. FOR PUB. INTEREST LAW AT COLUMBIA LAW SCH. & BERNARD KOTEEN OFFICE OF PUB. INTEREST ADVISING AT HARVARD LAW SCH., PRIVATE PUBLIC INTEREST AND PLAINTIFF'S FIRM GUIDE (2008).

93. Cummings & Southworth, *Between Profit and Principle*, *supra* note 5, at 19. Other common specialties involve environmental and consumer law. *Id.*

some nonprofit organizations, such as low salaries, fundraising obligations, the lack of training, and scarce resources for large-scale litigation.[94]

Another important advantage of private public interest firms is autonomy.[95] In studies of such firms, lawyers often emphasize the ability to set their own priorities as one of the most attractive features of their practice. For instance, lawyers at the Washington, D.C.-based Bernabei & Katz started their civil rights firm in order to "maximize discretion to select cases" consistent with their own political goals.[96] The desire for such autonomy seems true of lawyers on the right as well as left. Southworth's study of socially conservative and libertarian lawyers found that small firm practice accommodated individuals who wanted "practices reflecting their political commitments."[97]

Yet the autonomy of lawyers in private public interest firms is also constrained by financial imperatives, which often force tradeoffs between mission and money. These firms are typically small, often less than ten lawyers, and risky, because they generally lack a stable of repeat clients. Many struggle financially, and the unpredictability in revenue streams constrains their ability to handle more than a few large-scale cases or matters outside the most profitable fields. To be sure, many firms hedge financially riskier cases against ones that promise a strong likelihood of recovery, leaving some room for cases on behalf of low-income clients. However, the constant concern about fee generation creates incentives to screen out meritorious but low-value cases. In this sense, the litigation agenda of private public interest firms is driven by the delicate balance between profit and principle, which different firms handle in different ways. Some pursue *only* work that partners believe in—and sacrifice income to do so.[98] The lawyers at Bernabei & Katz—which accepted civil rights, civil liberties, employment discrimination, whistleblower, and prisoners' rights claims—refused to take cases for purely financial reasons and paid its attorneys on a nonprofit scale. Many firms, however, supplement their mission-driven work with other matters that are at least consistent with their commitments, if not their priorities. Still other firms take cases that do not further any

94. *See* Rhode, *Public Interest Law*, *supra* note 3, at 2059-60.

95. SCHEINGOLD & SARAT, *supra* note 4, at 88.

96. Debra S. Katz & Lynne Bernabei, *Practicing Public Interest Law in a Private Public Interest Law Firm: The Ideal Setting to Challenge the Power*, 96 W. VA. L. REV. 293, 296 (1994).

97. Ann Southworth, *Professional Identity and Political Commitment Among Lawyers for Conservative Causes*, *in* THE WORLDS THAT CAUSE LAWYERS MAKE, *supra* note 36, at 96.

98. Katz & Bernabei, *supra* note 96.

core values but subsidize other work that does.[99] Resource constraints shape the course as well as type of litigation. Some private public interest firm attorneys report being financially outmatched by large firm opponents, which can skew strategic and settlement decisions.[100]

Finally, these firms' dependence on the private market works against innovative high risk efforts and the development of strong ties to political movements. Although private public interest firms do sometimes take pro bono work, their economic model is generally inconsistent with pursuing claims primarily for their impact on organizing or policy campaigns. As a result, these firms are unlikely to be tightly integrated with, and accountable to, social movements. Lawyers in private public interest firms therefore confront an important tradeoff: although they generally remain free of government and foundation influence, they are dependent on paid work in ways that may limit political collaboration and risk-taking.

d. Law School Clinics

Law school clinics constitute another important (and under-explored) site of public interest litigation. The clinical movement, which began in tandem with public interest law in the 1970s, occupies a paradoxical space within law schools: firmly institutionalized but frequently marginalized. Its institutional presence is powerful: in 1999, the AALS Section on Clinical Legal Education's database showed 183 law schools with clinics staffed by over 1700 professors.[101] A recent study by the Center for the Study of Applied Legal Education found that there were over 800 in-house, live client clients in U.S. law schools, in areas that cut across a range of substantive public interest issues including children's rights, immigration, housing, human rights, disability, employment, civil rights, consumer, family, and environmental law.[102] Clinical programs have thus developed into substantial providers of legal services. And the pressure to expand these programs is strong. Law students generally report receiving great value from their clinical experiences and law schools recognize the need for courses that will attract top students interested in experiential learning and public ser-

99. Stuart Scheingold & Anne Bloom, *Transgressive Cause Lawyering: Practice Sites and the Politicization of the Professional*, 5 INT'L J. LEGAL PROF. 209, 246 (1998).

100. Cummings, *The Politics of Pro Bono*, *supra* note 5, at 134.

101. Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 30 (2000).

102. DAVID A. SANTACROCE & ROBERT R. KUEHN, CTR. FOR THE STUDY OF APPLIED LEGAL EDUC., REPORT ON THE 2007–2008 SURVEY 8.

vice practice.[103] In addition, as law schools try to adapt their curricula to meet the challenges of the contemporary profession, they see clinics as a valuable way to link analytic approaches with practical applications.[104]

Yet as is clear from an ongoing controversy over law school accreditation standards, the institutional status of clinicians remains a significant issue.[105] Many lack the security and status that come with tenure.[106] The Center for the Study of Applied Legal Education survey reported that nearly two-thirds of respondent clinicians had contractual appointments, or served as adjuncts, staff attorneys, or fellows; just over 10% were on a clinical tenure track, while just under a quarter were on an academic tenure track.[107] For those in charge of in-house, live-client clinics, the proportion of non-tenure track (clinical or academic) appointments is even larger.[108] One reason for the status disparity is financial. Clinical education requires intensive supervision, which is correspondingly expensive. Cost constraints often drive schools to avoid dedicating more expensive ladder-track lines for clinicians, choosing instead to reserve them for those whose scholarly reputations may bring national attention (and enhance law school rankings).[109] And law schools are often reluctant to guarantee adequate resources for skills-based instruction. As federal funding has eroded over the past decade, clinical programs have scrambled to supplement institutional funding with periodic grants from foundations, corporations, and individual donors.[110] However, clinicians report deep frustration with financial constraints, citing the lack of hard money, insufficient staffing and office

---

103. THE NALP FOUNDATION FOR LAW CAREER RESEARCH AND EDUCATION & THE AMERICAN BAR FOUNDATION, AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 81 (2004).

104. *See* WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

105. Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183 (2008).

106. Barry et al., *supra* note 101, at 31 (of nearly 800 clinicians reporting on their status in 1999, slightly more than 40% stated that they either had tenure or were on the tenure-track).

107. SANTACROCE & KUEHN, *supra* note 102, at 29.

108. *Id.* at 15.

109. Clinical instructors, who frequently come from non-profit organizations in search of opportunities to do the same cause-oriented work with higher salaries and better working conditions, may not initially perceive disparate status as a problem and students may not be attuned to how status disparities may impact their educational experience.

110. Barry et al., *supra* note 99, at 19-20 (during the 1980s and 1990s, the Federal Department of Education spent nearly $90 million to support the expansion of clinical education).

space, and lack of administrative and secretarial support as major challenges.[111]

Litigation efforts within clinics play out against these status and financial disparities, which vary across institutional context. At some law schools, clinical programs have resources that rival their non-academic public interest counterparts and clinical faculty receive equal—or near-equal—treatment to non-clinical faculty.[112] With resources and security, clinicians may be willing to take on larger and more controversial cases without fearing negative repercussions; clinicians with less support and stability may be less able to assume such risks. As an example, faculty at law schools with relatively well-funded and institutionally integrated clinical programs have worked on prominent cases representing Guantánamo detainees, challenging the legality of New York's workers' compensation system, and supporting undocumented immigrant workers' struggle for better employment conditions.

Yet even within well-supported programs, the mission and structure of clinical education impose significant challenges to social impact litigation. Clinicians need to select cases based on pedagogical value and to accommodate students' schedules, time commitments, and level of experience.[113] The need for discrete assignments that can be parceled out during the course of a semester works against taking on intensive litigation with heavy resource demands and unpredictable timing. Many clinical faculty, particularly those on a tenure track, are expected to publish scholarly articles, which creates incentives to curtail or delegate client supervision in order to protect research time. Controversial litigation can also pose problems for schools, which can be threatened with the loss of state funding or the withdrawal of private donors who disagree with a clinic's political goals. Over the last decade, several prominent clinics have become embroiled in controversies that sapped resources and imposed restrictions on student representation.[114] Finally, many institutions are under increasing pressure to offer skills instruction more responsive to the demands of private practice, in

111. SANTACROCE & KUEHN, *supra* note 102, at 12.

112. At Georgetown, for instance, the clinical program includes twelve free standing clinics with seventeen full-time faculty, twenty-six graduate student fellows, and several adjunct instructors. *See* Georgetown University Law Center, Law Center Clinical Program, http://www.law.georgetown.edu/clinics/ (last visited Apr. 21, 2009).

113. Sameer Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355, 410-11 (2008); Juliet Brodie, *Little Cases on the Middle Ground*, 15 CLINICAL L. REV. 332, 353 (forthcoming 2009).

114. Peter A. Joy, *Political Interference with Clinical Legal Education: Denying Access to Justice*, 74 TUL. L. REV. 235, 237-40 (1999).

areas like business transactions, intellectual property, and securities law. Investment in these fields often diverts resources from social justice causes.

As this overview suggests, the major sites of public interest litigation each confront distinctive opportunities and limitations. For those seeking social impact through law, the challenge is to think more strategically about the comparative capacities of particular forums. To that end, the literature on strategic philanthropy offers some relevant insights.

II. STRATEGIC PHILANTHROPY

A. The Strategic Giving Framework

1. The Rationale for Strategic Frameworks

An increasing proportion of public interest legal work is financed through philanthropic contributions, either pro bono time and money donated by private lawyers, or grants from foundations and corporate sponsors. In Rhode's recent study of the nation's leading public interest legal organizations, foundations typically accounted for about one-third of their budgets, individual donations for just over a quarter, and corporate contributions for about 14%.[115] About four-fifths of these organizations also reported substantial collaboration with pro bono counsel, particularly for major litigation.[116] In addition, many lawyers also contribute time and money directly to social impact work. Taken together, these contributions are quite substantial. The nation's 200 largest firms alone report time valued at $1.45 billion annually.[117] Yet participants in public interest legal activities are often strikingly unstrategic in their giving. Many operate with a "spray and pray" approach, which spreads assistance on multiple projects with the hope that something good will come of it.[118] Something usually does, but the result is not necessarily the most cost-effective use of resources.

Paul Brest, former Stanford law professor, and now President of the Hewlett Foundation, likes to remind organizations that "[i]f you don't know where you're going, any road will get you there."[119] Lawyers' deci-

115. Rhode, *Public Interest Law*, *supra* note 3, at 2054.

116. *Id.* at 2070 (47% reported extensive and 33% reported moderate collaboration).

117. Aric Press, *In-House at the American Lawyer*, AM. LAW., July 2008, at 13 (basing calculation on blended rate of $300 per hour).

118. PETER FRUMKIN, STRATEGIC GIVING: THE ART AND SCIENCE OF PHILANTHROPY 371 (2006). For an analysis of the problems of self-interest facing public interest lawyers, *see* Rhode, *Rethinking the Public*, *supra* note 89.

119. PAUL BREST & HAL HARVEY, MONEY WELL SPENT: A STRATEGIC GUIDE FOR SMART PHILANTHROPY 35 (2008).

sion-making often lacks that sense of direction. Many have not thought deeply about their objectives or attempted to assess the social impact of their contributions.[120] When the amounts of assistance are small, such an ad hoc approach is not particularly problematic; attempts at systematic assessment would not be worth the effort. But many individuals and institutions that make major contributions are motivated at least in part by a desire to give back to the community, to build a more just society, and to make a difference on issues that have affected them personally.[121] The objectives of these donors would benefit from a more systematic framework. Esther Lardent, President of the Pro Bono Institute, notes that too much of lawyers' charitable assistance is random and episodic.[122] What is needed are approaches that are strategic: informed, sustained, collaborative, and accountable.[123] Those approaches could benefit from the growing literature on strategic philanthropy.

2. The Strategic Process

What exactly qualifies as strategic philanthropy and how much it differs from major foundations' longstanding practices is a matter of dispute.[124]

---

120. *See* Rhode, *Rethinking the Public*, *supra* note 89, at 1445 (quoting representative senior partner's comment that the firm was unable to assess the social impact of its work); Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, 42 LOY. L.A. L. REV. (forthcoming 2009) (manuscript at 61-62, on file with author) (noting the frequent absence of evidence for Legal Aid lawyers' sense of effectiveness).

121. *See* RHODE, *supra* note 5, at 62 (2005); *see also* ROBERT COLES, THE CALL OF SERVICE 91 (1993); Gil Clary & Mark Snyder, *A Functional Analysis of Altruism and Pro Social Behavior: The Case of Volunteerism*, *in* PROSOCIAL BEHAVIOR 119, 125-26 (Margaret Clark ed., 1991); THE CTR. ON PHILANTHROPY, IND. UNIV., 2008 STUDY OF HIGH NET WORTH PHILANTHROPY: ISSUES DRIVING CHARITABLE ACTIVITIES AMONG AFFLUENT HOUSEHOLDS (2009); MICHAEL L. GROSS, ETHICS AND ACTIVISM: THE THEORY AND PRACTICE OF POLITICAL MORALITY 128-32 (1997).

122. Esther Lardent, President of the Pro Bono Inst., Comment at UCLA Conference on the Future of Pro Bono (Oct. 3, 2008).

123. *Id.*; *see also* Rhode, *Rethinking the Public*, *supra* note 89, at 1447.

124. For a claim that the term "strategy" has become so overused to describe any grant with a purpose that the term is almost meaningless, see Michael E. Porter & Mark R. Kramer, *Philanthropy's New Agenda: Creating Value*, HARV. BUS. REV., Nov.–Dec. 1999, at 121, 125 [hereinafter Porter & Kramer, *Philanthropy's New Agenda*]. For a claim that virtually all foundations claim to practice some form of strategic philanthropy, see Mark R. Kramer, *Strategic Confusion*, FOUND. NEWS & COMMENT., May–June 2001, at 40. For a suggestion that whether strategic philanthropy involves a new concept or just new terminology is less relevant than whether it makes a difference, see Peter Karoff, *Saturday Morning*, *in* JUST MONEY: A CRITIQUE OF CONTEMPORARY AMERICAN PHILANTHROPY 3, 13 (Peter Karoff ed., 2004) [hereinafter JUST MONEY]. For an argument that the practice of strategic philanthropy isn't all that different, see Joel L. Fleishman, *Simply Doing Good or Doing Good Well: Stewardship, Hubris, and Foundation Governance*, *in* JUST MONEY, *supra* at 104; Peter Frumkin, *Inside Venture Philanthropy*, SOC'Y, May–June 2003, at 7, 15; Stanley M.

Most experts agree, however, on two distinguishing features of strategic giving: clarity in objectives and specific measures of performance.[125] Unlike "mission driven" charity, which furthers a broadly stated organizational purpose (such as reducing poverty), strategic philanthropy demands a well-supported plan for achieving measurable goals. That plan needs to include means of tracking progress toward its goals and comparing the costs, benefits, and risks of any particular approach against other methods of achieving the same ends.[126]

Two strands of strategic philanthropy have particular relevance for public interest law. One involves the trend among large corporations to target charitable contributions in ways that serve business as well as societal interests. In its most effective form, such strategic giving both draws on the organization's distinctive resources and appeals to its particular stakeholders. For example, information technology companies contribute equipment to non-profits, and subsidize distance-learning programs for IT workers around the globe.[127] The closest analogy in the legal profession involves "signature" pro bono initiatives, which build on law firms' substantive specialties and align philanthropic goals with training, recruitment, and retention objectives.[128]

Katz, *What Does it Mean to Say that Philanthropy is Effective? The Philanthropists' New Clothes*, 149 PROC. AM. PHIL. SOC'Y 123, 126 (2005), *available at* http://www.aps-pub.com/proceedings/1492/490201.pdf.

125. BREST & HARVEY, *supra* note 119, at 7; Porter & Kramer, *Philanthropy's New Agenda*, *supra* note 124, at 126-27.

126. BREST & HARVEY, *supra* note 119, at 59; Paul Brest, *Strategic Philanthropy and its Malcontents*, *in* MORAL LEADERSHIP: THE THEORY AND PRACTICE OF POWER, JUDGMENT, AND POLICY 229, 230-31 (Deborah L. Rhode ed., 2006) [hereinafter MORAL LEADERSHIP]; s*ee also* Kramer, *supra* note 124, at 44 (describing key elements of strategic philanthropy as identifying the desired change, clarifying internal values and strengths, and ascertaining external needs).

127. John V. Kania, Found. Strategy Group, *Benchmarking Philanthropy*, PERSP. CORP. PHILANTHROPY, Winter, 2004, at 1, 2-3 (describing Microsoft signature initiatives); John V. Kania & Mindy W. Oakley, Found. Strategy Group, *Design for Giving: Understanding What Motivates Corporate Philanthropy*, PERSP. CORP. PHILANTHROPY, Winter, 2003 at 1 (describing Cisco Networking Academy); Michael A. Porter & Mark R. Kramer, *The Competitive Advantage of Corporate Philanthropy*, HARV. BUS. REV., Dec. 2002, at 57, 61, 64 (describing Cisco and Apple projects) [hereinafter Porter & Kramer, *Competitive Advantage*]. For other examples, see Michelle Courton Brown, *Making The Case for Corporate Philanthropy: Key Element of Success*, *in* JUST MONEY, *supra* note 124, at 151 (describing banks' efforts to bridge the digital divide and expand online banking services to low and moderate income communities); Keith Epstein, *Philanthropy, Inc.: How Today's Corporate Donors Want Their Gifts to Help the Bottom Line*, STAN. SOC. INNOVATION REV., Summer 2005, at 21 (describing missile manufacturer's support of local engineering and science education programs).

128. RHODE, *supra* note 5, at 30-31 (2005); Rhode, *Rethinking the Public*, *supra* note 89, at 1442 (describing the "bottom line" orientation in many firms).

A second form of strategic giving involves venture philanthropy. This approach, modeled after venture capitalism, helps high-potential non-profit organizations scale up to a point where they can sustain major social impact work.[129] This entails sufficient engagement and management assistance to promote organizational growth, capacity, and continued financial viability.[130] The closest analogy for the legal profession involves long-term pro bono collaborations between law firms and public interest groups, which can include significant financial support and assistance as general counsel, along with participation in particular legal projects.[131] Unlike venture philanthropists, however, who often look for an exit strategy after the initial investment, firms generally cultivate an ongoing relationship.

What unites these different forms of strategic philanthropy is a well-designed process for developing and evaluating a plan of action. To achieve social impact, a strategic plan needs a theory of how to achieve the desired result, an approach that is within the capacity of the project, and criteria for measuring progress.[132] Ideally, as Brest notes, the theory should be "empirically validated."[133] At the very least, it should be informed by the best available research on what works in the field, or confidence that the organization being supported has that base of knowledge. For many social problems, the most effective strategy is to address its root causes, rather than just alleviate its symptoms.[134]

Experts describe several stages of the strategic process. The first is "scoping," in which the philanthropist reviews factors such as research and expert opinions on the nature of the problem; the views of those who would benefit from assistance; the relative costs, benefits, and risks of potential solutions; the experiences of other groups that have worked on the issue; and any unique capabilities of the philanthropist.[135] In effect, the key question is where and how the donor can have the greatest effect on the dynamics that perpetuate the problem.[136] A second stage involves developing a

---

129. BREST & HARVEY, *supra* note 119, at 195; Frumkin, *supra* note 124, at 9.

130. *See* HANDLER, SOCIAL MOVEMENTS, *supra* note 11, at 9; Karoff, *supra* note 124, at 3, 13.

131. Rhode, *Public Interest Law*, *supra* note 3, at 2074.

132. Brest, *supra* note 126, at 233.

133. *Id.*

134. John A Byrne, *The New Face of Philanthropy*, BUS. WK., Dec. 2, 2002, at 82; Hal Harvey & Barbara Mertz, Problem Solving Philanthropy (unpublished manuscript, on file with author).

135. Bill & MELINDA GATES FOUND., STRATEGY LIFECYCLE OVERVIEW AND GUIDE 6-7 (2008), *available at* http://www.gatesfoundation.org/about/Documents/strategy-lifecycle-overview-and-guide-2008.pdf.

136. Byrne, *supra* note 134, at 82; Kramer, *supra* note 124, at 6.

specific strategy, identifying potential collaborators, and establishing criteria for measuring outcomes and long-term impact.[137] Once a philanthropist has made a commitment, the third stage of the process involves evaluating progress, and modifying the strategy in light of experience.

The most difficult and divisive aspect of this framework concerns the choice of "measurable outcomes" to use for assessment. Some strategic philanthropy, again borrowing from business models, attempts to quantify the social return on investment ("SROI"). In essence, the process estimates the social impact of an organization's project, adjusted by the likelihood of achieving it, in relation to the amount invested.[138] In 1996, the Roberts Enterprise Development Fund pioneered the concept as a way to attach monetary value to "social purposes enterprises" that attempted to move disadvantaged employees out of poverty.[139] By calculating the savings from social services when workers became self- sufficient, along with tax revenues generated by the businesses, the framework found a highly positive return from the original project investment. Building on that framework, a cottage industry has developed to quantify the social benefits of non-profit initiatives.[140]

3. The Challenges for Strategic Philanthropy

In principle, the virtues of strategic philanthropy are self-evident. Everyone benefits when money is well spent, not just well intentioned. Demanding measurable social impact is particularly important in contexts where other forms of accountability are lacking, as is typically the case in

---

137. BILL & MELINDA GATES FOUND., *supra* note 135, at 7-9; *see also* Porter & Kramer, *supra* note 124, at 129-30 (describing the need for foundations to engage in systematic research, learn from prior efforts, and identify its unique capacities); V. Kasturi Rangan, *Lofty Missions, Down–to-Earth Plans*, HARV. BUS. REV., Mar. 2004, at 1 (describing necessity and examples of development of specific strategies); Rebecca W. Rimel, *Strategic Philanthropy: Pew's Approach to Matching Needs with Resources*, HEALTH AFF., May–June 1999, at 229-30 (describing strategic process of Pew Charitable Trusts).

138. *See* BREST & HARVEY, *supra* note 119, at 153; Alison Lingane & Sara Olsen, *Guidelines for Social Return on Investment*, 46 CAL. MGMT REV. 116 (2004).

139. CYNTHIA GAIR, ROBERTS ENTER. DEV. FUND, A REPORT FROM THE GOOD SHIP SROI (2005), *available at* http://www.redf.org/learn-from-redf/publications/119 (scroll to bottom of page to find link to .pdf file, username and password is required). For the evolution of this model, see Carla I. Javits, *REDF's Current Approach to SROI*, May, 2008, *available at* http://www.redf.org/publications-sroi.htm (scroll to bottom of page to find link to .pdf file, username and password is required).

140. JACK QUARTER ET AL., WHAT COUNTS: SOCIAL ACCOUNTING FOR NONPROFITS AND COOPERATIVES 65-69 (2003); John Sawhill & David Williamson, *Measuring What Matters in Nonprofits*, MCKINSEY Q., May 2001, at 98; Lisa Sanfilippo, New Econ. Found., *Measuring Real Value: A DIY Guide to Social Return on Investment*, http://www.lsbu.ac.uk/bcim/cgcm/conferences/serc/2007/speakers/sanfilippo-serc-2007a.ppt (last visited Apr. 27, 2009).

philanthropic contexts, including lawyers' pro bono programs.[141] In practice, however, even experts sympathetic to this strategic framework question whether its rhetoric has outpaced its capacity.[142]

A threshold difficulty involves identifying a theory of change for the major social problems that philanthropists, particularly in law, are interested in addressing. These remain problems precisely because they defy simple solutions, and the causal dynamics of change are difficult to unpack with any certainty. Determining how much particular strategies have helped reduce homelessness, homophobia, or similar social pathologies are matters on which even the most well informed experts disagree.[143] Plausible theories frequently prove flawed in practice.[144] Or it may be impossible to tell. A program that does not succeed in some ambitious effort may still have prevented a worse result.[145]

So too, what constitutes "success" may be open to dispute. Many social initiatives have mixed results, and what one expert labels "philanthropy's biggest mistakes" may look to others like partial victories.[146] School desegregation litigation is a case in point. It often leads both to white flight and financial starvation for inner city schools, but also to greater racial tolerance and community engagement on local educational policy.[147] Much may turn on the time frame for evaluation. For example, leading gay and lesbian rights organizations generally opposed the first wave of same-sex marriage lawsuits.[148] Their concern was backlash, and their fears were not without foundation. Court victories in several states were reversed by vot-

---

141. For the absence of oversight in lawyers' pro bono programs, see Deborah L. Rhode, Where is the Public in Lawyers' Public Service? Pro Bono and the Bottom Line (Aug. 28, 2008) (unpublished essay), *available at* http://documentoleo.angelfire.com/Rhode_Essay.pdf; *see also* discussion *infra* Part II.B.1.d. For the lack of accountability in the philanthropic sector, *see* Fleishman, *supra* note 124, at 114, 124.

142. *See* FRUMKIN, *supra* note 118, at 15; Karoff, *supra* note 124, at 13.

143. Kramer, *supra* note 124.

144. Megan Greenwall, *New Way to Rate Charities Sought*, WASH. POST, Nov. 24, 2000, at B1 (discussing example of where theories were wrong about what made domestic violence treatment and prevention programs effective); s*ee also* BREST & HARVEY, *supra* note 119.

145. Steven A. Schroeder, *When Execution Trumps Strategy*, *in* JUST MONEY, *supra* note 124, at 190 (describing the failed effort by the Robert Wood Johnson Foundation to reduce the number of individuals lacking health insurance, but noting that without the effort, the problem might have been worse).

146. BREST & HARVEY, *supra* note 119, at 278. S*ee generally* MARTIN MORSE WOOSTER, HUDSON INST. & BRADLEY CTR. FOR PHILANTHROPY & CIVIC RENEWAL, GREAT PHILANTHROPIC MISTAKES (2006).

147. For the impact of *Brown v. Board of Education*, see *BROWN* AT FIFTY: THE UNFINISHED LEGACY (Charles Ogletree & Deborah L. Rhode eds., 2004).

148. William B. Rubenstein, *Divided We Litigate, Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1637-39 (1997).

ers and prompted statutes denying recognition to same-sex marriages.[149] Yet litigation also required an increasing number of states to permit gay and lesbian couples to marry or to enter domestic partnerships with comparable benefits.[150] Public support for those options has also grown dramatically.[151] It is impossible to know whether a different strategy would have been more effective in extending gay rights. Moreover, as that example illustrates, even the best laid strategies of major public interest organizations and their funders can be undermined by the actions of individual plaintiffs and politicians who force the issue into judicial or legislative forums before the necessary foundations are in place.[152]

A second difficulty for strategic philanthropists is that not all outcomes can be accurately measured. That is particularly the case in many public interest legal contexts. How do we price due process? Dennis Collins, former director of the Irvine Foundation, worries that strategic philanthropy encourages a "pseudo science" of "metrics and matrices" that cannot capture intangible values."[153] Bruce Sievers, former head of the Haas Family Foundation, similarly warns against what Alfred North Whitehead termed the "fallacy of misplaced concreteness."[154] Even the strongest advocates of SROI frameworks acknowledge their inability to quantify all relevant outcomes.[155] In many contexts, philanthropists cannot help but suffer "measurement angst;" they lack the research or methodology on which to make informed assessments of social impact.[156]

---

149. For an account of this history, see JANE SCHACTER, THE BACKLASH THAT WASN'T: MARRIAGE EQUALITY LITIGATION THEN AND NOW (forthcoming 2009); *see also* WILLIAM RUBENSTEIN ET AL., SEXUAL ORIENTATION AND THE LAW 612 (2008).

150. For a list of states, see Same Sex Marriage, http://www.ncsl.org/programs/cyf/samesex.htm (last visited May 12, 2009).

151. SCHACTER, *supra* note 149, at 56; Patrick Eagly et al., *Gay Rights*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 235 (Nathaniel Persily et al. eds., 2008).

152. The suit in Hawaii was brought by plaintiffs without the support of any major gay and lesbian rights organization. *See* Rubenstein, *supra* note 148, at 1637. The decision by San Francisco mayor Gavin Newsome to issue marriage licenses forced the issue into the courts before local gay and lesbian rights organizations thought it prudent. For Newsome's action, see Patrick Dillon & Lee Romney, *S.F. Judge Won't Halt Marriages: The City Gets Until March 29 to Return to Court and Defend the Merits of Allowing Same Sex Unions*, L.A. TIMES, Feb. 18, 2004, at A1.

153. Dennis Collins, *The Art of Philanthropy*, *in* JUST MONEY, *supra* note 124, at 64.

154. Bruce Sievers, *Philanthropy's Blindspot*, *in* JUST MONEY, *supra* note 124, at 135; *see also* Bruce Sievers, *Ethics and Philanthropy*, *in* MORAL LEADERSHIP, *supra* note 126, at 257.

155. QUARTER ET AL., *supra* note 140, at 81.

156. The phrase is Brown's, based on her experience with Fleet bank initiatives. Brown, *supra* note 127, at 160; s*ee also* Fleishman, *supra* note 124, at 118 (discussing the absence of research); WILLIAM & FLORA HEWLETT FOUND. & MCKINSEY & CO., THE NONPROFIT

Moreover, as experts like Peter Karoff of the Philanthropic Initiative have noted, insistence on objective performance measures can discourage funders and their grantees from taking on the "tough issues where success is hard to measure."[157] Philanthropists who demand measurable indicators of impact may be reluctant to "swing for the fences" on "complicated, messy, seemingly insoluble problems" where charitable funds and creativity are most needed.[158]

A further concern is that if philanthropists insist on combining business and societal objectives, they risk having bottom-line concerns distort giving priorities. A common criticism of corporate philanthropy is that too much money goes to publicizing good works rather than to the works themselves.[159] Similar problems arise when law firms select pro bono projects more for their training and public relations potential than for their social impact.[160] A related difficulty involves "signature projects" designed to brand the donor with a charitable cause. These projects might be more effective if pursued in collaboration, but organizations intent on enhancing their reputation may not want partners who would share in the reflected glory. At its worst, this mindset reflects a form of philanthropic hubris, in which donors delude themselves into believing their contributions alone are making a major dent on complex social problems.[161]

A final concern arises when philanthropists want hands-on engagement with their grantees but lack the expertise to make that relationship mutually beneficial.[162] Some nonprofits report that the process of working closely with donors is draining and unproductive.[163] Yet if, as is often the case,

---

MARKETPLACE: BRIDGING THE INFORMATION GAP IN PHILANTHROPY 1 (2008) (discussing the absence of any central repository for information about performance).

157. Peter Karoff, *Introduction*, *in* JUST MONEY, *supra* note 124, at xxii; s*ee also* Collins, *supra* note 153, at 65; Karoff, *Saturday Morning*, *supra* note 124, at 13; Sievers, *supra* note 154, at 134.

158. Collins, *supra* note 153, at 65, 67.

159. Porter & Kramer, *Competitive Advantage*, *supra* note 127, at 57 (citing Philip Morris's expenditure of $100 million to publicize a $75 million charitable campaign); Deborah L. Rhode, *Where is the Leadership in Moral Leadership?*, *in* MORAL LEADERSHIP, *supra* note 126, at 20 (noting that the demand for "value added" has pushed corporations to spend more on publicity than on what they are publicizing).

160. *See infra* note 199.

161. Fleishman, *supra* note 124, at 106.

162. BREST & HARVEY, *supra* note 119, at 200.

163. Frumkin, *supra* note 124, at 12; *see also* CTR. FOR EFFECTIVE PHILANTHROPY, TOWARD A COMMON LANGUAGE: LISTENING TO FOUNDATION CEOS AND OTHER EXPERTS TALK ABOUT PERFORMANCE MEASUREMENT IN PHILANTHROPY 12 (2002) (describing grantee perception that foundation staff sometimes increase their workload without compensating benefits, and foundation leaders' acknowledgement of the inadequacy of efforts to monitor and respond to concerns).

funders do not seek bottom-up feedback from their grantees, those organizations will be wary about volunteering it. The result is to prevent candid dialogue that could make their collaborations more effective.

4. Responding to the Challenges

These are all real concerns. But what is the alternative? Social impact is often hard to predict and measure, but abandoning the effort would be no improvement. All too often, leaders of philanthropic and non-profit organizations fall back on the claim that they just "don't have the resources for in-depth evaluation."[164] But organizations have choices regarding where to spend the resources they do have and the failure to spend some of them on assessment compromises the value of funds invested in programs.

A case history on point involves the Nature Conservancy. Its mission is to preserve the diversity of plants and animals by protecting the habitats of endangered species. For most of its history, the organization measured success by the amount of money it raised and the habitats it preserved. By this "bucks and acres" metric, the Conservancy appeared to be highly successful. Its membership, contributions, and protected land all grew steadily; by the turn of the twenty-first century, it had projects in twenty-eight countries, and had preserved some twelve million acres in the United States alone.[165] Yet the diversity of species continued to decline, even within protected areas. In-depth assessments revealed that survival rates depended on ecosystem preservation in bordering areas. To be effective, the Conservancy came to realize that it would need more multifaceted efforts focusing on issues such as economic development, pollution, and soil erosion. That broader strategy was a tough sell to some donors, who were wedded to the aesthetic value of wilderness preservation.[166] But a different approach was essential to achieving the organization's biodiversity objectives.

Of course, in some contexts, objective measures of progress will be much harder to come by. It is, however, generally possible to identify some indicators or proxies.[167] In legal contexts, these might include the number and satisfaction of individuals affected, the assessment of experts, and the impact on laws, policies, community empowerment, and social ser-

---

164. Brown, *supra* note 127, at 160; s*ee also* WILLIAM & FLORA HEWLETT FOUND. & MCKINSEY & Co., *supra* note 156, at 14 (noting perceived incapacity of leanly staffed organizations to gather and act on performance information).

165. Sawhill & Williamson, *supra* note 140, at 100.

166. *Id.* at 101.

167. Brest, *supra* note 126, at 237, 243; Harvey & Mertz, *supra* note 134; *see also* WILLIAM & FLORA HEWLETT FOUND. & MCKINSEY & CO., *supra* note 156, at 18 (noting value of proxy information such as views of stakeholders).

vices. For complex problems, it often makes sense to pool resources and expertise through strategic alliances with other funders and nonprofit organizations.[168] Another option is spread betting—distributing support over a wide range of approaches and organizations, and then periodically revising priorities in light of which investments prove most productive.[169]

The effectiveness of all of these strategies is likely to increase if organizations become more demanding in their evaluations and more willing to share information about what works and what does not. To be sure, those who invest significant amounts of time and money in impact litigation want to feel good about their efforts, and are understandably reluctant to spend additional resources to identify possible flaws in their efforts. That reluctance is particularly easy to rationalize in legal contexts, where organizations can generally point to at least some positive outcomes. Legal representation is, after all, itself a value. And what leader of a public interest organization or pro bono program wants to rain on the parade when it might jeopardize support for their work? But sometimes at least a light drizzle is essential to further progress. In addition, philanthropists need forums in which they can candidly share their experiences and prod each other to do better.

B. Lessons for Lawyers

For lawyers who seek social impact, strategic philanthropy holds several lessons. The first is the importance of clear goals and specific measures of progress. In essence, decision makers need to determine how they can use resources most effectively, given their distinctive concerns and capabilities. At a minimum, a strategic approach needs processes for:

- identifying objectives and establishing priorities among them;
- selecting projects that will best advance those objectives; and
- overseeing performance and evaluating how well objectives are being met.

The more substantial the investment, the more informed, inclusive, and transparent those processes should be. To develop the expertise and sustain the resource commitment necessary for major impact, organizations need to limit their substantive fields and focus on manageable goals.[170]

---

168. James Austin, *Strategic Alliances*, STAN. SOC. INNOVATION REV., Summer 2003, at 50; *see also* BREST & HARVEY, *supra* note 119, at 224.

169. TELES, *supra* note 3, at 20; Austin, *supra* note 168, at 54.

170. Michael A. Bailin, *Requestioning, Reimagining, and Retooling Philanthropy*, 32 NONPROFIT & VOLUNTARY SECTOR Q. 635, 636 (2003) (describing the need for focus); *see*

A second lesson from strategic philanthropy is the importance of developing appropriate measures of long-term impact. An example comes from Gary Blasi's experience with a Los Angeles slumlord.[171] In successive lawsuits against that building owner, a neighborhood legal aid office declared victory; it prevented evictions, obtained significant monetary judgments, and used the litigation to organize a tenants union. None of these cases, however, were able to force structural changes in the building that would have prevented future code violations and increased the supply of habitable housing. In retrospect, Blasi questions whether a different strategy might have been a better use of limited resources. But that question would never even have surfaced if, as is often the case, the organization tracked only short-term outcomes, not long-term results.

A third insight from strategic philanthropy involves the value of collaboration. Given the scale of problems they are typically addressing, public interest legal initiatives are up against what experts label "unsuitable odds."[172] In these contexts, significant change generally depends on extensive consultation and strategic alliances. Even organizations that are looking for a distinctive niche will benefit from working with other players and stakeholders to identify the best opportunity. All of these groups will also profit from developing common metrics of evaluation and benchmarking results against those of comparable programs.[173]

A final lesson concerns accountability. Given their relative insularity from market discipline and government regulation, public interest organizations and pro bono programs need structures for ensuring adequate feedback. In the long run, neither those who give nor those who receive legal and financial assistance are well-served by the common "don't ask, don't tell" approach concerning well-intentioned but ill-conceived efforts. In commenting on the Los Angeles slumlord case, Blasi noted that too often, legal aid and public interest lawyers go "for years feeling effective without ever actually examining the empirical facts to validate that feeling."[174] Organizations that want to maximize their social impact need pressure to assess their long-term impact and safe spaces to share their difficulties.

---

also CTR. FOR EFFECTIVE PHILANTHROPY, *supra* note 163, at 9-10 (noting that nearly all CEOs agreed on the importance of limiting project areas).

171. *See* Blasi, *supra* note 120.

172. Harvey & Mertz, *supra* note 134, at 2; s*ee also* Bailin, *supra* note 170, at 636 (noting the eventual recognition by Edna McConnell Clark Foundation leaders of the futility of trying to "reform huge, complex entrenched multibillion-dollar public systems with a staff of 25 people and around $25 million a year in grants.").

173. WILLIAM & FLORA HEWLETT FOUND. & MCKINSEY & CO., *supra* note 156, at 43.

174. Blasi, *supra* note 120, at 70-71 (on file with authors).

1. Pro Bono Contributions

Lawyers' pro bono contributions have played a central and increasing role in public interest litigation. As noted earlier, part of the increase is due to the rising support by legal employers, the legal media, and the organized bar.[175] Another factor is the growing scale and complexity of social impact initiatives, and the inability of nonprofit organizations to keep pace without outside help. About half of leading public interest organizations rely extensively on pro bono collaboration, and another third report moderate collaboration.[176] Almost all of these organizations involve private lawyers in impact litigation, and partner with them in about half of their major cases.[177]

a. The Extent of Pro Bono Work

How much unpaid effort lawyers devote to public interest cases is impossible to assess with any precision. Only seven states require reporting of pro bono work, and neither they, nor other published surveys provide much detail on the nature of contributions. The best available data come from a 2008 ABA study, which found that almost three-quarters of lawyers provided some pro bono assistance to persons of limited means or organizations serving them, for an average amount of forty-one hours per year.[178] About two-thirds of lawyers reported serving individuals rather than organizations, and only 7% of that aid went to pursuit of civil rights or liberties or other public rights.[179] Service to organizations included a wide range of groups, not just those targeted to public interest causes or individuals of limited means, and service encompassed a range of activities besides litigation assistance.[180]

Although the portion of pro bono work that goes towards social impact work remains unclear, there is little dispute that more and better focused assistance is needed. Only a quarter of the lawyers in the ABA's study met

---

175. ABA surveys have found an increase in the number of lawyers who engage in pro bono work, as well as in their amount of service over the past five years. *See* ABA STANDING COMM. ON PRO BONO AND PUB. SERV., SUPPORTING JUSTICE II, A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 21 (2009) [hereinafter ABA STANDING COMM.]. The *American Lawyer*'s survey of the 200 most profitable firms also registers an increase.

176. Rhode, *Public Interest Law*, *supra* note 3, at 2070.

177. *Id.*

178. ABA STANDING COMM., *supra* note 175, at 3.

179. *Id.* at vii, 17.

180. *Id.* at 9, 17 (noting that service to organizations did not track the ABA Model Rule definition singling out organizations serving clients of limited means, and that 60% of lawyers believed that sitting on a board of a non-profit organization or providing legal training could qualify as pro bono work).

its aspirational norm of fifty hours of assistance to persons of limited means or to organizations that serve them.[181] The percentage of lawyers providing any such assistance was disturbingly low in some sectors of the profession, such as corporate counsel (43%) and government (30%).[182] In the *American Lawyer*'s latest survey of the nation's 200 most profitable firms, only 40% of lawyers had contributed at least twenty hours a year.[183] A significant amount of what lawyers define as pro bono work includes bar activities, public education, and favors for friends, family, or coworkers.[184] However valuable, relatively little of this work is likely to qualify as strategic philanthropy; it is seldom part of a focused initiative to achieve social impact.

b. The Rationale for Greater Pro Bono Involvement

The failure of more attorneys to become involved in significant public interest initiatives represents a missed opportunity for both the profession and the public. Bar surveys find that lawyers' greatest source of dissatisfaction in practice is their lack of contribution to the social good.[185] For many attorneys, participation in impact work is a way to restore that connection, to feel that they are "making a difference," and to express the values that sent them to law school in the first instance.[186] Assistance to racial, ethnic or other disadvantaged groups can also be an important form of "giving back" and affirming identity.[187] There are also practical payoffs. Public interest litigation can bring recognition, contacts, trial experience,

---

181. *Id.* at 3. For the ABA's Model Rule on Pro Bono Service, see MODEL RULES OF PROF'L CONDUCT R. 6.1.

182. ABA STANDING COMM., *supra* note 175, at 10.

183. *See* Press, *supra* note 117; Nate Raymond, *A Silver Lining*, AM. LAW., July 2008, at 101.

184. The ABA's survey finds that a majority of referrals come from sources other than legal aid organizations, such as other attorneys (13%), family/friends (11%), coworkers/employers (7%) and court/judge (5%). ABA STANDING COMM., *supra* note 175, at 14. The survey finds that most lawyers also consider bar activities and speaking on legal topics pro bono. *Id.* at 9. For prior surveys on sources of pro bono work, see RHODE, *supra* note 5, at 19, 145-48.

185. AM. BAR ASS'N., ABA YOUNG LAWYERS DIVISION SURVEY, CAREER SATISFACTION 19 (2000).

186. RHODE, *supra* note 5, at 131-32.

187. *See generally* Robert Granfield, *The Meaning of Pro Bono: Institutional Variations in Professional Obligations Among Lawyers*, 41 LAW & SOC'Y REV. 113, 137 (2007); Robert Granfield & Thomas Koenig, *It's Hard to be a Human Being and a Lawyer: Young Attorneys and the Confrontation with the Ethical Ambiguity in Legal Practice*, 105 W. VA. L. REV. 496 (2003); David Wilkins, *Doing Well By Doing Good? The Role of Public Service in the Careers of Black Corporate Lawyers*, 41 HOUS. L. REV. 1 (2004).

and skill development that will ultimately yield career advantages.[188] Legal employers also stand to benefit in ways that vary somewhat across the practice settings described below.

For society generally, lawyers' involvement in impact litigation has played a central role in advancing public values. Pro bono assistance has helped protect fundamental rights, establish crucial principles, save individual lives, and safeguard the environment.[189] Finding more ways to attract private lawyers to this work and ensure the most cost-effective use of their assistance should be professional priorities.

c. Large Law Firms: Opportunities for Influence

The pro bono contributions of large law firms have increased substantially in both quantity and quality over the last decade. The average contributions of the top 100 law firms have more than doubled since the turn of the twenty-first century.[190] Among 135 large firms tracked by the Pro Bono Institute, contributions have increased 170% since 1995.[191] Large firms have also become more strategic in managing their aid. About half of the nation's 200 most profitable firms have at least one full time pro bono lawyer or coordinator, up from about a dozen in 2000.[192] These individuals bring a more professional focus to public service initiatives, and can channel efforts in ways that maximize social impact.

Underlying these trends is a growing recognition that effective pro bono programs serve institutional as well as societal interests. Particularly for junior attorneys, public interest litigation can offer training, trial experience, intellectual challenge, and responsibility far beyond what is available in their other work.[193] As corporate clients become increasingly unwilling to subsidize professional development opportunities for young associates, and firms become too highly leveraged to provide such opportunities to all

---

188. RHODE, *supra* note 5, at 131-32; Granfield, *supra* note 187, at 139; Esther F. Lardent, *Pro Bono in Uncertain Times: Learning from the Past/Looking to the Future*, PRO BONO WIRE, July 2008, at 2-3; Karen Lash, *Pitching Your Pro Bono Projects: Getting to 'Yes' with the ' Big Firm"*, 2 DEPAUL J. SOC. JUST. 3, 7-8 (2008).

189. For the work of public interest organizations that receive pro bono assistance, see Rhode, *Public Interest Law*, *supra* note 3, at 2040-41.

190. *See* Raymond, *supra* note 183.

191. Michael Moline, *In the Business of Doing Good: Pro Bono Projects Help Firms Define Their Identities*, NAT'L L.J., Jan. 5, 2007, at 1.

192. Daphne Eviatar, *Pro Bono Pros*, AM. LAW., July 2008, at 104; *see also* Moline, *supra* note 191, at 13 (describing improved managerial focus of firm programs); Emmett Berg, *Pro Bono Goes Full Time*, CAL. LAW., Dec. 2008 (describing full-time pro bono coordinator positions in California firms).

193. RHODE, *supra* note 5, at 30; Cummings, *The Politics of Pro Bono*, *supra* note 5, at 113; Granfield, *supra* note 187, at 138.

who need them, pro bono representation fills an important gap. Firm leaders consistently cite these professional benefits, along with recruitment and retention, as primary justifications for their public service initiatives.[194] Such work can also enhance the firms' reputation and visibility in the community, and improve their rankings in the *American Lawyer*, which rates the pro bono programs of the 200 most profitable firms based on the number of hours per lawyer and the percentage of lawyers who contribute more than twenty hours. A firm's pro bono rating also accounts for a third of its score in the competition for membership on the *American Lawyer*'s coveted "A-List" of the nation's top twenty firms. So too, a student- run organization, Building a Better Legal Profession, also has begun to rank law firms on their pro bono performance.[195]

As firms' public service reputation becomes more visible, it also becomes more important to clients and potential recruits.[196] Despite recent slowdowns in hiring, there remains a "war for talent," and "many if not most of the lawyers these firms want to hire" expect public interest opportunities.[197] Moreover, in the current economic downturn, such opportunities have also become increasingly important as way stations for underemployed or furloughed attorneys. This, of course, makes pro bono programs easier to sell as a purely financial proposition. As one lawyer in an American Foundation study put it: "[l]aw firms do not support pro bono unless there is a business reason to do so. The bottom line on this question is the bottom line."[198] From this perspective, pro bono looks like a sound investment in law firm image and market position.[199] Another lawyer expressed the common view with uncommon candor: "We're not running a charity here. This is good business and essential business for large firms."[200]

---

194. *See* AM. BAR FOUND., NEW APPROACHES TO ACCESS TO LEGAL SERVICES: RESEARCH, PRACTICE AND POLICY 10 (2006), *available at* http://www.americanbarfoundation.org/uploads/cms/documents/rlmoserfund.pdf; Brent Harris, Fulfilling the Promise of Law Firm Pro Bono (2008) (unpublished manuscript, on file with the author).

195. Building a Better Legal Profession, http://www.betterlegalprofession.org/ (last visited Apr. 27, 2009).

196. *See* Eviatar, *supra* note 192, at 106 (quoting Ronald Tabak, pro bono coordinator for Skadden, Arps, Slate, Meagher & Flom, about the increasing number of external constituencies, "including potential recruits, who now care about how big or successful a pro bono program you have").

197. Daniels & Martin, *supra* note 88, at 154.

198. AM. BAR FOUND., *supra* note 194, at 6.

199. *See* Harris, *supra* note 194, at 29-30 (2008); *see also* Ben Hallman, *Starting at the Top*, AM. LAW., July 2007, at 95.

200. Daniels & Martin, *supra* note 88, at 153.

d. Challenges and Constraints

Yet one unsettling byproduct of the "business case" for public service is that, as with corporate giving, the public can sometimes fall by the wayside. Problems arise along two main dimensions: lack of clarity in priorities, and insufficient oversight and accountability concerning performance.

A threshold difficulty involves the multiple objectives of pro bono programs, which sometimes tug in different directions. Relatively small cases offering the greatest responsibility and experience for junior associates do not generally provide the greatest visibility for the firm or social impact for the community. And policies that maximize choice and satisfaction for individual attorneys may not serve other institutional priorities. Well-publicized difficulties have surfaced when pro bono attorneys have challenged policies on positional conflicts, or have wanted to litigate controversial cases in areas such as affirmative action, abortion, and gay/lesbian rights.[201]

When asked about g case selection, firm leaders often fall back on platitudes: as one put it, "I'd like to think [our choice of work] reflects values."[202] But which values? There is obviously value in providing representation for unpopular positions and allowing lawyers to choose where to put their charitable efforts. There is also value in having firms focus resources in ways that are widely supported by their members and their communities, and that seek to maximize social impact. Under the latter approach, lawyers can always pursue different commitments on their own time.

There is, of course, no single appropriate resolution of these questions, but there are better and worse processes for deciding them. An important lesson from strategic philanthropy is that firm leadership needs to be clear about objectives, inclusive in the way it sets priorities, and well-informed about what work might best advance them. In effectively managed programs, multiple goals need not be mutually exclusive. Firms can offer a range of opportunities that accommodate different concerns. Programs that are strategic will also seek projects that are cost-effective, that build on distinctive capabilities, fill urgent needs, and hold capacity for systemic changes. The ABA's Standards for Pro Bono Programs underscore the importance of assessing community needs and many firms have become increasingly proactive in doing so.[203] So, for example, after surveying local

201. For protests regarding positional conflicts, see *supra* text accompanying note 94; for controversial cases, see Vivia Chen, *Rise of the Right*, AM. LAW., July 2007, at 114.

202. *Id.*

203. *See* ABA Standing Comm. on Pro Bono and Public Serv., R. 2.1 (1996).

service providers, one Philadelphia firm decided to assist veterans and the elderly; a Los Angeles firm focused on abused and neglected children; and a San Francisco Bay area firm concentrated on guardianship proceedings.[204] Such approaches can be especially cost-effective because the firm's investment in training and contacts pays off in multiple cases.

Maximizing social impact, however, is more challenging and often requires collaboration with other groups that have relevant expertise and resources. A model of such joint efforts is a coalition among the Los Angeles City Attorney's Office, the Legal Aid Foundation of Los Angeles, the Los Angeles Community Action Network, and several Los Angeles firms to address housing issues in the city's Skid Row. Each member of the coalition brings distinctive strengths: law firms offer resources and litigation expertise; nonprofit organizations have knowledge of substantive law and community needs; and city prosecutors have special investigative capacities and the leverage of criminal and civil penalties.[205] Yet all too often, the complexities and compromises necessary in collaboration, together with the desire for some distinctive signature program, prevent the partnerships that might maximize social impact.

A second challenge for pro bono programs is oversight. Here again, ABA Standards for Pro Bono Programs, as well as frameworks developed for strategic philanthropy, provide appropriate criteria for assessing effectiveness. Firms need systematic information about the quality of services, the outcomes achieved, the satisfaction of clients and pro bono partners, and the long-term impact of assistance. Such oversight is too often noticeable for its absence.[206] One result is that almost half of recently surveyed public interest organizations, reported extensive or moderate problems in the quality of pro bono assistance they received.[207] Some volunteers lack the relevant skill sets or supervision.[208] Others lack the time. As public interest leaders noted, practitioners may "want to do pro bono work in theory but in practice, don't [always] want to make the commitment."[209] Some firms look for "training and opportunities for bored associates but don't want to give them the time . . . when other paid work comes up."[210]

---

204. Michael Aneiro, *Room to Improve*, AM. LAW., July 2006, at 102; Eviatar, *supra* note 192, at 106; Harris, *supra* note 194, at 27, 45.

205. For this example, I am indebted to presentations made at a conference on the Future of Pro Bono at UCLA Law School, Oct. 4, 2008.

206. *See supra* text accompanying note 141.

207. *See* Rhode, *Public Interest Law*, *supra* note 3, at 2071.

208. *Id.* at 2071-72 (problems range from lack of knowledge of substantive law and procedure to an inability to take a deposition).

209. *Id.* at 2072 (quoting Richard Rothschild, Western Center on Law & Poverty).

210. *Id.* (quoting Steven Bright, Southern Center for Human Rights).

At the root of the problem is accountability. As in other philanthropic contexts where the need for help vastly exceeds the supply, those who contribute assistance often face inadequate pressure to worry about recipients' satisfaction or other measures of cost-effectiveness.[211] The problem is exacerbated by media ranking structures that focus only on the quantity, and not quality, of pro bono service. Indeed, as some program coordinators note, current frameworks penalize efficiency; a supervising partner who prevents pointless time-consuming work makes the firm's hourly "statistics in the *American Lawyer* look worse."[212]

This is not to suggest that checks on quality are entirely missing. Well-established public interest organizations, which generally control access to the most interesting high-visibility cases, can afford to be selective in their choice of outside counsel. Many receive more requests for pro bono work than they can accommodate, and choose firms that have demonstrated a commitment to effective representation.[213] So too, most lawyers have internalized an ethic of client service and care about their reputation among colleagues and the local community. But even the best intentioned attorneys may operate with unduly flattering self-evaluations when more disinterested forms of oversight are absent.

The same is true of social impact. One firm leader described a common state with uncommon candor: "we cannot opine as to which of our pro bono projects most effectively contributes to the community."[214] And why should they? Who wants to spoil the "helper's high" that comes from volunteer work, or the favorable write ups in firm publications and press releases with annoying qualifications concerning long-term impact?[215]

Yet the same societal concerns that prompt law firms to take on significant public interest work should also prompt efforts to assess its effectiveness. In the absence of formal structures of accountability, firms need to create their own. The Association for Pro Bono Counsel can push in that direction. Just as the Center for Effective Philanthropy has encouraged

---

211. *See* FRUMKIN, *supra* note 118, at 334; Judith Kaye, *The Legal Community's Response to 9/11: Public Service in a Time of Crisis; A Report and Retrospective on the Legal Community's Response to the Events of September 11, 2001*, 31 FORDHAM URB. L.J. 831, 938 (2004); Deborah L. Rhode, *Pro Bono in Times of Crisis, Looking Back by Looking Forward*, 31 FORDHAM URB. L.J. 1011, 1018 (2004).

212. Harris, *supra* note 194, at 49 (quoting pro bono coordinator of a New York firm).

213. *See* Rhode, *Public Interest Law*, *supra* note 3, at 2070.

214. Harris, *supra* note 194, at 24-25 (quoting Paul Saunders, Cravath, Swaine & Moore).

215. For discussion of the helper's high, a psychological state triggered by biological reactions, see ALAN LUKS WITH PEGGY PAYNE, THE HEALING POWER OF DOING GOOD, at xi-xii, 17-18, 45-54, 60 (2d ed. 2001).

foundations to pay attention to evaluations from its grantees, the Association could pressure law firms to seek assessments from clients and community partners.[216] Media ranking structures could also include information about oversight structures, and more forums could be available for pro bono coordinators to share insights from failures as well as successes. A useful model is the Hewlett Foundation's annual practice of having program officers identify their worst mistake and what they learned from it.[217] Only through more systematic evaluation processes can law firms take full advantage of their charitable capacities.

2. Public Interest Organizations

Most of the key lessons from research on social change and strategic philanthropy are reflected in the evolution of public interest legal organizations. Over the past three decades, these groups have grown dramatically in size and scope, largely in response to a corresponding growth in the scale and complexity of problems they are addressing.[218] Groups that started with a few idealists and several well timed lawsuits have become multi-million dollar organizations with multifaceted agendas. As they have evolved, public interest groups have become increasingly strategic in their approaches and mindful of the capacities and constraints of litigation.

a. The Strategic Value of Litigation

As Part I noted, a long-standing criticism of public interest legal organizations is that they have relied too heavily on lawsuits at the expense of broader social and political strategies.[219] Many leading organizations began with a litigation focus that quickly proved inadequate to the task. Environmental law is a case in point. In organizations like the Sierra Club, the legal staff's initial philosophy was "Just say no. Shut it down, clean it up."[220] So too, the Natural Resources Defense Council first defined its

---

216. MATHEW BISHOP & MICHAEL GREEN, PHILANTHROCAPITALISM 169 (2008).

217. *Id.* at 170.

218. *See* Rhode, *Public Interest Law*, *supra* note 3, at 2032-35; Nielsen & Albiston, *supra* note 5, at 1600-12.

219. *See* LÓPEZ, *supra* note 19; Lynn Jones, *The Haves Come out Ahead: How Cause Lawyers Frame the Legal System For Minorities*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 12, at 182, 183.

220. Rhode, *Public Interest Law*, *supra* note 3, at 2035 (quoting Carl Pope, President, Sierra Club).

mission as "identify polluters and make them stop."[221] And for Earth Justice, litigation victories were seen as "ends in themselves."[222]

Yet as soon became apparent, judicial decrees without a political base are vulnerable to chronic non-compliance, public backlash, statutory reversal, or judicial retrenchment.[223] In many contexts, courts lack the necessary expertise, legitimacy, and enforcement resources to secure lasting change.[224] And in other contexts involving fundamental rights, public interest organizations lack the resources to represent more than a small fraction of deserving claims. "Bailing with a thimble" is how many leaders define the challenge.[225]

Further limitations of litigation arise from opportunity constraints underscored by social movement theory, particularly the growing conservatism of the federal courts and the difficulties of obtaining major victories in judicial forums. Over the past two decades, doctrine has "gone south" on many issues central to public interest work such as standing, mootness, civil rights, attorneys' fees, civil liberties, welfare, prison reform, consumer protection and capital defense.[226] At the same time, clear villains and victims are harder to come by. Defendants are more sophisticated and discrimination is more subtle. Litigation has become more fact-sensitive, the facts are less clear cut, and judicial solutions are more elusive and expensive. Richard Rothschild of the Western Center on Law and Poverty puts it bluntly: "There are fewer easy cases."[227]

Leaders of contemporary public interest organizations generally acknowledge these limitations. It is, they recognize, impossible to "create policy," "change attitudes," or "build a movement" solely through litiga-

---

221. *Id.* at 2034 (quoting Frances Beinecke, President, NRDC).

222. *Id*. at 2046 (quoting Buck Parker, Earth Justice).

223. Kevin R. Den Dulk, *In Legal Culture But Not of It: The Role of Cause Lawyers in Evangelical Legal Mobilization*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 12, at 199-200; *see also* SCHEINGOLD, *supra* note 19, at xxiv (1994); sources cited in Southworth, *Lawyers and the "Myth of Rights"*, *supra* note 38. For early versions of this concern, see Gary Bellow quoted in Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1077 (1977). *See also* Steve Bachmann, *Law, Lawyers, and Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1, 4 (1984); Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 243 (1976).

224. *See generally* ROSENBERG, *supra* note 18; ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT (2003); Kenneth Lee, *Where Legal Activists Come from*, 4 AM. ENTERPRISE 50 (2001).

225. Rhode, *Public Interest Law*, *supra* note 3, at 2042 (quoting Gen Fujioka, Director, Asian Law Caucus).

226. *Id.* at 2037.

227. *Id.* at 2036 (quoting Rothschild).

tion.[228] Rather, as Ralph Nader once summed it up: "You have to deal with the adversary on all the fronts on which your adversary deals with you."[229]

Yet courts also remain a necessary, if by no means a sufficient, forum for public interest work. As social movement theory suggests, and experience confirms, other more political approaches often require a level of financial and popular support that many groups find difficult to marshal.[230] Courts may not always be the most effective dispute resolution forums, but they are often the most accessible; they are open as of right and can force more economically or politically powerful parties to the bargaining table.[231] As the preceding research on social movements makes clear, litigation can build public awareness, help frame problems as injustices, and reinforce a sense of collective identity, all of which can build a political base for reform.[232]

b. Strategic Focus, Collaboration, and Evaluation

In describing their most effective approaches, public interest leaders echo other themes from social movement theory and strategic philanthropy concerning the importance of collaboration and communication.[233] Some groups' greatest successes come from partnering with community organizations and helping them become more effective advocates. "Victory" in this context is often legal representation that leaves a client organization "stronger, and in a position to monitor and enforce a favorable decision."[234]

---

228. *Id.* at 2043 (quoting Susan Gates, Children's Defense Fund); *Id.* (quoting Rothenberg, N.Y. Lawyers for the Public Interest); *Id.* (quoting Gen Fujoka, Director, Asian Law Caucus).

229. NAN ARON, LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND 90 (1989).

230. For discussion of lobbying restrictions and other institutional constraints that push lawyers to litigate, see Southworth, *Lawyers and the "Myth of Rights"*, *supra* note 38, at 508.

231. Sabel & Simon, *supra* note 30.

232. For the importance of framing, see JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 171 (2005); Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611, 615-16 (2000); *see also* Bend Simon, *Individuals, Groups and Social Change: On the Relationship Between Individual and Collective Self Interpretation and Collective Action*, *in* INTERGROUP COGNITION AND INTERGROUP BEHAVIOR 257, 260-61 (Constantine Sedikides et al. eds., 1998).

233. Rhode, *Public Interest Law*, *supra* note 3, at 2048; s*ee also* Madeline Janis-Aparicio & Roxana Tynan, *Power in Numbers: Community Benefits Agreements and the Power of Coalition Building*, SHELTERFORCE ONLINE, Nov.–Dec. 2005, http://www.columbus.nhi.org/online/issues/144/powerinnumbers.html.

234. Rhode, *Public Interest Law*, *supra* note 3, at 2048 (quoting Barbara Arnwine, Lawyers' Committee for Civil Rights Under Law).

Public interest organizations, like strategic philanthropists, are sometimes instrumental in founding these groups or training their members.[235] Other coalitions involve the kind of partnerships among non-profits and corporations that research on philanthropy and social movements has advocated.[236] Public interest organizations are also devoting more attention to public education and are becoming more skilled in providing it. Putting a "human face on social problems" and showcasing "real life stories" of injustice are critical.[237] Many organizations are also increasingly effective in using internet technologies and blogs to mobilize support.[238]

Yet while public interest organizations have clearly grown more strategic in their focus, many lack the formal and inclusive processes of decision-making and evaluation that research on strategic philanthropy recommends. For example, in establishing priorities, only about a quarter of leading public interest organization make significant efforts to include stakeholders such as a clients or community groups.[239] Although the criteria that organizations use to select cases are typically consistent with a strategic framework, few organizations operate with explicitly articulated theories of change or specific measures of performance. Rather, most rely on staff assessments of what needs are most urgent, where there are gaps in coverage, where they can bring value added, and where they see the greatest likelihood of success.[240] Some leaders express skepticism or frustration concerning funders' insistence on more "measurable outcomes."[241] Yet none of those surveyed have much experience with systematic assessment frameworks or principled objections to their use.

c. Challenges and Constraints

The central challenge for contemporary public interest organizations, as their leaders generally perceive it, involves not formulating strategies, but developing the funding and policy leverage to implement them. Virtually all organizations report major difficulties in meeting their financial needs.

---

235. *Id.*

236. *Id.* at 2048, 2064 -65.

237. *Id.* at 2049 (quoting Susan Gates, Children's Defense Fund; Kate Kendell, National Center for Lesbian Rights; Francis Beneicke, NRDC).

238. *Id.* (citing interviews with Tod Gaziano, Heritage Foundation; James Ross, Human Rights Watch; Laurence Paradise, Disability Rights Advocates; Fred Krupp, Environmental Defense Fund; Beneicke, NRDC; Roger Clegg, Center for Equal Opportunity).

239. *Id.* at 2050-51.

240. *Id.* at 2053.

241. *Id.* at 2056.

Some confront equally daunting obstacles in mobilizing the other sources of influence that social movement theory identifies as critical.

The challenges vary across substantive areas. Environmental organizations have what seems to be the most favorable opportunity structure in terms of public support and access to funding. But they also confront problems of massive global dimensions and opponents with substantial resources and political leverage.[242] Civil rights and women's rights groups bump up against cultural complacency—the perception that "we've solved that."[243] Children may seem more sympathetic than other groups but they have neither the votes nor money necessary for political leverage.[244] Technology organizations have difficulty framing issues in ways that are compelling to the public; they lack pictures of "belching smokestacks or kids with AIDS," and "peoples' eyes glaze over" when the discussion turns technical, even if serious privacy and free speech concerns are involved.[245] Still greater challenges arise with groups that Americans find easy to demonize, such as prisoners, death-row defendants, and undocumented immigrants.[246]

Further difficulties arise from the growing competition for resources and recognition. As more public interest organizations enter the arena, they face increasing pressure to distinguish themselves from other groups. The result, as leaders often acknowledge, is that too much work occurs in isolation, and too many coalitions are sabotaged by infighting over credit.[247] Problems are compounded by lawyers' lack of training in running nonprofit organizations. The skills required for effective lawyering are not the same as those required for effective management and marketing. "Why didn't I go to business school?," was one director's question.[248]

Most of these challenges are by no means insurmountable. Law schools, continuing education programs, bar organizations, and non-profit groups could all do more to equip public interest leaders with managerial and strategic evaluation skills. Funders could provide more support for assessments and coalition work. More forums could be made available for can-

---

242. *Id.* at 2042-43 (citing interviews with Beneicke, NRDC, and Krupp, Environmental Defense Fund).

243. *Id.* at 2045 (quoting Irma Herrera, Equal Rights Advocates).

244. *Id.* at 2044 (citing interviews with Susan Gates, Children's Defense Fund; John O'Toole, National Center for Youth Law).

245. *Id.* at 2045 (quoting Jim Dempsey, Center for Democracy & Technology, and Shari Steele, Electronic Freedom Frontier Foundation).

246. *Id.*

247. *Id.* at 2045, 2068-69.

248. *Id.* at 2046 (quoting Cohen, Immigrant Legal Resource Center).

did dialogue about lessons learned from unsuccessful strategies or inadequate assessment.

Greater effort could also center on expanding resources, and on building collaborative funding initiatives. One notable failure of current organizational structures is their inability to realize the full potential of pro bono support. Although virtually all of the leading public interest organizations report that they are understaffed and overextended, only about a quarter believe that they could benefit from increased volunteers.[249] Part of the reason involves the quality concerns discussed below. But much of the problem lies in inadequate resources to identify projects, and provide supervision and backup services. Private lawyers, bar associations, and public interest organizations all need to work together to strengthen the financial foundations for public service.

CONCLUSION

In *The Last Lecture*, Randy Pautsch noted that "[e]xperience is what you get when you didn't get what you wanted."[250] If public interest litigation has not always delivered all that we desire, it has surely provided no lack of experience. Our challenge now is to integrate these lessons from practice with insights from allied disciplines. Taken together, they remind us of the need to coordinate litigation with broader mobilizing efforts, to think strategically about effectiveness, and to create adequate systems of evaluation and accountability. These are no small tasks, and we are grateful for occasions like this symposium to reflect more deeply about the capacities and constraints of law in pursuit of social justice.

249. *Id.* at 2072.

250. RANDY PAUTSCH, THE LAST LECTURE 148 (2008).

PROSECUTORIAL ADMINISTRATION: PROSECUTOR BIAS AND THE DEPARTMENT OF JUSTICE

Rachel E. Barkow[*]

[*] Segal Family Professor of Regulatory Law and Policy, Faculty Director, Center on the Administration of Criminal Law, NYU School of Law. For helpful feedback on earlier drafts, I thank Lincoln Caplan, Adam Cox, Adam Kolber, Margaret Love, Dan Markel, Rick Pildes, Daphna Renan, Ted Ruger, Adam Samaha, Peter Schuck, Stephen Schulhofer, Jeremy Waldron, and participants at the NYU Summer Workshop and Criminal Law Theory Colloquium. Thanks to Samuel Kalar, Zander Li, Alex Mindlin, Rebecca Welsh, and especially Maria Ponomarenko and Shaun Werbelow for first-rate research assistance. I also owe thanks to the Ford Foundation and to the Filomen D'Agostino and Max E. Greenberg Faculty Research Fund at NYU for their generous support.

INTRODUCTION

THE federal system is now the most punitive jurisdiction in America. In a nation of skyrocketing incarceration rates that eclipse those of any other country, the federal government can lay claim to the dubious honor of being the most punitive of all. Over the past decade, the federal prison population has increased 400 percent[1] and at a rate nearly three times that of the states.[2] Federal prisons currently house more inmates than the prisons of any single state.[3] During 2011, the number of criminal defendants increased to an all-time high of over 100,000.

Elected officials certainly bear the lion's share of responsibility for this state of affairs. Congress and the President, no matter what political party they belong to, have passed one harsh federal criminal law after another, ignoring the advice of experts.[4]

But we did not reach this state of affairs by politics alone. The role of prosecutors in setting criminal justice policy across a range of areas has also been critically important. It is, of course, well known that federal prosecutors hold the reins of power in individual federal criminal cases. They have almost unlimited and unreviewable power to select the charges that will be brought against defendants. In more than ninety-five percent of all federal criminal cases, defendants plead guilty without a trial, succumbing to prosecutorial demands.[5] Prosecutors' selection of charges and their decision whether to file a motion for a sentencing departure typically dictate a defendant's sentence as well.[6] And prosecutors have

[1] Chief Justice John G. Roberts, Jr., 2011 Year-End Report on the Federal Judiciary 14 (2011), available at http://www.supremecourt.gov/publicinfo/year-end/2011year-end report.pdf.

[2] Paul J. Hofer, The Reset Solution, 20 Fed. Sent'g Rep. 349, 350 (2008).

[3] As of Dec. 31, 2010, there were 209,771 prisoners in federal prison. The closest state was Texas, with 173,649 prisoners. See Paul Guerino et al., Bureau of Justice Statistics, U.S. Dep't of Justice, Ser. No. NCJ 236096, Prisoners in 2010, at 14 (2011), available at http://www.bjs.gov/content/pub/pdf/p10.pdf.

[4] William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 508 (2001); see also Rachel E. Barkow, Administering Crime, 52 UCLA L. Rev. 715, 734–35 (2005) [hereinafter Barkow, Administering Crime].

[5] According to the U.S. Sentencing Commission, "[i]n fiscal year 2009, more than 96 percent of all offenders [pleaded guilty], a rate that has been largely the same for ten years." Glenn R. Schmitt, U.S. Sentencing Comm'n, Overview of Federal Criminal Cases: Fiscal Year 2009, at 3 (2010), available at http://www.ussc.gov/Research/Research_Publications/2010/20101230_FY09_Overview_Federal_Criminal_Cases.pdf.

[6] See Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law, 61 Stan. L. Rev. 869, 876–77 (2009) [hereinafter Barkow, Institutional Design] (noting that "prosecutors often have a choice of charges, which often, in turn,

often been a driving force in the political arena for mandatory minimum sentences and new federal criminal laws.[7]

Prosecutorial power over federal criminal justice policy goes deeper still. Because of the structure of the Department of Justice ("DOJ"), prosecutors are involved in other areas of criminal justice, including corrections, forensics, and clemency. To borrow a phrase from Elena Kagan, who memorably observed that the President's control over the administrative state through a variety of means amounted to "presidential administration,"[8] we are living in a time of "prosecutorial administra-

means a choice of sentence as well" and that "a prosecutor's decision about what charges to bring and what plea to accept amounts to a final adjudication in most criminal cases").

[7] See, e.g., Penalties for White Collar Crime: Hearings Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary, 107th Cong. 102–03 (2002) (statement of James B. Comey, United States Attorney, Southern District of New York) (asking for tougher white collar crime penalties); Drug Mandatory Minimums: Are They Working?: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, & Human Res. of the H. Comm. on Gov't Reform, 106th Cong. 62–64 (2000) (statement of John Roth, Chief, Narcotic and Dangerous Drug Section, Criminal Division Department of Justice) (arguing in favor of mandatory minimum drug laws). In addition, although the United States Sentencing Commission is an independent agency in the judicial branch, the Department of Justice has had a tremendous influence on the Federal Sentencing Guidelines. The Commission typically takes the position being advocated by the Department of Justice. See Hofer, supra note 2, at 351; Letter from Jon M. Sands, Fed. Pub. Defender, to Hon. Ricardo H. Hinojosa, Chair, U.S. Sentencing Comm'n 3 (Sept. 8, 2008), available at http://www.fd.org/docs/select-topics---sentencing/USSC_Priorities_ltr_with_appendix_9-8-08.pdf("The Department has routinely and successfully argued for increased guideline ranges . . . ."). The Commission's membership further reflects the dominance of prosecutors. In almost every year of its existence, a majority of the Commission's voting membership has been comprised of former prosecutors. See Barkow, Administering Crime, supra note 4, at 764. In addition, a member of the Department of Justice serves as an ex officio member of the Sentencing Commission. Sentencing Reform Act, Pub. L. No. 98-473, § 235(b)(5), 98 Stat. 1837, 2033 (1984) (codified as amended in scattered sections of 18 and 28 U.S.C.). When the Judicial Conference proposed the inclusion of a public defender as one of the Commission's ex officio members, the Department of Justice objected. The Commission's response was silence. It refused to stand by the Judicial Conference's initial proposal to balance the Commission's membership. See Letter from John M. Sands, Federal Public Defender, to Hon. Ricardo H. Hinojosa, Chair, U.S. Sentencing Comm'n 1 (July 31, 2007), available at http://www.famm.org/Repository/Files/USSC_Letter_Victims_Advisory_Group_7-31-07.pdf (stating that "the Commission has, at least initially, decided to take no position on the proposal"); see also The Smart on Crime Coal., Smart on Crime: Recommendations for the Administration and Congress 129 (2011), available at http://www.besmartoncrime.org/pdf/Complete.pdf (arguing that "[t]he presence of a Defender ex officio would ensure that all relevant issues are raised and receive timely and balanced consideration"); Richard S. Frase, State Sentencing Guidelines: Still Going Strong, 78 Judicature 173, 174 (1995) (noting that most state sentencing commissions include defense attorneys and other interested parties, making these panels much more broadly representative than the federal commission).

[8] Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2245 (2001).

tion," with prosecutors at the helm of every major federal criminal justice matter.[9] Kagan highlighted the benefits of presidential administration, but consolidating power comes with costs.

Indeed, whatever the benefits of presidential administration, the consequences of *prosecutorial* administration should concern anyone interested in a rational criminal justice regime that is free from bias in any particular direction. If decisions about corrections, forensics, and clemency are being made by prosecutors—and thus through the lens of what would be good for prosecutors and their cases and from the limited perspective of those who have prosecuted cases but have not represented other interests—it is possible that these decisions are not accounting for what would be good policy overall, taking into account interests other than law enforcement. Indeed, even if the goal is law enforcement, it is possible that prosecutors might be ill-suited to take into account the long-term goals of law enforcement because they are focused on the short-term pressure of dealing with current cases and often lack a broader perspective.

To be sure, law enforcement interests will exercise enormous political power, no matter what the institutional structure. But some institutional structures are better than others at mediating prosecutorial impulses, either by making it difficult for prosecutors to keep tabs on each individual decision that gets made or by allowing an agency with a different agenda to fully research and generate data on a topic of interest without being stopped in its tracks by prosecutors at the Department of Justice before the agency can finish its inquiry. This Article takes up the task of showing the flaws in the current structure of prosecutorial administration and offers possible roadmaps for improvement.

Part I begins by describing the current regime of "prosecutorial administration" and its reach into a variety of areas beyond simple en-

[9] In many respects, prosecutorial power goes far deeper than criminal matters. Prosecutors effectively regulate businesses through the threat of criminal charges. See generally Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct (Anthony S. Barkow & Rachel E. Barkow eds., 2011). And prosecutors are often at the heart of national security decisions as well, deciding when to pursue national security objectives through criminal cases or other means. See, e.g., 28 U.S.C. § 509A (2006) (establishing, through a reauthorization of the USA PATRIOT Act, the National Security Division of the United States Department of Justice for the purpose of combating terrorism and other threats to national security); Jane Mayer, The Trial, The New Yorker, Feb. 15 & 22, 2010, at 60, 62 (describing Attorney General Eric Holder's decision to pursue terrorists through criminal trials). This article, however, focuses on the extent of prosecutorial administration in criminal justice issues.

forcement of the law in an individual case. In particular, it focuses on three areas of criminal justice policy: corrections, clemency, and forensics. These topics were selected because of their importance to the criminal justice system and because of the potential conflicts they pose with prosecutorial interests. Part I explains how these matters came under the aegis of the Department without much concern about the conflicts they would create with the Department's law enforcement mission. And as the conflicts began to emerge, the interests of prosecutors trumped other concerns.

Part II explains prosecutorial administration as a matter of institutional design. It is a well-established feature of institutional design that an agency with competing mandates will adhere to the dominant one. In the case of the Department of Justice, that dominant mandate is undoubtedly law enforcement and obtaining convictions in particular cases. As a result, whenever conflicts arise (or appear to arise) between this mission and other functions such as corrections, clemency, or forensic science, the law enforcement interests (as perceived by the Department's prosecutors) will dominate.

Part III turns to the question of how institutional design could help create a more balanced approach in these areas that is not so tilted to law enforcement concerns. It begins by first considering whether there is a political will to make any changes at all, given the power of law enforcement interests in the political arena. After making the case that institutional change is feasible in at least some areas, Part III tackles the question of what changes could yield positive results in each of these areas and what tradeoffs they entail. The goal must be to strive for a design that would allow prosecutorial concerns to be aired and addressed without overshadowing other concerns. Put another way, while federal prosecutors should have general input on the Nation's criminal justice policies to produce sound decision making—and as a political matter, will have such influence, regardless of institutional design—they should not dominate the process to the exclusion of other interests. Institutional design can help curb some of that dominance.

I. PROSECUTORIAL ADMINISTRATION

The Department of Justice today is, by any measure, a behemoth. Consisting of thirty-nine separate components,[10] with over 116,000 employees,[11] it is one of the largest federal departments.[12]

The Department, as such, with the Attorney General ("AG") at the helm, was not created until 1870. The position of the AG came much earlier, with the passage of the Judiciary Act in 1789.[13] But for most of the Nation's early history, the AG's function was relatively modest, consisting largely of providing the President with occasional advice on legal matters.[14] Indeed, up to the Civil War, the AG's office has been described as "basically a one-man operation."[15] The AG did not obtain the authority to oversee U.S. Attorneys (called district attorneys until 1870) until 1861.[16] The AG was named the head of the Department at its creation in 1870.[17] The purpose of the 1870 Act creating the Department was to eliminate redundancy among legal advisor offices within different departments and consolidate control over criminal justice within a single department.[18] The Department's role remained relatively modest, however, because there were so few federal criminal laws at the end of the nineteenth century.[19]

As federal criminal law expanded, so too did the responsibilities of the Department. The first wave of increased federal jurisdiction came

[10] U.S. Dep't of Justice, Organization, Mission and Functions Manual, http://www.justice.gov/jmd/mps/mission.htm (last updated June 2012).

[11] U.S. Dep't of Justice, FY 2011 Performance and Accountability Report I-6 (2011), available at http://www.justice.gov/ag/annualreports/pr2011/par2011.pdf.

[12] U.S. Office of Pers. Mgmt., Employment Cubes: March 2012, http://www.fedscope.opm.gov/employment.asp (last visited Oct. 29, 2012). Not counting the military or the Department of Veterans Affairs, the Department of Justice is the second largest department after the Department of Homeland Security.

[13] Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93.

[14] Indeed, until 1853, Attorneys General were able to combine their legal duties with private legal practice. See Homer Cummings & Carl McFarland, Federal Justice: Chapters in the History of Justice and the Federal Executive 154–55 (1937).

[15] James Eisenstein, Counsel for the United States: U.S. Attorneys in the Political and Legal Systems 10 (1978).

[16] Act of Aug. 2, 1861, ch. 37, § 1, 12 Stat. 285, 285–286.

[17] The AG has the authority to make rules and regulations for the Department and to supervise U.S. Attorneys. Act of June 22, 1870, ch. 150, §§ 1, 8, 16 Stat. 162, 162–63.

[18] Cummings & McFarland, supra note 14, at 221–25.

[19] Barkow, Institutional Design, supra note 6, at 884 ("Federal criminal law barely existed prior to 1896.").

with the adoption of the Eighteenth Amendment and Prohibition.[20] Another burst of federal criminal legislation came with the New Deal, with a particular focus on regulatory offenses.[21] But the biggest growth spurt is the most recent, beginning in the 1970s. Of the federal criminal laws enacted since the Civil War, more than forty percent were passed since 1970.[22]

Each of these expansions in federal law prompted a corresponding increase in the number of federal prosecutors and prosecutions. A growing population of federal inmates eventually necessitated the construction of federal prisons and a new prison bureau to oversee their management. The growing federal inmate population also led to an influx of pardon applications, which prompted the creation of an office to process those clemency requests. Law enforcement tools and techniques also changed over time, with science and technology pushing toward the development of a federal identification system and national laboratory for forensics.

As the expansion of federal criminal law placed greater strain on corrections and the pardon process, and as science and technology advanced, Congress faced a choice of where to put the responsibility for addressing these issues: within the Department of Justice or elsewhere (perhaps in a newly created agency or an existing department other than Justice). Congress spent little time mulling over the decisions and ultimately settled on the Department of Justice at each juncture. These decisions at the time were far from irrational. When the decisions were made, the new bureaus were so small, and their functions so limited, that it did not seem to matter a great deal where they were placed. And it was efficient to place them with an existing agency instead of creating a new one. Moreover, the Department's overall responsibilities for criminal justice were also still relatively slight. Federal criminal law was still in its infancy, and tough-on-crime politics had yet to take hold. Even if not fully documented or studied, it was at least rational for policymakers to assume that the Department of Justice could make professional judgments in each area in which it governed without being unduly influenced by its other functions, because no one function seemed to dominate its agenda.

[20] Sara Sun Beale, Federalizing Crime: Assessing the Impact on the Federal Courts, 543 Annals Am. Acad. Pol. & Soc. Sci. 39, 41 (1996).

[21] Id. at 41–42.

[22] Task Force on the Federalization of Criminal Law, Am. Bar Ass'n, The Federalization of Criminal Law 7 (1998).

This Part tells this story in greater depth, explaining how and why the decisions were made to place corrections, clemency, and forensics within the Department. These initial decisions were critical, because by the time the incongruence between the Department's core prosecutorial mission and these more peripheral functions became apparent, bureaucratic inertia and the modern politics of crime made changing course more difficult.

A. The Bureau of Prisons

At the Nation's founding, federal criminal law was sparse.[23] As a result, there was hardly a need for a bureaucracy to administer it. Pursuant to the Judiciary Act of 1789, the U.S. Marshals had authority over the sparse number of federal prisoners.[24] The Marshals were appointed by the President[25] and operated independently of the Attorney General, so there was no mingling between prosecutorial functions and corrections.[26] Moreover, the duties of the Marshals themselves were limited because federal prisoners were housed in state and local jails.[27]

It was not until the establishment of the Department of Justice in 1870 that the AG assumed responsibility for federal prisoners.[28] The decision to give the Nation's chief law enforcement officer control over the prisons sparked almost no debate. This is unremarkable, as there were still no federal prisons at that time, and few federal inmates. All that was at stake was the administrative control over where among state and local jails to place the relatively small number of federal prisoners. The AG's power as a law enforcement officer was also relatively narrow at this point, as federal criminal law was hardly a major political issue of the

[23] See supra note 19.

[24] See Judiciary Act of 1789, ch. 20, §§ 27, 28, 33, 1 Stat. 73, 87–88, 91–92; Paul W. Keve, Prisons and the American Conscience: A History of U.S. Federal Corrections 10–13 (1995) (noting Marshals' early supervision of prisoners). As late as 1890, the federal government still had fewer than 2000 total prisoners. Elizabeth Dale, Criminal Justice in the United States, 1789–1939, at 118 (2011).

[25] See Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87.

[26] See Cummings & McFarland, supra note 14, at 218 (noting that both district attorneys and Marshals "remained all but completely independent" of the Attorney General).

[27] Dale, supra note 24, at 10. The Marshals' duties were so limited that, in addition to transporting prisoners and serving warrants, they were also tasked with conducting the decennial census until 1870. Cummings & McFarland, supra note 14, at 369.

[28] See Act of June 22, 1870, ch. 150, § 15, 16 Stat. 164; Cummings & McFarland, supra note 14, at 225.

day.[29] Thus, the notion of a potential conflict between the AG's responsibilities was not immediately apparent.

By the end of the nineteenth century, federal criminal law expanded and the federal inmate population grew sufficiently large that Congress moved to establish the first federal prisons. With a greater federal presence in criminal law enforcement,[30] policymakers began to confront the wisdom of combining enforcement and prison administration within a single department. Attorney General Augustus Garland supported housing both functions in the Department, urging Congress to provide for the construction of a federal prison and to establish a prison bureau within the Department of Justice.[31] In 1890, the House Committee on the Judiciary agreed with this recommendation.[32]

It was during the debate over this law that concerns were first expressed that the Department might have a conflict of interest between law enforcement and prison administration functions. In particular, Representative William McAdoo[33] objected to placing prisons under the Attorney General's authority, finding it "eminently improper to give to this officer the charge of disciplining the prisoners whom he has prosecuted and convicted in the courts."[34] McAdoo seemed most concerned that prison administration responsibilities would negatively affect law enforcement decisions because one responsible for administering prisons would have incentives to see them fully occupied, which could lead that person to overcharge if he was also responsible for bringing cases.[35] Because of this conflict, McAdoo proposed giving the Department of Interior supervisory responsibility for the federal prisons.[36]

[29] At the end of the nineteenth century, political attention was focused mainly on the increasing expression of "extralegal justice," "popular justice," or "rough justice" within the states. See Dale, supra note 24, at 90–96. The importance of federal criminal law took a back seat to local issues such as jury nullification and a sharp rise in lynching. Id.

[30] By 1895, there were "2516 federal felons held in [state prisons], compared to only 1027 ten years earlier." Keve, supra note 24, at 26.

[31] 21 Cong. Rec. 783 (1890).

[32] Id. at 892.

[33] McAdoo served in Congress only briefly and later went on to serve as New York Police Commissioner.

[34] 21 Cong. Rec. 792 (1890) (statement of Rep. William McAdoo).

[35] Id. at 873. As noted in Part II, the more likely concern given the modern politics of crime is the opposite—prosecutorial interests are likely to influence prison administration decisions. See infra Part II.

[36] Id. at 792.

But McAdoo was essentially a lone voice on this issue, as his colleagues did not share his concerns. First, because the AG was already responsible for assigning prisoners, they argued that it made sense as a matter of administrative efficiency to grant him authority over the newly constructed federal prisons.[37] In addition, they noted that all but two European countries placed prison administration under the control of a Minister of Justice or comparable official.[38] They also pointed out that the Department of Interior had enough responsibilities already without being given more.[39] When McAdoo failed to win support for his views, he withdrew the amendment and the House voted to place prison administration under the Justice Department's control.[40] The Senate approved the measure—now known as the Three Prisons Act—in 1891.[41]

The question of the AG's possible conflict of interest lay dormant for almost four decades after the federal prisons were created.[42] Then, in 1928, in response to reports of mismanagement and overcrowding at the three federal prisons existing at the time, Congress held a series of hearings on the prospect of creating a Bureau of Prisons within the Department of Justice that would exercise more robust central control over federal prisons. At those hearings, questions were once again raised about the possible conflict of having the Nation's chief prosecutor operate the Bureau.

[37] Id. at 876 (statement of Rep. John Henry Rogers).

[38] Id. (statement of Rep. John D. Stewart).

[39] Id. (statement of Rep. James B. McCreary).

[40] The final vote in favor of the bill was 116 to 104, with 108 members abstaining. Id. at 892. The principal disagreement, however, was over the necessity of federal prisons to begin with, not the wisdom of placing prison management under the Attorney General's authority.

[41] Originally, the Senate version of the bill proposed an independent committee to oversee prison construction, but similarly delegated ultimate control over prison management to the Department of Justice. 22 Cong. Rec. 2925 (1891). The Senate ultimately enacted the House version of the bill. Id. at 3563–64 (1891).

[42] The federal prisons, while nominally under the control of the Attorney General, were in practice governed by individual wardens who operated largely independently. See Keve, supra note 24, at 91–92. In 1907, the Attorney General created the Office of the Superintendent of Prisons, who, along with a minimal staff, was tasked with supervising the federal prisons and surveying conditions in state and local jails, which still housed most federal inmates. Id. After 1910, the superintendent also served as the third member on each of the newly established federal parole boards. See Edgardo Rotman, The Failure of Reform: United States, 1865–1965, *in* The Oxford History of the Prison: The Practice of Punishment in Western Society 151, 167 (Norval Morris & David J. Rothman eds., 1998). Because of these responsibilities, he did not have the time or the resources to provide much oversight.

This time there was a new factual basis for an argument in favor of an independent prisons bureau. By 1929, all of the states had established independent prison commissions or bureaus.[43] And although state structures varied (and produced varying results),[44] a movement toward rehabilitation in the late 1800s led many states to focus on the need to make prison management more professionalized.[45]

Congress, however, seemed uninterested in the state experience or testimony about the desirability of an independent bureau. The outgoing Superintendent of Prisons drafted a bill[46] that passed both houses with little debate and without a recorded vote.[47] Thus, the establishment of the Bureau of Prisons ("BOP") in the Department was met with little resistance and limited discussion.

Since the BOP's establishment, there has been no serious call for its removal from the Department of Justice. Until the early 1980s, it was hardly clear there was a conflict that required remedying, and, even now, the tension is not immediately apparent. As late as 1974, a Bureau official noted that: "The Bureau is a small, non-political part of the Department of Justice and certainly not the most visible; we have traditionally been low on the department priority list . . . ."[48] Indeed, for much of its history, "[a]ttorneys general have done little to interfere with the daily management of the Bureau."[49] As a result, Bureau officials long pursued

[43] Federal Penal and Reformatory Institutions: Hearings Before the Special H. Comm. on Fed. Penal and Reformatory Institutions, 70th Cong. 80–81 (1929) [hereinafter 1929 Hearings] (statement of James Bennett).

[44] Georgia, for example, established a Prison Commission in 1897, and its three members were initially elected by popular vote. Prison Indus. Reorganization Admin., The Prison Labor Problem in Georgia 5 (1937). After serious abuses of its prisons came to light, Georgia shifted the structure of its prison authority, ultimately adopting a five-member Board of Corrections, appointed by the Governor with the advice and consent of the state senate. Albert B. Saye, A Constitutional History of Georgia, 1732–1945, at 460 (2010) (citing sections of the 1945 Georgia Constitution, which created a five-member State Board of Corrections, appointed by the Governor and confirmed by the Senate, for staggered five-year terms). California experimented with several different board structures made up of gubernatorial appointees. Shelley Bookspan, A Germ of Goodness: The California Prison System, 1851–1944, at 2–51 (1991). In 1895, New York established an eight-member State Prison Commission. Rebecca M. McLennan, The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State, 1776–1941, at 201 (2008).

[45] Bookspan, supra note 44, at 39–40 (describing this shift in California).

[46] Keve, supra note 24, at 96.

[47] 72 Cong. Rec. 2157–58, 8575–76 (1930).

[48] Arjen Boin, Crafting Public Institutions: Leadership in Two Prison Systems 109–10 (2001) (quoting Norm Carlson, former Director, Bureau of Prisons).

[49] Id. at 109.

a more reformist agenda than one might expect from an agency under the authority of prosecutors. For instance, the Bureau was one of the first correctional systems to implement a community corrections program through "a series of halfway houses of its own to help offenders nearing the end of their sentences prepare for their release back to the community."[50] And "[w]hereas in 1996 more than half of the state prison systems had one or more consent decrees or court judgments concerning the conditions of confinement pending against them, the Bureau had none."[51]

But times have changed, and there are signs that in recent decades the BOP's placement in the Department may be muting it as a voice for corrections reform. For half a century after the Bureau was established in the Department, the federal prison population remained relatively stable at roughly 20,000 prisoners.[52] Starting in the mid-1980s, the federal prison population started to spike, and has quadrupled since 1990.[53] There are now 120 federal institutions with over 212,000 prisoners.[54] The Bureau witnessed these enormous changes in virtual silence.

As the American Bar Association recently noted in a letter calling for new leadership to "reinvigorate the agency," the Bureau has been "slow and grudging" in adapting to this drastic expansion of the prison population.

> It has lagged behind many state systems in developing innovative programs for women prisoners and those with families, imposed unnecessary restrictions on admission to beneficial drug treatment programs, been haphazard in preparing prisoners for release, failed to respond to the needs of the growing population of non-citizen prisoners, and resisted sensible suggestions for change as exemplified by rejection of the National Prison Rape Elimination Commission recommendations

[50] John W. Roberts, The Federal Bureau of Prisons: Its Mission, Its History, and Its Partnership With Probation and Pretrial Services, 61 Fed. Probation 53, 55 (1997).

[51] Boin, supra note 48, at 112.

[52] Letter from Bruce Green, Chair, ABA Criminal Justice Section, to Hon. Eric Holder, Att'y Gen. (May 6, 2011) (on file with the Virginia Law Review Association).

[53] Id.

[54] Id.

that reflect prevailing state policy on cross-gender searches and supervision.[55]

Margaret Colgate Love attributes the "BOP's institutional sclerosis . . . to its place within the Department of Justice."[56] She argues that "[a] career-led BOP has become captive to the Justice Department's prosecutorial agenda."[57] As an example, she notes that it is difficult for the Bureau to lead the charge on downsizing the prison population by reducing recidivism through reentry programs or other reforms—something that some state corrections departments are doing[58]—because of the potential conflict with the Department's continued pursuit of convictions and long sentences.[59]

The conflict between the Department's law enforcement mission and the Bureau's responsibility over corrections is manifest not only in the Bureau's failure to take a more aggressive role on corrections reform. It can also be seen in the federal policy on the use of community correction centers ("CCCs"), more commonly known as halfway houses. The

[55] Id. The ABA also criticized the Bureau's reluctance to use its sentence modification authority to grant compassionate release to terminally ill prisoners so that they can die at home. Id.

[56] Margaret Colgate Love, Time for a Really New Broom at the Federal Bureau of Prisons, The Crime Rep. (Apr. 17, 2011, 11:46 PM), http://www.thecrimereport.org/news/articles/2011-04-time-for-a-really-new-broom-at-the-federal-bureau-of [hereinafter Love, Time].

[57] Id.

[58] For example, the Georgia Department of Corrections and the State Board of Pardons created the Reentry Partnership Housing for Residence-Problem Inmates project. The project "is designed to provide housing for work-ready convicted felons who remain in prison after the Parole Board has authorized their release due solely to having no residential options." Reentry P'ship Housing, Georgia Department of Corrections, http://www.dcor.state.ga.us/Divisions/OPT/Reentry/ReentryPartnershipHousing.html (last visited July 24, 2012). The program also resulted in an estimated savings of $18 million. National Council of State Housing Agencies, Award-Winning Georgia Re-Entry Program Creates Housing Solutions, U.S. Interagency Council on Homelessness E-newsletter (June 5, 2009), http://www.ncsha.org/story/award-winning-georgia-re-entry-program-creates-housing-solutions. James LeBlanc, Chief of Operations for the Louisiana Department of Public Safety and Corrections, has also pushed for reentry initiatives. LeBlanc "started the re-entry program at Dixon Correctional Center when he was the warden there, and he has made re-entry a centerpiece of his system-wide reform efforts." Cindy Chang, Louisiana Incarcerated: How We Built the World's Prison Capital; Re-entry Programs Help Inmates Leave the Criminal Mindset Behind. But Few Have Access to the Classes, Times-Picayune, May 19, 2002 at A1. "Under LeBlanc's plan, the pilot program currently in place at [Orleans Parish Prison], along with a similar one in Shreveport, will eventually develop into regional re-entry centers, hosting all soon-to-be released inmates from those areas. LeBlanc hopes that, someday, all local prison inmates will graduate from re-entry." Id.

[59] Love, Time, supra note 56.

Bureau had a longstanding practice of placing some of its nonviolent offenders with short sentences in these facilities when recommended by a judge.[60] And on at least one occasion during that time, the Department affirmed the legality of the Bureau's position.[61]

In 2002, however, the Deputy Attorney General asked the Department's Office of Legal Counsel ("OLC") to reconsider this practice.[62] The impetus seemed clear: the Bush administration was coming under fire "by some Democrats for going easy on corporate criminals because of its close political ties to Wall Street."[63] Department officials thus opted to change the Bureau's practice "to strengthen the hands of federal prosecutors in high-priority cases like the Enron and WorldCom scandals. Officials say they are trying to signal to reluctant targets in those cases that they should cooperate with the government—or else."[64] While the Department memorandum condemning the Bureau practice intimated that the Bureau asked for OLC's evaluation of the policy,[65] one judge called that description "disingenuous."[66] And, in fact, the memorandum itself suggests the key motivating factor for the Department to take a closer look at the policy: "BOP's current placement practices run the

[60] Yana Dobkin, Note, Cabining the Discretion of the Federal Bureau of Prisons and the Federal Courts: Interpretive Rules, Statutory Interpretation, and the Debate over Community Confinement Centers, 91 Cornell L. Rev. 171, 173 (2005).

[61] Statutory Authority to Contract with the Private Sector for Secure Facilities, 16 Op. Off. Legal Counsel 65 (1992), *quoted in* Todd Bussert, et. al., New Time Limits on Federal Halfway Houses: Why and How Lawyers Challenge the Bureau of Prisons' Shift in Correctional Policy—and the Courts' Response, 21 Crim. Just. 20, 21–22 (2006).

[62] Memorandum from Larry D. Thompson, Deputy Att'y Gen., to Kathleen Hawk Sawyer, Dir., Fed. Bureau of Prisons (Dec. 16, 2002) [hereinafter Thompson Memo] (on file with the Department of Justice).

[63] Eric Lichtblau, Criticism of Sentencing Plan for White-Collar Criminals, N.Y. Times, Dec. 26, 2002, at C2. While the Justice Department implied that its review of the policy stemmed from a Bureau request, most accounts attribute the second-look of the policy as coming from a Justice Department eager to show it was willing to be tough on corporate fraud. S. David Mitchell, Impeding Reentry: Agency and Judicial Obstacles to Longer Halfway House Placements, 16 Mich. J. Race & L. 235, 245 n.45 (2011); Jennifer Borges, Note, The Bureau of Prisons' New Policy: A Misguided Attempt to Further Restrict a Federal Judge's Sentencing Discretion to Get Tough on White-Collar Crime, 31 New Eng. J. on Crim. & Civ. Confinement 141, 179 (2005).

[64] Michael Isikoff, Hard Time for Corporate Perps, Newsweek and The Daily Beast (Dec. 19, 2002, 7:00 PM), http://www.thedailybeast.com/newsweek/2002/12/19/hard-time-for-corporate-perps.html.

[65] Memorandum Opinion from M. Edward Whelan III, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to the Deputy Att'y Gen. 1 (Dec. 13, 2002) 2002 WL 31940146 (O.L.C.).

[66] Monahan v. Winn, 276 F. Supp. 2d 196, 205 n.9 (D. Mass. 2003) (Gertner, J.)

risk of eroding public confidence in the federal judicial system" by giving white collar offenders preferential treatment.[67]

Given the policy concerns of the Department, it is hardly surprising that it concluded that the Bureau lacked authority to place offenders in these facilities because they did not constitute "imprisonment" under the Bureau's authorizing statute,[68] even though imprisonment was broadly defined as "any available penal or correctional facility."[69] According to the Department's interpretation, the Bureau could use CCCs only pursuant to its statutory authority related to reentry transfer, and thus could place inmates in CCCs for the final ten percent of their term, up to a maximum of six months, but could not otherwise use CCCs as a form of imprisonment.[70]

The Department's view received widespread criticism, particularly from trial judges,[71] but there is no evidence the Bureau tried to push back. After courts disagreed with the Department's interpretation of the relevant statutes as denying the Bureau the discretion to use CCCs as it did,[72] the Bureau promulgated a rule in 2005 that reached the same outcome that the Department advocated, only this time claiming the power to do so as a matter of discretion as opposed to statutory mandate.[73] Still

[67] Thompson Memo, supra note 62. As one Bureau official pointed out, white-collar offenders were by no means the only inmates to benefit from CCC placement: "There are a lot of drug offenders, single moms and ordinary folks who aren't wealthy people who have benefited from this. It's not just Enron types." Lichtblau, supra note 63.

[68] Whelan, supra note 65, at 4–5, 7. Pursuant to 18 U.S.C. § 3621(b) (2000), "[t]he Bureau of Prisons shall designate the place of the prisoner's imprisonment." Id. at 4.

[69] The First Circuit rejected the Department's interpretation. Goldings v. Winn, 383 F.3d 17, 24, 28 (1st Cir. 2004).

[70] Mitchell, supra note 63, at 249.

[71] Dobkin, supra note 60, at 174–75 (noting that the decision "raised the ire of judges nationwide, who expressed shock at the 'amputation of the [Bureau's] discretion' and the insult to the courts, and who criticized that even if the Bureau's 'about-face on community corrections could somehow be justified . . . it should never have been carried out in the cavalier manner it was'" (citations omitted)).

[72] See *Goldings*, 383 F.3d at 19 (concluding that the new policy is contrary to the plain meaning of 18 U.S.C. § 3621(b) (2000)); Elwood v. Jeter, 386 F.3d 842, 847 (8th Cir. 2004) (noting that "the BOP may place a prisoner in a CCC for six months, or more" and that the BOP has "the discretion to transfer prisoners to CCCs at any time during their incarceration"); Monahan v. Winn, 276 F. Supp. 2d 196, 199 (D. Mass. 2003) (citing examples).

[73] Community Confinement, 70 Fed. Reg. 1659 (Jan. 10, 2005) (codified at 28 C.F.R. § 570 (2011)); Mitchell, supra note 63, at 254. See also Muniz v. Sabol, 517 F.3d 29, 33 (1st Cir. 2008) ("[T]he BOP has codified as a formal rule the substance of the 2002 policy, reaching the same result by relying on the opposite rationale: instead of arguing, as previously, that it lacks discretion to make CCC placements before the last ten percent of a sentence,

more telling, even after Congress expressly permitted the Bureau to place inmates in CCCs for up to a year prior to release,[74] the Prison Bureau issued a new rule that once more reaffirmed the six-month limit first mandated by the Justice Department in 2002.[75]

Given the Bureau's four-decade preference for exercising its discretion to place certain nonviolent offenders in CCCs, its shift to a categorical rule barring such placements except in the limited circumstances that the Department had endorsed seems to be a product of the Department's law enforcement preferences, not the Bureau's corrections objectives.

B. Clemency

Because federal prisons did not emerge until the end of the nineteenth century, the notion of a Bureau of Prisons, much less where to place it, was not on the Framers' radar. In contrast, clemency presented itself as an issue to confront from the outset. Article II, Section 2 of the Constitution gives the President the power to "grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." From the Founding, then, there was a need to determine how this power would be administered.

Early on, individuals seeking clemency made their request to the Secretary of State. Typically, the Attorney General also reviewed all applications, but only the Secretary of State had the authority to investigate requests and issue pardon warrants. Thus, while the chief law enforcement officer played a role in the process, the leading force was the Secretary of State, someone outside of the criminal justice regime.

This practice continued until the middle of the nineteenth century. In 1853, President Millard Fillmore's AG and his Secretary of State agreed that, as a matter of expediency, the AG should take charge of receiving and reviewing all pardon applications, though the State Department would still retain the final authority to issue warrants.[76] Congress tacitly approved this institutional arrangement when in 1865 it provided for a

BOP now claims its discretion is broad enough to allow it to make a categorical rule preventing such placements.").

[74] 18 U.S.C.A § 3624(c)(1) (West 2012).

[75] Mitchell, supra note 63, at 261.

[76] Cummings & McFarland, supra note 14, at 149.

pardon clerk to assist the AG in his new responsibility, and later, in 1891, created the office of the Pardon Attorney.[77]

At the time the AG took on the responsibilities for clemency, the potential for conflict existed because of his law enforcement functions. But there were several mitigating factors at play that may have detracted attention from flaws with that institutional design. First, as noted above, federal law enforcement itself was relatively modest at this point in the Nation's history, and certainly the politics surrounding federal crime were a far cry from the tough-on-crime culture that we have witnessed in the past four decades. Second, the AG's role at the head of the Department of Justice remained limited. The AG's office in its first 100 years was narrow in scope, shielded in part from partisan politics, and almost entirely divorced from the day-to-day administration of criminal justice by U.S. Attorneys in the field.[78] In fact, because the AG was so removed from the political landscape, handing him authority over pardons was in some sense a decision to insulate those decisions from politics. As former Pardon Attorney Margaret Love observes, "[d]irecting all pardon applicants to the Justice Department gave the president a measure of protection both from unwelcome importuning and political controversy."[79]

These factors may explain why the rate at which clemency was granted stayed relatively high (at least compared to past grants) even after the AG took over responsibility for pardons.[80] Love reports that Presidents issued more than 10,000 grants of clemency between 1885 and 1930,[81]

[77] Margaret Colgate Love, Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to Be Merciful, 27 Fordham Urb. L.J. 1483, 1489 n.26 (2000) [hereinafter Love, Of Pardons]. In 1893, President Cleveland issued an executive order formally giving the Department the authority to review and issue all warrants. Joanna M. Huang, Note, Correcting Mandatory Injustice: Judicial Recommendation of Executive Clemency, 60 Duke L.J. 131, 143 n.66 (2010).

[78] See generally Nancy V. Baker, Conflicting Loyalties: Law and Politics in the Attorney General's Office, 1789–1990, at 3, 51–52 (1992); Cornell W. Clayton, The Politics of Justice: The Attorney General and the Making of Legal Policy 16, 48 (1992).

[79] Margaret Colgate Love, Reinventing the President's Pardon Power, 20 Fed. Sent'g Rep. 5, 6 (2007) [hereinafter Love, Reinventing].

[80] P.S. Ruckman, Jr., provides a comprehensive table of the number of pardons requested, granted, and denied by each administration from 1900 to 1993, in Executive Clemency in the United States: Origins, Development, and Analysis (1900–1993), 27 Presidential Stud. Q. 251, 261, 263 (1997).

[81] Margaret Colgate Love, The Twilight of the Pardon Power, 100 J. Crim. L. & Criminology 1169, 1185 (2010) [hereinafter Love, Twilight].

"with no slow starts and no bunching of grants at the end."[82] Warren Harding issued 474 pardons and 733 commutations during his two years in office; Franklin Roosevelt issued 2,721 pardons and 491 commutations over the course of his twelve-year presidency.[83] Indeed, the 1920s represented the high-water mark for clemency, particularly in proportion to the size of the federal inmate population and the number of pardon requests. With the advent of federal parole in 1931, parole replaced commutation as the principle mechanism for shortening prisoners' sentences.[84] Accordingly, clemency rates dropped somewhat over the ensuing five decades.[85] Presidents continued, however, to issue post-sentence pardons at rates that seem high by today's standards. Between 1960 and 1980, an average of 150 pardons were issued per year.[86]

The conflict between clemency and prosecution responsibility came to light in the Reagan years, for two main reasons. The first was the new politics of crime.[87] By 1980, it became clear that criminal justice was a key political issue and that no President could afford to be seen as soft on criminal law. Certainly the message was crystal clear by the time George H.W. Bush successfully ran against former Massachusetts Governor Michael Dukakis with an ad campaign that featured Willie Horton, who had committed rape and robbery while on release as part of a Massachusetts furlough program.[88]

The AG and the Department of Justice were highly sensitive to what it meant to operate in this new political climate. President Reagan promoted an ideological shift toward "tougher" crime policy,[89] and criminal law enforcement and criminal justice policies became a high-profile part of the presidential administration. In a memorandum sent to key leaders within the Department of Justice, Assistant Attorney General William Bradford Reynolds emphasized that the administration should "polarize the debate" on a variety of public health and safety issues such as drugs, AIDS, obscenity, and prisons, and "not seek 'consensus'" but rather

[82] Id. at 1186.
[83] Ruckman, Jr., supra note 80, at 261.
[84] Love, Twilight, supra note 81, at 1190.
[85] Id. at 1190–91.
[86] Id. at 1192.
[87] See Love, Of Pardons, supra note 77, at 1495.
[88] See A 30-Second Ad on Crime, N.Y, Times, Nov. 3, 1988, at B20; Paul Farhi, Two Political Ads Share More Than Fame and Controversy, Wash. Post, Sept. 7, 2004, at A2.
[89] See Marc Mauer, Race to Incarcerate 59–64 (2d ed. 2006) (examining the "tough-on-crime" focus of the Reagan Administration).

"confront[ation] . . . in ways designed to win the debate and further our agenda."[90] The political message was clearly received, as federal prosecutions for nondrug offenses rose by less than four percent and drug prosecutions rose by ninety-nine percent from 1982 to 1988.[91] Correction spending also increased by 521 percent between 1980 and 1993.[92]

The second reason the conflict between clemency and law enforcement grew so pronounced involved a shift in the responsibility for pardons at DOJ. Attorney General Griffin Bell decided in 1978 to delegate supervisory authority over clemency to the Deputy Attorney General.[93] Until then, the Pardon Attorney reported directly to the Attorney General, who in Love's telling is a "political counselor" as much as a law enforcement officer.[94] The principal responsibility of the Deputy Attorney General's Office is to supervise federal prosecutions, so the shift in reporting meant that the pardon process "increasingly reflected the perspective of prosecutors, in policy positions in Washington and in the field, who did not always have a clear understanding of or appreciation for clemency."[95]

Given the changing nature of the politics of crime, it is certainly possible (if not likely) that even if the Pardon Attorney continued to report to the AG, positive clemency recommendations would decline. It is hard to imagine a "political counselor" being much more inclined than a law enforcement officer to tell the President to issue more pardons given the political climate. Love also observes that the Deputy Attorney General "has either been a former prosecutor himself, or has had career prosecutors on his staff review the clemency recommendations drafted by the Pardon Attorney."[96] As a result, Love claims that the "the pardon pro-

[90] Id. at 63 (citing Memorandum from Assistant Att'y Gen. William Bradford Reynolds for Heads of Dep't Components, Dep't of Justice (Feb. 22, 1988)).

[91] Id. at 61.

[92] Id. at 68.

[93] Love, Twilight, supra note 81, at 1194 ("But perhaps the most important negative influence on presidential pardoning was the hostility of federal prosecutors and a change in the administration of the pardon program at the Justice Department that allowed prosecutors to control clemency recommendations.").

[94] Love, Reinventing, supra note 79, at 7–8.

[95] Love, Of Pardons, supra note 77, at 1496; see also Albert W. Alschuler, Bill Clinton's Parting Pardon Party, 100 J. Crim. L. & Criminology 1131, 1165–66 (suggesting that the "fraternal regard" prosecutors have for one another led them to be less inclined to grant pardons).

[96] Love, Of Pardons, supra note 77, at 1496 n.49; see also Alschuler, supra note 95, at 1165 (stating that both Pardon Attorneys and their superiors in the Justice Department have

gram lost its independent voice and pardon recommendations came to reflect the unforgiving culture of Federal prosecutors."[97] But AGs have largely come from similar law enforcement backgrounds.[98]

Whatever the ratio between politics and institutional allocation of responsibility that drove the shift, the consequences for clemency practice since 1980 have been dramatic. The Pardon Office established more exacting rules for recommending a grant to the President,[99] a shift that the Pardon Attorney during the Reagan administration described as "better reflect[ing] his administration's philosophy toward crime."[100] Love, who was Pardon Attorney from 1990 to 1997, reports that, at the beginning of the Clinton administration, she was briefly "directed to deny all commutation petitions except those in which a member of Congress or the White House had expressed an interest."[101] By the late 1990s, she writes, "Justice seems to have essentially shut down its production of pardon recommendations, notwithstanding the steadily growing number of applications."[102] "Under Bill Clinton and George W. Bush together, the Justice Department received more than 14,000 petitions for commutations, but recommended only 13 to the White House."[103]

DOJ's increasing stinginess with positive recommendations is reflected in the rate of presidential clemency grants. The grant rate was forty-nine percent between 1860 and 1900, and it slowed down to twenty-

"overwhelmingly" been former prosecutors); Love, Twilight, supra note 81, at 1194 n.105 (observing that "[a]ll but a handful of the individuals officially responsible for approving Justice Department clemency recommendations since 1983 have been former federal prosecutors").

[97] Presidential Pardon Power: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 107th Cong. 25 (2001) [hereinafter 2001 Hearings] (statement of Margaret Love).

[98] Of the sixteen attorneys general who have served from 1969 to the present (2013), only four lacked prosecutorial experience. Those with prosecutorial experience either worked as prosecutors in the Department of Justice (with four having been Deputy Attorneys General), in state AG offices, or as state prosecutors. Attorneys General of the United States 1789–Present, U.S. Dep't of Justice, http://www.justice.gov/ag/aghistlist.php.

[99] Love, Of Pardons, supra note 77, at 1497, 1497 n.53.

[100] Pete Earley, Presidents Set Own Rules on Granting Clemency, Wash. Post, Mar. 19, 1984, at A17.

[101] Margaret Colgate Love, Taking a Serious Look at "Second Look" Sentencing Reforms, 21 Fed. Sent'g Rep. 149, 150 (2009).

[102] Margaret Colgate Love, The Pardon Paradox: Lessons of Clinton's Last Pardons, 31 Cap. U. L. Rev. 185, 198 (2003).

[103] George Lardner, Jr., No Country for Second Chances, N.Y. Times, Nov. 24, 2010, at A27.

eight percent between 1961 and 1980.[104] After 1980, it dropped sharply. The rate of clemency grants for each complete presidential administration since Nixon is as follows:[105]

President	**Clemency Grant Rate**	**Avg. Grants per Month in Office**	**Total Number of Grants**
Nixon	35.7%	13.8	926
Ford	26.8%	14.1	409
Carter	21.5%	11.8	566
Reagan	11.9%	4.8	410
George H.W. Bush	5.3%	1.6	77
Clinton	6.1%	4.8	457
George W. Bush	1.8%	2.1	200

The trend continues with President Obama. President Obama ended his first term with only twenty-two pardons and one commutation,[106] giving him a grant rate of less than one per month he has been in office and the lowest total number for a full-term President since George Washington.[107] With almost 400,000 people currently under federal supervision,[108] and hundreds of thousands more living with federal records, it is hardly for lack of candidates that the rate of pardons and commutations have fallen so dramatically.

C. Forensics

Although the states have traditionally dominated most areas of criminal justice—with the overwhelming responsibility for policing, the great bulk of all criminal prosecutions, and the lion's share of prisons and

[104] Alschuler, supra note 95, at 1131.

[105] I based the calculations on data from Presidential Clemency Actions by Administration (1945 to Present), U.S. Dep't of Justice, http://www.justice.gov/pardon/actions_administration.htm.

[106] Dafna Linzer, Commutation Request Will Get a New Look: U.S. Inmate's Case Sparked Criticism, Wash. Post, July 19, 2012, at A3.

[107] Obama: More Dubious Pardon History-Making, Pardon Power Blog (Jan. 24, 2013, 7:20 PM), http://www.pardonpower.com/.

[108] See Mark Motivans, Bureau of Justice Statistics, U.S. Dep't of Justice, Ser. No. NCJ 234184, Federal Justice Statistics, 2009, at 17, available at http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09.pdf.

jails—the federal government has typically been at the forefront of what we now think of as forensic science.

The federal government's first inroad into this field was with the establishment of a national system of criminal records to facilitate identifications. In 1902, Congress authorized a National Bureau of Criminal Identification at Leavenworth to maintain records of federal inmates. Other such bureaus for criminal records existed throughout the U.S., including one in the New York City Police Department ("NYPD") and a voluntary clearinghouse kept by the International Association of Chiefs of Police ("IACP").[109]

But while prosecutors' offices and prisons could operate independently without much in the way of negative consequences, balkanized policing was another matter. The problems with the disaggregation of criminal records soon became apparent. As Simon Cole notes, "police in New York City looking for a suspect's criminal record would have to write separately to the police in Newark, Philadelphia, Hartford . . . and so on. How many letters the police were willing to write depended on how badly they wanted the information."[110]

Although some local bureau chiefs resisted centralization because they worried about losing their powers,[111] ultimately the need for a uniform national system of identification overcame local resistance. The question thus became not whether to have a central repository, but where to house it. The NYPD offered to serve as a temporary clearinghouse until an independent Central Police Bureau could be established in Washington, D.C.[112] The IACP, which had never been on particularly good terms with the NYPD, lobbied instead for the Department of Justice to take over the records of existing bureaus. In 1921, the IACP succeeded, and the Attorney General combined the IACP's records with its existing collection in Leavenworth to form a new identification depository in Washington, D.C.[113]

Congress held hearings in 1924 to consider the suitability of having DOJ as the central clearinghouse. Objections were not particularly focused on the wisdom of placing a law enforcement agency in control of

[109] Simon A. Cole, Suspect Identities: A History of Criminal Identification and Fingerprinting 220 (2001).
[110] Id. at 219.
[111] Id. at 236.
[112] Id. at 242.
[113] Id. at 243–44.

identification records; after all, other law enforcement agencies had already controlled them. Rather, the main objections at the hearing involved the fear of some local departments that they would become "an annex to the Department of Justice."[114] Thus, for example, the NYPD commissioner testified in favor of having the bureau placed at the Department of the Interior instead because of his concern that it not be placed where "it might lead to control."[115]

Congress was not persuaded that Interior was a good fit for the bureau, and, as one member stated, the idea of "[a] separate bureau is rather obnoxious to us at Washington."[116] So with Interior out and an independent commission seen as wasteful, Congress opted in 1924 to formally authorize an Identification Division within the FBI.[117]

J. Edgar Hoover became Director of the FBI in that same year and viewed forensic science as a key part of the agency's mission. Hoover led the Bureau to create a "cross-referenced filing system that permitted an agent to take a single piece of information—a fingerprint, a physical description, a modus operandi—and trace it back to a whole criminal."[118] Hoover encouraged some of his agents to develop expertise in ballistics, handwriting analysis, and other first-generation forensic techniques. In 1932, the Bureau created its own Technical Laboratory to assist in federal investigations and later to assist state and local police agencies throughout the United States with forensic science (or what they more commonly called scientific policing).[119]

Although the potential for conflict between objective forensic scientific analysis and law enforcement goals should have been apparent even at the formative stage, the expansion of the FBI into this field raised few

[114] To Create a National Police Bureau, To Create a Bureau of Criminal Identification: Hearing Before the H. Comm. on the Judiciary on H.R. 8580 and H.R. 8409, 68th Cong. 5 (1924) (statement of Richard E. Enright, N.Y.C. Police Comm'r).

[115] Id. at 11.

[116] See, e.g., id. at 5 (statement of Rep. Ira G. Hersey, Member, H. Comm. on the Judiciary).

[117] See John Edgar Hoover, Civil Liberties and Law Enforcement: The Role of the FBI, 37 Iowa L. Rev. 175, 184 n.8 (1952). At the time, the FBI was known as the Bureau of Investigation—it went through several name changes before finally settling as the FBI in 1935.

[118] Claire Bond Potter, War on Crime: Bandits, G-Men, and the Politics of Mass Culture 36 (1998).

[119] Not many agencies took the FBI up on its offer to test samples. The FBI made only fifty-three examinations for outside agencies in November 1934. Department of Justice Appropriation Bill for 1935: Hearing Before the Subcomm. of H. Comm. on Appropriations, 73d Cong. 66 (1934) (statement of J. Edgar Hoover, Dir. of Investigation).

eyebrows. In part, this was because investigation bureaus organically developed in police agencies, so no other model existed and path dependency likely took hold. But it also reflected that the FBI put itself at the forefront of the field, earning it a reputation that led the Commission on Law Enforcement and the Administration of Justice (created by President Johnson to review the state of criminal justice and chaired by Attorney General Nicholas Katzenbach) to spend little time even addressing forensic science "because the best laboratories, such as the FBI's, are well advanced . . . ."[120]

DOJ's reach into forensic science ultimately went deeper than the FBI lab. After the Katzenbach Commission proposed the creation of research institutes to study criminal justice topics, the Johnson administration recommended that Congress pass the Safe Streets and Crime Control Act.[121] The Act provided, among other things, for a Law Enforcement Assistance Administration ("LEAA") to fund law enforcement training and development programs, as well as a National Institute of Law Enforcement and Criminal Justice within the LEAA to coordinate and finance research into all aspects of criminal justice and reform.

At this point, a counterview emerged to place this research function in a more independent body. Senator Ted Kennedy introduced a proposal for a National Institute of Criminal Justice, also within the Department of Justice, but operating independently of the LEAA.[122] This institute, modeled on the National Institute of Mental Health, "would be a well-staffed, highly competent, neutral, nonpolitical institution which could serve as a marketplace of ideas and a repository and disseminator of information, a seeker of truth and a stimulator of progress, without responsibility for governmental functions, or for day to day administering of large grant-in-aid programs."[123] Under Senator Kennedy's vision, this institute would have its own laboratories, research staff, and a compre-

[120] President's Comm'n on Law Enforcement & Admin. of Justice, The Challenge of Crime in a Free Society 255 (1967).

[121] Omnibus Crime Control and Safe Streets Act of 1967, S. 917, 90th Cong. (as reported in the Senate, Apr. 29, 1968), H.R. 5037, 90th Cong. (1967); Text of President Johnson's Special Message to Congress on Crime in United States, *in* N.Y. Times, Feb. 7, 1967, at 24.

[122] S. 992, 90th Cong (1967), *reprinted in* Controlling Crime Through More Effective Law Enforcement: Hearings on S. 300, S. 552, S. 580, S. 674, S. 675, S. 678, S. 798, S. 824, S. 916, S. 917, S. 992, S. 1007, S. 1094, S. 1194, S. 1333, and S. 2050 Before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary, 90th Cong. 102–03 (1967) [hereinafter, 1967 Hearings].

[123] Id. at 1050–51 (statement of Sen. Edward M. Kennedy, Member, Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary).

hensive fellowship program to attract outside experts.[124] Members of the American Bar Association's criminal law section offered an even stronger view that the Justice Department might not be an ideal location for an independent research institution.[125]

DOJ resisted suggestions for a more independent model. Attorney General Ramsey Clark testified on behalf of the Department that the Kennedy proposal would be duplicative and unnecessary because the successor body to the Office of Law Enforcement Assistance contemplated by the Safe Streets and Crime Control Act of 1967 would fulfill the charge of the Katzenbach Commission.[126] Dr. Donald Hornig, Director of the Office of Science and Technology, supported the DOJ model because in his view, an independent research program would be too divorced from "actual field operations" and new laboratories may be too "arduous and time-consuming" to set up.[127]

Congress sided with the President and created a small national research institute as part of the broader LEAA.[128] A decade later—in response to criticism that emerged that the LEAA had focused too many of its resources on police programs at the expense of other aspects of criminal justice[129]—Congress established the National Institute of Justice ("NIJ"), which is "dedicated to improving knowledge and understanding of crime and justice issues through science."[130] Again, however, Congress opted to place this agency within the Department of Justice.[131]

The decisions to place these research agencies within DOJ can also be understood as a species of path dependence and a concern with resource constraints. At this point, almost all forensic laboratories—eighty percent—were tied to a law enforcement agency with the rest scattered

[124] Id.

[125] Id. at 1065 (statement of William Walsh, President-Elect, American Bar Association Section of Criminal Law).

[126] Id. at 381–82, 481, 822 (statement of Hon. Ramsey Clark, Att'y Gen. of the United States).

[127] Id. at 1062–63 (statement of Dr. Donald F. Hornig, Dir., Office of Sci. and Tech.).

[128] See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified as amended at 42 U.S.C. § 3711(2006)).

[129] See, e.g., Jay N. Varon, Note, A Reexamination of the Law Enforcement Assistance Administration, 27 Stan. L. Rev. 1303, 1307 (1975) (noting that the LEAA's excessive focus on police problems is the principal source of controversy surrounding the agency).

[130] National Institute of Justice, About NIJ, http://www.nij.gov/about/welcome.htm (last modified Apr. 4, 2011).

[131] Justice System Improvement Act of 1979, Pub. L. No. 96-157, 93 Stat. 1167 (codified as amended at 42 U.S.C. § 3722 (2006)).

through "medical examiners' offices, prosecutors' offices, scientific/public health agencies, and other public or private institutions."[132] As with the creation of the forensic lab at the FBI, then, this model was the dominant one, and strong reasons had not emerged to second guess it.

Strong reasons did emerge, however, at the end of the twentieth century and the beginning of the twenty-first century when DNA evidence came on the scene. To be sure, reasons existed earlier, as there was evidence in the 1970s that labs were producing erroneous results at high rates.[133] But these results failed to prompt any kind of considered look or reflection. Doubts about DNA, in contrast, got attention. Defense experts and judges began to raise concerns about government DNA evidence in cases in the late 1980s and early 1990s. In one landmark case, *People v. Castro*,[134] experts on both sides of the case jointly agreed that "the DNA data in this case are not scientifically reliable enough to support the assertion that the samples . . . do or do not match. If these data were submitted to a peer-reviewed journal in support of a conclusion, they would not be accepted."[135]

A series of reports and studies followed that unearthed disturbing findings about crime labs.[136] There were dozens of serious scandals at crime labs that revealed "carelessness, bias, incompetence, [and] exces-

[132] Paul C. Giannelli, Regulating Crime Laboratories: The Impact of DNA Evidence, 15 J.L. & Pol'y 59, 69 (2007); see Randolph N. Jonakait, Forensic Science: The Need for Regulation, 4 Harv. J.L. & Tech. 109, 115 (1991) (noting that "crime laboratory performance is routinely unreliable and that the quality of forensic science needs drastic improvement" (citations omitted)); D. Michael Risinger et al., Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting Identification "Expertise," 137 U. Pa. L. Rev. 731, 734 (1989) ("Like folk medicine, handwriting identification may sometimes be efficacious; but no verification yet exists of when, if ever, it is and when it is not.").

[133] A proficiency testing program, sponsored by the LEAA, revealed in 1978 that 71% of labs produced erroneous results in at least one blood test, and 28.2% in firearms identifications. Only about two-thirds of the labs "had 80 percent or more of their results fall into the acceptable category." Giannelli, supra note 132, at 72–73 (citations omitted) (internal quotation marks omitted).

[134] 545 N.Y.S.2d 985 (Sup. Ct. Bronx Cnty. 1989). On the history and consequences of the landmark case, see Jennifer L. Mnookin, *People v. Castro*: Challenging the Forensic Use of DNA Evidence, *in* Evidence Stories 207, 208–09 (Richard Lempert ed., 2006). See also Giannelli, supra note 132, at 79.

[135] Eric S. Lander, Commentary, DNA Fingerprinting on Trial, 339 Nature 501, 504 (1989).

[136] For an excellent history, see generally Paul C. Giannelli, *Daubert* and Forensic Science: The Pitfalls of Law Enforcement Control of Scientific Research, 2011 U. Ill. L. Rev. 53, 53–58 (2011).

sive coziness with prosecutors."[137] Labs in Boston, Chicago, Detroit, Houston, Los Angeles, New York, North Carolina, Oklahoma City, San Francisco, West Virginia, and the FBI all came under fire for various deficiencies in a variety of forensic areas.[138] One study in 1999 revealed that, of sixty-two DNA exonerations, one-third of the convictions had been based in part on "tainted or fraudulent science."[139] Another found that forensic evidence was introduced by prosecutors in more than half of the trials of defendants ultimately exonerated by DNA evidence.[140] As one prominent biologist observed, "[a]t present, forensic science is virtually unregulated—with the paradoxical result that clinical laboratories must meet higher standards to be allowed to diagnose strep throat than forensic labs must meet to put a defendant on death row."[141]

In many instances, it was clear that problems stemmed in part from close ties between law enforcement investigators and lab analysts. It is routine in many places for police investigators to give forensic practitioners background details about a case. In New Jersey, for example, the forms officers use to submit evidence to the state's police laboratory leave a space for investigators to include just such background details about the case.[142] Indeed, "the practice was virtually universal" in publicly funded labs.[143] Other forms of pressure are even more direct. Michael Risinger notes that "[s]ometimes police or prosecutors respond to test results that are negative or inconclusive by suggesting to forensic scientists what they should have found and asking them to test again in hopes of obtaining a 'better' result."[144]

[137] Jennifer L. Mnookin et al., The Need for a Research Culture in the Forensic Sciences, 58 UCLA L. Rev. 725, 727–28 (2011).

[138] Problems occurred in serology, bloodstain pattern analysis, DNA, fingerprint identification, and other areas. Id. at 728 n.5.

[139] Giannelli, supra note 132, at 85 (quoting Barry Scheck et al., Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted 248 (2000)).

[140] Brandon L. Garrett, Judging Innocence, 108 Colum. L. Rev. 55, 81 (2008).

[141] Lander, supra note 135, at 505.

[142] D. Michael Risinger et al., The *Daubert*/*Kumho* Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion, 90 Calif. L. Rev. 1, 32 (2002).

[143] Id.

[144] Id. at 39. One analyst recalls "investigators who responded to inconclusive results by saying to forensic examiners: 'Would it help if I told you we know he's the guy who did it?'" Id. (quoting Peter DeForest, Address at the 2d International Conference on Forensic Document Examination (June 14–18, 1999) (notes of Michael Saks, who was present)).

In theory, forensic analysts could resist such pressures, but because the labs are part of law enforcement agencies and under their supervision, there is a "team spirit" that takes hold.[145] As one former lab director put it, scientists in the lab viewed "their role as members of the state's attorney's team. 'They thought they were prosecution witnesses.'"[146] One example offers a vivid image of how the lines between law enforcement and science can be blurred: A discredited forensic analyst in West Virginia, who falsified test results in as many as 134 cases over a decade,[147] "asked to be addressed as 'Trooper,' and . . . wore a police uniform and gun even though his job was to supervise a crime lab."[148]

Less dramatic, but no less troubling, examples emerge from labs plagued by scandal. A review of the forensic lab in North Carolina revealed that lab analysts routinely failed to disclose inconclusive or negative tests for the presence of blood; indeed, failing to turn over inconclusive results was the explicit policy of the lab contained in its operating manual.[149] The investigators probing the lab's procedures concluded that the lab's failures stemmed, in part, from "[a] mindset promoted by the Section Chief that the lab's customer was law enforcement and reported results should be tailored primarily for law enforcement's consumption."[150] A similar bias was found in Houston. After a series of investigative reports by a local television station exposed troubles at Houston's crime lab, the city hired a team of independent specialists to investigate its lab. The final report, published in 2007, described the laboratory's DNA and serology work as "extremely troubling."[151] Investigators reviewed a sample of 135 DNA cases and found "major issues" in forty-

[145] Jim McKay, A Bad Apple Or . . ., Tex. Tech., Spring 2008, at 10, 13 (quoting William Thompson, a professor at the University of California, Irvine and forensic expert).

[146] Steve Mills et al., When Labs Falter, Defendants Pay, Chi. Trib., Oct. 20, 2004, at 16.

[147] Paul C. Giannelli, Essay, The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories, 4 Va. J. Soc. Pol'y & L. 439, 442 (1997).

[148] Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 92 (2011).

[149] Chris Swecker & Michael Wolf, An Independent Review of the SBI Forensic Laboratory 21 (2010), available at http://media2.newsobserver.com/smedia/2010/08/18/13/SBIreview.source.prod_affiliate.156.pdf; see also Bernadette Mary Donovan & Edward J. Ungvarsky, Strengthening Forensic Science in the United States: A Path Forward—Or Has It Been a Path Misplaced?, Champion, Jan.–Feb. 2012, at 22.

[150] Swecker & Wolf, supra note 149, at 28.

[151] Michael R. Bromwich, Final Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room 4 (2007), available at http://www.hpdlabinvestigation.org/reports/070613report.pdf.

three of them (thirty-two percent).[152] The report concluded that, in a number of cases, analysts had "reported conclusions, frequently accompanied by inaccurate and misleading statistics, that often suggested a strength of association between a suspect and the evidence that simply was not supported by the analyst's actual DNA results."[153] The problems could be traced in part to a poor physical plant and shoddy supervision.[154] But the troubles were also linked to bias. "[T]he lab almost always erred on the prosecution's side,"[155] with "many instances of failure to report analytical results that would have weakened the prosecution's case or strengthened the case for exonerating the defendant."[156]

The federal government has not been immune to this dynamic. In 1995, after a chemist in the FBI's crime lab publicly accused the FBI of "pressuring forensic experts to commit perjury or skew tests to help secure convictions in hundreds of criminal cases,"[157] the Department's Inspector General ("IG"), Michael Bromwich, launched an investigation. He issued a report in 1997 that documented "significant instances of testimonial errors, substandard analytical work, and deficient practices."[158] The IG recommended that the chiefs of both the Chemistry-Toxicology and Explosives units be removed from their positions and, if permitted to remain in the laboratory, be supervised by examiners with scientific backgrounds. The IG report also documented a number of examiners who had given false or perjured testimony in high profile cases, and still others whose work simply lacked the markers of objectivity or expertise. The IG urged the Justice Department to review the cases in which the examiners had taken part.

Although the FBI responded by raising standards for examiners and improving its supervisory structure, an effort the Office of the Inspector

[152] Id.

[153] Id. at 5.

[154] Id. at 10 ("[T]he DNA Section was in shambles—plagued by a leaky roof, operating for years without a line supervisor, overseen by a technical leader who had no personal experience performing DNA analysis . . . and generating mistake-ridden and poorly documented casework.").

[155] McKay, supra note 145, at 10, 12.

[156] Bromwich, supra note 151, at 94. Since the release of the report, the Houston lab changed its practices and after a series of reviews received accreditation by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board. Id. at 2.

[157] David Johnston, F.B.I. Chemist Says Experts Are Pressured to Skew Tests, N.Y. Times, Sept. 15, 1995, at B8.

[158] Michael R. Bromwich, The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases pt. 1, at 2 (1997).

General later described as commendable,[159] the Department was less impressive in how it handled the review of individual cases. The AG appointed a task force to go through the laboratory's files to identify instances of past misconduct in the thousands of criminal cases (state and federal) handled annually. But the FBI asked that the task force "keep the focus off the most vulnerable cases by not conducting reviews if a case was still in litigation or on appeal."[160] Despite earlier promises of transparency, the task force never made its conclusions public.

More than a decade later, in 2012, *ProPublica* and *The Washington Post* published exposés on the results of the task force investigation and subsequent Department actions. As the *Post* describes, "[T]he panel operated in secret and with close oversight by FBI and Justice Department brass . . . who took steps to control the information uncovered by the group."[161] When the Department uncovered any potentially exculpatory evidence in its review of the cases, it turned the information over to the individual federal and state prosecutors working on the case, but did not notify the defendants.[162] In federal cases, the Department informed prosecutors that it would "'monitor all decisions' . . . over whether to disclose information."[163] *The Washington Post*'s review of task force files suggests that "prosecutors disclosed the reviews' results . . . in fewer than half of the 250-plus questioned cases."[164] As IG Bromwich observed, it was "deeply troubling that after going to so much time and trouble to identify problematic conduct by FBI forensic analysts the DOJ Task Force apparently failed to follow through and ensure that defense counsel were notified in every single case."[165]

As cases of wrongful convictions brought these conflicts and errors to light, calls for more in-depth research studies followed. The National Academy of Sciences ("NAS") was going to examine various techniques, but canceled its project after the Departments of Defense and

[159] Id. at 27.

[160] Spencer S. Hsu et al., Reviewed Lab Work Held Close to Vest, Wash. Post, Apr. 18, 2012, at A1.

[161] Id.

[162] Id.

[163] Id.

[164] Spencer S. Hsu, Defendants Left Unaware of Flaws Found in Cases, Wash. Post, Apr. 17, 2012, at A1. Donald Gates, for example, who was finally exonerated as a result of DNA testing in 2009, was never notified by D.C. prosecutors of potential inconsistencies in the hair sample analysis that put him away. Id.

[165] Id.

Justice wanted to review its findings—oversight that the NAS believed compromised its integrity as a scientific institution.[166] Congress responded in 2005 by bypassing DOJ and appropriating funds directly to the NAS to establish a forensic sciences committee to analyze the state of forensic science and make recommendations for reform where appropriate.[167]

NAS appointed the committee in 2006, and in 2009 the NAS forensic science committee ("NAS Committee") issued its report.[168] The NAS Committee described the deficiencies of various forensic techniques, including fingerprint examinations, handwriting comparisons, and ballistics, and noted that testimony about their reliability is often exaggerated and that there are often no standard protocols in place for forensic practice.[169] The NAS report observed that, other than DNA analysis, "no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source."[170] Based on the existing shortcomings of forensic science, the NAS report made a variety of recommendations. These included calling for scientific research to establish the validity of forensic techniques, for the development of nationwide standards for reporting and testing procedures, and for certification for forensic labs and technicians. To spearhead these reforms and control research and funding, the NAS Committee called for the creation of an independent federal agency—a National Institute of Forensic Science—and for funding for state and local governments to transfer their existing forensic responsibilities from the police to independent administrative units.[171]

The NAS Committee's endorsement of the independent agency model stemmed from its view that a forensic agency "must have a culture that is strongly rooted in science" and "cannot be principally beholden to law

[166] Giannelli, supra note 136, at 64, 80.

[167] Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-108, 119 Stat. 2290, 2302 (2005).

[168] Nat'l Acad. of Scis., Strengthening Forensic Science in the United States: A Path Forward (2009) [hereinafter Strengthening Forensic Science].

[169] Id. at 4–7.

[170] Id. at 7.

[171] A majority of state and local laboratories are part of law enforcement agencies. Id. at 183; Paul C. Giannelli, Independent Crime Laboratories: The Problem of Motivational and Cognitive Bias, 2010 Utah L. Rev. 247, 250 (quoting Joseph L. Peterson et al., The Capabilities, Uses, and Effects of the Nation's Criminalistics Laboratories, 30 J. Forensic Sci. 10, 11 (1985)).

enforcement."[172] The NAS Committee recognized the "modest" efforts of NIJ and the FBI crime lab to address existing problems, but noted the limits of these agencies: "[B]ecause both are part of a prosecutorial department of the government, they could be subject to subtle contextual biases that should not be allowed to undercut the power of forensic science."[173] The NAS Committee reached "a strong consensus . . . that no existing or new division or unit within DOJ would be an appropriate location for a new entity governing the forensic science community."[174] The NAS Committee remarked that "DOJ's principal mission is to enforce the law and defend the interests of the United States according to the law" and that DOJ agencies "operate pursuant to this mission."[175] Thus, the NAS Committee observed, "[t]he potential for conflicts of interest between the needs of law enforcement and the broader needs of forensic science are too great."[176]

The NAS report, which was widely covered in the media, received mixed reactions.[177] A diverse group of research scientists, academics, and members of the bench and bar specifically praised the call for an independent forensic agency.[178]

[172] Strengthening Forensic Science, supra note 168, at 14–19.

[173] Id. at 16.

[174] Id. at 80.

[175] Id. at 17.

[176] Id.

[177] See, e.g., Rick Casey, Houston: They All Have a Problem, Hous. Chron., Feb. 8, 2009, at B1; Solomon Moore, Science Found Wanting in Nation's Crime Labs, N.Y. Times, Feb. 5, 2009, at A1 (expressing optimism that the report would result in meaningful reform); Carol Cratty & Jeanne Meserve, Crime Labs Need Major Overhaul, Study Finds, CNN (Feb. 18, 2009), http://articles.cnn.com/2009-02-18/justice/crime.lab.problems.

[178] See, e.g., Strengthening Forensic Science in the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 111 (2009) (statement of Drs. Lyn Haber and Ralph Norman Haber) (supporting an independent NIFS, noting that "[t]he 100 year history of the forensic disciplines continues to show the inadequacy of their self-regulation"); The Need to Strengthen Forensic Science in the United States: The National Academy of Sciences' Report on a Path Forward: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 56–57 (2009) [hereinafter Senate Judiciary March 2009] (statement of Peter Neufeld, Co-Director, Innocence Project) ("The Innocence Project whole-heartedly supports the primary recommendation of the . . . report to create a federal National Institute of Forensic Sciences."); How Scientific Is Forensic Science?, Champion, Aug. 2009, at 36, 37–38 (including statements of Professors Adina Schwartz and William C. Thompson and defense attorney Michael Burt in support of an independent NIFS, and a statement by Judge Jed S. Rakoff suggesting that an NIFS could be placed anywhere "as long as it is not located in the Department of Justice").

The reaction from law enforcement was decidedly more negative. Even before the NAS Committee's report was published, the Department resisted its findings.[179] Once released, DOJ continued to downplay the NAS Committee's conclusions that cast doubt on the scientific validity of forensic methods.[180] DOJ also resisted the suggestions for reform. Kenneth E. Melson, Acting Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives, testified on behalf of the Department before the House of Representatives and indicated that the FBI's scientific working groups and the National Institute of Justice were already conducting the necessary research called for in the report.[181] As for the NAS Committee's call for an independent agency due to possible conflicts, Melson viewed that recommendation as potentially wasteful and unnecessary.[182] An FBI-sponsored scientific working group similarly rejected the proposal for national oversight as unnecessary and inefficient.[183]

State and local law enforcement officials' reactions mirrored those of DOJ. The National District Attorneys Association released an online video arguing that the "report does not show that there are problems with forensic science," and rejecting the call for the National Institute of Forensic Science.[184] The International Association of Chiefs of Police

[179] Giannelli, supra note 136, at 53; see also Commerce, Justice, Science, and Related Agencies Appropriations for Fiscal Year 2009: Hearings Before a Subcomm. of the S. Comm. on Appropriations, 110th Cong. 101–02 (2008) (statement of Sen. Richard C. Shelby) (accusing the National Institute of Justice of attempting to "derail" the report and "undermine and influence" its authors); Moore, supra note 177, at A1 (citing earlier attempts by DOJ to derail the report and noting that "law enforcement opposition" had "delayed its publication").

[180] Simon A. Cole, Who Speaks for Science? A Response to the National Academy of Sciences Report on Forensic Science, 9 L. Probability & Risk 25, 36–38 (2010) (quoting exchange between Melissa Gische of the FBI Laboratory and William Thompson). An FBI-sponsored scientific working group released a position statement highly critical of both the methodology and findings of the NAS report. Scientific Working Grp. on Friction Ridge Analysis Study and Tech., SWGFAST Position Statement (Aug. 3, 2009), http://www.swgfast.org/Comments-Positions/SWGFAST_NAS_Position.pdf) [hereinafter SWGFAST Position Statement].

[181] National Research Council's Publication "Strengthening Forensic Science in the United States: A Path Forward": Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary, 111th Cong. 5–7 (2009) [hereinafter House Judiciary May 2009] (statement of Kenneth E. Melson, Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives, Former Director, Executive Office for the United States Attorneys, U.S. Department of Justice).

[182] Id. at 65.

[183] SWGFAST Position Statement, supra note 180, at 5.

[184] NDAA Message to Prosecutors Regarding the National Academy of Sciences Forensic Science Report, WIN Interactive, http://www.wininteractive.com/NDAA/NAS.html (last

also opposed any efforts to remove crime laboratories from law enforcement control.[185]

The forensic science community largely sided with law enforcement. The American Society of Crime Laboratory Directors endorsed the report's call for more federal funding, but opposed the call to make crime labs independent of law enforcement agencies.[186] The International Association for Identification rejected the proposal to have an expanded federal role in accreditation and standardization.[187] Only the American Academy of Forensic Sciences ("AAFS") endorsed the report's recommendations in full, though the depth of the organization's enthusiasm for the creation of an independent national forensic agency is unclear.[188]

Given the opposition by law enforcement to the report, it is unsurprising that Congress has been slow to respond to its recommendations. The first congressional hearing on forensic science after the report's publication investigated the possibility of locating the federal government's reform initiatives in the offices of the National Institute of Standards and Technology—one of the agencies the NAS Committee expressly deemed poorly suited to handle forensics.[189] Congress ultimately held

visited June 16, 2012) ("The other recommendation which is problematic for us is the creation of [the] NIFS . . . to allow some nebulous as yet unformed group to take control over forensic sciences throughout the country. Now that doesn't give me a warm and fuzzy feeling, ok? I'm not really comfortable abrogating control of forensic crime laboratories to a government that can't get bottled water to the superdome for four days.").

[185] Meredith Mays, IACP Responds to National Academy of Sciences Report on Forensics, The Police Chief, July 2009, at 8.

[186] Senate Judiciary March 2009, supra note 178, at 25–26 (statement of Dean Gialamas, President, and Beth Greene, President-Elect, American Society of Crime Laboratory Directors).

[187] Id. at 42–43 (statement of Robert J. Garrett, President, International Association for Identification).

[188] Press Release, Am. Acad. of Forensic Scis., The American Academy of Forensic Sciences Approves Position Statement in Response to the National Academy of Sciences' "Forensic Needs" Report (Sept. 4, 2009), available at http://www.innocenceproject.org/docs/widgets/AAFS_Position_State-ment_for_Press_Dis-tribution_090409.pdf. The position statement offers only a general endorsement of the report's recommendations. The statement specifically singles out those recommendations dealing with certification and standardization, leaving some doubt as to the strength of the AAFS's support for an independent NIFS, as opposed to a new entity housed in one of the existing agencies.

[189] Strengthening Forensic Science in the United States: The Role of the National Institute of Standards and Technology: Hearing Before the Subcomm. on Tech. & Innovation of the H. Comm. on Sci. & Tech., 111th Cong. 5 (2009) (statement of Rep. David Wu, Chairman, Subcomm. on Tech. & Innovation of the H. Comm. on Sci. & Tech.).

three additional hearings in 2009, and law enforcement witnesses dominated the hearings. Not a single scientist was called to testify.[190]

Some members of Congress have introduced legislation in response to the NAS report, but none of the proposed bills follows the NAS blueprint of creating an independent agency outside of the Department. In 2010, members of the Senate Judiciary Committee began discussing a forensic science reform bill that would create a Forensic Science Commission in the office of the Deputy Attorney General.[191] In 2011, Senator Leahy introduced a similar bill, the Criminal Justice and Forensic Science Reform Act of 2011,[192] which would place a federal forensic science authority (the Office of Forensic Sciences) within the Department with a director appointed by the Attorney General.[193] The legislation empowers the Department to undertake responsibility for best practices, accreditation, national research strategy, the validation process, and the definition of forensic science disciplines.[194] The Director of the Office of Forensic Sciences would be required to give "substantial deference" to the accreditation and research priority recommendations of a newly created Forensic Science Board.[195] The Board, which would be comprised of nineteen members appointed by the President, would have at least ten members with "comprehensive scientific backgrounds" (five with experience in scientific research and five with experience in forensic science), and would also represent federal, state, and local law enforcement and criminal justice interests.[196] Senator Leahy argued that this proposal would strike a balance between the interests of law enforcement and

[190] House Judiciary May 2009, supra note 181, at 72 (written statement of Jay Siegel, Director, Forensic and Investigative Sciences Program, Chair, Department of Chemistry and Chemical Biology, Indiana University-Purdue University Indianapolis).

[191] Staff of S. Comm. on the Judiciary, 111th Cong., Preliminary Outline of Draft Forensic Reform Legislation (May 5, 2010), available at http://www.bulletpath.com/wp-content/uploads/2010/06/Draft-Legislation.pdf.

[192] S. 132, 112th Cong. (2011).

[193] Id. § 101(a)-(b).

[194] Id. § 101(e)(2).

[195] Id. § 101(e)(4)(i).

[196] Id. § 102(b)(1), (3)-(4). The Board would be required to have at least one member from each of the following groups: "(A) judges; (B) Federal Government officials; (C) State and local government officials; (D) prosecutors; (E) law enforcement officers; (F) criminal defense attorneys; (G) organizations that represent people who may have been wrongly convicted; (H) practitioners in forensic laboratories; (I) physicians with relevant expertise; (J) State laboratory directors." Id. § 102(b)(4)(A)–(J).

those seeking broader reform,[197] and he further emphasized the cost savings associated with keeping the agency within DOJ.[198] The Judiciary Committee has yet to take any action on the bill.

As critics have been quick to point out, although these proposals pay some attention to the importance of science and independence, they fail to address the conflict of interest that stems from having the forensic science agency within the Department. It "dangerously tie[s] the development and oversight of forensic science to federal law enforcement."[199] According to the American Statistical Association, "[b]ecause DOJ is so integrally tied to the forensic science culture and current problems, a forensic science office must be independent of the DOJ to realize the necessary changes in a timely manner."[200] Professor Paul Giannelli notes that "[t]he most thorough and well-reasoned reports in the field have come from impartial scientific investigations," whereas "[t]he government has not only failed to conduct the needed research, it has thwarted efforts to do so."[201] Thus far, however, there has been no further movement to create an independent forensic agency.

II. AGENCY DESIGN AND THE RISE OF PROSECUTORIAL ADMINISTRATION

As Part I documented, when functions other than prosecution and investigation were placed within the Department of Justice, little attention was paid to whether a conflict was likely to emerge. But conflicts have emerged in each of these areas, to varying degrees, and when they have,

[197] 112 Cong. Rec. S194-95 (daily ed. Jan. 25, 2011) (statement of Sen. Patrick Leahy) ("Some have argued that, because the purpose of forensic science is primarily to produce evidence to be used in the investigation and prosecution of criminal cases, it is vital that those regulating and evaluating forensics must have expertise in criminal justice. . . . Others have argued that, for forensic science to truly engender our trust and confidence, its validity must be established by independent scientific research, and standards must be determined by scientists with no possible conflict of interest. . . . This legislation attempts to address both of these concerns with a hybrid structure that ensures both criminal justice expertise and scientific independence.").

[198] Id. at S195 (noting that the proposed legislation "capitalizes on existing expertise and structures, rather than calling for the creation of a costly new agency. . . . I am committed to exploring ways to use existing resources so that this urgent work will not negatively impact the budget").

[199] Donovan & Ungvarsky, supra note 149, at 23.

[200] Id. at 24 (quoting Letter from Robert N. Rodriquez, President, Am. Statistical Ass'n, to Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary (Mar. 31, 2012), available at http://www.amstat.org/policy/pdfs/LeahyS132letter.pdf).

[201] Giannelli, supra note 136, at 89-90.

prosecution interests have won out. In the case of clemency, the conflict is pronounced, with positive clemency recommendations from the Department plummeting and rule changes tightening up eligibility. We have also witnessed notable tension between forensic science and prosecution interests, with forensic labs tailoring results for law enforcement interests and the Department resisting changes to its use of forensics even in the face of serious evidence that existing protocols come up short. Conflicts with corrections are perhaps the hardest to document, but even there we have seen the BOP abandon its use of community correction centers because of the Department's political concerns. The relative silence of the BOP on questions of reentry is similarly notable given the BOP's charge to "provide work and other self-improvement opportunities to assist offenders in becoming law-abiding citizens."[202]

It is reasonable to predict that more conflicts will arise in the future—and anticipate how they will likely turn out. This Part explains why—given everything we know about agency design—the Department's prosecution functions will trump the secondary interests of corrections, clemency, and forensic science.[203] It begins in Section II.A with a general discussion of how institutional design and the number of functions vested in an agency affects the achievement of its goals, and then applies those lessons to the Department in Section II.B.

A. The Relationship Between Agency Design and Agency Goals

Whenever Congress needs some function performed, it faces the choice of whether to give that function to a preexisting agency that is already responsible for at least one other mission or to create an agency dedicated solely to the task.[204] Resource constraints will typically point in favor of giving the function to an agency that is already up and running with a staff, or at least to setting up an agency that will do more than one thing. These kinds of efficiency concerns were explicitly men-

[202] Fed. Bureau of Prisons, Mission and Vision of the Bureau of Prisons, http://www.bop.gov/about/mission.jsp (last visited Feb. 7, 2013).

[203] By secondary, I mean non-dominant interests. It is possible for an agency to have a preexisting mission that becomes non-dominant as compared to a subsequently granted function. The temporal order does not matter, except insofar as path dependency might make it harder for the initial mission to yield.

[204] See James M. Landis, The Administrative Process 26–28 (1966); Rachel Barkow, Insulating Agencies: Avoiding Capture Through Institutional Design, 89 Tex. L. Rev. 15, 50–51 (2010) [hereinafter Barkow, Insulating Agencies].

tioned when the Department obtained responsibility for federal prison administration and became a clearinghouse of criminal records.[205] Such concerns have also been raised by those seeking to keep forensic science within the Department.[206] No doubt, these issues will become part of the discussion of clemency reform as well.

But cost savings in this manner may come with a less obvious price. The new function assigned to the existing agency may take a backseat to the primary reason for establishing the agency in the first place.[207] Or, if an agency is set up from the outset with more than one goal, one may dominate because of the politics surrounding it.

We have seen this dynamic play out with regulatory agencies tasked both with maximizing economic development and protecting the environment. These missions often conflict, and when they do, economic development typically trumps environmental concerns.[208] For example, when the Forest Service was created, its primary goal was to promote timber production.[209] As the agency's mission expanded to include wildlife protection and recreation, it struggled to balance these aims with its initial charge of resource production and usually sided with economic interests.[210] Similarly, the Federal Energy Regulatory Commission ("FERC") operates under a primary mandate to promote hydropower, but several laws also insist that it work to preserve the environment.[211] Here, too, for most of its history, the agency resisted the secondary missions and focused on its primary task of promoting hydropower.[212]

A similar conflict between primary and secondary missions—and the triumph of the primary mission—can be seen in agencies charged both with ensuring the safety and soundness of financial institutions and protecting consumer interests. When these goals seem to conflict—as they

[205] See supra note 37 and accompanying text.

[206] See supra note 198 and accompanying text.

[207] See J.R. DeShazo & Jody Freeman, Public Agencies As Lobbyists, 105 Colum. L. Rev. 2217, 2220 (2005) ("Agencies frequently resolve such interstatutory conflicts by prioritizing their primary mission and letting their secondary obligations fall by the wayside.").

[208] See Eric Biber, Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies, 33 Harv. Envtl. L. Rev. 1, 3 (2009); Sara A. Clark, Taking A Hard Look at Agency Science: Can the Courts Ever Succeed?, 36 Ecology L.Q. 317, 324–25 (2009).

[209] Clark, supra note 208, at 324.

[210] Biber, supra note 208, at 17–20.

[211] DeShazo & Freeman, supra note 207, at 2219–20.

[212] Id. at 2303.

often do[213]—the banking regulators have time and again favored what the financial institutions claim is necessary for safety and soundness, even when it comes at the expense of consumer interests.[214]

Scholars have identified several reasons for the tilt toward one mission over another, with the main reason rooted in public choice theory. In their study of FERC's longtime reluctance to comply with environmental protection mandates, Professors Jody Freeman and J.R. DeShazo document several political and economic pressures that generally push agencies toward their primary mission:

> [C]ongressional committees that reward an agency's pursuit of its primary mission to the exclusion of its obligations under other statutes, executive oversight that fails to force agency compliance with multiple and potentially conflicting obligations arising in different statutes, interest group pressure that supports the agency's primary mission but not its secondary ones, and aspects of agency culture and organization that create obstacles to full compliance with all mandates.[215]

Put another way, an agency will focus on the mission that its political overseers take the greater interest in.[216] That mission, in turn, will be defined by the politics of the situation. In the case of the Forest Service, for instance, "resource extraction industries and the local economies they support tend to exert a disproportionate influence" because of their relative political pull.[217] Similarly, financial institutions have far more political muscle because of their greater wealth and organization than the dispersed community of consumers, leading political overseers and financial regulatory agencies to disproportionately favor their interests.[218]

A related factor that will lead an agency to favor one mission over another involves monitoring and measurement. Agencies will tend to

---

[213] As Professors John Coffee and Hillary Sale observe, "[i]t approaches the self-evident to note that conflict exists between the consumer protection role of a universal regulator and its role as a 'prudential' regulator intent on protecting the safety and soundness of the financial institution." John C. Coffee, Jr. & Hillary A. Sale, Redesigning the SEC: Does the Treasury Have a Better Idea?, 95 Va. L. Rev. 707, 724 (2009).

[214] Barkow, Insulating Agencies, supra note 204, at 72–73; Christopher L. Peterson, Federalism and Predatory Lending: Unmaking the Deregulatory Agenda, 78 Temp. L. Rev. 1, 73 (2005).

[215] DeShazo & Freeman, supra note 207, at 2221.

[216] Barkow, Insulating Agencies, supra note 204, at 21–22.

[217] Clark, supra note 208, at 325.

[218] Barkow, Insulating Agencies, supra note 204, at 22–23.

choose the goals that are more easily measured so they can demonstrate progress.[219] This often means taking an approach that focuses on short-term concerns with tangible outputs, as opposed to long-term effects that might be harder to predict and quantify and that offer little to politicians' reelection efforts. Again using the Forest Service as a case in point, it is easier to measure the economic effects of greater timber production than it is to calculate long-term environmental effects.[220]

To take an example from another context, the primary mission of the Department of Housing and Urban Development is to develop affordable housing; but it also has a secondary mission to ensure equal access to housing and combat racial segregation.[221] These goals compete for the agency's limited resources, and the agency has favored its main mission at the expense of the pro-integration goals.[222] Professor Chris Bonastia argues that one reason for this tilt in agency priorities is that short-term indicators of residential desegregation are not unequivocally viewed as progress (and could be viewed as "white flight" or a neighborhood in decline) and the longer term success of a desegregation program (in home appreciation or better life outcomes for children) is not immediately apparent or easy to quantify.[223] Thus, the goal of racial desegregation fares poorly as compared to the mandate for affordable housing, which is more easily measured and immediately visible.

Agency culture and structure are also important in understanding how one goal can override others. As Professor James Q. Wilson observed, "[c]ulture is to an organization what personality is to an individual. Like human culture generally, it is passed on from one generation to the next. It changes slowly, if at all."[224]

---

[219] See, e.g., Neil Barofsky, Bailout: An Inside Account of How Washington Abandoned Main Street While Rescuing Wall Street 53 (2012) (noting how Inspector General funding hinged on performance statistics and metrics like the number of audits completed, the percentage of recommendations adopted by agencies, and, where relevant, the number of arrests).

[220] Biber, supra note 208, at 25–27.

[221] Dep't of Hous. & Urban Dev., Mission, http://portal.hud.gov/hudportal/HUD?src=/about/mission (last visited Nov. 1, 2012).

[222] Thaddeus J. Hackworth, Note, The Ghetto Prison: Federal Policy Responses to Racial and Economic Segregation, 12 Geo. J. on Poverty L. & Pol'y 181, 195–96 (2005).

[223] See Chris Bonastia, Why Did Affirmative Action in Housing Fail During the Nixon Era? Exploring the "Institutional Homes" of Social Policies, 47 Soc. Probs. 523, 533 (2000).

[224] James Q. Wilson, Bureaucracy: What Government Agencies Do and Why They Do It 91 (1989).

Culture is formed in part when the agency is first set up, so its initial mission is likely to shape what comes after.[225] While a later mission can come to dominate an earlier one, based on the politics of a given situation, the temporal order in which an agency gets its marching orders may matter because of the ways in which the agency builds itself around its initial functions. This may also be tied to the agency's leadership. One formative experience can lead to organizational "imprinting," where a founding member "imposes his or her will on the first generation of operators in a way that profoundly affects succeeding generations."[226]

Agency personnel decisions also shape its culture. The composition of an agency and the views it represents will be critically important to how it views competing interests and whether it can successfully achieve its mission.[227] The Forest Service, for instance, has had a history of hiring predominantly from a pool of forest school graduates who are eager to fit into existing agency culture, and it weeds out those who challenge the agency's existing goals and methods.[228] Additionally, Forest Service managers typically live in the communities that benefit economically from timber production. Thus, as one scholar observes, that makes it difficult for them "to make decisions that directly and adversely affect the economic well-being of one's neighbors."[229] FERC's culture was shaped by the engineers who comprised most of the initial staff, leading to an emphasis on dam safety instead of wildlife conservation.[230] At the financial regulatory agencies, employees often come from the financial services sector—and hope to return to it upon leaving government—making them prone to be sympathetic to the interests of the financial institutions they know so well, as opposed to the consumer interests which may be more foreign to them.[231]

[225] See Terrence E. Deal & Allan A. Kennedy, Corporate Cultures: The Rites and Rituals of Corporate Life 158 (2000) (noting how important history and heroic figures are to an organization's development).

[226] Wilson, supra note 224, at 96.

[227] Barkow, Administering Crime, supra note 4, at 800–04 (describing the importance of sentencing commission membership and its relationship to political impact).

[228] Biber, supra note 208, at 24–25 (citing Herbert Kauffman, The Forest Ranger: A Study in Administrative Behavior 166, 207 (1960)).

[229] Clark, supra note 208, at 325.

[230] See DeShazo & Freeman, supra note 207, at 2217, 2239–40.

[231] Barkow, Insulating Agencies, supra note 204, at 23; Barofsky, supra note 219.

The leadership and personnel decisions can thus help to foster a self-perpetuating culture that will be particularly powerful if it feeds into the political dynamics that support the agency's dominant mission.[232] The agency's leadership can further cement the dominance of the primary interest and guard against subdivisions pursuing conflicting goals—in the parlance of political scientists, can tighten up principle/agent slack—by requiring those subdivisions to seek approval before acting in a particular way or to report on their functions. Monitoring, in other words, can keep the agency personnel in line so that they pursue the dominant mission.

B. Agency Design at the Department of Justice

Applying these insights about public choice, monitoring, and culture to the Department, it is easy to see why the law enforcement mission will trump all others.

The dominance of law enforcement interests at the Department is a reflection of the dominance of law enforcement interests in the politics of criminal justice. For the last four decades, tough-on-crime politics by law enforcement officials has beat out just about any competing concern at the federal level.[233] Prosecutors have an interest in making the consequences of convictions relatively harsh because, all else being equal, it gives them greater bargaining leverage to obtain pleas. Thus, not only do they have an interest in longer sentences and mandatory punishments, they also have an interest in opposing corrections reforms that make the conditions of confinement more relaxed or that result in earlier release times. Anything that makes the threat of a sentence after trial less severe limits their bargaining power to some extent.[234]

Similarly, prosecutors have an interest in opposing routine grants of clemency because it reduces the time a defendant needs to serve and if

[232] If an agency's initial mission has less political support than a subsequent mission that the agency takes up, there would be an issue of how long it takes the agency's culture to shift gears to respond to the more politically powerful interests that support the subsequent mission. Ultimately, one would expect the agency will shift to that new goal in the case of a conflict, but the cultural forces may be sufficiently embedded that it takes some time. In the case of the functions under discussion here, the law enforcement interests both dominate in terms of politics and came first in terms of DOJ's history, so they point in the same direction.

[233] Barkow, Administering Crime, supra note 4, at 728 ("No other group comes close to prosecutorial lobbying efforts on crime issues.").

[234] Id. ("The more risky going to trial becomes, the easier it is for prosecutors to get a plea.").

clemency became routine enough, defendants might not take plea bargains as quite the all-or-nothing proposition they are today. Currently, however, given the low rates of clemency grants, it is unlikely that prosecutors hold a tight rein over clemency for this reason. Instead, the bigger conflict arises from the fact that every request for clemency is, in effect, a critique of the decision to prosecute (either at all or to seek a parparticular charge or sentence). Prosecutors have a stake in maintaining their reputations and therefore opposing any second look at their decision-making process.

Prosecutors are also motivated to maintain the status quo in forensic policy—a status quo, as the NAS describes, in which forensic methods are not subject to scientific standards or scrutinized for accuracy.[235] Prosecutors want to make it as easy as possible for them to win at trial, and that will-to-win can create cognitive biases in even the most well-intentioned prosecutors.[236] Prosecutors may therefore place greater faith in existing forensic science methods than empirical evidence would justify because they have used this information in cases where they believed the defendant to be guilty.[237]

In all these areas, prosecutors have cognitive biases—not as a result of bad faith, but out of what we know to be common human development—that may make it hard for them to see beyond short-term law enforcement interests in winning cases and give full measure to competing interests.[238]

---

[235] See House Judiciary May 2009, supra note 181 (examining the current problems with forensic science used in law enforcement).

[236] Keith A. Findley, Conviction of the Innocent: Lessons from Psychological Research 316–17 (Brian L. Cutler ed., 2012); Dan Simon, In Doubt: The Psychology of the Criminal Justice Process 22–25 (2012); Barkow, Institutional Design, supra note 6, at 883.

[237] For example, for more than a decade prosecutors and FBI analysts used invalid scientific testimony without any empirical support to make arguments that bullets "must have come from the same box"—arguments that at times played an important role in securing convictions. Comm. on Scientific Assessment of Bullet Lead Elemental Composition Comparison, Nat'l Research Council of the Nat'l Acads., Forensic Analysis: Weighing Bullet Lead Evidence 90–94 (2004).

[238] See, e.g., Simon, supra note 236, at 22–25 (explaining tunnel vision among law enforcement officers, including prosecutors); Alafair S. Burke, Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science, 47 Wm. & Mary L. Rev. 1587, 1611 (2006) (explaining that a prosecutor might be biased not only because she is "engaged in a 'competitive enterprise,' but because the theory has developed from that enterprise might trigger cognitive biases, such as confirmation bias and selective information processing"); Bruce A. Green & Ellen Yaroshefsky, Prosecutorial Discretion and Post-Conviction Evidence of Innocence, 6 Ohio St. J. Crim. L. 467, 488 (2009) (describing the risk of "tunnel

Given prosecutors' interests and perspectives, it is no wonder the Department of Justice is a regular player in criminal law issues before Congress.[239] And for the most part, other powerful interests (victim groups, rural communities interested in prison jobs, private prison companies) and the public at large are on the same side as prosecutors, not lining up against them.[240]

Those who do oppose prosecutors tend to have little sway in the political arena. The direct targets of tougher crime policies—criminal defendants—are about as weak as a political interest can get. With the exception of white-collar defendants facing certain regulatory and corporate crimes, generally most criminal defendants are dispersed, disorganized, poor, and in many instances, barred from voting.[241] They are thus poorly situated to push for reforms in corrections, clemency, or forensic science.

Other groups that may share an interest in criminal defendants' rights are similarly powerless, particularly as compared to law enforcement. While judges may have an interest in these areas,[242] they too are poorly

vision" with prosecutors that may make them prone to view evidence "through the lens of . . . preexisting expectations and conclusions"); Ellen Yaroshefsky, Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment, 68 Fordham L. Rev. 917, 945–47 (1999) (explaining how cognitive bias develops in prosecutors).

[239] Victoria F. Nourse & Jane S. Schacter, The Politics of Legislative Drafting: A Congressional Case Study, 77 N.Y.U. L. Rev. 575, 587–88 (2002).

[240] Barkow, Administering Crime, supra note 4, at 729 (observing that "[o]ther groups with influence tend to join forces with prosecutors," including rural communities, private prison companies, corrections officers, and victims' groups).

[241] Id. at 725–26 (explaining the relative political weakness of criminal defendants); Christopher Uggen et. al, State-Level Estimates of Felon Disenfranchisement in the United States, 2010, at 1 (July 2012), available at http://sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf.

[242] See e.g., Judicial Conf. of U.S., Report of the Proceedings 13 (Sept. 15, 2009) (endorsing the commission of a study to assess the efficacy and cost-effectiveness of reentry programs). When she was on the bench, then-Judge Nancy Gertner was a major advocate for reform, especially in the forensic science area. In *United States v. Green*, faced with a challenge to firearms evidence, Judge Gertner remarked, "[t]he more courts admit this type of toolmark evidence without requiring documentation, proficiency testing, or evidence of reliability, the more sloppy practices will endure; we should require more." 405 F. Supp. 2d 104, 109 (D. Mass. 2005). Judge Gertner has urged that the validity of forensic science evidence "ought not to be presumed" and that defense attorneys should vigorously challenge fingerprints, bullet identification, handwriting, and other trace evidence. Nancy Gertner, Commentaries on the Need for a Research Culture in the Forensic Sciences, 58 UCLA L. Rev. 789, 792 (2011); see also Jonathan Saltzman, US Judge Urges Skepticism on Forensic Evidence: Gertner Says She'll Expect Defense Lawyers to Challenge Its Validity, Bos. Globe, Mar. 29, 2010, at B1.

positioned to push for change. For starters, they are not unified in their views on these topics, so they do not advocate for change as a group. And even if they agreed on an issue, they do not control or influence large numbers of votes or possess financial pull.[243] Plus, there are limits on how much they can lobby.[244]

Corrections officials and workers may want to push for greater authority or changes in policies—though, as with judges, their interests may not be unified.[245] But as long as they are under the auspices of the Department of Justice, it is unlikely that they will be authorized to lobby for any shifts in practice.

Scholars and scientists may advocate for forensic reform,[246] but they lack much political muscle. They are not able to deliver voting blocs or financial benefits to representatives. And the public at large increasingly seems skeptical about expert views on criminal justice policies, preferring instead to follow a tough-on-crime policy.[247]

Given this stark imbalance of power, the Department's primary mission of law enforcement is the one that wins out at the political level. The secondary interests in corrections, clemency, or forensic science reform typically do not stand much of a chance. Politicians want to keep the powerful interests and the public happy, and that means giving the Department what it wants.[248]

---

[243] Barkow, Administering Crime, supra note 4, at 724.

[244] See Leslie B. Dubeck, Note, Understanding "Judicial Lockjaw": The Debate Over Extrajudicial Activity, 82 N.Y.U. L. Rev. 569 (2007) (examining the historical limits on extrajudicial conduct).

[245] In fact, these organizations may be more likely to side with law enforcement. See Franklin E. Zimring, Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on "Three Strikes" in California, 28 Pac. L.J. 243, 246 (1996) (noting that a coalition lobbying to put a three strikes law on the ballot in California included the California Correctional Peace Officers Association and the prison guard union); Developments in the Law, A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons, 115 Harv. L Rev. 1868, 1872–73 (2002) (noting that both the private prison industry and prison guard unions often lobby for tough-on-crime candidates and tougher sentencing).

[246] See supra notes 235–237.

[247] Barkow, Administering Crime, supra note 4, at 730, 734–35 (noting that, among the public, "there seems to be a settled perception that keeping criminals behind bars for as long as possible is a good thing" and little "need for expert advice" on the topic).

[248] See Stuntz, supra note 4, at 510 (explaining that "American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes" and that "[l]egislators are better off when prosecutors are better off").

In this political environment, measurable results that are monitored are convictions, long sentences, and tough policies.[249] Reforms that will not yield immediate results but that may, over a period of years, lower crime rates or save money will likely lose out to more immediate actions. So, investing in corrections or clemency reforms that help with reentry by placing offenders in halfway houses or clearing their records may not be politically viable because their benefits come over that offender's lifetime if he stays out of trouble and successfully reintegrates. And these are benefits that are unlikely to grab the attention of the media or the public.

The media is interested in the cases that go bad, making reforms that give particular offenders a break particularly fraught with political danger, because if even one offender who receives such a benefit goes on to commit a heinous crime, it will undoubtedly call the entire reform effort into question—a result we have seen time and time again.[250] The paradigmatic example is the Willie Horton ad campaign.[251] Horton's violence overshadowed the fact that the program overall had a 99.5% success rate.[252] One of the victims of Horton's crimes reflected what seemed to be the prevailing public view when he stated that "when you're dealing with people that are this dangerous and this violent, anything short of 100 percent is not successful."[253] The lesson for politicians was clear: one pardon gone awry can ruin a campaign.

The politics of forensic science reform is less one-sided because the public is sympathetic to innocent individuals who are wrongfully convicted. Each case in which an innocent person is convicted grabs media headlines, and prosecutors are in a tougher position to resist reforms that are designed to improve the accuracy of the system. The public, however, is unlikely to pay sufficient attention to the details of the reforms. Thus, if law enforcement opposes particular changes that would improve forensic science, the public may not notice or fully understand the larger debate over scientific reliability. The public's diffuse and marginal in-

[249] Barkow, Administering Crime, supra note 4, at 731–32.

[250] Rachel E. Barkow, The Politics of Forgiveness: Reconceptualizing Clemency, 21 Fed. Sent'g Rep. 153, 155 (2009) [hereinafter Barkow, The Politics of Forgiveness] (explaining that "[i]t takes just one offender who benefited from a pardon or commutation to reoffend to call into question an executive's judgment").

[251] See supra note 88.

[252] Joseph E. Kennedy, Monstrous Offenders and the Search for Solidarity Through Modern Punishment, 51 Hastings L.J. 829, 892 (2000).

[253] Id. at 893–94 (quoting Cliff Barnes).

terest in the issue will be no match for the intensity of the Department's preferences about how to handle forensic science—particularly when the Department can make a plausible claim that its preferred approach is the right one for law enforcement objectives.

This political environment helps foster a culture at the Department that also favors the law enforcement mission. This is the central mission of the Department, and it has been from its founding. The Department's leadership reflects this. The Attorney General and Deputy Attorney General typically have prosecution experience,[254] so the tone is set from the top that the Department is devoted to prosecutors. Thus, even to the extent that there are lawyers and other personnel who belong to a culture other than law enforcement, they are likely to find themselves in a losing battle against the dominant culture of prosecution.[255]

To be sure, sometimes a subculture can develop.[256] One reason that the Bureau of Prisons had a long history of relative independence from prosecutorial influence was that its leadership created a corrections culture within the Bureau.[257] The first director, Sanford Bates, made it a condition of his appointment that he be given the discretion to institute a prison system built around rehabilitation rather than punishment.[258] The Bureau's second director, James Bennett, served from 1937 to 1964, spanning five presidential administrations and ten Attorneys General. This longevity allowed him to build up enormous institutional capital that permitted him to foster the subculture of reform in corrections and resist any pressures that may have arisen.

But even independent leaders can find themselves at the mercy of the formal hierarchy and the dominant culture within the agency as a whole. Bates, for example, disagreed with the need for creating a new maxi-

[254] See supra notes 95–97.

[255] Wilson, supra note 224, at 101 (explaining that organizations with two or more cultures will see a struggle for supremacy and resist tasks that are incompatible with the dominant culture).

[256] Wilson cautions against assuming that agencies have a uniform culture. "One mistake is to assume that an organization will have *a* culture; many, perhaps most, will have several cultures that often are in conflict." Id. at 92.

[257] Boin, supra note 48, at 108–09.

[258] Keve, supra note 24, at 95–96. True to his agenda, the Bureau of Prisons under his watch engaged in a broad reformist agenda. The BOP modernized not only the federal prisons, but also state and local jails where the bulk of federal prisoners were housed well into the 1940s. Among its reforms, the Prison Bureau introduced a comprehensive classification scheme, abolished the use of billy clubs, and brought all correctional officers under the civil service. Id. at 160–64.

mum-security prison at Alcatraz to house the infamous gangsters, kidnappers, and racketeers arrested by the FBI. Attorney General Homer Cummings proposed the idea in 1933 as part of a coordinated campaign to raise the profile of federal policing. Despite his doubts about the wisdom of the proposal, Bates ultimately relented.[259] And it is hard to believe that the Bureau wanted its community correction center policy second-guessed and ultimately overruled.

Thus, even with a fairly strong subculture, there have been limits to the BOP's independence, and over time, there are ways in which the dominant mission will erode those subcultures to the extent there is a conflict. The BOP has kept quiet as its prisoner population has soared, and it has failed to address pressing corrections issues from such a large population, including greater needs for reentry resources. Some of the BOP's state counterparts, who operate independently of prosecutors' offices, are meeting these issues head-on. Thus one must worry that the rehabilitative culture within the Bureau is fading, and it has become part of the team that furthers the Department's larger mission of prioritizing law enforcement interests without giving sufficient weight to its mission of preparing offenders for reentering the community.

Given the political pressures that emphasize law enforcement and being tough on crime, one can expect that the culture of the Department will continue to be dominated by those interests.

Monitoring has also been critical to the focus on law enforcement at the expense of other interests. The Department is able to maintain the law enforcement culture by keeping tabs on its subdivisions. For instance, as noted, the Pardon Attorney must report to the Deputy Attorney General ("DAG"), so the DAG is well positioned to check what he or she sees as excessive pardon grant recommendations. The DAG also oversees the Bureau of Prisons. The BOP must seek the DAG's approval for compassionate release decisions. Any testimony by DOJ bureaus or divisions must be cleared by the Office of Legislative Affairs.[260] As Paul Giannelli has documented, the Department has also kept a close watch on NIJ studies of forensic science. With this intense monitoring in place, it is harder for the subdivisions to pursue an agenda without DOJ noticing, particularly when preclearance is required in many cases. These

[259] Id. at 174–75.

[260] E-mail from Margaret Colgate Love to author (July 25, 2012) (on file with author).

subdivisions cannot even mobilize support because they cannot get a project off the ground without DOJ's blessing.

Thus, a combination of culture and formal structures within the Department provide the mechanisms by which the dominant mission gets enforced and any conflicting missions are stifled.

III. INSTITUTIONAL REFORM

Thus far, the aim of this article has been to make the case that the current institutional arrangement is flawed if the goal is to have an agency consider questions of corrections, clemency, and forensics without a prosecutorial bias. This Part turns to the question of what institutional reforms make the most sense in each of these contexts. Section III.A considers where the incentives for institutional reform lie. Section III.B provides an overview of the kinds of institutional reforms that are available given where the incentives stand.

A. The Motivation for Change

The same political economy that pushes law enforcement concerns to the top of DOJ's agenda creates an obstacle to any institutional change. Indeed, the current institutional design of law enforcement dominance—though initially a product of historical accident and later path dependency—may be precisely the model most politicians would select today if operating on a blank slate. Where, then, could the motivation arise for making a change? This Section considers separately the politics in each of the three areas under discussion.

1. Corrections

A main reason for prosecutorial administration is the increasingly dysfunctional political landscape in which federal criminal justice policy is addressed. When federal criminal law was itself largely outside of the political fray and used sparingly, it did not matter much that DOJ also exercised responsibility for related criminal justice matters, including corrections. This explains why the BOP's early history is one of relative independence. Federal corrections could become in many ways a model regime because it was operating outside the political sphere. Even today,

the conditions of confinement within federal facilities are laudable as compared to conditions in state facilities.[261]

But when the politics of crime started to shift, so too did the ability of the BOP to resist external pressure. Thus, the BOP is now the subject of criticism for its silence on the question of overcrowding, for how it has addressed new populations (including women and immigrants), and for its inability to resist attacks on its use of community confinement centers.[262] To be sure, these could be seen as relatively minor criticisms, especially as compared to the stark conflicts and pressures seen in clemency and forensics. But these are likely harbingers of things to come. The BOP is poorly positioned to be an independent voice on corrections because its officials must speak through DOJ, which deemphasizes corrections concerns, including rehabilitation and reentry, in favor of prosecutors' interests, which are to maintain longer sentences on the books and sufficiently harsh conditions of confinement so that prosecutors maintain the bargaining leverage that allows them to obtain pleas so easily. Prosecutors do not have the same long-term interest in reintegrating offenders into society after they have served their sentences, keeping incarceration costs down to free up funds for other law enforcement expenditures such as policing, or lowering recidivism risks by offering programming in prisons or alternatives to incarceration. Prosecutors care more about how punishment can help them win cases and be used to lock up people they view as dangerous. They are institutionally poorly situated to think about what happens after someone is sentenced and what inmates need to reenter society when that sentence is up.

Where are the incentives for modifying this state of affairs? Prosecutors are unlikely to seek changes because the current regime gives them the power they feel they need to win their cases and a menu of sanctions that allows them to mete out harsher punishment when they deem it appropriate. Congress, too, is unlikely to be a key agent of change. To be sure, many state legislatures have been reforming their sentencing and corrections policies (such as releasing prisoners early or scaling down the sentences for nonviolent crimes) in the wake of the economic downturn because of tightened state budgets.[263] But Congress typically pays

[261] Jayne O'Donnell, State Time or Federal Prison?, USA Today, Mar. 18, 2004, at 3B, available at http://www.usatoday.com/money/companies/2004-03-18-statetime_x.htm.

[262] See supra text accompanying notes 52–75.

[263] See Mary D. Fan, Beyond Budget-Cut Criminal Justice: The Future of Penal Law, 90 N.C. L. Rev. 581, 583 (2012); see also Randal C. Archibold, Driven to a Fiscal Brink, A

little attention to corrections expenditures because they are such a small part of the federal budget, and because the benefits of tough-on-crime politics have thus far been viewed as greater than any efforts toward fiscal restraint in crime spending.[264] Some conservatives have started to call attention to the fiscal issue of incarceration, with Right on Crime assembling a list of notable Republicans who seek corrections reform.[265] But as of yet, this has not produced a legislative response. Congress, as has become apparent, is increasingly unable to pass legislation opposed by a significant bloc, and certainly any corrections reform would be met with strong resistance, particularly by individual legislators worried about being viewed as soft on crime.

The courts might spur action by ruling certain corrections practices unconstitutional. For example, California corrections is undergoing a massive overhaul in the wake of decisions finding its overcrowded prison conditions to be cruel and unusual punishment in violation of the

State Throws Open the Doors to Its Prisons, N.Y. Times, Mar. 24, 2010, at A14 ("The California budget crisis has forced the state to address a problem that expert panels and judges have wrangled over for decades: how to reduce prison overcrowding."); Monica Davey, Safety Is Issue as Budget Cuts Free Prisoners, N.Y. Times, Mar. 5, 2010, at A1 (documenting state early release programs and sentence reforms in response to budgetary pressures); Cindy Horswell, Texas Cuts Costs Amid Prison Reform, Hous. Chron., Dec. 15, 2009, at B1, available at http://www.chron.com/news/houston-texas/article/Treatment-efforts-credited-as-prison-population-1750304.php (documenting the decrease in state prison population as a result of the "reinvestment movement" which "invests state funds in drug, alcohol and mental health programs to treat offenders rather than just prisons to house them"); Polly Ross Hughes, Study's Ideas Counter Prison Sprawl, Hous. Chron., Jan. 31, 2007, at B1, available at http://www.chron.com/news/houston-texas/article/New-prison-policies-could-save-millions-1837907.php (discussing the Texas "Justice Reinvestment" report which suggests organizational changes to cut prison spending); Marty Roney, 36 States Offer Release to Ill or Dying Inmates, USA Today, Aug. 14, 2008, at 4A (examining the wave of states implementing early release for ill or dying prisoners in order to cut costs); Bob McEwen, Budget Crisis Could Curtail Oregon's Prison Boom, The Oregonian, (May 25, 2009, 9:20 PM), http://www.oregonlive.com/news/index.ssf/2009/05/budget_crisis_could_curtail_or.html (explaining that in response to major budget shortfalls, some Oregon legislators are "pushing for a new approach to criminal justice—one that allows for a range of sanctions for lawbreakers so fewer people end up in prison").

[264] Rachel E. Barkow, Federalism and the Politics of Sentencing, 105 Colum. L. Rev. 1276, 1299–1312 (2005) (explaining why cost considerations have a lesser influence at the federal level than in the states).

[265] Right On Crime, http://www.rightoncrime.com/the-conservative-case-for-reform/statement-of-principles/ (last visited Aug. 20, 2012) (listing national signatories that include Jeb Bush, former Governor of Florida, Newt Gingrich, former Speaker of the U.S. House of Representatives and Republican presidential candidate, and Edwin Meese, III, former U.S. Attorney General under Ronald Reagan).

Eighth Amendment.[266] But the odds are long that a decision along these lines will be forthcoming for the federal system, much less an institutional response to such a decision that would involve institutional change in corrections, as opposed to merely a narrow response to whatever defect the court might identify.

A more likely source for prompting change would be an Executive with a strong vision for reforming corrections. There are, admittedly, few signs of this happening in the current political climate. But as mass incarceration stays with us, its glaring racial disparities continue, and the economic and social consequences it leaves in its wake continue to mount, it is possible that a President will eventually seek a new model, particularly as he or she focuses on questions of class and poverty. The criminal justice system is currently designed to keep people in poverty, not to help them get out of it. But to pursue a new model that focuses on reform, the President would likely have to override what will be a push by his or her Attorney General and other law enforcement officials to maintain the status quo.

This would be a difficult task. But although the uphill climb is steep, it is not impossible to envision a President who is sufficiently concerned with America's status as an outlier in the world for its use of incarceration. And the fact that the federal system is now the most punitive of all within the United States may well prompt a sufficiently interested leader to act. It is a costly system, and it is far from clear that it yields benefits to justify those costs. Thus, a President interested in cost-benefit analysis more generally might decide to analyze corrections more rigorously. And a more rigorous analysis should be an objective inquiry that includes the benefits to prosecutors but does not stop the analysis there. The costs to communities and to longer-term strategies for combatting crime and poverty might yield different conclusions about some types of

[266] See Brown v. Plata, 131 S. Ct. 1910, 1932–34, 1937 (2011) (citing, among other factors, unsafe and unsanitary prisoner living conditions and lack of proper medical care resulting from overcrowding in holding that such a prison environment constitutes cruel and unusual punishment and therefore runs afoul of the Eighth Amendment). In the wake of the *Plata* ruling, California has begun complying with the court-mandated state prisoner reduction by realigning its prison population from overcrowded state facilities to local jails. See, e.g., Douglas A. Berman, A Year After Plata Ruling, a "Picture of Success" Fixing California's Overcrowded Prisons, Sent'g L. and Pol'y (May 29, 2012, 9:49 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2012/05/a-year-after-plata-ruling-a-picture-of-success-fixing-californias-overcrowded-prisons.html ("The prison population is declining . . . [as] a new state law shifted the responsibility for some lower-level offenders to the county jails, which are filling up.").

crimes and offenders than the prosecution-driven model we currently have.

2. Clemency

The politics of clemency bear a strong resemblance to the politics of corrections, but there are differences. Congress's incentives in both contexts are largely the same. Congress has paid little attention to the use of the pardon power except in instances where it has seemed that the President has been too generous with his clemency grants.[267] To the extent that there has been any political push to shape the exercise of the clemency power, it has been in the direction of curbing clemency grants still further. For instance, in the wake of President Ford's decision to pardon Richard Nixon, Walter Mondale proposed a "constitutional amendment to empower two-thirds majorities in both houses of Congress to disapprove of presidential pardons."[268] Republicans in Congress introduced similar measures in the wake of President Clinton's outgoing pardon of Mark Rich and other close associates and friends.[269] To be sure, some critics aired their concerns about the atrophy of presidential clemency at the congressional hearings, but Congress paid little attention.[270] Instead, congressmen present at the hearings seemed more interested in finding ways to give prosecutors more power over pardons. Asa Hutchinson, for example, queried whether it was important to codify a requirement that prosecutors be notified of a pending pardon application.[271] Bob Goodlatte similarly wondered whether Congress could, under its Necessary

[267] See, e.g., Use and Misuse of Presidential Clemency Power for Executive Branch Officials: Hearing Before the H. Comm. on the Judiciary, 110th Cong. 1–2 (2007); 2001 Hearings, supra note 97, at 1–6; Pardon of Richard M. Nixon, and Related Matters: Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary, 93rd Cong. 1–2 (1974).

[268] John Dinan, The Pardon Power and the American State Constitutional Tradition, 35 Polity 389, 390 (2003).

[269] Pardon Attorney Reform and Integrity Act, H.R. 3626, 106th Cong. (2000); Pardon Attorney Reform and Integrity Act, S. 2042, 106th Cong. (2000). For a description of Clinton's pardons, see Alschuler, supra note 95, at 1137–52.

[270] 2001 Hearings, supra note 97, at 20 (statement of Daniel T. Kobil, Professor of Law, Capital University Law School) ("[T]he real danger posed by the controversy over the Clinton pardons is that it will cause clemency, with its attendant benefits to the public welfare, to disappear entirely."); id. at 25 (statement of Margaret Colgate Love) ("[I]t is the Justice Department's reluctance to recommend cases favorably for clemency that was, at least in part, responsible for the extraordinary breakdown of the pardon process at the end of the Clinton administration.").

[271] Id. at 8 (statement of Rep. Asa Hutchinson).

and Proper Clause authority, require the President to consult with prosecutors before issuing a pardon.[272]

Congress's treatment of the pardon authority shows that, if change is going to come, it is more likely to emerge from a presidential administration committed to maximizing the influence of professional judgment, untainted by bias and competing interests. Here, the prospect for reform might be slightly more promising than it is for corrections, though admittedly still somewhat bleak.

For a time early in President Obama's first administration, it appeared that he might provide an example of how leadership in this field could take hold. When President Obama took office, incoming White House Counsel Greg Craig proposed that an "independent commission of former judges, prosecutors, defense attorneys and representatives of faith-based groups" take responsibility for making pardon recommendations to the President.[273] Craig enjoyed the backing of Deputy Attorney General David Ogden—a noteworthy base of support given that Ogden's office would be the one that would lose power if such reforms were adopted. But Craig and Ogden resigned before their proposal could be put in place. Instead, the White House proposed to review the criteria for granting clemency under the existing regime.[274]

Despite the lack of reform so far, there are reasons to believe a future President (or even President Obama in his second term) might yet be open to change. The pardon power has become a source of embarrassment for recent Presidents, and it is largely the result of institutional dysfunction. The controversy over the pardon of Mark Rich resulted in part because of President Clinton's "dissatisfaction with the general approach to clemency cases being taken by his own Justice Department" that led him, ultimately, to "[rely] instead on his own White House staff and any other sources of advice he found useful."[275] President George W. Bush also experienced difficulties with the Justice Department because of its stinginess with favorable pardon recommendations:

---

[272] Id. at 9–10 (statement of Rep. Bob Goodlatte).

[273] Dafna Linzer & Jennifer LaFleur, A Racial Gap for Criminals Seeking Mercy, Wash. Post, Dec. 4, 2011, at A1, available at http://www.washingtonpost.com/investigations/propublica-review-of-pardons-in-past-decade-shows-process-heavily-favored-whites/2011/11/23/gIQAElnVQO_story.html.

[274] Joe Palazzolo, Despite Efforts, Pardon System Still Unchanged, Main Justice (Apr. 20, 2010, 6:55 PM), http://www.mainjustice.com/2010/04/20/despite-efforts-pardons-system-still-unchanged/.

[275] 2001 Hearings, supra note 97, at 25 (statement of Margaret Colgate Love).

> In 2006, White House Counsel Harriet Miers became so frustrated with the paucity of recommended candidates that she met with [Pardon Attorney] Adams and his boss, Deputy Attorney General Paul McNulty.
>
> Adams said he told Miers that if she wanted more recommendations, he would need more staff. Adams said he did not get any extra help. Nothing changed.
>
> "It became very frustrating, because we repeatedly asked the office for more favorable recommendations for the president to consider," said Fielding, who was Bush's last White House counsel. "But all we got were more recommendations for denials."[276]

The disagreement between the White House and the Justice Department grew still more heated as Bush neared the end of his presidency and the Pardon Office continued to recommend against clemency in almost all cases. Bush was thus forced, like Clinton, to work outside the system, which resulted in his own ill-considered pardon of a New York real estate developer, a pardon which drew extensive negative publicity and that Bush ultimately was forced to revoke.[277]

And those are not the only controversies. Recently, *ProPublica* and the *Washington Post* have published a series of alarming articles about flaws with the clemency power. One article examined racial disparities in clemency grants, noting that "[w]hite criminals seeking presidential pardons over the past decade have been nearly four times as likely to succeed as minorities."[278] Another article documented that "[a]pplicants with a member of Congress in their corner were three times as likely to win a pardon as those without such backing."[279]

---

[276] Linzer & LaFleur, supra note 273, at A21.

[277] Id.

[278] Dafna Linzer & Jennifer LaFleur, Presidential Pardons Heavily Favor Whites, ProPublica (Dec. 3, 2011, 11:00 PM), http://www.propublica.org/article/shades-of-mercy-presidential-forgiveness-heavily-favors-whites; see also Dafna Linzer, Inmate Still in Prison After Facts Kept from Bush Team, Wash. Post, May 14, 2012, at A1, available at http://www.washingtonpost.com/investigations/clarence-aaron-was-denied-commutation-but-bush-team-wasnt-told-all-the-facts/2012/05/13/gIQAEZLRNU_story.html (examining the "extraordinary, secretive powers wielded by the Office of the Pardon Attorney" and the records showing "that Ronald Rodgers, the current pardon attorney, left out critical information in recommending that the White House deny Aaron's application").

[279] Dafna Linzer, Pardon Applicants Benefit From Friends in High Places, ProPublica (Dec. 4, 2011, 11:00 PM), http://www.propublica.org/article/pardon-applicants-benefit-from-friends-in-high-places.

Still more recent coverage has highlighted the Justice Department's role in concealing the institutional support from both the prosecuting attorney and trial judge for the pardon of Clarence Aaron, currently serving three life terms for a first-time drug offense.[280] This latest revelation has spurred yet another round of condemnation in the press, prompted Representative John Conyers to call for an investigation,[281] and led a group of academics to call for congressional hearings on how DOJ uses its pardon authority.[282] In the wake of media stories on Aaron's case, once again the Obama administration is signaling receptivity to reform, noting that it is preparing for a "comprehensive, independent study" of "how petitions for pardon are adjudicated and whether any discernible bias exists."[283]

Whether meaningful change to the pardon process comes as a result remains to be seen,[284] but these kinds of controversies illustrate what might ultimately lead a President to seek broader institutional changes to the current structure.

[280] Dafna Linzer, Pardon Attorney Torpedoes Plea for Presidential Mercy, ProPublica (May 13, 2012, 7:00 PM), http://www.propublica.org/article/pardon-attorney-torpedoes-plea-for-presidential-mercy.

[281] See, e.g., Azmat Khan, Why Was Clarence Aaron's Pardon Request Denied?, Frontline (May 14, 2012, 3:28 PM), http://www.pbs.org/wgbh/pages/frontline/criminal-justice/why-was-clarence-aarons-pardon-request-denied/; Debra J. Saunders, When Will Obama Reform Presidential Pardons?, S.F. Chron., May 27, 2012, at E3, available at http://www.sfgate.com/opinion/saunders/article/Obama-must-reform-presidential-pardons-3588734.php; Scott Horton, Blocking Pardons at Justice, Harper's (May 16, 2012, 9:20 AM), http://harpers.org/archive/2012/05/hbc-90008619/.

[282] See, e.g., Letter from Rachel E. Barkow, Professor, N.Y. Univ. Sch. of Law, et al., to Hon. Patrick Leahy, Chairman, Comm. on the Judiciary, and Hon. Charles Grassley, Ranking Member, Comm. on the Judiciary (June 26, 2012), available at http://sentencing.typepad.com/files/062612-law-professor-letter-opa.pdf.

[283] Linzer, supra note 106.

[284] A parallel history of the clemency power as it evolved in the states—virtually all of which vest the pardon power in the governor in consultation with an independent board—offers a minor caveat to what would otherwise appear to be a grim forecast for the future of presidential clemency. As political scientist John Dinan notes, state constitutional amendments placing limits on unilateral executive pardon authority and entrusting the responsibility at least in part to independent boards were generally introduced in response to perceived abuses of an overly politicized pardon process. In short, the very systems intended to restrict a governor's ability to issue pardons freely have, as a largely unintended consequence, resulted in arrangements that actually permit governors to use the process more freely. See Dinan, supra note 268, at 396 ("In the view of the vast majority of state convention delegates from the mid-nineteenth to the late-twentieth century, executive responsibility for the pardon power was plagued by frequent and flagrant abuses.").

As Presidents near the end of their terms in office and focus on their legacies more than reelection, they typically want to exercise their clemency power to show that they have the ability and leadership to forgive and believe in redemption. No President wants to be known historically as unforgiving and too fearful to give anyone a second chance. Thus, Presidents typically want to grant pardons and commutations when they reach the end of their time in office, and they need a functioning system so they can do so intelligently.

It is also possible that a President will simply have a personal conviction that clemency is a core executive duty to be exercised. It is, admittedly, hard not to be a cynic and dismiss this possibility out of hand, but some governors provide an example of just this kind of leadership. When Mike Huckabee was Governor of Arkansas, he granted clemency to more than 1000 people, and many of those grants took place in his first term.[285] Former Virginia Governor Tim Kaine also granted a large number of pardons and commutations.[286] Huckabee's and Kaine's attitudes toward clemency were driven in part by religious and moral convictions.[287] Robert Ehrlich, the former Governor of Maryland, was also active with his pardon power, and in his case, it was a deep belief in the constitutional duty of the executive to take that power seriously.[288]

The odds are long that a President will hold similar views, given that a strong position on clemency might mean sacrificing other critical national goals. But the chances of a President holding this view increase as the number of individuals with federal convictions swells, the enormous racial and economic disparities in this population remain, and a huge share of this group represents casualties of a drug policy that has been widely criticized, including by the White House's Drug Control Policy Director.[289]

---

[285] Barkow, The Politics of Forgiveness, supra note 250, at 153.

[286] Margaret Colgate Love, Relief from the Collateral Consequences of a Criminal Conviction (2008 ed.), available at http://www.sentencingproject.org/tmp/File/Virginia08.pdf (forthcoming in Margaret Colgate Love, Collateral Consequences of Criminal Convictions: Law, Policy and Practice (2012–13 ed.)).

[287] Barkow, The Politics of Forgiveness, supra note 250, at 153 n.11.

[288] Matthew Mosk, Ehrlich Prolific in Granting Clemency, Wash. Post, Aug. 25. 2006, at A1.

[289] Congress OKs Fair Sentencing Act, UPI (July 28, 2010), available at http://www.upi.com/Top_News/US/2010/07/28/Congress-OKs-Fair-Sentencing-Act/UPI-22641280367802/ (quoting White House Drug Control Policy Director).

3. Forensics

Forensics provides probably the most likely place for institutional change. A political push is currently on by scientists, academics, defense lawyers, and judges,[290] all of whom are pointing to the NAS report and its recommendation for an independent commission. The effort is currently stalled, but a few more wrongful convictions and post mortems showing lab failings might tilt the balance.

Indeed, this is an area where Congress might end up leading the charge. Congress was concerned enough to fund the NAS report. And because forensics is about identifying the right people, it is easy to tell a political story in defense of these reforms that does not subject someone to a soft-on-crime attack. The political strength of the innocence movement is a testament to what can be done under this banner.[291]

It is also possible that a President with a great enough interest in scientific objectivity might override Department pleas to keep forensics within its grasp. Some states have shifted to a more independent forensic agency oversight model, which proves that this is politically feasible.[292] For example, the Houston City Council voted this year to make its forensic lab independent of police control after revelations of abuse and misconduct.[293] And in 2011, North Carolina passed the Forensic Science

[290] See, e.g., Jennifer Friedman, A Path Forward: Where Are We Now?, Champion, Jan.–Feb. 2012, at 16, 17 ("Since the issuance of the NAS Report, defense attorneys in state and federal trials and postconviction cases have challenged forensic science evidence and, in particular, pattern impression evidence, raising many of the deficiencies described in the report."); Radley Balko & Roger Koppl, C.S.Oy, Slate (Aug. 12, 2008, 12:43 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2008/08/csoy.html (noting that Mississippi terminated its twenty-year relationship with medical examiner Dr. Steven Hayne after pressure from criminal justice groups like the Innocence Project); Innocence Project, New Pressure on Mississippi Medical Examiner, Innocence Blog (May 7, 2008, 3:12 PM), http://www.innocenceproject.org/Content/New_pressure_on_Mississippi_medical_examiner.php.

[291] Susan A. Bandes, Framing Wrongful Convictions, 2008 Utah L. Rev. 5, 5 (2008) ("Concern over wrongful convictions has led to an 'innocence movement' that has managed to bridge ideological divides, rouse people to action, and achieve unprecedented success in reforming the operation of the death penalty."); Daniel S. Medwed, Innocentrism, 2008 U. Ill. L. Rev. 1549, 1549 (2008) (describing "the increasing centrality of issues related to actual innocence in courtrooms, classrooms, and newsrooms").

[292] Fifteen states now have forensic science oversight boards or committees. Robert J. Norris et al., "Than That One Innocent Suffer": Evaluating State Safeguards Against Wrongful Convictions, 74 Alb. L. Rev. 1301, 1327 tbl.2 (2010–2011).

[293] Chris Moran, Council Gives OK to Crime Lab Plan, Hous. Chron., June 7, 2012, at B1, available at http://www.chron.com/news/houston-texas/article/Council-hands-crime-lab-to-independent-board-3615078.php.

Act, which creates a forensic science advisory board designed to eliminate human error in forensic evaluation, require certification of forensic science professionals, and implement other best practices.[294] The fact there has been political will in the states suggests that it could exist at the federal level as well.

4. The Long View

There is no denying that the current politics of criminal law make big changes unlikely. Prosecutorial administration reflects prosecutorial and law enforcement power. Those same powers will fight any efforts that they see as undermining their ability to win cases or that challenge their views of what is in the best interests of law enforcement needs and priorities. Indeed, we have already seen this resistance when efforts have been made to shift authority from DOJ.

But a President concerned with law enforcement should look closely at the current setup, because it leaves much to be desired. It is a system focused on the short-term interests of prosecutors—winning cases here and now, judged from their perspective and vantage point—and the short-term electoral interests of politicians worried about creating soundbites instead of real policy reforms that look to longer-term interests.

In fact, the current system of mass incarceration may not be in the long-term interests of the country, including the long-term interests of law enforcement. It is extremely costly, both in actual dollars spent and social costs to communities. And it may produce more criminals than it deters.[295] Corrections reform might therefore produce less crime and at a lower cost—as the states are finding out.[296] Clemency reform may also

[294] 2011 N.C. Sess. Laws 25–27; see also State Legislative Initiatives, Nat'l Ass'n of Criminal Def. Lawyers, http://www.nacdl.org/criminaldefense.aspx?id=22113 (last visited July 26, 2012) (describing the legislation).

[295] Raymond V. Liedka et al., The Crime-Control Effect of Incarceration: Does Scale Matter?, 5 Criminology & Pub. Pol'y 245, 260–62, 272 (2006) (finding that, at a certain point, an increase in incarceration increases crime); Joanna Shepherd, The Imprisonment Puzzle: Understanding How Prison Growth Affects Crime, 5 Criminology and Pub. Pol'y 285, 286–87, 290 (2006) (explaining that increases in prison population will have a varying effect on crime, depending on the type of offenders coming into the system, with increases in nonviolent and drug offenders having no effect or even a negative effect on crime rates).

[296] Michael Jacobson, Downsizing Prisons: How To Reduce Crime and End Mass Incarceration 126 (2005); Ryan S. King et al., The Sentencing Project, Incarceration and Crime: A Complex Relationship 4 (2005) (surveying states trends to find that, "[s]ince 1998, 12 states experienced stable or declining incarceration rates, yet the 12% average decrease in crime rates in these states was the same" as those states with increasing incarceration rates).

improve public safety, allowing individuals to reintegrate into society instead of facing obstacles because of their criminal records. It may serve as a needed corrective to mandatory sentences that should have never been meted out in the first place. Forensic science reforms could similarly make the system better by ensuring we convict the right people.

Currently, though, we have no way of knowing if we are reaching the right results in these areas because the decision-makers are not objective. Forensic science reforms may make sense in the long term, but if they cause upheaval in cases in the short term, prosecutors may resist when an objective assessment would argue in favor of taking the long view. Prosecutors are similarly poorly positioned to play a decision-making role in clemency when those decisions second-guess prosecution decisions. And corrections determinations should likewise stretch beyond what prosecutors think they need for bargaining or for deterrence.

It may turn out that prosecutors make the right policy decisions in many of these areas. But it is asking a lot of prosecutors to expect them to step outside of themselves to reach decisions that may undercut their own interests. Even when they act in good faith—as most likely do—cognitive biases may blind them to the strength of opposing arguments.[297]

Sound institutional design should take these conflicts and biases into account to allow for better decision making. Indeed, this is the motivation behind our entire system of government and the separation of powers.[298] Unfortunately, these lessons were forgotten when DOJ began accumulating additional powers. But for a leader who wants to improve decision making, it is never too late to shift course.

B. The Nature of Institutional Reform

If one wants to improve upon the current institutional design, the next question is how. It is beyond the scope of this Article to catalog and evaluate every institutional possibility and its likelihood for success because there are so many unique dynamics that require detailed and sepa-

[297] See supra note 238.

[298] See Jeremy Waldron, Separation of Powers or Division of Power? 2 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 12-20, 2012), available at http://ssrn.com/abstract=2045638.

rate evaluation.[299] This Section will instead provide a more general overview of some of the main design options and the issues they raise, beginning with reforms that could take place if these functions stay within the Department and then considering options for moving these functions elsewhere.

1. Changes Within the Existing Department of Justice Structure

One possible avenue—and the one that would require the least amount of political capital to be spent—is to make changes while keeping corrections, clemency, and forensics within DOJ. Margaret Love has at times urged changes of this nature. She has proposed, for instance, placing the Attorney General once again in charge of the pardon authority, instead of having the Pardon Attorney report to the DAG.[300] She has similarly called for changes in BOP leadership, as opposed to the wholesale removal of the BOP from DOJ. As she puts it, "[i]f the right candidate can be found, perhaps it will not be necessary to consider a more complete separation of prisons and prosecutors."[301] And there are some components within DOJ (such as the Office of the Solicitor General and the Office of Legal Counsel) that are, in fact, more independent, showing that it is possible to create independence even when an agency exists within the larger Department.

The key is determining what mechanisms would make corrections, clemency, and forensics more independent, given that they do not have the same tradition of independence as the Solicitor General's Office or OLC. Those offices are protected, in the words of Adrian Vermeule, "by unwritten conventions that constrain political actors from attempting to bully or influence them."[302] But we have already seen that corrections,

[299] For example, a thoughtful designer would want to pay particular attention to how to staff an agency to maximize its effectiveness, but that inquiry is complicated because it will vary based on the issue at stake and the politics at play. See, e.g., Barkow, Administering Crime, supra note 4, at 800–04 (describing ideal staffing for sentencing commissions); Barkow, Insulating Agencies, supra note 204, at 45–50 (listing appointment qualifications and post-employment restrictions as potential mechanisms for guarding against capture). And there are numerous other design characteristics as well. Id. at 26–64 (describing a host of design features for agencies).

[300] See Love, Of Pardons, supra note 77, at 1509–10.

[301] Love, Time, supra note 56.

[302] Adrian Vermeule, Conventions of Agency Independence 2 (Harvard Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 12-32, 2012), available at http://ssrn.com/abstract=2103338; see also Kirti Datla & Richard L. Revesz, Deconstructing Independent Agencies (And Executive Agencies) 46 (N.Y. Univ. Sch. of Law Pub. Law &

clemency, and forensics lack those same protections. While the early history of the BOP seems to be characterized by similar conventions, times have changed, and all of these functions now seem patrolled by DOJ without much concern about their independence.

So what can be done? Love is correct to call attention to leadership. Leaders matter. A leader willing to call out what he or she sees as too much political pressure by DOJ could raise the political stakes of DOJ's decisions by drawing media attention to the issue. Thus, choosing independent-minded and visionary leaders who are willing in some cases to stand up for their division's independent judgment could make a difference.

But even the strongest leader will struggle against the kind of institutional pressure that comes from pursuing an agenda that conflicts (or is perceived to conflict) with an organization's primary mission. Not every decision can be a battle, and resisting comes at a great political cost to those leaders. Their future employment and political connections hang in the balance. Moreover, getting that kind of leader appointed in the first place will be difficult, in light of the Department's interest in maintaining control over its current fields of operation.

The emphasis should therefore focus on structural changes and not simply personnel decisions. The harder it is for prosecutors to exercise authority within the Department, the easier it is for a subculture to develop that focuses on other interests. Love's proposal to shift pardon oversight to the AG, however, is of a type that seems less likely to matter. The AG will ultimately want to make his or her law enforcement personnel happy, because that is the mission of the Department that gets the most attention. Congress will be more supportive of the Department if it focuses on that primary goal, and the President shares the same agenda. It seems unlikely, then, that AG supervision will in practice be any different than DAG supervision.

Other internal DOJ reforms might be more promising, particularly if they could give the agencies responsible for corrections, clemency, and forensics greater operational independence and make their decisions less transparent to DOJ leadership. The key, here, however is that complete operational independence makes the placement of these agencies within

Legal Theory Research Paper Series, Working Paper No. 12-44, 2012), available at http://ssrn.com/abstract=2125194 (discussing agencies with "practical independence" that are not "structurally independent").

DOJ meaningless. Obviously the reason they are there—and that DOJ fights to keep them there—is so they can be under some degree of control. So the question is what aspects of their operation could be more independent without undermining the reasons that DOJ wants them there in the first place.

If these agencies could shield more of their decisions from direct oversight, they would have greater independence, because DOJ would not be aware of everything they were doing. But presumably one of the main reasons DOJ wants these functions in-house is to be able to keep tabs on what is going on and to ask for reports on what these units are doing. Indeed, it is hard to make sense of a division being within a larger agency if it does not mean reporting obligations. And that monitoring means that DOJ is well positioned to block any efforts it does not like.

Other forms of operational independence might be less threatening to what it means for a unit to be a part of DOJ. One possibility is to create funding independence. That is, perhaps these agencies could be funded directly, without having to get budget allocations from DOJ. This could mean less funding overall, because these units would lose DOJ's powerful political muscle for appropriations.[303] And control over funding might be another one of those features that DOJ deems essential to what it means for a division or office to be within the Department.[304] But if funding independence were possible, it would certainly give these divisions greater leverage to resist Department pressures.[305]

Another source of independence would be to give these units litigation authority. This would be more valuable for the BOP than the others, because it is involved in a fair amount of ligation. But this also seems to go to the heart of what it means to have a division within DOJ. The general rule is that DOJ retains litigation authority over all executive agen-

[303] The Department of Justice is one of the largest federal agencies, and saw its budget increase to $28.2 billion in 2012, a two percent increase over 2010. White House Office of Mgmt. and Budget, http://www.whitehouse.gov/omb/factsheet_department_justice (last visited Aug. 20, 2012).

[304] Although each Division of the Department of Justice submits its own Congressional Budget Justification report, the Department submits a single budget and is in control of that budget. See U.S. Dep't of Justice Overview, http://www.justice.gov/jmd/2012 summary/pdf/fy12-bud-summary-request-performance.pdf (last visited Nov. 11, 2012); The Budget for Fiscal Year 2013, Dep't of Justice, http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/jus.pdf (last visited Nov. 11, 2012).

[305] Barkow, Insulating Agencies, supra note 204, at 42–45 (discussing the importance of funding as a hallmark of independence).

cies, even those outside of DOJ,[306] so presumably it would fight particularly hard to keep its own divisions under its control.

Perhaps one of the least threatening and most effective options would be to allow these divisions to communicate directly with Congress and the media without seeking DOJ clearance. Having this line of communication would mean these divisions would be better able to get political support for their missions.[307] For example, DOJ may perceive a conflict with law enforcement goals where it does not exist or it is at least arguable which side is correct. The disagreement may be over short-term and long-term results, as discussed above. Consider an example involving forensic science reforms. DOJ may worry that forensic reforms may cast doubt on past convictions or make it harder to obtain them in the future. Thus, DOJ would want to retain control over how this information is used. A forensic agency within the Department can only make its case to the AG and his or her delegates, and if it loses there, that is the end of the matter. But if that forensic agency could communicate directly with the public and Congress, it would be better positioned to develop support for its view that, in the long run, better science means more accurate results, which will increase the legitimacy of the system in the eyes of judges and the public—thus helping to obtain convictions. Right now, this discussion is internal to DOJ. An agency with greater freedom to make these claims without DOJ as a filter could potentially get the kind of political support that is necessary to force DOJ to make changes, because it would have a chance to air these views and see how the public responds. The Department's response to the *ProPublica* and *Washington Post* reporting on its prior failure to respond to forensic errors is enlightening in that regard. All the negative publicity prompted DOJ to take a second look at how it was handling those cases.

[306] Datla & Revesz, supra note 302, at 30, 31 tbl.5 (noting that "most agencies do not possess partial or full litigation authority" but instead have to go through DOJ).

[307] Barkow, Administering Crime, supra note 4, at 804–12 (describing the importance of data generation to the success of sentencing commissions); Barkow, Insulating Agencies, supra note 204, at 59–60 ("One of the most powerful weapons policy makers can give agencies is the ability to generate and disseminate information that is politically powerful."); Barofsky, supra note 219, at 65 ("The only way to make things happen in Washington . . . was to ensure that Congress and the public were aware of the problems you saw, so that they could pressure the agency to resolve them. One of the best ways to do that . . . was through the press.").

2. Moving These Functions to an Existing Agency Other than the Department of Justice

A second possible institutional fix would be to move these functions out of DOJ entirely and place them within a different executive agency or department. For example, some have called for the pardon authority to be switched to the White House Counsel's Office.[308] Or, even more radically, corrections could be placed within the judicial branch insofar as it is so closely tied to sentencing.[309]

An institutional shift such as this would add a layer of protection from prosecutorial pressure by allowing a bypass of Department oversight. In this arrangement, the AG would not have direct authority over decision making, either in the form of control over budget requests, the screening of congressional testimony, or direct supervision and approval of individual applications for pardons or compassionate release requests. It would also be less controversial to give an agency outside of DOJ independent litigation authority.

Release from direct DOJ oversight would be no small matter. The main advantage would be to make it much costlier for DOJ to monitor these fields.[310] Less monitoring therefore means that more decisions could escape DOJ notice altogether, except the ones that generate publicity. As a result, more policies would be able to go through without a law enforcement objection.

A major limit to this institutional model is that the agency would still be competing with some other agency mission. If pardons are placed within the White House Counsel's Office, for example, they will vie for resources against the Counsel's Office's many other functions. The Office handles everything from judicial appointments to the proper use of military force, tackling such tough issues as the closing of the Guan-

[308] See, e.g., Alschuler, supra note 95, at 1167–68 ("The Pardon Attorney should be someone whose name the President knows. He should in fact be a presidential appointee, someone the President trusts to help formulate and then implement a consistent clemency policy. . . . His office should be part of the Executive Office of the President, and he should report to the White House Counsel."); see also Evan P. Schultz, Does the Fox Control Pardons in the Henhouse?, 13 Fed. Sent'g Rep. 178 (2000–2001) ("The real solution is removal of the process from Justice. Let the president appoint people inside the White House to help him.").

[309] Thanks to Steve Schulhofer for this provocative and interesting suggestion.

[310] Cf. Kagan, supra note 8, at 2273 ("[N]o President can hope (even with the assistance of close aids) to monitor the agencies so closely as to substitute all his preferences for those of the bureaucracy.").

tanamo Bay detention facilities and the use of drone strikes.[311] It is hard to imagine pardons winning the battle against those tasks.

Another shortcoming to this approach is that there may not be another institutional home that makes sense for these functions. The reason these tasks were put in DOJ in the first instance is that they were related to law enforcement. Other possible venues may be a poor fit. And the poorer the fit, the weaker the rationale for putting the agency there, because there are few if any efficiency gains to be had.

3. Creating Single-Mission Agencies

The most ambitious model would be to create a separate, single-mission agency for each of the tasks[312]—one for corrections, one for clemency, and one for forensics.[313]

---

[311] The White House, Presidential Department Descriptions, Office of White House Counsel, http://www.whitehouse.gov/about/internships/departments (last visited Aug. 6, 2012); see also Jo Becker & Scott Shane, Secret 'Kill List' Proves a Test of Obama's Principles and Will, N.Y. Times, May 29, 2012, at A1 (indicating the role of the White House Counsel's Office in advising the President on matters of counterterrorism kill orders and rendition policies); Anne E. Kornblut & Dafna Linzer, White House Regroups on Guantanamo, Wash. Post, Sept. 25, 2009, at A1 (discussing the role of the White House Counsel's Office as serving in the initial leadership role in the effort to close Guantanamo); Charlie Savage, Obama Lagging on Filling Seats in the Judiciary, N.Y. Times, Aug. 18, 2012, at A1; Charlie Savage & Mark Landler, White House Defends Continuing U.S. Role in Libya Operation, N.Y. Times, June 16, 2011, at A16 (reporting the conclusion by the White House Counsel's Office that the continued White House-directed military actions in Libya were lawful).

[312] This Article focuses on single- versus multi-mission agency design instead of the traditional marker of independence for federal agencies—preventing the President from removing officials who run these agencies except for good cause—because that fact is unlikely to matter much here. The relevant question for purposes of this Article is whether for-cause removal protection would affect whether the President can direct an agency to take a particular action. But as recent articles have made clear, removal authority is likely to matter less than the President's appointment power and conventions on how the agency operates. See Barkow, Insulating Agencies, supra note 204, at 42–64 (discussing importance of various factors besides removal in insulating agencies from capture); Adrian Vermeule, supra note 302, at 30–34 (discussing the relationship between conventions that protect agency independence and the President's power to direct the exercise of delegated statutory discretion to the agency).

[313] This is a model that is seen in many states. In corrections, for instance, this is the dominant approach, with corrections departments reporting directly to the governor in forty states: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Washington, Wisconsin, and Wyoming. In nine states, the corrections department reports to a larger executive agency that often includes the parole

The main advantage to this approach is that it creates only one goal for the agency, thus allowing it to lobby for that goal and to generate data that supports the agency's mission.[314] Presumably, the agency would be funded to pursue this goal and could more readily communicate its agenda and arguments to the public or to Congress.[315]

A single-mission agency could mean less funding, given DOJ's strength in getting appropriations, which is a function of its responsibility for law enforcement. But the ability to communicate more directly without DOJ preclearance would allow the agency more freedom to pursue what it believes is the wisest path in the area in which it governs. An independent agency that is studying forensic science, for instance, could use science and peer-reviewed information to make the strongest case for its reforms. It would have the power of information and it would not have to go through a Department filter. Similarly, a pardon office that is not directly within the Department could consider cases without an eye toward what the DAG, who is responsible for the prosecutors within that very same agency, will think. Instead, a more independent pardon board, with enough varying interests represented and expertise on risk factors and criminal justice policy, might produce some political cover for the President who takes its recommendations. That is far harder when the recommendations come from the Department. Although an independent

and police departments. (The corrections department is part of an agency that includes the police in Hawaii, Kentucky, Louisiana, Massachusetts, Virginia, and West Virginia. Maryland, Texas, and Vermont do not place the police in the same agency.) Only Nevada has a model that somewhat resembles the federal one, with the corrections department reporting to a board that includes the attorney general (along with the governor and secretary of state). Nev. Const. art. 5, § 21. Many states also use independent boards for clemency. Margaret Colgate Love, Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide (Executive Summary) 5–6, 8 (2005), available at http://www.sentencingproject.org/doc/File/Collateral%20Consequences/execsumm.pdf [hereinafter Love, Relief] (forthcoming in Margaret Love, Collateral Consequences of Criminal Convictions: Law, Policy and Practice (2012–13)). It is rarer to have independent forensic agencies, as the overwhelming majority of states currently house forensics within their police departments or other law enforcement agencies. Strengthening Forensic Science, supra note 168, at 183. But there are some states that are starting to shift to a more independent model. See infra text accompanying notes 313–322.

[314] Datla & Revesz, supra note 302, at 10 ("Newly created agencies could escape the inertia and capture of existing cabinet departments and could focus on a narrow subject area without giving consideration to competing programmatic interests.").

[315] Currently, all agencies must submit any "proposed legislative program" or "proposed legislation or report or testimony" to the Office of Management and Budget for clearance. But this more general review is less likely to block proposals than the specific oversight of the Department, with its greater focus on prosecution interests.

Bureau of Prisons may look much like the Bureau does now, it too would have greater freedom to speak without DOJ clearance, thus allowing it to disseminate its data and information should it seek broader corrections initiatives. Thus, whatever the benefits of a particular corrections, clemency, or forensic reform, they would get a full airing.

An additional virtue of this institutional change is that the structure of a single-mission agency can be tailored to what would best serve this single interest as opposed to worrying about competing interests. A detailed analysis of what those tailor-made provisions should look like is beyond the scope of this Article, but a few examples can demonstrate how this approach could be advantageous.

Clemency provides one illustration. Many states use boards to make clemency decisions, and among the states in which pardons are regularly given to ordinary citizens, using some kind of independent board seems to be critical. A 2005 study of pardons in the states found nine states where pardoning is done with some regularity, and among those nine, four place the pardon power in an independent board, four require the governor and a board to agree, and one gives the pardon decision to a board of officials that includes the governor among its members.[316] "Thus, in each of these states, an agency possesses significant, if not exclusive, power to make the pardoning decision, thereby taking some or all of the political heat off the governor."[317]

To be sure, this design is hardly a magic bullet for improving clemency. In many states that use independent clemency boards, pardons remain rare.[318] Thus, while this model can be an improvement, it is far from a panacea. But it does seem to be the kind of change in institutional design that holds promise for making a difference, particularly if the agency is set up to be sensitive to the politics of clemency decisions.[319] In the context of clemency, a key design feature is one that gives the executive some distance from the decision-making process so that decisions can be made without fear that one bad case will undercut the entire process.

Forensics offers another illustration. A number of states have also started to experiment with more independent forensic agencies, in many cases after flaws were revealed with the model that had these agencies

[316] Love, Relief, supra note 313, at 8.
[317] Barkow, The Politics of Forgiveness, supra note 250, at 154.
[318] Id. at 155 ("[M]any of the states with low grants of clemency have such a board.").
[319] For a close analysis of those politics, see id. at 153–59.

too closely tied to law enforcement.[320] Arkansas, for instance, has a crime laboratory that operates as a separate agency in the executive branch. It has been independent from the state police force since 1981, and since 1997 it has been housed in a physical facility outside the police department to give it greater independence.[321]

Other states have opted for hybrid models, with labs still closely tied to law enforcement, but with research arms that are more independent. For example, New York's state forensic laboratories are part of the Division of State Police. But New York also has a separate Office of Forensic Services ("OFS"), which operates independently of the state police.[322] Maryland, too, operates under this kind of dual setup. While the state labs are tied to the police, the Secretary of the Department of Health and Mental Hygiene has, since 2007, possessed regulatory oversight of the forensic labs, including licensing and inspection authority.[323] A separate Forensic Laboratory Advisory Committee[324] advises the Secretary on proficiency and certification standards.

These state clemency and forensic agencies thus illustrate that single-mission bodies can be designed to reflect the interests at stake. This can be fostered by having a variety of interests form a part of the decision-making process so that all the stakeholders are involved in devising the right solution.[325] Single-mission bodies can also be physically separated, so they are less likely to face social pressures from individuals with competing interests. Moreover, "an agency with a well-defined mission

[320] Norris et al., supra note 292, at 1325–29.

[321] Arkansas State Laboratory: About Us, Arkansas.gov, http://www.crimelab.arkansas.gov/aboutUs/Pages/default.aspx (last visited July 10, 2012).

[322] OFS works out of the Division of Criminal Justice Services, an independent state agency that collects and analyzes crime and fingerprint data, administers research and training programs, and operates the sex offender registry. Within OFS is an independent Commission on Forensic Science, a fourteen-member board including the Commissioner of Criminal Justice Services, the Commissioner of the Department of Health, and twelve additional members appointed by the governor representing a range of interests within the criminal justice system. N.Y. Exec. Law § 995-a.1–2. (McKinney 1996). The Commission on Forensic Science determines the accreditation standards and best practices for the state's laboratories.

[323] Md. Code Ann., Health-Gen. §§ 17-2A-02(a)(1), 17-2A-04, 17-2A-09 (LexisNexis 2009).

[324] Id. § 17-2A-12(a).

[325] For an analogous evaluation of how composition requirements have affected the success of sentencing commissions, see Barkow, Administering Crime, supra note 4, at 800–04.

will tend to attract bureaucrats whose goals are sympathetic to that mission."[326]

There are limits to this approach, of course. The chief one is that the single-mission agency will still be under the supervision of the President. Presidents do not win elections by focusing on corrections, clemency, or forensic science reform. But they do gain political points for being tough on wrongdoing. And, perhaps equally important, Presidents can lose elections if it looks like they were soft on crime in a manner that allowed an atrocity to take place. No President wants to be the target of a Willie Horton-type ad because he or she gave a pardon to someone who goes on to commit a brutal crime or if a killer's freedom can be traced to a corrections reform relating to where offenders are placed.

If the Department is telling the White House that the reforms proposed by another agency are a bad idea—and one would fully expect that to be the case, given that the Department currently opposes such reforms—then it is hard to imagine the White House being disinterested. The Department's goals are likely to trump the other interests for the same reasons those law enforcement goals win out within the Department.

The biggest difference with this kind of set-up is that the Department is less likely to resist on the same number of issues. As a threshold matter, the Department will not know about the same number of issues because monitoring will be more difficult and costly. Even when the Department does find out about reforms it does not like, the President's time and energy is limited, and the Department is not going to want to go to the President's inner circle every time it disagrees with another agency. As a result, some initiatives that would normally be stopped within the Department may evade its veto.

Moreover, the fact that prosecutors remain a critical part of the process in some number of the decisions in these categories is not a bad thing. Prosecutors *should* have input into the decision-making process. They have important information to add about law enforcement objectives and corrections, and how a corrections environment may or may not affect deterrence. Similarly, prosecutors who work on a particular case are key sources of information when a defendant seeks clemency, and they should always be consulted for their view of the facts and the

[326] David B. Spence, Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control, 14 Yale J. on Reg. 407, 424 (1997).

law.[327] And no forensic science program should ignore how forensics data is actually used by police and prosecutors.

The key is to make prosecutors valuable inputs into the ultimate decision—not to make them the final decision maker. The specifics of the institutional design requires careful study of each area, but the overarching point should be to consider ways to minimize the conflict of interest with a powerful prosecutorial mission and the cognitive biases associated with it, while still tapping into the expertise that prosecutors may bring to these issues.

CONCLUSION

Proponents of a unitary executive model and the consolidation of power in one place often overlook the fact that placing multiple responsibilities with one actor comes at a cost. In particular, not all responsibilities will be treated equally, and when functions conflict with each other, some will dominate because of the politics at play. This has been the case with the Department of Justice's hegemony over varied criminal justice areas. They have not all been treated equally. The law enforcement objectives of prosecutors have trumped other concerns. As a result, decisions about corrections, clemency, and forensics have not been objectively evaluated but have instead been colored by prosecutorial objectives.

The aim of this Article has been to document this regime of prosecutorial administration and explain why prosecution interests have dominated and will continue to dominate unless attention is paid to the institutional design of where authority for these responsibilities should rest. In the search for alternatives, the key is to place the valuable law enforcement perspective of prosecutors in its proper role—as one perspective. Other perspectives are also important. Empirical studies about corrections and risk matter. When clemency is sought, specific information about the facts of a case and the individuals involved matter, as does their behavior since their convictions. The science of forensics matters. But these other sources of information risk being ignored or downplayed

[327] U.S. Dep't of Justice, U.S. Attorneys' Manual § 1-2.111 (1997), available at http://www.usdoj.gov/pardon/petitions.htm ("The United States Attorney can contribute significantly to the clemency process by providing factual information and perspectives about the offense of conviction that may not be reflected in the presentence or background investigation reports or other sources.").

if everything is viewed through prosecutors' unique perspective on law enforcement. The risk of prosecutorial administration is that even the most well-meaning law enforcement officials—and this Article assumes that the officials in the Department are well-meaning and operate in good faith—can suffer from cognitive biases. Ultimately, we need sound criminal justice administration and that will come from many sources, not just those charged with prosecuting cases.