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CONTENTS

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Donald Trump's Clemencies: Unconventional Acts, Conventional Justifications

Austin Sarat, Laura Gottesfeld, Carolina Kettles, Olivia Ward

ABSTRACT

During his four years as President Donald Trump's use of the clemency power generated considerable controversy. Much scholarship documents the fact that he ignored the traditional procedures for reviewing and approving requests for pardons and commutations. Trump used clemency to favor a rogues gallery of cronies, celebrities and those whose crimes showed particular contempt for the law. However, few scholars have examined the justifications he offered when he granted pardons and commutations. This paper fills that gap. We argue that because the clemency power sits uneasily with democracy and the rule of law, when Presidents use this power they feel the need to supply justifications. We report on a study of Trump's clemency justifications that suggests that while his clemencies themselves were often controversial and his means of communicating about them unconventional, the reasons he gave for them were generally quite conventional and continuous with the justifications offered by his predecessors for their pardons and commutations.

KEYWORDS

clemency, rhetoric, retribution, rehabilitation

CONTENTS

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"The power to pardon is a beautiful thing."
Former President Donald Trump[1]

I. Introduction

An official White House statement released on November 25, 2020, followed up on a tweet from President Donald Trump announcing that he was pardoning Michael Flynn.[2] That statement offered an elaborate explanation and justification for that grant of clemency. Flynn served briefly as Trump's first national security advisor and had also been "head of the Defense Intelligence Agency," "a decorated lieutenant general," and an "early supporter of Mr. Trump's campaign" for President.[3] He pled guilty in 2017 to charges brought by special counsel Robert Mueller of lying to the F.B.I when they questioned him about his contacts with a Russian diplomat.[4] He later attempted to withdraw his plea, accused the government of trying to frame him, and asserted his innocence.[5]

The Flynn pardon ignited a firestorm of criticism.[6] For example, Congressman

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1 Don Gonyea, *Trump Sees Pardon as Power, Perk — Considers One for Muhammad Ali*, NPR, June 8, 2018, https://www.npr.org/2018/06/08/618224554/trump-sees-pardon-as-power-perk-considers-one-for-muhammad-ali.

2 White House Press Release, Statement from the Press Secretary Regarding Executive Grant of Clemency for General Michael T. Flynn (Nov. 25, 2020), *at* https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-executive-grant-clemency-general-michael-t-flynn/ [hereinafter Flynn Pardon].

3 Charlie Savage, *Trump Pardons Michael Flynn, Ending Case His Justice Dept. Sought to Shut Down*, N.Y.Times, Nov. 25, 2020.

4 Ryan Lucas, *Trump Pardons Michael Flynn, Who Pleaded Guilty to Lying About Russia Contact*, NPR, Nov. 25, 2020, https://www.npr.org/2020/11/25/823893821/trump-pardons-michael-flynn-who-pleaded-guilty-to-lying-about-russia-contact, https://www.nytimes.com/2020/11/25/us/politics/michael-flynn-pardon.html.

5 *Michael Flynn: Trump Pardons Ex-National Security Advisor*, BBC, Nov. 26, 2020, https://www.bbc.com/news/world-us-canada-55080923.

6 Savage, *supra* note 3; Eric Tucker, *Trump Pardons Flynn Despite Guilty Plea in Russia Probe*, AP News, Nov. 26, 2020, https://apnews.com/article/donald-trump-pardon-michael-flynn-russia-aeef585b08ba6f2c763c8c37bfd678ed; Benjamin Wittes, *Why the Flynn Pardon Matters*, Lawfare, Dec. 18, 2020, https://www.lawfareblog.com/why-flynn-pardon-matters; Rachel VanLandingham & Geoffrey Corn, *Trump's Blackwater Pardons Erase the Line Between Slaughter and Justified Wartime Violence*, USA Today, Dec. 23, 2020, https://www.usatoday.com/story/opinion/2020/12/23/trump-pardons-american-war-criminals-undermines-rule-law-column/4026014001/; Laurel Wamsley, *Shock and Dismay After Trump Pardons Blackwater Guards Who Killed 14 Iraqi Civilians*, NPR, Dec. 23, 2020, https://www.npr.org/2020/12/23/949679837/shock-and-dismay-after-trump-pardons-blackwater-guards-who-killed-14-iraqi-civil; Jude Joffe-Block & Terry Greene Sterling, *Joe Arpaio: Inside the Fallout of Trump's Pardon*, Guardian, Apr. 8, 2021, https://www.theguardian.com/us-news/2021/apr/08/joe-arpaio-sheriff-arizona-donald-trump; Amita Kelly, *President Trump Pardons Former Sheriff Joe Arpaio*, NPR, Aug. 25, 2017, https://www.npr.org/2017/08/25/545282459/president-trump-pardons-former-sheriff-joe-arpaio; Terry Greene Sterling & Jude Joffe-Block, *Joe Arpaio Pardoned By Donald Trump: The Inside Story of How It Really Happened*, Slate, Apr. 26, 2021, https://slate.com/news-and-politics/2021/04/joe-arpaio-donald-trump-pardon-history.html; Jim Sergent & George Petras, *Trump's*

Adam Schiff, labelled it an abuse of power and a corrupt reward for Flynn's loyalty to the President. Schiff tweeted, "Donald Trump has repeatedly abused the pardon power to reward friends and protect those who covered up for him. This time he pardons Michael Flynn, who lied to hide his dealings with the Russians. It's no surprise that Trump would go out as he came in—Crooked to the end."[7]

The White House statement justified the Flynn pardon by claiming that he "should never have been prosecuted" and went on to say that "the relentless, partisan pursuit of an innocent man" must end.[8] Trump associated Flynn's criminal charges with efforts by his own political opponents to challenge the results of the 2016 election, and he argued that this act of clemency would set "right an injustice."[9] He called Flynn an "American hero" and, invoking the tradition of symbolic presidential pardons commemorating the Thanksgiving holiday,[10] wished a Happy Thanksgiving to Flynn and his family.[11]

The Flynn pardon was just one of President Trump's 238 acts of clemency during his four years in office.[12] These commutations and pardons included four others granted to people involved in the Mueller investigation, including his "longtime friend Roger J. Stone Jr,"[13] George Papadopoulos, Paul Manafort, and Alex van der Zwaan.[14] Benjamin Wittes, editor in chief of the Lawfare blog and a Senior Fellow in Governance Studies at the Brookings Institution, argues that these pardons offer a revealing glance into Trump's use of the pardon power to "give out goodies to friends, and anger enemies."[15] But the controversies surrounding Trump's clemencies do not end there.

Final Pardons Included Controversial Allies, but not Himself or His Family, USA Today, Dec. 30, 2020, https://www.usatoday.com/in-depth/news/2020/12/30/trump-pardons-controversial-patterns/4038315001/; Jonathan Lemire, et al, *Trump Pardons Ex-Strategist Steve Bannon, Dozens of Others*, AP News, Jan. 20, 2021, https://apnews.com/article/steve-bannon-trump-pardons-broidy-66c82f25134735e742b2501c118723bb; *Here are Some of the People Trump Pardoned,* N.Y Times, Jan. 26, 2021, https://www.nytimes.com/article/who-did-trump-pardon.html.

7 Adam Schiff (@RepAdamSchiff), Twitter (Nov. 25, 2020, 4:25 PM), https://twitter.com/repadamschiff/status/1331710650490478593?lang=en.

8 Flynn Pardon, *supra* note 2.

9 *Id*.

10 Betty Monkman, *Pardoning the Thanksgiving Turkey*, The White House Hist. Ass'n., https://www.whitehousehistory.org/pardoning-the-thanksgiving-turkey; Fiskesjö, Magnus, The Thanksgiving Turkey Pardon, the Death of Teddy's Bear, and the Sovereign Exception of Guantanamo (Prickly Paradigm Press, 2003)*;See* also Daniel T. Kobil, *Should Mercy Have a Place in Clemency Decisions?*, in Forgiveness, Mercy and Clemency 60 (Austin Sarat & Nasser Hussain eds., Stanford University Press, 2007); Presidents occasionally exercise clemency power during holidays, often using the occasion to invoke mercy. For example, on Christmas Eve of 1945, President Truman issued a proclamation that restored the rights of ex-convicts who had served in the military for at least a year and had been honorably discharged. President Warren G. Harding in 1921 was said to have commuted the sentence of Eugene V. Harding, a public critic of the US involvement in World War I, so that he could spend Christmas with his wife.

11 Flynn Pardon, *supra* note 2.

12 *Clemency Statistics*, U.S. Dep't of Just., https://www.justice.gov/pardon/clemency-statistics, (last visited Sept. 26, 2021).

13 Savage, *supra* note 3.

14 Sergent & Petras, *supra* note 6.

15 Wittes, *supra* note 6.

The former President caused a stir when he pardoned four Blackwater contractors convicted of killing 14 Iraqi civilians in 2007,[16] avid Trump supporter and "immigration hard-liner" Sheriff Joe Arpaio,[17] and his "former top strategist Stephen Bannon."[18] In each case, Trump used multiple means to explain, justify and rally support for his exercises of clemency. These included tweets, informal remarks to reporters, speeches, and White House press statements.

In what follows we examine what Trump said when he exercised his clemency power and how he used various platforms to justify his use of that extraordinary presidential prerogative. We note that while his use of it was often controversial and unconventional, and while some of the mediums through which he communicated about clemency were novel, his public justifications were quite conventional. They drew on a set of well recognized grounds to explain the clemency power's uses.

In Part II, we examine the existing scholarship on former President Trump's use of the pardon power with a particular focus on controversy and unconventionality. Part III explores rhetorical justifications for clemency identified by other scholars, and Part IV analyzes a shift from rehabilitative to retributive rhetoric that occurred alongside a shift in penal philosophy at the end of the twentieth century. Part V presents our findings about Trump's clemency justifications. Part VI offers a conclusion.

II. Trump's Controversial Use of the Clemency Power

We are not the first to explore Trump's use of the pardon power, although we are among the first to focus specifically on his justificatory strategies. Others have focused on Trump's circumvention of the standard procedures for granting clemency, the influence of personal connections on his decision making, Trump's exploration of the possibility of a self-pardon, and the impact of his specific acts of clemency.

A number of scholars have highlighted former President Trump's disregard of the federal government's well-established clemency processes.[19] Before Trump,

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16 VanLandingham & Corn, *supra* note 6 ; Wamsley, *supra* note 6.

17 Greene Sterling & Jude Joffe-Block, *supra* note 6; Joffe-Block & Greene Sterling, *supra* note 6; Kelly, *supra* note 6.

18 Sergent & Petras, *supra* note 6.

19 Bernadette Meyler, *Trump's Theater of Pardoning*, 72 Stan. L. Rev. 92, (Mar. 2020) [hereinafter Trump's Theater of Pardoning]; Bernadette Meyler, *Transforming the Theater of Pardoning*, 33 Fed. Sent. R. 293, 293-96 (2021) [hereinafter Transforming the Theatre of Pardoning].; Jeffrey Crouch, *President Donald J. Trump and the Clemency Power: Is Claiming 'Unfair' Treatment for Pardon Recipients the New 'Fake News'?* in Presidential Leadership in the Trump Clemency 99-120 (Charles Lamb & Jacob Neiheisel eds., London: Palgrave Macmillan, 2020.); Budd Shenkin & David Levine, *Should the Power of Presidential Pardon Be Revised*, 47 Hasting Const. L. Q. 3, 3-18 (2019); Matthew Gluck & Jack Goldsmith, *Donald Trump and the Clemency Process*, 33 Fed. Sent. R. 297, 297-300 (2021); Kenneth Vogel & Nicholas Confessore, *Access, Influence and Pardons: How a Set of Allies Shaped Trump's Choices*, N.Y. Times, Mar. 21, 2021, https://www.nytimes.com/2021/03/21/us/politics/trump-pardons.html; Michael Schmidt & Kenneth Vogel, *Prospect of Pardons in Final Days Fuels Market to Buy Access to Trump*, N.Y. Times, Jan. 17, 2021, https://www.nytimes.com/2021/01/17/

clemency applications first were funneled through the Office of the Pardon Attorney in the Department of Justice.[20] Matt Gluck and Jack Goldsmith concluded, after analyzing the Office of the Pardon Attorney's (OPA) database,[21] that "most likely, only twenty-five of the 238 [clemency grants] were recommended by the Pardon Attorney."[22] They claim that although other Presidents had on rare occasions ignored the Pardon Attorney process, Trump "turned the exceptional circumvention of the pardon attorney process into the rule."[23]

While he ignored the pardon attorney, Kenneth Vogel reported that 27 out of the 238 total pardons and commutations were endorsed by the Aleph Institute: "a loose collection of lawyers, lobbyists, activists, and Orthodox Jewish leaders who had worked with Trump administration officials on criminal justice legislation championed by Jared Kushner."[24] Vogel says that the Institute tended to support

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us/politics/trump-pardons.html; Margaret Colgate Love, *After Trump: Restoring Legitimacy to the Pardon Power*, 33 Fed. Sent. R., 285, 285-92 (2021); Tyler Brown, *The Court Can't Even Handle Me Right Now: The Arpaio Pardon and Its Effect on the Scope of Presidential Pardons,* 46 Pepp. L. Rev. 331, 331-36 (2019); *Trump Grants Clemency to Former Blackwater Contractors Convicted of War Crimes in Iraq and Associates Prosecuted Following the Mueller Investigation*, 115 Am. J. of Int'l L., 329, 329-34 (2021) [hereinafter *Trump Grants Clemency to Former Blackwater*]; Julia Jefferson-Bullock*, I, Too, Sing America: Presidential Pardon Power and the Perception of Good Character*, 57 Duq. L. Rev. 309, 309-24 (2019); Mark Osler, *Clemency as the Soul of the Constitution*, 34 J.L. & Pol. 131, 131-64 (2019).

20 *Office of the Pardon Attorney*, United States Dep't of Just., https://www.justice.gov/pardon (last visited Oct. 25, 2021). The Pardon Attorney, under the direction of the Deputy Attorney General, receives and reviews all petitions for Executive Clemency (which includes pardon after completion of sentence, commutation of sentence, remission of fine or restitution and reprieve), initiates and directs the necessary investigations, and prepares a report and recommendation for submission to the President in every case. In addition, the Office of the Pardon Attorney acts as a liaison with the public during the pendency of a clemency petition, responding to correspondence and answering inquiries about clemency cases and issues.

21 Jack Goldsmith & Matthew Gluck, *Trump's Aberrant Pardons and Commutations*, Lawfare, Jul. 11, 2020, https://www.lawfareblog.com/trumps-aberrant-pardons-and-commutations. In their spreadsheet titled "Trump's Aberrant Pardons and Commutations Chart" (https://docs.google.com/spreadsheets/d/1lPyYaALDOzDWsyfaOjkWk0LkXoGe_ayf9FV4oHgLAhQ/edit#gid=1909960010), Goldsmith and Gluck attempt to determine whether the Office of the Pardon Attorney (OPA) recommended a pardon to Trump. They grouped Trump's clemencies into four categories: "yes," "probably," "probably not," and "no." While categorizing Trump's clemencies, Goldsmith and Gluck examined news articles as well as the OPA's databases. Goldsmith and Gluck used these databases to help determine whether a clemency petition was ever submitted to the OPA. If it was not, then the clemency was placed in the "no" category. If a petition was submitted, then Goldsmith and Gluck looked through news articles, determined whether the petition was marked as declined in the OPA's databases, examined the different criteria the OPA would normally use when deciding to recommend a petition, and estimated whether the OPA had enough time to process the petition. If Goldsmith and Gluck had doubts as to whether a petition had gone through the OPA, then the clemencies would be placed in either "probably" or "probably not."

22 Gluck & Goldsmith, *supra* note 21, at 298.

23 *Id*.

24 Vogel & Confessore, *supra* note 19.

"wealthy or well-connected fraudsters,"[25] which added to disparities during the Trump Administration between those deserving clemency and those who actually received it.[26]

Others argue that Trump ignored the Department of Justice's recommendations and screenings[27] in order to select recipients of pardons or commutations "because of their celebrity, his personal connection with him, political ties, or the nature of the law under which they were convicted."[28] *New York Times* reporters Michael Schmidt and Kenneth Vogel claim that the recommendations that the President received largely came from an "ad hoc system" of outside advisors.[29] Political scientist Jeffrey Crouch agreed and concluded that Trump's decision to bypass the Pardon Attorney signals the need for serious, structural reform of the clemency process.[30]

But former President Trump's preferred clemency process had other distinctive and unusual features. Some claim that it lacked "any effort to make the process appear fair"[31] and was carried out with "no hint of restraint."[32] Several scholars point out the numerous political, high-profile, and unpopular grants of clemency that Trump issued during his presidency.[33] Law professor Mark Osler argues that Trump, early on in his term, made it clear that he would actively and personally participate in the clemency process and that he continued to do so until he left office.[34] Osler adds that "Modern presidents have sullied clemency through disuse (both Bushes) and occasional self-serving grants (Clinton). However, no president has ever used clemency *primarily* to reward friends and political allies—until Trump."[35]

Bernadette Meyler and Margaret Love see in Trump's use of the clemency power an alarming disregard of the law.[36] Love says that Trump was eager to use pardons and commutations to "disrupt ongoing prosecutions or sharply curtail punishment in cases of political corruption or massive fraud against the government."[37] Meyler argues that Trump's populist messaging promotes a vision of "leadership unconstrained by the rule of law," and his tendency to pardon political associates showed that he cared less about the overall wellbeing of the country than about demonstrating his ability to flout or ignore the law.[38]

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25 *Id*.
26 Schmidt &Vogel, *supra* note 19.
27 Trump's Theater of Pardoning, *supra* note 19; Transforming the Theater of Pardoning, *supra* note 19, at 293; Crouch, *supra* note 19 ; Shenkin & Levine, *supra* note 19; Gluck & Goldsmith, *supra* note 19, at 297.
28 Trump's Theater of Pardoning, *supra* note 19.
29 Vogel & Confessore, *supra* note 19, Schmidt & Vogel, *supra* note 19.
30 Crouch, *supra* note 19.
31 Love, *supra* note 19, at 286.
32 Jefferson-Bullock, *supra* note 19, at 310.
33 Love, *supra* note 19, at 285-286; Shenkin & Levine, *supra* note 19, at 11; Brown, *supra* note 19, at 354; Osler, *supra* note 19, at 146.
34 Osler, *supra* note 19, at 147.
35 Matthew Schwartz, *Roger Stone Clemency Latest Example of Trump Rewarding His Friends, Scholars Say,* NPR, July 12, 2020, https://www.npr.org/2020/07/12/890075577/roger-stone-clemency-latest-example-of-trump-rewarding-his-friends-scholars-say.
36 Trump's Theater of Pardoning, *supra* note 19.; Transforming the Theater of Pardoning, *supra* note 19, at 294-95; Love, *supra* note 19, at 285-289.
37 Love, *supra* note 19, at 286.
38 Transforming the Theater of Pardoning, *supra* note 19, at 294-95.

The pardon of "ex-sheriff Joe Arpaio…in August 2017"[39] occurred early in Trump's term, relative to the time recent presidents had first used their clemency power. Meyler and Crouch note that Arpaio was an outspoken supporter of Trump, advocated for harsh immigration policies, and did not even request clemency.[40] Others draw attention to Arpaio's charge—criminal contempt—and suggest that his pardon was an affront to the judiciary and offended the separation of powers.[41] Meyler and Love both label such uses of the pardon power as "theatrical."[42]

Scholars also suggest that many of former President Trump's clemency decisions, including who he pardoned, whose recommendations he sought, and the medium he used to communicate the pardon, were really about him and his sense of being underappreciated or embattled by hostile political forces.[43] Trump's self-centered clemency comes through in his insistence on pardoning those involved in the Mueller investigation, his indifference to pardon attorney recommendations, and sidelining the bureaucracy by putting himself at the hub of a network of supplicants who sought his favor. This self-centeredness was also seen in his use of Twitter as a personal and unfiltered platform on which he could communicate about his innocence and that of his associates.[44] Trump used clemency as a tool to promote his own image and protect his administration.[45]

Colton Brown connects this pattern to Trump's impeachment process. He claims that several pardons and commutations granted after the President's first acquittal were undeniably well-connected to the President and demonstrated "President Trump's 'growing sense of political invulnerability.'"[46] Stylistically, Meyler notes that Trump placed "his name in enormous bold letters," larger than the font of the recipient's name, at the beginning of pardon announcements.[47]

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39 Crouch, *supra* note 19.

40 Trump's Theater of Pardoning, *supra* note 19; Colton Brown, *Executive Judgments: The Insidious Implications of the Presidential Pardon and Commutation Authority*, 93 Temp. L. Rev. Online, 27, 42 (2021).

41 Paul Eckstein & Mikaela Colby*, Presidential Pardon Power: Are There Limits and, If Not, Should There Be*, 51 Ariz. St. L. J. 71, 71-108 (2019).

42 Love, *supra* note 19, at 285.

43 Trump's Theater of Pardoning, *supra* note 19; Transforming the Theater of Pardoning, *supra* note 19, at 293-94; Brown, *supra* note 40, at 27-60; Crouch, *supra* note 19; Love, *supra* note 19, at 286; Shenkin & Levine, *supra* note 19, at 5; Scott Johnson, *President Donald J. Trump and the Potential Abuse of the Pardon Power*, 9 Faulkner L. Rev. 289, 289-328 (2018); Paul Larkin, Jr., *The Legality of Presidential Self-Pardons*, 44 Harv. J.L. & Pub. Pol'y 763, 763-826 (2021); Gluck & Goldsmith, *supra* note 19, at 299; Goldsmith & Gluck, *supra* note 21; Jefferson-Bullock, *supra* note 19, at 315; Frank Bowman, III, *Are Blanket Pardons Constitutional*, 33 Fed. Sent. R 301, 301-06 (2021),Vogel & Confessore, *supra* note 19; Schmidt & Vogel, *supra* note 19.

44 Brown, *supra* note 40, at 46-47; Eckstein & Colby, *supra* note 41. Schumer, Congressional Record 164, no. Number 7 (01/11/2018): S143-S170.*See* generally Katie Rogers & Maggie Haberman, *Like Father Like Son, Using Twitter as a Foil to Skewer Political Foes*, N.Y. Times, July 1, 2017, at A14.

45 Trump's Theater of Pardoning, *supra* note 19; Transforming the Theater of Pardoning, *supra* note 19, at 293; Brown, *supra* note 40, at 42-46; Shenkin & Levine, *supra* note 19, at 5; Johnson, *supra* note 43, at 302; Larkin Jr., *supra* note 43, at 765; Gluck & Goldsmith, *supra* note 19.

46 Brown, *supra* note 40, at 45.

47 Trump's Theater of Pardoning, *supra* note 19; Transforming the Theater of Pardoning, *supra* note 19, at 293.

Brown argues that Trump's pardons were particularly controversial because of his "pattern of rewarding people popular with his supporters or those who had spoken glowingly of Trump."[48]

Others focus on the fact that Trump was openly partial to his political allies, granting clemency to longtime allies Roger Stone"[49] and Paul Manafort.[50] Crouch claims that the earlier pardon of Dinesh D'Souza was designed to send a message to "Michael Cohen and others that their devotion may be rewarded with a presidential pardon."[51] He adds that although some of Trump's choices may have been questionable, the former President, "to his credit," did not try "to hide his clemency decisions from the public."[52]

The controversial pardons of three United States service members - Michael Behenna, Clint Lorance, and Mathew Golsteyn - also generated substantial scholarly commentary.[53] According to NPR reporter Bill Chappell, Behenna was "convicted by a military court in 2009 for killing an Iraqi prisoner suspected of being part of al-Qaida" and was released on parole in 2014 after being originally sentenced to 25 years.[54] Lorance and Golsteyn were charged with similar crimes; Lorance was sentenced to 19 years for ordering his soldiers to shoot unarmed Afghan civilians and killing two in the process, while Golsteyn was convicted of killing a "suspected Afghan bombmaker."[55] David Maurer states that, while President Trump was not the first President to pardon a soldier, the pardon of Behenna was "the first time any president had pardoned a former or current soldier for battlefield misconduct that could have been charged as a war crime."[56]

Meyler claims that these military pardons "affirmed the use of force regardless of international human rights"[57] and proved Trump's disregard for the laws of war.[58] Maurer and Ford both pick up this theme and highlight the unique nature of war crime pardons. Ford suggests that Trump violated international criminal law by ending the punishment of a war criminal,[59] and Maurer argues that such abuse of

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48 Brown, *supra* note 40, at 43.

49 Transforming the Theater of Pardoning, *supra* note 19, at 294.

50 Larkin Jr., *supra* note 43, at 765.

51 Crouch, *supra* note 19.

52 *Id*.

53 Trump's Theater of Pardoning, *supra* note 19; Transforming the Theater of Pardoning, *supra* note 19, at 294; Brown, *supra* note 40, at 44-45; Love, *supra* note 19 at 286; *Trump Grants Clemency to Former Blackwater*, *supra* note 19; Stuart Ford, *Has President Trump Committed a War Crime By Pardoning War Criminals?,* 35 Am. U. Int'l L. Rev. 757, 757-820 (2020); David Maurer, *War Crime Pardons and Presidential (Self-) Restraint*, 33 Fed. Sent. R. 313, 313-318 (2021); *Issuing Several Pardons, President Trump Intervenes in Proceedings of U.S. Troops Charged or Convicted of Acts Amounting to War Crimes*, 114 Am. J. Int'l L. 307 (2020).

54 Bill Chappell, *Trump Pardons Michael Behenna, Former Soldier Convicted of Killing Iraqi Prisoner*, NPR, May 7, 2019, https://www.npr.org/2019/05/07/720967513/trump-pardons-former-soldier-convicted-of-killing-iraqi-prisoner.

55 *Trump Clears Three Service Members in War Crimes Cases*, L.A. Times, Nov. 15, 2019, https://www.latimes.com/politics/story/2019-11-15/trump-intervenes-in-military-justice-cases-grants-pardons.

56 Maurer, *supra* note 53, at 313.

57 Transforming the Theater of Pardoning, *supra* note 19, at 294.

58 Trump's Theater of Pardoning, *supra* note 19; Brown, *supra* note 40, at 44.

59 Ford, *supra* note 53, at 770.

power highlights the need for reform of the process for granting military pardons that should be entirely independent from the President's absolute pardon power.[60]

The question of a potential self-pardon by President Trump drew a significant amount of scholarly attention.[61] Trump asserted on Twitter in 2018 that he had "the absolute right to pardon myself"[62]—an unprecedented and constitutionally questionable assertion.[63] Meyler responded that it would be reasonable for a court to decide that the "prohibition of judging in one's own case" would "extend to pardoning" and be unconstitutional.[64] However, other scholars disagreed.[65]

When scholars venture beyond the fact of particular clemency grants, their political meaning or the controversies they generated, few have very much to say about the justificatory rhetoric on which Trump relied. However, Crouch does note Trump's frequent use of the word "unfair" in his grants of clemency, which he claims was "an intentional messaging decision."[66] Additionally, Brown focuses on the language Trump used in his defense of the Arpaio pardon and noted that it relied on an innocence argument rather than a more typical claim about the undue harshness of the sentence.[67] Yet neither presents the kind of comprehensive analysis of the justifications Trump offered for his clemency decisions that we consider in this paper.

III. Justifying Clemency

Clemency demands explanation and justification in a constitutional democracy because the President's power to grant pardons and reprieves is a plenary power, a power that knows no legal limits.[68] "Historically," as Professor Colleen Klasmeier notes, "clemency's effectiveness depended on its unpredictability ... the sovereign might grant clemency for any reason or for no reason at all."[69] Clemency exists in a space of possibility beyond regulation. Thus pardon "does not belong to the juridical order. It does not stem from the same plane of the law ... Indeed pardon outruns the law as much through its logic as its end."[70] Law professor Henry

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60 Maurer, *supra* note 53, at 315.

61 Trump's Theater of Pardoning, *supra* note 19; Transforming the Theater of Pardoning, *supra* note 19, at 294; Brown, *supra* note 40, at 48; Crouch, *supra* note 19; Larkin Jr., *supra* note 43, at 773-777; Paul Eckstein & Mikaela Colby, *Presidential Pardon Power: Are There Limits and, If Not, Should There Be*, 51 Ariz. St. L. J. 71, 71-108 (2019); Schmidt, *supra* note 19.

62 Trump's Theater of Pardoning, *supra* note 19; Eckstein & Colby, *supra* note 61, at 98.

63 Eckstein, *supra* note 61, at 98; Larkin Jr., *supra* note 43, at 777; Transforming the Theater of Pardoning, *supra* note 19, at 294.

64 Trump's Theater of Pardoning, *supra* note 19.

65 Crouch, *supra* note 19, Eckstein & Colby, *supra* note 61.

66 Crouch, *supra* note 19

67 Brown, *supra* note 19, at 356.

68 For a discussion of the need to justify clemency, *see* Austin Sarat, Mercy on Trial: What It Means to Stop an Execution (2005). The following discussion is adapted from that book.

69 Coleen Klasmeier, *Towards a New Understanding of Capital Clemency and Procedural Due Process*, 75 B. U. L. Rev. 1507 (1995).

70 Paul Ricouer, The Just 144 (David Pellauer, trans., 1995). As Hugo Adam Bedau puts it, "Clemency decisions-even in death penalty cases-are standardless in procedure, discretionary in exercise, and unreviewable in result." *See* Hugo Adam Bedau, *The*

Weihofen similarly contends that clemency "has always been the broadest and least limited of powers. By its very nature, it could not be subject to rules or restrictions. Its function was rather to break rules, wherever in the opinion of the pardoning authority mercy, clemency, justice, or merely personal whim dictated."[71]

Highlighting this, the Attorney General of the United States issued a report in the mid-twentieth century on release procedures in the federal system, including the President's clemency power. He described its relation to law as follows:

> Emerging from the field of mere arbitrary caprice or semi-magical folklore, pardon has become an institution which is part of, and yet above, the legal system. It has never been crystallized into rigid rules. Rather its function has been to break rules. It has been the safety valve by which harsh, unjust, or unpopular results of formal rules could be corrected. The almost wholly unrestricted scope of the power...has been the tool by which many of the most important reforms of the substantive criminal law have been introduced.[72]

Right from the start of the Republic the clemency power has been difficult to reconcile with America's commitment to the rule of law and traditions of democratic governance. Writing in 1788, Alexander Hamilton set out to explain and defend what seemed to his contemporaries something of an anomaly in America's new constitutional scheme, namely lodging the power to grant "reprieves and pardons for offenses against the United States" solely in the President of the United States.[73] Although the original versions of the New York and Virginia Plans that provided the frameworks for debate at the Constitutional Convention included no provisions for pardon, revisions to both plans eventually did. The power that emerged from the convention was regarded by Hamilton as one of the great prerogatives of sovereignty. He hoped that lodging such awesome power in one person would inspire in the chief executive "scrupulousness and caution."[74]

Decline of Executive Clemency in Capital Cases, 8 N.Y.U. Rev. L. & Soc. Change 252, 255 (1990-91).

71 Henry Weihofen, *Pardon as an Extraordinary Remedy*, 12 Rocky Mountain L. Rev. 112, 114 (1940). *See* also Victoria Palacios, *Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases,* 49 Vand. L. Rev. 311, 331-32 (1996). Palacios says that clemency "operates in derogation of the law. It is the antithesis of the rule of law because it is called upon when legal rules have failed to do justice. It is inherently paradoxical because it enhances justice in general by overriding the justice system in a specific case." As the Government of Mexico recently contended in an argument before the International Court of Justice, in the United States, "clemency review is standardless, secretive, and immune from judicial oversight." *See* Memorial of Mexico (June 20, 2003) submitted in the "Case Concerning Avena and Other Mexican Nationals, Mexico v United States of America". Found at http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm.

72 United States Department of Justice*, 3 Attorney General's Survey of Release Procedures* 209, 295 (1939).

73 U.S. Const. art. 2, § 2, cl.1.

74 Alexander Hamilton, *Federalist 74*, in The Federalist: A Commentary on the Constitution of the United States 482 (New York: The Modern Library, 1956).

Yet Hamilton recognized that, notwithstanding its advantages, granting such a power to the Chief Executive blurred the boundary between the rule of law and monarchical privilege. Traditional ideas of sovereignty would be imported into a document dedicated to constructing a government of limited powers. Like the king acting "in a superior sphere...," lodging the power to pardon exclusively in the President meant that the fate of persons convicted of crimes would be dependent ultimately on the "*sole fiat*" of a single person. This was hardly the image of a government of laws and not of persons that Hamilton sought to defend. This is why, unlike the President's power as commander-in-chief of the army and navy a constitutional provision the propriety of which, in Hamilton's view, was "so evident in itself ... that little need be said to explain or enforce it,"[75] the President's power to pardon seemed to him neither self-evident nor self-explanatory. Yet explain and defend it he did, while also claiming that what he called "the benign prerogative of pardoning ... (unlike almost every other government power in the new constitution) should be as little as possible fettered."[76]

Clemency in the Supreme Court

Numerous Supreme Court decisions have embraced Hamilton's vision and tried to reconcile clemency and the constitutional tradition, starting with the case of *United States v. Wilson*, the first clemency case to reach the Court.[77] This case brought to the Court President Andrew Jackson's pardon of a robber for "the crime for which he has been sentenced to death" and the question of what happened when Wilson, for breathtakingly inexplicable reasons, "did not wish in any manner to avail himself, in order to avoid the sentence in this particular case, of the pardon referred to."[78] Wilson's refusal put the courts in a bind of almost novelistic proportions, requiring them to determine whether a pardon could unseal the fate of a criminal against his wish to see it sealed.

To resolve such a question, Marshall found little in America's own nascent legal tradition and thus invoked the historical connection of the United States to "that nation whose language is our language."[79] Adopting the "principles" and "rules" of English law, Marshall carved out an honored place for clemency. He described a pardon of the kind rendered by President Jackson as "an act of grace, proceeding from the power entrusted with the execution of the laws... ."[80] This grace is seemingly beyond the reach of legal compulsion or regulation; it is a grace freely given or withheld finding its only home, as Blackstone put it, in "a court of equity in ... [the President's] own breast."[81]

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75 *Id*.
76 *Id*.
77 *See* United States v. Wilson, 32 U.S. 150, 160 (1833).
78 *Id*. at 159
79 *Id*. at 160.
80 *Id*. As we will see below, many have taken issue with the conception of clemency as grace. For example, Winthrop Rockefeller says that this view is "totally wrong. In a civilized society such as ours, executive clemency provides the state with a final deliberative opportunity to reassess the moral and legal propriety of the awful penalty which it intends to inflict." Winthrop Rockefeller, *Executive Clemency and the Death Penalty*, 21 Cath. U. L. Rev. 94, 95 (1971).
81 William Blackstone, *Commentaries on the Laws of England*, 4(2) J. Law (2014), 397–402.

A little more than twenty years after *Wilson* the Supreme Court dealt with the question of whether the President could impose conditions on pardons. In *Ex Parte Wells*,[82] a murderer under a death sentence received and accepted from President Fillmore "a pardon of the offence of which he was convicted, upon condition that he be imprisoned during his natural life, that is, the sentence of death is hereby commuted to imprisonment for life in the penitentiary at Washington."[83] The murderer subsequently sought habeas corpus review of his prison sentence. Wells contended that his acceptance of the condition was invalid because it was undertaken while under the "duress" of imprisonment.[84]

The Court began its decision by acknowledging that, while the power to pardon was expressly provided for in the Constitution,[85] "No statute has ever been passed regulating it in cases of conviction by the civil authorities. In such cases, the President has acted exclusively under the power as it is expressed in the constitution."[86] Justice Wayne turned to language and usage, noting the way the term pardon is understood in "common parlance." Ordinarily pardon "is forgiveness, release, remission. Forgiveness for an offence, whether it be one for which the person committing it is liable in law or otherwise. Release from pecuniary obligation, as where it is said, I pardon you your debt. Or it is the remission of a penalty, to which one may have subjected himself by the non-performance of an undertaking or contract, or when a statutory penalty in money has been incurred, and it is remitted by a public functionary having power to remit it."[87]

Wayne articulated the reason clemency was included in the Constitution.[88] "Without such a power of clemency, to be exercised by some department or functionary of a government, it would be most imperfect and deficient in its political morality, and in that attribute of Deity whose judgments are always tempered with mercy."[89]

In 1866, the Supreme Court again took up the President's power to pardon, this time upholding clemency for a confederate legislator who had been pardoned "for all offences by him committed, arising from participation, direct or implied, in the said Rebellion."[90] The issue before the Court was whether that pardon exempted

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82 *Ex parte* Wells, 59 U.S. 307 (1856).

83 *Id*.

84 *Id*.

85 For a discussion of their constitutional roots as well as a qualified defense of conditional pardons. *See* Harold Krent, *Conditioning the President's Conditional Pardon Power*, 89 Calif. L. Rev. 1665, 1719-21 (2001).

86 *Id*. at 309.

87 *Id*. at 309-10.

88 *Id*. at 310. Embracing Wayne's view of the distinction between clemency and forgiveness, former Ohio Governor Richard Celeste explained his commutation of 8 death sentences by saying that while he spared the lives of those whose sentences were changed to life in prison he "didn't forgive them. I did not forgive them." *See* Celeste, *At Ease With Commutations*, Cleveland Plain Dealer, Jan. 5, 1997, at 12A. Or, as Dean notes, "Forgiveness and pardon are logically independent ... . A pardon is an act one can perform only in a social or legal role. This characteristic distinguishes it from forgiveness and mercy, which are virtues that persons exhibit as individuals." *See* Kathleen Dean Moore, Pardons: Justice, Mercy, and the Public Interest, 185, 193 (1989).

89 *Id*.

90 Ex *parte* Garland, 71 U.S. 333, 336 (1866).

him from being subject to an act of Congress requiring persons wanting to practice law to swear that they had "not yielded a voluntary support to any pretended government, authority, power, or constitution, within the United States, hostile or inimical thereto."[91]

Speaking of the President's pardon power, Justice Stephen Field gave legal sanction to its lawlessness. "The power thus conferred," Field said,

> is unlimited, with the exception [in cases of impeachment]. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.[92]

Clemency's Justificatory Rhetoric

These decisions allow chief executives to grant clemency without any constitutional impediments. Both the President and state governors have complete discretion over to whom they will grant clemency and when. Austin Sarat and Nassar Husain say that this power is a form of "lawful lawlessness."[93] This means that the power is authorized, but not regulated, by law.[94] Because clemency cannot be justified by the usual democratic or legal norms, its legitimacy must lie elsewhere. The justificatory rhetoric that accompanies pardons and commutations of the kind that Trump granted seeks to secure such legitimation.[95] It works to domesticate the clemency power, and establish its compatibility with democratic politics. Those who wield undemocratic power want to legitimate it by addressing the background expectations of the political and legal culture. Their justifications seek to soothe anxiety and quiet doubt, to repair the breach between America's desire for rule-governed conduct and the ungovernability of clemency.

Scholars have identified several different kinds of arguments that presidents have used to justify commutations and pardons. The first, as suggested by the language used by the Supreme Court is mercy. Daniel Kobil defines mercy-based clemency as "an act of judgment by one in a position of authority that reduces what is owed to achieve for society the benefits of benevolence or compassion."[96] Understood this way, mercy means giving an offender less than they deserve or less

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91 *Id*. at 376.

92 *Id*. at 371. *See also* Armstrong v. United States, 80 U.S. 154, 155-156 (1872) (upholding the validity of Andrew Johnson's proclamation of pardon and amnesty of Dec. 25, 1868) and United States v. Klein, 80 U.S. 128, 142 (1872) (upholding the President's power to "annex to his offer of pardon any conditions and qualifications he should see fit").

93 Austin Sarat & Nasser Hussain, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life*, 56 Stan. L. Rev. 1307, 1321 (2004).

94 Austin Sarat, *Clemency Without Mercy*, in Mercy on Trial 98-9, 140 (2009).

95 Sarat, *supra* note 94.

96 Daniel Kobil, "Should Mercy Have a Place in Clemency Decisions?" in Austin Sarat and Nasser Hussain, eds. Forgiveness, Mercy, and Clemency, 40 (2007).

than a struct calculus of justice would require.[97] The merciful disposition says, in effect, "This is what you deserve, but I will nonetheless reduce your punishment."[98] Clemency, Elizabeth Rapaport argues, like "'mercy,' characterizes a judgment or action when a person with the power to exact punishment or payment declines to exact all or some of what he or she is entitled to exact. No wrongdoer or debtor has a right to such leniency—where a right to demand relief exists, clemency or mercy is neither asked nor can be granted."[99]

A related kind of justificatory rhetoric links clemency to rehabilitation or redemption.

A redemptive approach to clemency treats "punishment ... as part of a dynamic process, at least potentially of transformation," and links the use of executive clemency with rehabilitative goals.[100] It focuses on the post-conviction lives of criminals. When chief executives consider clemency they take an interest in who prisoners become, and what they do, once their punishment has begun.[101]

"Redemptive clemency," Rapaport argues, "may be deserved in the sense that it is earned but not owed ... .There are," she continues again making the tie between a rehabilitative theory of punishment and clemency as redemption explicit, "at least two types of cases that exemplify post-conviction merit, rehabilitation and heroic service."[102] Prisoners who experience a moral transformation, acknowledge their wrongdoing, and give evidence of a desire to serve the community and reconcile with those they have harmed have a stronger case for clemency than those who do not regardless of the justness of their original conviction and sentence.[103]

Clemency as redemption "rejects the Manichean division of people into good and evil ... . From the redemptive perspective, free citizens are also mean, weak, selfish, and takers of bad risks. And transgressors, like the rest of us, have the potential for morally adequate lives and lives of high moral achievement."[104]

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97 Linda Ross Meyer, The Merciful State 95 (2007).

98 As Daniel Markel puts it, mercy "refers primarily to leniency afforded to criminal offenders on the basis of characteristics that evoke compassion or sympathy but that are morally unrelated to the offender's competence and ability to choose to engage in criminal conduct." *See* Daniel Markel, *Against Mercy*, 88 Minn. L. Rev. 1421 (2004).

99 Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 Chi-Kent L. Rev. 1501 (2000). Redemption is, of course, not the only foundation on which clemency can be based. Among other reasons for clemency are, as we have seen, considerations of justice*, e.g*. pardoning to correct miscarriages of justice, and principled opposition to an entire type of punishment, e.g. the death penalty.

100 *Id*. at 1528.

101 Among Trump's clemencies, there were a few cases where rehabilitative language was used to describe post-crime, but pre-punishment, character. For example, in a press statement issued on January 20, 2021, concerning James Austin Hayes IV, the Trump Administration notes that "Mr. Hayes cooperated immediately and extensively and disgorged all profits he earned in a related civil action." White House Press Release, Statement from the Press Secretary Regarding Executive Grant of Clemency (Jan. 20, 2021), *at* https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-executive-grants-clemency-012021/.

102 *Id*. at 1523.

103 On the significance of this last factor *see* Stephen Garvey, *Punishment as Atonement*, 46 UCLA L. Rev. 1801 (1999).

104 Rapaport, *supra* note 99, at 1530.

Finally, Rapaport notes that "Hope is also a redemptive criminal justice value: the example of clemency...would foster hope for release and reconciliation among those willing to take on the rigors of self-transformation."[105]

A third form of justificatory rhetoric that may accompany presidential pardons or commutations treats clemency as error correction. Rejecting redemption as a legitimate basis for clemency, advocates of "retributive" clemency argue that "... like the imposition of punishment, the remission of punishment must be administered in a principled, consistent fashion."[106]

The most extended example of this search for principle and consistency has been offered by Kathleen Dean Moore.[107] Moore begins from the proposition that clemency is an archaic idea that needs to be refurbished to comport with constitutional democracy. She insists on the necessity of stripping away "all of the concepts left over from the seventeenth century—All the 'acts of grace' and 'divine forgiveness'—and look at pardons operationally... ."[108] When we do so, she contends, what she calls the "close relationship" of pardons and punishment will be apparent.[109]

If we grant the equivalence between pardon and punishment, Moore notes, we should expect that pardons, like punishment, need to be "justified by reasons having to do with what is just."[110] While Moore concedes that pardons sometimes "make exceptions to rules...when general presumptions are defeated by exceptional circumstances,"[111] she insists they can and should be disciplined. "In the American democracy," Moore argues, "the pardon is not a gift from the sovereign and cannot be exempt, on that ground, from the need for justification."[112] In her view the simplest and best justification for punishment is that it is "deserved."[113] While there are other justifications, none are, as she sees it, as powerful as retribution.

Moore is a strict retributivist in the sense that she believes that helping to satisfy the demands of just desert is the *primary* basis on which modern clemency can be justified. As she says, "the only good and sufficient reason for pardoning a felon is that justice is better served by pardoning than by punishing in that particular case."[114] Pardons are correctives for legal mistakes that put the commands of justice at risk. They help the law adhere, more closely than it otherwise could, to those commands.

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105 *Id*.

106 See Daniel Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 Tex. L. Rev. 569, 575 (1991). *Also* Daniel Kobil, *The Evolving Role of Clemency in Capital Cases*, in America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction, 531-542 (James Acker, Robert Bohm, & Charles Lanier, eds., 1998).

107 Moore, *supra note* 88.

108 *Id.* at 91.

109 *Id*. Linda Meyer provides a very different perspective on this issue as well as an important critique of retributivism when she contends that every act of punishment is also "a form of forgiveness." *See* Linda Meyer, *Forgiveness and Public Trust*, 27 Fordham Urb. L.J. 1515, 1530 (2000).

110 Moore, *supra note* 88.

111 *Id*. at 129.

112 *Id*. at 91.

113 *Id*. at 92.

114 Kathleen Dean Moore, *Pardon for Good and Sufficient Reasons*, 27 U. Rich. L. Rev. 281, 281 (1993).

She lists several principles that justify pardons. Pardons are allowed in order to correct the punishment of the innocent (those who stand convicted of a crime they "may not have committed")[115] and of those who are "guilty under the law but are not morally blameworthy."[116] They may be used when the punishment of a guilty and deserving offender is unduly severe or to prevent cruelty or relieve those whose suffering exceeds what they merit.[117] In our legal system, a pardon is "a backup system that works outside the rules to correct mistakes, making sure that only those who deserve punishment are punished."[118]

The final kind of justificatory rhetoric linked to clemency is utilitarian. Daniel T. Kobil and C.R. Snyman define utilitarian clemency as "a means to a secondary end or purpose" beyond just desert.[119] Utilitarian justifications for clemency treat it as a tool for achieving some other social or political end.[120] They treat clemency as a device to promote peace, reconciliation, and "healing."[121] Examples include President Andrew Johnson 1868 pardon of 12,652 ex-Confederates after the Civil War[122] and President Jimmy Carter's 1976 blanket amnesty of Vietnam War draft dodgers in 1976.[123] Finally, Margaret Colgate Love identifies a subset of utilitarian pardons which are justified in terms of what she calls "operational considerations," which includes pardons granted to reward people for aiding a governmental investigation.[124]

IV. The Decline of the Rehabilitative Ideal and the Rise of Retributive Clemency

Throughout most of the twentieth century, the rehabilitative ideal dominated American thought about crime and punishment and also played a prominent role in thinking about clemency.[125] Former Supreme Court Justice Hugo Black, writing in 1949, called it the "prevalent modern philosophy of penology ... . Reformation

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115 *Id*. at 286.
116 *Id*. at 287.
117 Moore, *supra* note 88, at 11.
118 Moore, *supra* note 114, at 284.
119 C.R. Snyman, Criminal Law (5th ed., 2008).
120 Kobil, *supra* note 106, at 592.
121 Washington's clemency proclamation is quoted in Karlyn Kohrs Campbell and Kathleen Hall Jamieson, Presidents Creating the Presidency: Deeds Done in Words, 111 (2008).
122 *Id*. at 593. Both Lincoln and Andrew Johnson issued amnesty to persons who had fought against the Union, so long as they took an oath to uphold the Constitution. Allen Pusey, *Jan. 21, 1977: Carter Pardons Vietnam-Era Draft Dodgers*, ABA (Jan. 1, 2014, 7:20 am) https://www.abajournal.com/magazine/article/jan._21_1977_carter_pardons_vietnam-era_draft_dodgers. Carter explicitly described his Executive Order 11967 as a tool to "bind the nation's wounds and to heal the scars of divisiveness."
123 Andrew Glass, *President Carter Pardons Draft Dodgers*, Politico (Jan. 21, 2018, 06:30 AM) https://www.politico.com/story/2018/01/21/president-carter-pardons-draft-dodgers-jan-21-1977-346493.
124 Margaret Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to Be Merciful*, 27 Fordham Urb. L.J. 1483, 1490 (2000).
125 Francis Allen, The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose (1981).

and rehabilitation of offenders have," he said, "become important goals of criminal jurisprudence."[126] Black noted that rehabilitation's purpose was not to make the "lot of offenders harder. On the contrary, a strong motivating force ... has been the belief that by careful study of ... convicted offenders could be less severely punished and restored sooner to complete freedom and useful citizenship."[127] Rehabilitative punishment was, in Black's mind, linked to mercy and mercy in turn was linked to a social project that criminologist David Garland calls "penal welfarism."[128]

According to the 1976 Report of the Committee for the Study of Incarceration, rehabilitation emerged from "a humanistic tradition which, in pressing for ever more individualization of justice ... demanded that we treat the criminal, not the crime."[129] It relies, the report continued, "upon a medical and educative model, defining the criminal as, if not sick, less than evil ... . As a social malfunctioner, the criminal needs to be 'treated' or to be reeducated, reformed, or rehabilitated."[130] With this attention to the criminal and their humanity, rehabilitation seems compatible with, if not directly nurturing of, a merciful disposition.

Rehabilitative theories were embodied in indeterminate sentencing schemes in which judges would sentence those convicted of crimes to a range of prison time, leaving determination of the exact amount of time served to parole boards whose job it would be to carefully monitor the inmates' progress on the road to reform.[131] In addition, they were reflected in the internal organization of prisons where education, work, and therapy provided much of the day-to-day activity of the convict population.[132] Finally, they shaped a widespread belief in the "redemptive theory of clemency."[133]

If the rehabilitative ideal, and the redemptive theory of clemency, were indeed important throughout a large part of the twentieth century, by the late 1960s both were on the verge of a dramatic and massive repudiation.[134] Fueled by philosophical criticisms from both conservatives and liberals, and the mobilization of crime and punishment as national political issues during presidential elections from 1968 through the end of the century, leniency, mercy, rehabilitation, and redemption were discredited and largely abandoned in a massive reorientation of the American penal system.

Tougher sentencing laws in the form of mandatory minimums for a variety of crimes increased the severity of punishments across the board, created more draconian conditions in prisons, and increased use of the death penalty. These are all symptoms of a society "governed through crime."[135] Against a background of urban disorder and rising crime rates, "law and order" by the late 1960s had become

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126 *See* Williams v. New York, 337 US 241, 247-49 (1949).

127 *Id*.

128 David Garland, The Culture of Control: Crime and Social Order in Contemporary Society 36 (2001).

129 *See* Andrew Von Hirsch, Doing Justice: The Choice of Punishments, 29 (1976).

130 *Id*. *See* also Karl Menninger, The Crime of Punishment, (1969).

131 For a description and critique of the practices of indeterminate sentencing, *see* Marvin Frankel, Criminal Sentences: Law Without Order, (1976).

132 *See*, *e.g*., Keally McBride, *Hitched to the Post: Prison Labor, Choice, and Citizenship*, 30 Stud. L., Pol. & Society 107 (2004).

133 Rapaport, *supra* note 99, at 1501.

134 *Id*. at 1506-7.

135 *See* Jonathan Simon, Governing Through Crime: The War on Crime and the Transformation of American Governance, 1960-2000 (2009).

the watchword of the day for politicians seeking to turn the stark sociological facts about crime to partisan advantage. As James Whitman argues,

> American punishment practices are largely driven by a kind of mass politics that has not succeeded in capturing Western European state practices. We have ... 'popular justice' and indeed populist justice. The harshness of American punishment is made in the volatile and often vicious currents of American democratic electioneering. Calling one's opponent 'soft on crime' has become a staple of American campaigning and...and this has had a powerful, often a spectacular, impact on the making of harsh criminal legislation in the United States.[136]

Since the middle of the last century, criminal justice populism has altered the way presidents and state governors explain and justify grants of clemency. Today the prevailing cultural commonsense holds that we need to punish severely in order for punishment to be effective and that mercy should be greatly limited in order to ensure criminals are not released from prison "far too soon."[137] At the heart of these beliefs is the view that the criminal justice system in the past was overly solicitous of defendants' rights and too lenient in responding to crime. Due to the war on crime, chief executives themselves act like prosecutors, "exercising executive discretion to sustain and maintain punishments by denying clemency or parole, signing a death warrant, or seeking to protect the death penalty."[138] So our prisons fill up, our death rows expand, the rate at which clemency is granted declines, and our understanding of what we are doing with those we punish shifts from rehabilitation and redemption to other harsher theorizations of punishment.

The attack on mercy and the rehabilitative ideal has also been seen in a flourishing industry of academic criticism. Since the late 1960s, academic critics on both the right and the left have voiced various worries about rehabilitation—that it depends on lodging discretionary authority in sentencing judges and that discretion was often associated with disparity and discrimination;[139] that it is too lenient and, as a result, ineffective in preventing recidivism;[140] and/or that it does not deal

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136 James Whitman, Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe, 14-15 (2003).

137 Since the claim that punishment is now too lenient is embedded in cultural understandings rather than experience with crime, the implication that we are not now imposing enough punishment, is a cultural tenet, a value judgement, not subject to empirical refutation. *See* Stuart A. Scheingold, The Politics of Law and Order: Street Crime and Public Policy, 226-27 (2011). Thus, incontestable documentation that the United States is unrivaled among western democracies in severity of sentences and time served for criminal violence is ignored or deemed irrelevant.

138 The War on Drugs shifted penal philosophy, encouraging executives to crack down on sentencing, and reduce their use of clemency for rehabilitative and mercy reasons, only focusing on retributive justifications, *see* Simon, *supra note* 135, 71.

139 *See* Von Hirsch, *supra* note 129, at 29. "The most obvious drawback of allowing wide-open discretion....is the disparity it permits....".

140 Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 10 Pub. Interest 22 (1974). As Von Hirsch argues, "In our day-to-day experience, and in our preliminary research findings, it seemed that rehabilitation was far less often achieved than our predecessors would have believed.... Despite every effort and every attempt,

adequately with the underlying social causes of crime.[141] Critics called for reforms to cure one or another of these defects. Some advocated an end to rehabilitation in the hope that doing so would result in shorter prison sentences for fewer people.[142] Others pushed for approaches to punishment that would result in longer sentences for more offenders and a different attitude toward clemency.[143]

Rapaport asserts that, by the end of the twentieth century, the ethos of neo-retributivism[144] eclipsed that of rehabilitation. Adherents to this philosophy advocated not for harsh sentencing necessarily, but rather for what they saw as objectivity in the pursuit of justice.[145] They looked to clemency as another venue in which to rectify wrongs and redress unfairness in and of the criminal justice system. Just as retribution gained traction elsewhere from the mid-20th century onwards, it took over as the dominant, often the exclusive, grounds for commuting or pardoning offenders.[146] If mercy-based clemencies are presented as distributing undeserved leniency, and redemptive/rehabilitative clemencies focus on post-sentencing changes in offenders, retributive justifications treat clemency as error correction.

Use of Retributive Rhetoric in Recent Presidencies

Recent presidents have embraced such retributive language in their efforts to justify commutations and pardons, often saying that such acts were necessary to serve the ends of justice, fairness and equality. Examples include President Clinton's pardon of 16 Puerto Rican nationalists who were FALN members, Marc Rich and Pincus Green, and Edgar and Vonna Jo Gregory. FALN, or the Armed Forces of National Liberation, was a terrorist group focused on independence for Puerto Rico.[147]

FALN had been linked to 146 bombings and 9 deaths by 1996, and the 16 members granted clemency by Clinton had been convicted "on a variety of charges that included conspiracy, sedition, violation of the Hobbes Act" and "armed robbery."[148] Clinton explained that clemency for the 16 FALN members was justified because they faced "extremely lengthy sentences" and that their "punishment should fit the crime."[149] He claimed that he granted them clemency because they agreed to renounce violence.[150]

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correctional treatment programs have failed." *See* Von Hirsch, *supra* note 129, at 32, 38.

141 *See*, *e.g.*, Jessica Mitford, Kind and Usual Punishment; The Prison Business, (1973).

142 Von Hirsch, *supra* note 129.

143 *See* Ernest van den Haag, Punishing Criminals: Concerning a Very Old and Painful Question (1975).

144 Rapaport, *supra* note 99, at 364.

145 Samuel T. Morrison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 Buff. Crim. L.Rev.1, 1-138 (2005).

146 Rapaport, *supra* note 99, at 361.

147 Debra Burlingame, *The Clintons' Terror Pardons*, Wall St. J., Feb. 12, 2008, https://www.wsj.com/articles/SB120277819085260827.

148 *Id*.

149 Charles Babington & David A. Vise, *Clinton Explains Clemency Decision*, Wash. Post, Sept. 22, 1999 https://www.washingtonpost.com/wp-srv/politics/daily/sept99/clinton22.htm.

150 *Id*.

Marc Rich and Pincus Green, leading commodity traders, were charged with "51 counts of tax evasion, racketeering, and fraud" for evading $48 million in income taxes and illegally buying oil from Iran.[151] During his prosecution, Marc Rich fled the US and went to Switzerland.[152] Edgar and Vonna Jo Gregory were convicted in 1982 of charges related to stealing $800,000 from an Alabama bank and causing it to go bankrupt.[153] The case and subsequent clemency garnered controversy because it was supported by Tony Rodham, Sen. Hillary Rodham Clinton's brother, who had been a "paid consultant for the company since 1997."[154]

Rich and Green were two of President Clinton's final pardons, and in response to the criticism over these pardons, he wrote a *New York Times* op-ed called "My Reasons for the Pardons."[155] There he questioned whether Rich and Green ever committed tax evasion and mentioned that the two men had already paid roughly $200 million in fines.[156] At the end of his op-ed, he claimed to have pardoned them in the "best interest of justice."[157]

Clinton's successor, George W Bush pardoned 189 people and commuted 11 sentences between 2001 and 2009.[158] Like President Clinton, Bush didn't grant clemency to a single petitioner in his first two years of presidency, even though the number of requests were at an all-time high.[159] When he did exercise his clemency power he generally did so on retributive grounds as he had when he commuted or pardoned people in his previous role as governor of Texas. In Bush's own words, when he considered clemency he "would ask: is there any doubt about this individual's guilt or innocence? And, have the courts had ample opportunity to review all the legal issues in this case?"[160] Bush claimed that clemency only should be used as "a failsafe, one last review to make sure that there is no doubt the individual is guilty… I don't believe my role is to replace the verdict of the jury … ."[161] Bush relied on a retributive justification to explain his most controversial pardon: "Scooter" Libby. In July, 2007 he emphasized the unfairness of Libby's punishment stating: "I respect the jury's verdict. But I have concluded that the

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151 Eric Berg, *Marc Rich Indicted in Vast Tax Evasion Case*, N.Y. Times, Sept. 20, 1983, https://www.nytimes.com/1983/09/20/business/marc-rich-indicted-in-vast-tax-evasion-case.html.

152 Eric Lichtblau & Davan Maharaj, *Clinton Pardon of Rich a Saga of Power, Money*, Chi. Trib., Feb. 18, 2001 https://www.chicagotribune.com/sns-clinton-pardons-analysis-story.html.

153 Jeffrey McMurray, *Pardons of Tenn. Couple Questioned*, Wash. Post, Mar. 3, 2001 https://www.washingtonpost.com/archive/politics/2001/03/03/pardons-of-tenn-couple-questioned/ba5fcf39-eba4-4898-a276-520ea70f15b2/.

154 *Id*.

155 James Rogan, *Blame Clinton, Not the Power to Pardon*, L.A. Times, Mar. 16, 2001 https://www.latimes.com/archives/la-xpm-2001-mar-16-me-38470-story.html.

156 *Id*.

157 William Jefferson Clinton, *My Reasons for the Pardons*, N.Y. Times, Feb 18, 2001, https://www.nytimes.com/2001/02/18/opinion/my-reasons-for-the-pardons.html.

158 *Pardons Granted by President George W. Bush (2001-2009*), U.S. Dep't of Just., https://www.justice.gov/pardon/pardons-granted-president-george-w-bush-2001-2009 (last visited Oct. 16, 2021).

159 *Clemency Statistics*, U.S. Dep't of Just, https://www.justice.gov/pardon/clemency-statistics#w-bush (last visited Oct. 16, 2021).

160 George W. Bush, A Charge to Keep (1999).

161 *Id*. at 148.

prison sentence given to Mr. Libby is excessive. Therefore, I am commuting the portion of Mr. Libby's sentence that required him to spend 30 months in prison."[162]

Retributive justifications played a large role in the 1715 commutations and 2132 pardons issued by President Barack Obama.[163] Among his most controversial clemencies was the commutation of Chelsea Manning's sentence. Manning, a former United States Army soldier and whistleblower disclosed to WikiLeaks nearly 750,000 classified or sensitive military and diplomatic documents.[164] President Obama shortened her 35-year sentence, which was by far the longest punishment ever imposed in the U.S. for a leak conviction, to a mere 7 years.[165]

Critics denounced the commutation, complaining that "soft" sentencing for leakers might encourage Russian interference and hacking.[166] During a question and answer session with journalists, President Obama responded in retributive terms: "Chelsea Manning has served a tough prison sentence … the sentence that she received was very disproportional … I feel very comfortable that justice has been served."[167] And in a 2017 *Harvard Law Review* article describing a president's role in advancing criminal justice reform through different avenues, including the executive clemency power, Obama wrote that he "worked to reinvigorate the clemency power and … restore a degree of justice, fairness, and proportionality to the system."[168]

V. Trump's Clemency Justifications

Former President Trump granted 238 clemencies to a total of 231 individuals; four of whom were both pardoned and commuted, and three of whom were commuted twice. In the sources we examined, he offered a total of 634 justifications for 227 of his grants of clemency. He offered no justifications for eleven of his clemencies.

We examined all justificatory statements supplied by the White House Press Secretary.[169] Additionally, we used the HeinOnline database to examine all

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162 *Statement on Granting Executive Clemency to I. Lewis Libby*, *Authenticated U.S. Government Information (GPO)*, July 9, 2007, https://www.govinfo.gov/app/details/WCPD-2007-07-09/WCPD-2007-07-09-Pg901.

163 *Clemency Statistics*, U.S. Dep't of Just., https://www.justice.gov/pardon/clemency-statistics#obama (last visited Oct 16, 2021).

164 Scott P. Johnson, *President Donald J. Trump and the Potential Abuse of the Pardon Power*, 9 Faulk. L. Rev. 301, 301(2018).

165 Charlie Savage, *Chelsea Manning to Be Released Early as Obama Commutes Sentence*, N.Y. Times, Jan. 17, 2021, https://www.nytimes.com/2017/01/17/us/politics/obama-commutes-bulk-of-chelsea-mannings-sentence.html.

166 Jennifer Rubin, *Obama's Grave Misstep: Commuting Manning's Sentence*, Wash. Post, Jan. 18, 2017, https://www.washingtonpost.com/blogs/right-turn/wp/2017/01/18/obamas-grave-misstep-pardoning-manning/.

167 Office of the Press Secretary, Remarks by the President in Final Press Conference, (Jan. 18, 2017), https://obamawhitehouse.archives.gov/the-press-office/2017/01/18/remarks-president-final-press-conference.

168 Barack Obama, *The President's Role in Advancing Criminal Justice Reform,* 130 Harv. L. Rev. 811 (2017).

169 We did not include the Pardon Attorney Statements because they are only templates that are reused, only changing to fill in the name of the person receiving clemency and their sentence. They are signed by the President with generalized language that do not

statements, speeches, press conferences, press releases, proclamations, executive orders, acts approved by the President and "many more documents" released by the White House.[170] We also studied all the tweets relating to clemency from three twitter accounts: @Whitehouse45, and @TrumpWarRoom. @RealDonaldTrump.[171]

In total, we identified justifications in 211 official press statements, 34 tweets from @RealDonaldTrump, 10 tweets from @WhiteHouse45, 2 from @TrumpWarRoom, and 52 in statements to the press, speeches or remarks with reporters. These 311 statements contained 634 separate justifications.[172]

Not all of Trump's justificatory statements fit into the four categories—mercy, redemptive/rehabilitative, retributive, utilitarian—that we discussed above. We identified two other categories in addition to the widely accepted ones which we labelled "evidence of smooth re-entry" and "character" related. While rehabilitative rhetoric often references character, much of Trump's character-based language was not linked to a post-sentencing change in behavior. For example, Trump described one person he pardoned as "a pillar of his community" and another as someone who "has no documented history of violence" and "who simply stumbled along life's path and made a mistake."[173] These statements suggest the crime was an aberration in the

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tailor justifications to any individual case. Additionally, we looked through many TV, newspaper, and radio interviews, as well as transcripts from Trump's rallies. However, we did not include them in our analyzes because there is no comprehensive list of all of these events, and we could not be sure we looked at every interview, rally, etc. We opted to focus on datasets we were sure were complete. Within our chosen media, we found several statements where Trump mentioned the unfairness of a trial or prosecution for someone to whom he would eventually grant clemency, without specifically mentioning clemency or responding to a question about clemency. We included these types of statements, we included these types of statements only if they came within a year of the eventual clemency.

170 *US Presidential Library,* Heinonline, https://home.heinonline.org/content/u-s-presidential-library/.

171 @RealDonaldTrump was Trump's personal twitter account that he used throughout his campaign and presidency until it got suspended on January 6th. @WhiteHouse45 is the official account of the Trump Administration and @TrumpWarRoom is the official account for the Trump 2020 re-election Campaign.

172 In order to search the databases and Twitter accounts for Trump's clemency justifications, we created a list of search terms to standardize our searches across mediums. This included all the first name, last names, combination of first and last names, and a series of key terms in a document, including "clemency," "commutation," "pardon," among others specific to clemency recipients. This list is in the appendix.

173 White House Statement, President Trump Commutes Sentence of Ted Suhl, (July 29, 2019), at https://trumpwhitehouse.archives.gov/briefings-statements/president-trump-commutes-sentence-ted-suhl/.

President Trump pardoned Theodore E. Suhl on July 29, 2019. Mr. Suhl participated in a bribery scheme in order to increase Medicaid payments to his company, and was sentenced to seven years in prison. The statement describes him as a "a pillar of his community before his prosecution and a generous contributor to several charities"; White House Statement, Statement from the Press Secretary Regarding Executive Grants of Clemency, (Oct. 21, 2020), at https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-executive-grants-clemency-102120/. On October 21, 2020 President Trump issued a press statement commuting the sentence of John Bolen, a small business owner who transported cocaine from the Bahamas to Florida. The statement notes that he has "no documented history of violence" and "simply stumbled along life's path and made a mistake".

life of an otherwise upstanding person, not that they had rehabilitated or redeemed themselves. Additionally, we found many statements that someone to whom he granted clemency "has a supportive family and church" or has "widespread support from their neighbors."[174]

We disaggregated Trump's retributive statements into three subcategories: excessive punishment, claims of innocence, and unfair process. Excessive punishment justifications contend that the sentence was disproportionate to the crime. Others suggest that the person who received clemency would have gotten a lower sentence if tried today or that they should have never been prosecuted in the first place, or that other people who committed the same crime were not given the same sentence.[175] Trump also often used the phrase "treated unfairly" without further explanation of whether he was referring to the investigation, the sentence, the trial, or something else entirely. We categorized such general statements under excessive punishment.

Innocence claims assert that the clemency recipient did not commit the crime for which they were convicted. This includes claims that the trial never should have happened, or they were wrongly convicted. We put justificatory rhetoric that referenced the "Witch Hunt" or the "Mueller Scam" under this category because Trump used those terms to justify his clemencies on the grounds that the people targeted were actually innocent.

Unfair process justifications suggest that some part of the investigation, trial, or sentencing process was suspect, such as a tainted jury pool, evidence that should not have been admitted, and prosecutorial misconduct.

We also disaggregated redemptive/rehabilitative justifications. We identified instances when Trump said that a person had accepted responsibility, had acknowledged wrongdoing or had expressed remorse.

Trump often justified pardons by reference to particular redemptive actions that people to whom he granted clemency performed during or outside of prison. This included teaching others or educating themselves while in prison, supporting their community or family outside of prison, or becoming a person of faith.[176]

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[174] White House Statement, Statement from the Press Secretary Regarding Executive Grants of Clemency, (Jan. 20, 2021), *at* https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-executive-grants-clemency-012021/;On January 20, 2021 the Trump Administration issued a statement regarding the commutation granted to April Coots, who was convicted of a non-violent drug offense. The Press Secretary notes that "Importantly, Ms. Coots has a supportive family and church community that will help her transition and create a stable network for her post-incarceration"; White House Statement, Statement from the Press Secretary Regarding Executive Clemency for Dwight and Steven Hammond, (July 10, 2018), at https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-executive-clemency-dwight-steven-hammond/; Dwight and Steven Hammond were convicted in association with a fire that leaked onto a portion of neighboring public grazing land. The Trump Administration's July 10, 2018 press statement describes their "widespread support from their neighbors".

[175] This final reason was used many times with the Mueller pardons. Notably, Trump claimed that "General Michael Flynn's life can be totally destroyed while Shadey James Comey can Leak and Lie and make lots of money from a third rate book" 4/20/18 tweet from @RealDonaldTrump.

[176] This is distinguished from character-related justifications because it is an action they started doing post crime, not a characteristic they've always embodied.

In what follows, we first report on the overall composition of Trump's clemency justifications. Next, we analyze the breakdown of those justifications by crime type, medium of statement, time during Trump's term when they were granted, pardon attorney recommendation,[177] and association with the Mueller investigation. [178]

Of the 634 justifications offered by Trump for his clemencies

a. 38.8% (246) were retributive
b. 33.8% (214) were rehabilitative
c. 17.7% (112) were character-based
d. 5.7% (36) referenced smooth re-entry
e. 2.4% (15) referenced mercy
f. 1.7% (11) were utilitarian

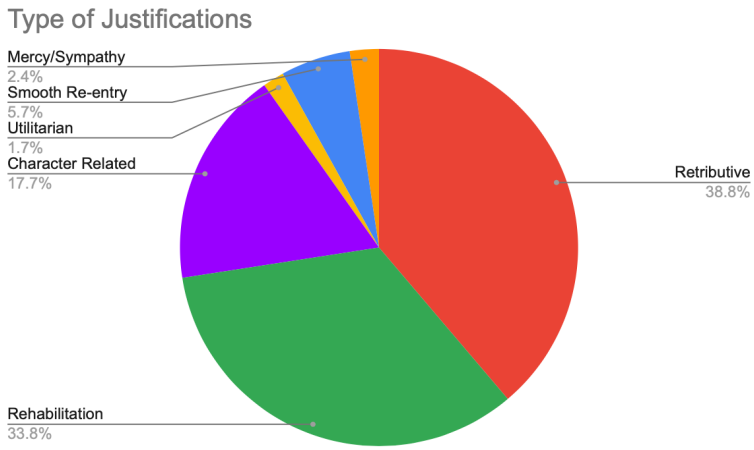

Figure 1: Trump's Clemency Justifications.

While Trump's use of retributive justifications continued the trend set by his predecessors, he broke with their recent tendency to eschew using redemption/rehabilitation to explain clemency grants.

Below, we will show that much of Trump's retributive rhetoric was used when he gave scripted and unscripted comments to the press. For example, in prepared remarks to reporters aboard Air Force One on August 7th, 2019, Trump explained why he commuted the sentence of former Illinois governor, Rod Blagojevich by saying that "You have drug dealers that get not even 30 days, and they've killed 25 people. They put him in jail for 18 years, and I think it's very unfair."[179] Blagojevich

[177] Data sourced from Goldsmith and Gluck, in their spreadsheet titled *Trump's Aberrant Pardons and Commutations Chart*. Further explanation of their methods is detailed in the following pages, in the section *Recommended by Pardon Attorney*.

[178] In this category we included justifications for clemency granted to five people: General Michael Flynn, George Papadopoulos, Paul J. Manafort, Roger J. Stone, and Alex Van Der Zwaan.

[179] Administration of Donald J. Trump, 2019 Remarks and an Exchange With Reporters Aboard Air Force One, *Daily Compilation of Presidential Documents* 1 (2019).

had been sentenced to 168 months in prison for soliciting bribes to fill Barack Obama's old senate seat. Trump commuted his sentence to time served, plus two years of supervised release and the remaining balance of his $20,000 fine. Trump's justification minimized Blagojevich's crime and suggested that he shouldn't be punished any further because he had already served more prison time than he deserved.

Of the 246 retributive justifications Trump offered for his clemencies the majority (57.3%) followed the Blagojevich pattern, referencing excessive punishment. 24.4% involved claims of unfair process, and 18.3% referenced claims of innocence.

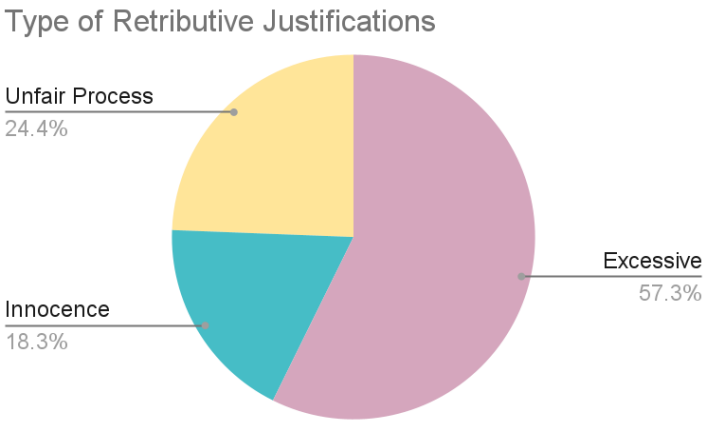

Figure 2: Composition of Retributive Justifications.

In many cases, Trump offered more than one kind of retributive justification. This is evidenced in the official White House press statement about clemency for Paul Erickson who, while charged with wire fraud and money laundering, was involved with the Trump campaign's Russia connections.[180] That statement emphasized both the excessiveness of Erickson's sentence and the fact that he should not have been prosecuted at all. "Although the Department of Justice sought a lesser sentence,"

[180] Carrie Johnson & Philip Ewing, *Paul Erickson, Boyfriend of Russian Agent Maria Butina, Charged in Fraud Scheme*, NPR, Feb. 6, 2019 https://www.npr.org/2019/02/06/687417296/paul-erickson-boyfriend-of-russian-agent-maria-butina-charged-in-fraud-scheme; Nicholas Fandos, *Operative Offered Trump Campaign 'Kremlin Connection' Using N.R.A. Ties*, N.Y. Times, Dec 3, 2017, https://www.nytimes.com/2017/12/03/us/politics/trump-putin-russia-nra-campaign.html. *Sioux Falls Man Sentenced for Wire Fraud and Money Laundering*, United States Attorney's Off., Dist. S. Dakota (July 6, 2020),https://www.justice.gov/usao-sd/pr/sioux-falls-man-sentenced-wire-fraud-and-money-laundering-1.Journalists note Erickson's relationship with Russian agent Maria Butina, as well as evidence that he attempted to facilitate a back-channel meeting between Trump and Putin. The Trump Administration's Press Statement blames his wire fraud conviction, for which he was found to have lied to his investors, on an association with Russia.

Trump said, "Mr. Erickson was sentenced to 7 years' imprisonment—nearly double the Department of Justice's recommended maximum sentence … ."[181] Additionally, Trump pointed out that "Mr. Erickson's conviction was based off the Russian collusion hoax."[182]

Among the 214 rehabilitative justifications that Trump offered for his clemencies, 76.2% referencing post-sentence redeeming behavior while 23.8% referenced accepting responsibility by the person whose sentence Trump commuted or pardoned

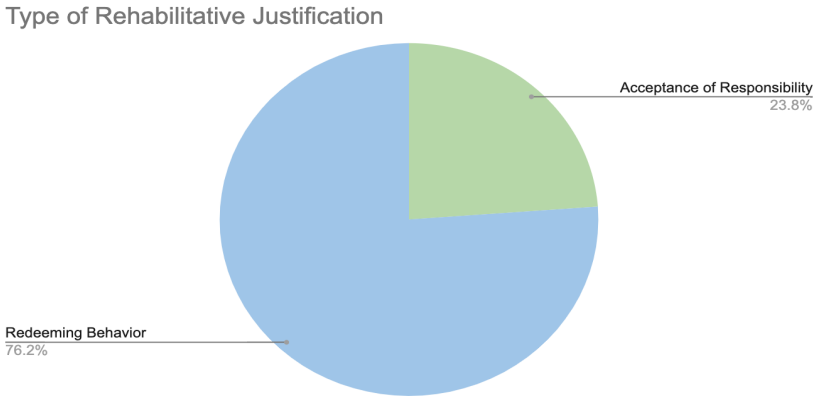

Figure 3: Composition of Rehabilitative Justifications, split between acceptance of responsibility and redeeming behavior.

In a statement from the White House Press Secretary, Trump announced that he had commuted the sentence of Adrianne Davis Miller. Miller struggled with drug addiction, but had no previous federal charges before she pleaded guilty to possession and intent to distribute methamphetamine.[183] Miller was sentenced to fifteen years, but Trump commuted her sentence to time served with three years of supervised release. In so doing he emphasized the fact that Miller "is extremely remorseful ... has taken full responsibility for her actions."[184] Additionally, Trump listed steps she took to change her life including taking "numerous courses including drug education, life management, and has participated in the Life Connections Program" and has "fully committed to rehabilitation."[185]

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181 White House Statement, *Statement from the Press Secretary Regarding Executive Grants of Clemency,* (Jan. 20, 2021), *at* https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-executive-grants-clemency-012021/.

182 *Id*.

183 Margaret Anne Davis, *Clemency for Adrianne Davis Miller serving 15 years for a NON-VIOLENT Drug Conspiracy*, Change.org, https://www.change.org/p/donald-trump-clemency-for-adrianne-davis-miller-serving-15-years-for-a-non-violent-drug-conspiracy.

184 *Id*.

185 *Id*.

The Medium and the Message

President Trump's use of social media, specifically Twitter, was unique among previous presidents.[186] Many commentators have criticized the uncensored and unconventional way he used Twitter,[187] and such characteristics were also apparent in his tweets justifying clemencies, such as one tweet explaining his pardon of Kristian Saucier. In 2016, Saucier was sentenced to 1 year imprisonment and 3 years supervised release for illegal storage of classified photos as a Navy sailor.[188] According to court documents, Saucier "used his personal cell phone to take six photos of classified areas, instruments, and equipment in the sub" and then "destroyed a computer, camera, and memory card" after being questioned by the FBI.[189] After Saucier completed his prison term, Trump granted him a full and unconditional pardon.[190]

Justifying that pardon, Trump tweeted, "Remember what they did to the young submarine sailor, but did nothing to Crooked Hillary. I ended up pardoning him - it wasn't fair!"[191] In the same tweet he said "Washed up Creepster John Bolton is a lowlife who should be in jail,"[192] while Saucier should not be. This aggrieved, aggressive, retributive language is very different from the character-based justification found in the official press statement, where Trump asserted that "Mr. Saucier's offense stands in contrast to his commendable military service."[193]

In fact, we found that the way Trump talked about clemency depended on the medium of communication he used.[194] He was most prone to offer retributive

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186 President Trump's use of Tweets represents a new development in presidential forms of communication, similar to the development of Fireside Chats by Roosevelt and Television Communication by Ronald Reagan, *See* Vincent Wardynski *The Social Media Era President*, 1 U. Cent. Fla. Dep't Legal Stud. L.J. 13 (2018).

187 Michael D. Shear, *How Trump Reshaped the Presidency in Over 11,000 Tweets*, N.Y. Times (Nov. 2, 2019), Fernando R. Laguarda, *Think of an Elephant: Tweeting as Framing Executive Power*, Legislation & Policy Brief 8 (2018): 32-52; Brian Monahan & R.J. Maratea, *The Art of the Spiel: Analyzing Donald Trump's Tweets as Gonzo Storytelling*, 44 Symbolic Interaction 699 (Jan. 18, 2021), https://doi.org/10.1002/symb.540.

188 Ryan Lucas, *Trump Pardons Ex-Navy Sailor Sentenced for Photos of Submarine*, NPR, Mar. 9, 2018, https://www.npr.org/2018/03/09/592440282/trump-pardons-ex-navy-sailor-sentenced-for-photos-of-submarine.

189 *Id*.

190 White House Press Briefing, Press Briefing by Press Secretary Sarah Sanders, (9 Mar., 2018) *at* https://trumpwhitehouse.archives.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-030918/ (last visited Oct. 8, 2021).

191 Trump Twitter Archive, https://www.thetrumparchive.com/?searchbox=%22young+submarine+sailor%22&results=1 (last visited Oct. 8, 2021).

192 *Id*.

193 White House Press Briefing, Press Briefing by Press Secretary Sarah Sanders, *at* https://trumpwhitehouse.archives.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-030918/ (last visited Oct. 8., 2021).

194 We first divided up the 634 statements across six different mediums: three Twitter accounts, official press statements, scripted remarks from HeinOnline, and unscripted remarks from HeinOnline. "Scripted" remarks include speeches and other prepared remarks and "unscripted" remarks include responses to reporter questions and other spontaneous commentary. We then recorded what type of justification that was included in each statement. One example of a justification occurring during reporter questioning

justifications on his personal Twitter at 79.5%, followed by unscripted remarks at 73.6%, and scripted speeches at 52.6%. In fact, out of the 130 justifications Trump provided in unscripted remarks and tweets, only 3 were rehabilitative. The other 99 were retributive. In contrast, in press statements Trump offered rehabilitative justifications far more than retributive ones. We found this same pattern in statements released on @WhiteHouse45 and @TrumpWarRoom.[195]

Table 1: Distribution of justifications across Medium of Statement.

	White House Press Statement	**Tweet from @ Whitehouse45**	**Tweet from @Trump-WarRoom**	**Tweet from @Real-Donald Trump**	**Scripted Speeches and Planned Remarks**	**Unscripted Interviews and Remarks**	**Total**
RETRIBUTIVE	119	8	0	35	20	64	*246*
REHABILITATIVE	185	11	6	1	9	2	*214*
CHARACTER	81	0	0	5	8	18	*112*
UTILITARIAN	7	2	0	0	0	2	*11*
SMOOTH RE-ENTRY	36	0	0	0	0	0	*36*
MERCY	11	0	0	2	1	1	*15*
Total	*439*	*21*	*6*	*43*	*38*	*87*	***634***

Timing

Donald Trump's Twitter was suspended on January 6, 2021. As a result, he was forced to justify his remaining clemencies without using this mode of communication. Additionally, we found no unscripted remarks offering clemency justifications after this date. This is especially important because presidents, like other chief executives, are known to save grants of clemency for the end of their term when they would no longer be vulnerable to political criticism for doing so.

would be a retributive justification for Roger Stone. During a Q&A a reporter asked President Trump "Can you-you seemed, from your tweet today, that you were upset about the Roger Stone sentencing. Did you… ask the Justice Department to change that?" We categorized his following response as an unplanned, or unofficial remark on Roger Stone's impending pardon.

195 We then collapsed the six mediums into two categories: unofficial justifications (@RealDonaldTrump, unscripted remarks) and official (all others). The difference between rehabilitative and retributive justifications was most notable, Official statements were more rehabilitative (41.8%) and less retributive (29.1%), while unofficial statements were significantly more retributive (75.6%) and less rehabilitative (2.3%).

Trump followed this trend by signing fully one half of his clemencies in his last two days in office. In fact, only 18% (44) of Trump's clemency grants occurred before the November, 2020 election. From January 20, 2017 to January 6 of 2021, Trump granted clemency 94 times, and from January 6 to January 20, 2021, he granted 144 more. 85% of Trump's retributive justifications were offered before January 6, 2021 while the majority of his rehabilitative justifications, 55%, were offered after that date. 91% of justifications citing evidence of smooth entry were given after January 6, while 80% of character related justifications were given before that date.

Table 2: Distribution of justifications between Pre and Post January 6th.

	Pre-January 6th	**Post-January 6th**
RETRIBUTIVE	202	44
REHABILITATIVE	91	123
CHARACTER	74	38
UTILITARIAN	7	4
SMOOTH RE-ENTRY	3	33
MERCY	12	3
Total	399	245

Type of Crime

Mark Osler claims that Trump's early clemencies were granted nearly exclusively to "celebrities, [those] connected to him by friendship, or both."[196] Colton Brown argues that his pardons followed a "pattern of rewarding people popular with his supporters or those who have spoken glowingly of [Trump],"[197] and Gluck and Goldsmith claim that "almost all the beneficiaries of Trump's pardons and commutations have had a personal or political connection to the president."[198] Those who have close ties to the President of the United States are likely to have committed certain kinds of crimes and not others, especially white collar crimes and/or obstruction of justice.

To explore this pattern, we analyzed the justifications Trump used for granting clemency in different kinds of crimes: Financial, Drug, Crimes Against Person, Crimes Against Property, Obstruction of Justice, and Other.[199] We found that 66%

196 Osler, *supra* note 19.
197 Brown, *supra* note 40, at 43.
198 Gluck & Goldsmith, *supra* note 21.
199 We relied on Justia's "types of Criminal Offenses" to categorize crime types. Their list can be found here: https://www.justia.com/criminal/offenses/.We also aggregated crime types into White Collar (Financial & Obstruction) and Street Crime (Drug, Crime Against Property, Crime Against Person), and divided Other accordingly (We considered the illegal hunting of migratory birds, the possession of a firearm by a felon, illegal sale of firearms, wildlife smuggling, lying on a government form to obtain a firearm,

of the time that Trump used retributive, error correction-type rhetoric was for those charged with either obstruction of justice or financial crimes.

Table 3: Distribution of justifications across Type of Crime.[200]

	Obstruction	**Financial**	**Drug**	**Crime against Person**	**Crime against Property**	**Other**	**Total**
Retributive	116	69	38	27	17	11	*278*
Rehabilitative	9	68	103	8	20	13	*221*
Character Based	26	43	15	21	5	11	*121*
Utilitarian	3	2	0	3	2	1	*11*
Smooth Re-entry	0	4	29	0	2	2	*37*
Mercy/Sympathy	7	6	2	1	1	0	*17*
Total	*161*	*192*	*187*	*60*	*47*	*38*	***685***

For example, George Papadopolous was indicted in the Mueller investigation for pleading "guilty … to lying to the FBI about the timing of meetings with alleged go-betweens for Russia" in September of 2018.[201] He was sentenced to 14 days imprisonment with 12 months of supervised release, 200 hours of community service, and fined $9,500.[202] When he granted clemency, Trump claimed that Papadopoulos had committed no crime. He said, in a remark at a Fox News Town Hall, "And how about Papadopoulos? I didn't know Papadopoulos, but what they put him through—he turned out to be totally—they had a tape of his conversation that was supposed to be-—this conversation was like a perfect conversation."[203]

operation of off-road vehicle on public lands closed to off-road vehicles, possession of firearm silencer without serial number, and possession of machine gun to be Street Crime. We considered the leaking of classified information, violation of the Foreign Agents Registration Act, making false statements to the government, espionage, making false statements on a bank loan application, participating in an illegal gambling business, illegal voting, and conspiracy to access a protected computer without authorization to be White Collar Crimes.). We found that 69% of retributive rhetoric was used to justify white collar crimes, and 62% of rehabilitative rhetoric was used to justify street crimes.

200 The total number of justifications increased from our original 634, since we counted the justification for all the crimes for which Trump granted clemency. In some cases, the same justification was used to pardon two or even three different crimes.

201 *George Papadopoulos: Ex-Trump Adviser Goes to Prison*, BBC, Nov. 28, 2018, https://www.bbc.com/news/world-us-canada-46347887 .

202 Mark Mazzetti & Sharon LaFraniere, *George Papadopoulos, Ex-Trump Adviser, Is Sentenced to 14 Days in Jail*, N.Y.Times, Sept. 7, 2018, https://www.nytimes.com/2018/09/07/us/politics/george-papadopoulos-sentencing-special-counsel-investigation.html.

203 "Administration of Donald J. Trump, 2020 Remarks and a Question-and-Answer Session at a Fox News Town Hall in Green Bay, Wisconsin," *Daily Compilation of Presidential Documents* (2020): 12.

Nearly 50% of Trump's rehabilitative rhetoric was used to justify clemency for drug crimes, compared to only 13% of his retributive rhetoric. The pardon of Crystal Munoz exemplifies this point; In 2008, Crystal Munoz was sentenced to 15 years in prison and 5 years supervised release for conspiring to distribute marijuana.[204] After she served 12 years, Trump commuted her sentence twice: first, shortening her prison term to time served[205] and later, ending her supervised release requirement.[206] He explained that she had "demonstrated an extraordinary commitment to rehabilitation" and "mentored people working to better their lives."[207]

The use of redemptive/rehabilitative arguments in drug cases is also illustrated in the case of Alice Marie Johnson who in 1997 was sentenced to life imprisonment[208] for a nonviolent drug conspiracy, which was her first offense.[209] After serving nearly 22 years, President Trump first commuted her sentence to time served[210] and later gave her a full and unconditional pardon.[211] In so doing Trump explained that Johnson had "accepted responsibility for her past behavior," has "worked hard to rehabilitate herself in prison," and has "acted as a mentor to her fellow inmates."[212]

Recommendations by Pardon Attorney

Bernadette Meyler claims that Trump wanted to avoid what he regarded as the "bureaucratic pardoning produced by the work of the Office of the Pardon Attorney."[213] Gluck and Goldsmith report that the OPA's criteria for clemency consideration include "post-conviction conduct," the "seriousness and relative recentness of the offense," and "acceptance of responsibility, remorse, and atonement."[214] Some of these criteria fit with a rehabilitative view of clemency.

Interestingly, Trump distances himself from Papadopolous even as he is saying he did nothing wrong.

204 *Trump Grants Clemency to Crystal Munoz, Former Inmate Friends with Alice Marie Johnson*, Associated Press, Feb. 20, 2020, https://www.nbcnews.com/news/us-news/trump-grants-clemency-crystal-munoz-former-inmate-friends-alice-marie-n1139786.

205 *See Public Disclosure for Crystal Munoz, Commutations Granted by President Donald J. Trump (2017-2021)*, U.S. Dep't of Just., https://www.justice.gov/pardon/commutations-granted-president-donald-j-trump-2017-2021 (last visited Oct. 16, 2021).

206 *Id*. Trump did not offer separate justifications for these two separate acts of clemency.

207 White House Press Statement, Statement from the Press Secretary Regarding Executive Grants of Clemency (Feb. 18, 2020), *at* https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-executive-grants-clemency-2/.

208 *See Public Disclosure for Alice Marie Johnson, Commutations Granted by President Donald J. Trump (2017-2021)*, U.S. Dep't of Just., https://www.justice.gov/pardon/commutations-granted-president-donald-j-trump-2017-2021 (last visited Oct. 16, 2021).

209 Jennifer Turner, *Alice Marie Johnson Talks About Her Life Sentence, Getting Clemency, and Her Newfound Freedom*, ACLU, Jun. 14, 2018, https://www.aclu.org/blog/smart-justice/sentencing-reform/alice-marie-johnson-talks-about-her-life-sentence-getting.

210 *See* Public Disclosure for Alice Marie Johnson, *supra note* 208.

211 While Trump did offer traditional justifications for Johnson's clemency, her case is unique because of Kim Kardashian West's advocacy for her case. *Id*.

212 White House Press Release, President Trump Commutes Sentence of Alice Marie Johnson, https://trumpwhitehouse.archives.gov/briefings-statements/president-trump-commutes-sentence-alice-marie-johnson/ (last visited Oct. 8, 2021).

213 Trump's Theater of Pardoning, *supra* note 19.

214 Gluck & Goldsmith, *supra* note 19, at 297.

Thus, when Trump followed the Office of the Pardon Attorney's process, we would expect to see more rehabilitative justifications than when he did not.

To test this claim, we examined the correlations between Goldsmith and Gluck's categorizations of Trump's clemencies and the different justifications that Trump offered.[215] Overall, only 6.8% of Trump's clemency justifications occurred in cases involving the Pardon Attorney.

Table 4: Distribution of justifications across Pardon Attorney Recommendation.

	YES & PROBABLY	**NO & PROBABLY NOT**	**Total**
Retributive	8	238	*246*
Rehabilitative	30	184	*214*
Character Related	1	111	*112*
Utilitarian	1	10	*11*
Evidence of Smooth Re-entry	3	33	*36*
Mercy-Sympathy	0	15	*15*
Total	*43*	*591*	***634***

We found that all of the 15 mercy justifications Trump offered occurred in clemencies where the Office of the Pardon Attorney made no recommendation or made a negative one. Additionally, all but one of the character justifications and nearly 97% of retributive justifications were offered where the Pardon Attorney played no role in the process. A smaller number of the rehabilitative justifications were offered in such cases.

The Mueller Investigation

Trump offered many justifications for granting clemency to his allies and cronies who were convicted of crimes committed during the Mueller investigation.[216] George Papadopulos, Michael Flynn, Roger Stone, and Alex Van Der Zwaan all made false statements in the course of that investigation.[217] Additionally, Stone and Paul Manafort were charged with obstruction of justice and witness tampering.[218] Because all of these crimes fall into the categories of obstruction or financial crimes, we expected the justifications offered for their clemencies to be retributive. An additional reason for such retributive justifications is that the Mueller investigation hit so close to home for Trump, given that it was "an inquiry into whether he

[215] We tallied the justifications for each clemency and grouped them into Goldsmith and Gluck's four categories. We later decided to collapse the four categories into two: a "yes/probably" category and a "probably not/no" category. We made the decision to collapse the four groups because there was only one clemency in the "yes" category.

[216] Brown, *supra* note 40, at 47.

[217] *Id*.

[218] *Id*.

obstructed justice during the investigation into Russia's interference in the 2016 election and its possible collusion with his team."[219]

To test the impact of the Mueller investigation on this claim, we examined the types of justifications offered for two groups of clemency recipients: the five men who were involved in the Mueller investigation and everyone else.

Table 5: Distribution of justifications across involvement in the Mueller Investigation.

	Mueller	**Non-Mueller**	**Total**
Retributive	96	150	*246*
Rehabilitative	0	214	*214*
Character Related	14	98	*112*
Utilitarian	0	11	*11*
Evidence of Smooth Re-entry	0	36	*36*
Mercy-Sympathy	5	10	*15*
Total	*115*	*519*	***634***

Notably, the great majority of justifications offered for Mueller related clemencies were retributive. The justifications Trump offered for Paul Manafort's clemency provide good examples of his use of retributive rhetoric. As President Trump put it in a statement on March 13, 2019, "Paul Manafort—the black book turned out to be a fraud. We learned that during the various last number of weeks and months. They had a black book that came out of Ukraine. It turned out to be a fraud. It turned out to be a fraud. They convicted a man; it turned out to be a fraud."[220]

The remaining Mueller related clemencies were mercy or character related. None of them were justified in rehabilitative terms since doing so would have required Trump to acknowledge his associates' guilt.

VI. Conclusion

President Trump's 238 acts of clemency generated considerable controversy, but the justifications offered were quite conventional. He continued the retributive trend established by his predecessors. He did, however, resurrect rehabilitation as a clemency justification. However, here the medium mattered. When he spoke in his own voice, in speeches, tweets, and answering reporter questions, he was much more prone to make retributive arguments, to emphasize unfairness or injustice

[219] Eric Lipton & Kenneth Vogel, *In Trump's Pardons, Disdain for Accountability*, N.Y. Times, Jan. 20, 2021, https://www.nytimes.com/2021/01/20/us/politics/trump-pardons-accountability.html.

[220] Administration of Donald J. Trump, 2020 Remarks at a White House Coronavirus Task Force Press Briefing, Daily Compilation of Presidential Documents (2020): 23, https://heinonline.org/HOL/P?h=hein.fedreg/dcpd20277&i=23.

as a reason for clemency. And strikingly, the most frequent and emphatic use of retributive rhetoric was in the cases of clemency for people targeted by the Mueller investigation.

Perhaps these justifications were really aimed at clearing Trump's own name, for if the people targeted by Mueller were innocent or unfairly targeted, so was he. In this sense, as in many other arenas, Trump's clemencies were often as much about him as those whose sentences he commuted or the people he pardoned. As Trump put it in explaining why he pardoned Flynn: "The whole thing turned out to be a scam, and it turned out to be a disgrace to our country, and it was a takedown of a duly elected President."[221]

[221] *Administration of Donald J. Trump*, *2020 Remarks in a Roundtable Discussion on the Positive Impact of Law Enforcement and an Exchange With Reporters*, Daily Compilation of Presidential Documents 13 (2020).

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The Power to Restrict Immigration and the Original Meaning of the Constitution's Define and Punish Clause

Robert G. Natelson[1]

ABSTRACT

The Supreme Court and constitutional commentators have long struggled to identify the provision in the Constitution, if any, that grants Congress authority to restrict immigration. This article demonstrates that authority to restrict immigration is included within the Constitution's grant of power to Congress to "define and punish . . . Offenses against the Law of Nations."[2]

KEYWORDS

Define and Punish Clause, U.S. Constitution and Immigration, Immigration restrictions, Law of nations, International law

CONTENTS

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[2] U.S. Const. art. I, § 8, cl. 10.

[3] *Bibliographical footnote*: This footnote brings together volumes cited more than once in this article.
Jean-Jacque Burlamaqui, Principles of Natural and Politic Law (Liberty Fund ed. 2006) (Thomas Nugent, trans.) [hereinafter Burlamaqui]
The Documentary History of the Ratification of the Constitution (John P. Kaminski et al. eds., 1976-2021) (40 volumes) [hereinafter Documentary History]
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Hugo Grotius, The Rights of War and Peace (Richard Tuck ed., 2005) (3 vols.) [hereinafter Grotius]
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The Records of the Federal Convention (Max Farrand ed., 1911) [hereinafter Farrand]
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Hamilton Vreeland, Jr., Hugo Grotius: the Father of the Modern Science of International Law (1917) [hereinafter Vreeland]
Collected Works of James Wilson (Kermit L. Hall & Mark David Hall eds. 2007) [hereinafter Wilson]
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Christianus L. B. de Wolff, Jus Gentium Methodo Scientifica Pertractatum (1759) [hereinafter Wolff]

> "The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the High Seas, and Offenses against the Law of Nations."[4]

* * * *

I. Statement of the Problem

A. "It's in There Somewhere!"

The Define and Punish Clause provides that "The Congress shall have Power . . . To define and punish Piracies and Felonies Committed on the High Seas, and Offenses against the Law of Nations."[5] When the Constitution was written, "the law of nations" was the usual phrase for international law.

Because immigration is movement across national boundaries, the reference to "the Law of Nations" seems to invite consideration of whether the clause authorizes Congress to restrict immigration. Yet very few commentators have accepted that invitation. Those discussing the Define and Punish Clause almost invariably neglect to address immigration,[6] and those discussing immigration almost invariably overlook the Define and Punish Clause.[7]

A few commentators have contended that the Constitution does not grant the federal government any authority over immigration at all—that the subject is one reserved to the states.[8] However, Article I, Section 9, Clause 1 of the Constitution seems inconsistent with that view. It provides:

> The *Migration* or Importation of such Persons as any of the States now existing shall think proper to admit, *shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight*, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.[9]

Although this provision usually is identified as a concession to the slave trade, the term "Migration" commonly was applied to free persons rather than slaves.[10]

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4 U.S. Const. art. I, § 8, cl. 10.

5 U.S. Const. art. I, § 8, cl. 10.

6 *Id*.

7 *E.g.*, Sarah H. Cleveland, *Our International Constitution*, 31 Yale J. Int'l L. 1 (2006) (discussing the foreign affairs power without linking immigration to the Define and Punish Clause); Andrew B. Ayers, *Note, International Law as a Tool of Constitutional Interpretation in the Early Immigration Power Cases*, 19 Geo. Immig, L. J. 125 (2004); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 Wis. L. Rev. 965 (1993); James A.R. Nafziger, *The General Admission of Aliens under International Law*, 77 Am. J. Int'l L. 804 (1983).

8 *E.g.*, Nikolas Bowie & Norah Rast, *The Imaginary Immigration Clause*, 120 Mich. L. Rev. 1419, 1426 (2022) (labeling the federal power to restrict immigration as "imaginary").

9 U.S. Const. art. I, § 9, cl. 1. (Italics added.)

10 *See* 20 Documentary History, *supra* note 3, at 318 in which James Iredell, a Federalist, explains to the North Carolina ratifying convention:

A free person migrating from France to New York State before 1808 was within the coverage of this clause: Congress could not prevent his immigration if New York State was willing to accept him. The necessary implication, however, is that beginning in 1808, Congress *could* prevent him from coming.[11] What specific constitutional provision granted Congress that authority?

Both the Supreme Court and commentators have cast about for an answer to that question.[12] In the 1875 case of *Chy Lung v. Freeman*,[13] the Court asserted that power to regulate immigration was latent in the Foreign Commerce Clause.[14] This conclusion is open to the objection that mere non-commercial travel is not "commerce" as the Constitution uses the term.[15] In 1889, in *Ping v. United States*, the court shifted ground, relying instead on the doctrine of inherent sovereign authority.[16] That doctrine, however, contradicts the text of the Tenth Amendment.[17] Thus, as commentators have observed, the court's rulings seem "untethered to any constitutional power."[18]

> The Committee will observe the distinction between the two words migration and importation. The first part of the clause will extend to persons who come into the country as free people or are brought as slaves. But the last part extends to slaves only. The word migration refers to free persons; but the word importation refers to slaves, because free people cannot be said to be imported.

See also James Wilson, *Remarks at the Pennsylvania Ratifying Convention*, 2 *id*. at 463 (pointing out that this clause gives Congress power only to impose duties on the importation of slaves, not on the migration of white people); Albany Federal Committee, *An Impartial Address*, c. Apr. 20, 1788, *reprinted in* 21 *id*. at 1388, 1393 (making the same distinction); The Federalist No. 42 (James Madison) (referring to "voluntary . . . emigrations"), *reprinted in* 15 *id*. at 427, 429.

11 This clause likely affected emigration as well, a process Founding-era sovereignties sometimes restricted. Vattel, *supra* note 3, at 220-25. Consider this scenario: Virginia has an anti-emigration statute, but a free Virginian nevertheless leaves his or her state for New York. New York is willing to receive that person. In that case, the clause permitted Congress, beginning in 1808, to adopt measures to reinforce state anti-emigration statutes. Before 1808, it could not do so.
However, the surrounding language and history rendered it probable that the drafters thought of the clause as applying only to immigration.

12 Christopher G. Blood, *The "True" Source of the Immigration Power and its Proper Consideration in the Elian Gonzalez Matter*, 18 B.U. Int'l L.J. 215, 226-28 (2000) (describing the judicial struggle).

13 92 U.S. 275 (1875); *see also* Edye v. Robertson, 112 U.S. 580 (1884).

14 92 U.S. at 280. The Foreign Commerce Clause reads, "The Congress shall have Power . . . To regulate Commerce with foreign Nations . . . . " U.S. Const. art. I, § 8, cl. 3.

15 Robert G. Natelson, *The Legal Meaning of "Commerce" in the Commerce Clause*, 80 St. John's L. Rev. 789 (2006); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847 (2003); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 Chi. L. Rev. 101 (2001). *Cf*. United States v. Lopez, 514 U.S. 549 (1995) (holding that the Commerce Clause authorizes only regulation of economic activities).

16 130 U.S. 581 (1889).

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

18 *Bowie & Rast*, *supra* note 8, at 1426. *See also* Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 Harv. C.R.-C.L. L. Rev. 289 (2008):

Yet the Court's critics have done no better.[19] A few[20] have turned for guidance to the controversy over the Alien Act of 1798[21] for insights on the source of the immigration power. That controversy does not provide much guidance, though, because it did not center on a law that restricted immigration; the Alien Act merely authorized the President to expel certain foreigners who had arrived legally.[22] Moreover, during the debate over the law, leading Founders were divided.[23] Finally, because the controversy arose well after the Constitution was ratified, it tells us nothing about the ratifiers' understanding of the document.

Most commentators do agree that the federal government's power to regulate immigration is implied rather than express, but this still begs the question of its

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> Most recently, the Court has seemed uninterested in undertaking a substantive inquiry into the sources of the powers to exclude and expel. It has noted a number of sources of constitutional authority pertaining to immigration generally, including the naturalization powers, the foreign relations powers, and the war powers.

Id. at 306.

19 *E.g.*, *Bowie & Rast*, *supra* note 8 (expressing doubt as to the source of the Constitution's immigration power); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Alliances, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 81-83 (2002) (doubting whether the Constitution's framers contemplated a federal immigration power; adding, "The constitutional text does not expressly address authority to regulate immigration," and referring to some constitutional provisions as bearing on aliens, but concluding that "Otherwise, the Constitution is silent regarding governmental control over aliens."); Ilya Somin, *Migration and Self-Determination*, 18 Geo. J. L. & Pub. Pol'y 805, 815 (declaring that there is a "lack of any explicit statement" in the Constitution granting power to control immigration).
See also Andrew Kent, *The New Originalism and the Foreign Affairs Constitution*, 82 Fordham L. Rev. 757, 775 (2013):

> It has long been noted that the Constitution lacks a clear textual basis for full congressional control over immigration. Some aspects of an immigration power may be implied from the Naturalization Clause, the war powers clauses, the Foreign Commerce Clause, or perhaps even the Migration and Importation Clause, but Congress regulates a vast array of immigration-related matters and not all can be easily implied from these other substantive powers.

See also Robert J. Reinstein, *The Aggregate and Implied Powers of the United States*, 69 Am. U. L. Rev. 3, 12 (2019).

20 *E.g.*, *Markowitz*, *supra* note 18, at 326-27.

21 1 Stat. 570 (1798).

22 Except insofar as an alien expelled from the country under the Act was barred from returning. 1 Stat. 571 (1798).

23 *Supra* note 20.

ultimate source. On that issue, commentators divide: Some suggest "inherent sovereign authority,"[24] at least for purposes of criticism.[25] Some suggest the "law of nations," but in a manner unconnected to any specific constitutional grant.[26] Others favor combinations of constitutional provisions such as the Naturalization[27] and Foreign Commerce[28] Clauses.

For the most part, therefore, the only thing the Supreme Court and most commentators agree on is, "The power's in there somewhere!"[29] As often happens when writers fail to reconstruct the Constitution's original understanding, some blame the uncertainty on the framers' bad drafting.[30]

B. Plan of this Article

In 2000, Christopher Blood, a law student, wrote about the then-famous case of Elian Gonzalez, a child captured in a federal raid and deported.[31] Blood contended that the Define and Punish Clause was the source of the federal immigration power. However, he relied only on scanty evidence—most of it arising long before or long after the Constitution was adopted.[32] His Founding-era evidence was not extensive.[33]

This article musters additional evidence and applies Founding-era interpretive methods[34] to it. The evidence shows that Christopher Blood was correct: The Define and Punish Clause is the fount of the congressional power to restrict immigration. Most of this additional evidence consists of standard works on the law of nations

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24 *E.g.*, 1 Rotunda & Nowak, *supra* note 3, at 786.

25 *E.g.*, *Scaperlanda*, *supra* note 7 (criticizing the sweep of the sovereignty theory without offering any other constitutional basis for congressional regulation of immigration); Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 Harv. C.R.-C.L. L. Rev. 1 (2010) (discussing and criticizing the "sovereignty" origins of the plenary power doctrine).

26 *E.g.*, Patrick J. Charles, *The Plenary Power Doctrine and the Constitutionality of Ideological Exclusions: An Historical Perspective*, 15 Tex. Rev. L. & Pol. 61 (2010) (attributing the power to the law of nations, but not to the Define and Punish Clause).

27 U.S. Const. art. I, §8, cl. 4 ("The Congress shall have Power . . . To establish an uniform Rule of Naturalization . . . "); see *Kent, supra* note 19, at 775 (deriving some aspects of the immigration power from the Naturalization Clause).

28 *Id.* art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations . . . ")

29 *Blood*, *supra* note 12, at 223 ("Indeed, a leading immigration law textbook cites no less than five potential sources of the immigration authority. These possible sources include the Commerce Clause, the Migration Clause, the Naturalization Clause, the War Clause, and 'implied' powers.")

30 *E.g.*, *Kent, supra* note 19, at 775 ("The immigration power and debate about unenumerated, inherent legislative authority provides another example of ways the foreign affairs Constitution was incomplete and poorly drafted . . . ")

31 *Blood*, *supra* note 12.

32 *Id.* at 232 (discussing practices in ancient Greece and Rome) & 234-36 (discussing matters arising long after the Constitution was ratified).

33 Blood offered a single citation (not really on point) to the work of Hugo Grotius, *id.* at 233; two to the work of Emer Vattel, *id.* at 229-30, one to a book by George Friedrich von Marten, *id.* at 230, and two to William Blackstone. *Id.* at 230 & 233-34. These individuals are discussed *infra* Part III.

34 Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 60 Ohio St. L. Rev. 1238, 1286 & 1305 (2007).

published before the thirteenth state, Rhode Island, ratified the Constitution on May 29, 1790. All these works were well-known and widely accepted in the United States. The evidence also includes two documents issued in 1791, but long in preparation and reflecting circumstances before 1791.

II. The Define and Punish Clause

The relevant portion of the Define and Punish Clause provides that Congress may "define and punish . . . Offenses against the Law of Nations."[35] The meaning of "Nation" has shifted somewhat since the Constitution was adopted. Today it almost invariably means a sovereign state. In the eighteenth century an older use still survived: A "nation" could be a large ethnic group, a people, a nationality.[36] Thus, in eighteenth-century discourse, the territory occupied by a "nation" was not necessarily coterminous with the boundaries of a sovereign state. A sovereign might rule over several nations or only part of one.[37] Modern analogues are the Arab nationality, which is spread over many sovereignties and the Maori nationality, which forms only a small minority within the single sovereign state of New Zealand.

The origin of the phrase *law of nations* reflects that older meaning of "nation:" The phrase is a direct translation of the Roman expression *ius gentium* (or *jus gentium*)—literally, "the law [or jurisprudence] of peoples"—that is, of peoples other than the Romans.

Consistently with the older meaning of "nation," the eighteenth century law of nations sometimes addressed the rights of sub-sovereign ethnic groups.[38] Nevertheless, most of it consisted of rules governing relationships among sovereigns. The 1778 edition of the *Encyclopaedia Britannica* stated:

> Sect. V. *Of offenses against the law of nations*.
>
> (1.) The *law of nations* is a system of rules, deducible by natural reason, and established by universal consent, to regulate the intercourse between independent states.
> (2.) In England, the *law of nations* is adopted in its full extent, as part of the law of the land.[39]

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35 U.S. Const. art. I, § 8, cl. 10.

36 Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denver Univ. L. Rev. 201, 259 (2007) (providing dictionary definitions). Failure to understand this shift of meaning has engendered confusion in Indian law, where modern writers assume that when an eighteenth-century speaker applied the term "nation" to a tribe the speaker necessarily was conceding sovereignty. *See, e.g.*, Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L. J. 1012, 1033 n.105 (relying on a single usage without acknowledging dictionary definitions).

37 *E.g.* Vattel, *supra* note 3, at 210 (listing a chapter heading as "How a Nation may separate itself from the State of which it is a Member, or renounce its Allegiance to its Sovereign when it is not protected") & 210-11 (speaking of a "free nation becom[ing] subject to another state").

38 *Id.*

39 6 Encylopaedia Britannica 35 (2d ed., 1778) (Italics in original.)

Founding-era scholars divided the law of nations into two broad categories. The *necessary* law of nations was the product of natural law and, as such, was immutable. The *arbitrary* or *voluntary* law of nations consisted of treaties, customs, and other enactments consistent with the broad principles of the necessary law.[40]

Although the law of nations affected primarily sovereigns and ethnic groups, it also could impact individuals. The *Encyclopaedia Britannica* entry continued:

> (3.) Offences against this law are principally incident to whole states or nations; but, when committed by private subjects, are then objects of the municipal [i.e., internal] law.
> (4.) Crimes against the law of *nations,* animadverted on [punished] by the laws of England, are 1. Violations of *safe-conducts*. 2. Infringement of the rights of *embassadors* [*sic*]. Penalty, in both: arbitrary. 3. *Piracy*. Penalty: judgment of felony, without clergy [i.e., death].[41]

The rules impacting individuals primarily were imposed by local or "municipal" law.[42] Sovereignties "defined and punished" offenses against the law of nations to promote and secure concord with other sovereignties.[43]

The crimes listed in *Encyclopaedia Britannica* (infringements on safe-conducts and ambassadors, and piracy) were illustrative only. Individuals could offend against international law in other ways. For example, in 1781, the Confederation

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40 Burlamaqui, *supra* note 3, at 177-78 & 274. *Cf.* Wilson, *supra* note 3, at 529 & 546 (dividing the law of nations into necessary and arbitrary categories). The term *arbitrary* should be understood in its Latinate sense of being based on human judgment.
Vattel refined the classification scheme into (1) the *necessary* law, imposed by pure natural law principles; (2) the *arbitrary* law, which included (a) the *conventional* law (based on consent expressed in treaties and other enactments) and (b) the *customary* law (based on tacit consent through usage). Vattel added a category he called (3) the *voluntary* law, which was based on presumed but not actual consent. It encompassed concessions from the necessary law required by circumstances. Vattel, *supra* note 3, at 17 & 70-78.
It may help to understand Vattel's scheme to compare his three principal categories with three categories from our private common law: (1) the law of torts (which usually operates without regard to consent), (2) contracts (based on real consent, express or inferred ["implied"]), and (3) quasi-contract and other forms of restitution (based on fictional consent).

41 *Id.* (Italics in original).

42 *Cf.* 7 J. Cont. Cong. 134 (Feb. 20, 1777) (reproducing the notes of Thomas Burke of North Carolina on a congressional debate on whether certain proceedings should be held under the municipal law or the law of nations); *see also* 16 *id.* 62 (Jan. 15, 1780) ("And whereas trials by Jury in cases of capture, which are decided by the law of nations, and not the municipal laws of the land . . .").

43 1 William Blackstone, Commentaries *68:

> But where the individuals of any state violate this general law [of nations], it is then the interest as well as duty of the government under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained. For in vain would nations in their collective capacity observe these universal rules, if private subjects were at liberty to break them at their own discretion, and involve the two states in a war.

Congress formally recommended that the American states enact legislation punishing offenses against the law of nations. Congress recommended punishment for violations of safe-conducts and passports and infractions of the immunities of foreign diplomats (all itemized by *Britannica*), but also for acts of hostility against friendly aliens, and "infractions of treaties and conventions to which the United States are a party."[44]

The bifurcated aspect of the law of nations—general standards "defined" by more specific rules—occasioned a brief dispute at the 1787 Constitutional Convention. The delegates were drafting what became the Define and Punish Clause. The question arose as to whether they should apply the word "define" to the phrase "the Law of Nations." James Wilson, considering the law of nations as merely a statement of natural law, objected: "To pretend to define the law of nations which depended on the authority of all the Civilized Nations of the World," he said, "would have a look of arrogance that would make us ridiculous."[45] In response, Gouverneur Morris explained: "The word define is proper when applied to offences in this case; the law of nations being often too vague and deficient to be a rule."[46]

The convention agreed with Morris.[47]

III. The Founders' Authorities on the Law of Nations

A. The Committee's List

Whether Congress may "define" limits on immigration and "punish" infractions depends on whether the law of nations, as understood by the Constitution's ratifiers, encompassed immigration restrictions and whether a breach of those restrictions was seen as an "Offense" against the law of nations.

The migration rule of Article I, Section 9 demonstrates that Americans were conscious that restrictions on immigration might one day be imposed. However, that possibility provoked only slight notice during the ratification debates[48]—probably because the United States then had no such limits and, like other countries, sought security in higher populations.[49] In other words, Americans thought they needed

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44 21 J. Cont. Cong. 1136-37 (Nov. 23, 1781).

45 2 Farrand, *supra* note 3, at 615 (Sept. 14, 1787) (Madison).

46 *Id.*

47 *Id.* The Second Continental Congress previously had gone through the process of attempting to clarify one aspect of the law of nations. *E.g.*, 19 J. Cont. Cong. 116-17 (Feb. 5, 1781) (discussing the need to clarify the law of nations pertaining to foreigners paying taxes and imposts).

48 "Deliberator," Freeman's J., Feb. 20, 1788, *reprinted in* 33 Documentary History, *supra* note 3, at 902, stating with disapproval that under the Constitution

> Congress may, by imposing a duty on foreigners coming into the country, check the progress of its population; and after a few years they may prohibit altogether, not only the migration of foreigners into our country, but also that of our own citizens to any other country.

Id. at 905.

49 Burlamaqui, *supra* note 3, 450 (stating that immigration of screened individuals should

more immigrants, not fewer.[50] This sentiment rendered immigration restrictions unlikely in the immediate future, so discussion centered on more pressing issues.

During the Founding era, American knowledge of the law of nations was shaped by treaties and treatises. Treaties commonly addressed the topic of cross-border migration, but usually emigration rather than immigration.[51] However, treatises universally recognized as authoritative did discuss immigration.

One indication of whether the Founders considered a treatise authoritative is whether it appeared on a January 24, 1783 list of recommended books complied by a three-man committee of the Confederation Congress. The committee members were James Madison of Virginia, Hugh Williamson of North Carolina, and Thomas Mifflin of Pennsylvania—all three of whom were to serve among the Constitution's framers.

One section of the list was entitled "Law of Nature and Nations." It included (1) several works on natural law, (2) several on aspects of the law of nations not related to immigration (such as the law of the sea and rules pertaining to ambassadors), and (3) five works devoted specifically to the law of nations. The committee report listed those five as—

- "Wolfius's Law of Nature;"
- "Grotius' Law of Nature and Nations;"
- "Vattel's Law of Nature and Nations;"
- "Puffendorf's Law of Nature and Nations with notes by Barbeyrac;" and
- "Burlamaque's [*sic*] Law of Nature and Nations."[52]

In addition, the committee recommended that Congress acquire a sixth work relevant to the law of nations: William Blackstone's *Commentaries on the Laws of England*.[53] Blackstone's treatise was devoted mostly to the common law, but also contained an overview of international law.[54]

B. The Authorities on the Law of Nations

Among these authors, the earliest in time was Hugo Grotius, who lived from 1583 to 1645. "Hugo Grotius" is a Latinized version of his Dutch name, Huig de Groot.

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be encouraged to increase a country's military strength); Vattel, *supra* note 3, at 198 (stating that increasing the number of citizens is "one of the first objects that claim the attentive care of the state or its conductor.").

50 *E.g.*, "Marcus," *N.Y. Daily Advertiser*, Oct. 15, 1787, *reprinted in* 19 Documentary History, *supra* note 3, at 85 (presenting as an argument for ratification of the Constitution that "thousands in Europe, with moderate fortunes, will migrate to this country, if an efficient Government gives them a prospect of tranquility"); *cf.* Wilson, *supra* note 3, at 535 & 538-39 (referring to a country's need to attract people).

51 1 Collection of Treaties Between Great Britain and other Powers 472 (George Chalmers ed. 1790) (reciting, as a term in the Treaty of Paris of 1763, that the French inhabitants of Canada may emigrate freely for a period of eighteen months); *id*. at 480 (similar terms for inhabitants of Florida); 2 *id*. at 233 (similar terms in 1783 treaty with Spain for the retrocession of Florida).

52 24 J. Cont. Cong. 83-84 (Jan. 24, 1783).

53 *Id.* at 89.

54 *Infra* Part IV(I).

Grotius was endowed with an astonishing intellect. That intellect, and his conscientious application, made him one of the leading figures of his age.[55] In addition to law, his intellectual range included drama, philosophy, history, theology, and poetry—in Greek, Latin, and Dutch. Grotius also was a man of affairs and served in high office in the Netherlands. In 1618, however, he was caught in a political-religious dispute and illegally tried, convicted, and sentenced to life imprisonment. Two years later he escaped from his prison in a trunk, which, his wife assured the guards, contained only books and porcelain.[56]

The Netherlands never recalled Grotius from exile. He spent most of the remainder of his life in Paris. For many years he served the Swedish crown as its ambassador to France.

Grotius' most important literary production was the three-volume set identified by the congressional committee as "Law of Nature and Nations." It was published in 1625, initially in Latin, under the title, *De Jure Belli ac Pacis*. It established Grotius as the founder of modern international law.[57]

Despite the fact that Grotius' treatise was over 150 years old when the Constitution was written, members of the founding generation still consulted it. Particularly popular was the edition translated and annotated by the French academic, Jean Barbeyrac (1674–1744).[58]

Chronologically, the next author on the congressional committee's list was the German scholar Samuel von Pufendorf (1632-1694). (Americans of the founding generation usually spelled his name "Puffendorf.") Like Grotius, Pufendorf spent much of his life under the protection of the Swedish crown.[59] He served as a professor at the University of Lund and, subsequently, as royal historiographer. He returned to Germany a year before his death and was awarded a barony.[60]

The congressional committee referred to Pufendorf's most famous work as "Law of Nature and Nations with notes by Barbeyrac." Published in 1672, it was composed in Latin under the title *De Jure Naturae et Gentium*. A 1729 edition translated and annotated by Barbeyac became the standard.[61]

Chronologically, the next author on the committee's list was the German polymath Christian Wolff, who lived from 1679 to 1754. Wolff was a professor at the University of Halle. When forced to leave, he moved to the University of Marburg. Later he served as science adviser to Czar Peter the Great, and eventually returned in triumph to the University of Halle—as chancellor.[62]

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55 See generally Vreeland, *supra* note 3 (discussing the life of Grotius).

56 The story of Grotius' escape is riveting. Central to the narrative is the courage, loyalty, and cleverness of his wife, Maria van Reigersberg, and of a young servant woman named Elsje van Houweing. Vreeland, *supra* note 3, at 131-49.

57 *Id.* at 164-65 & 171-72.

58 *E.g.*, Anderson v. Winston, Jeff. 24, 28-20 (Va. Gen. Ct. 1736) (citing Barbeyrac's notes on both Grotius and Pufendorf).

59 *Samuel, baron von Pufendorf, German jurist and historian*, Encyclopaedia Britannica, https://www.britannica.com/biography/Samuel-Freiherr-von-Pufendorf.

60 *Id.*

61 *E.g.*, Anderson v. Winston, Jeff. 24, 28-20 (Va. Gen. Ct. 1736) (citing Barbeyrac's notes on both Grotius and Pufendorf); Tucker v. White, 1 N.J. L 94, 101 (1791) (argument of counsel, citing Barbeyrac's notes on Pufendorf).

62 *Christian, baron von Wolff, German philosopher*, Encyclopaedia Britannica, https://www.britannica.com/biography/Christian-baron-von-Wolff.

In 1749, Wolff published in Latin the *Jus gentium methodo scientifica pertractatum* ("The law of nations treated thoroughly according to scientific method"). The author's surname was Latinized (awkwardly) into "Wolfius"—hence the congressional committee's designation of his book as "Wolfius's Law of Nature."

Wolff was less known in America than Grotius or Pufendorf.[63]

Next on the list (again, in chronological order) was the book the committee described as "Burlamaque's Law of Nature and Nations." Jean-Jacques Burlamaqui (1694–1748) was a natural law professor at the Academy of Geneva. He published his *Principes du droit naturel* in 1747.[64] In 1751, three years after his death, some of his academic colleagues supplemented his work by arranging his lecture notes into the *Principes du droit politique*.

"Vattel's Law of Nature and Nations," as the congressional committee called it, originally was to be an elaboration on the Wolff's treatise,[65] but it metamorphosed into something far more. Emir de Vattel (1714 to 1767) was a Swiss lawyer and diplomat who studied under Burlamaqui.[66] Vattel served as a member of the privy council of the elector of Saxony and chief foreign affairs adviser to the Saxon government.[67]

Vattel published his work in French in 1758 under the title *Le Droit des Gens*. During the Founding-era, his was the most recent available work devoted exclusively to natural law and the law of nations and, at least among Americans, the most cited.[68]

Although not in the committee's list, one more international law scholar merits our attention. Georg Friedrich von Martens (1756-1821) was a professor at the University of Göttingen, in Germany. In 1789, Martens published *Précis du droit des gens modernes de l'Europe*. An English translation appeared six years later.[69]

Martens' work was not available in time for the constitutional debates, but his period of composition was exactly contemporaneous with those debates. His treatise therefore reflects international law as it stood precisely when the Constitution was written and ratified.[70]

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63 *Infra* Part III(D).

64 Burlamaqui, *supra* note 3, at 161-68.

65 Vattel, *supra* note 3, at 13; *Emerich de Vattel*, Encyclopaeda Britannica https://www.britannica.com/biography/Emmerich-de-Vattel.

66 Vattel, *supra* note 3, at x (editor's introduction). Vattel's first name often is given as "Emerich" or "Emmerich," but he was christened "Emer." *Id.* at ix, n. 1 (editor's introduction).

67 *Id*. at xi (editor's introduction).

68 *See, e.g.*, 17 J. Cont. Cong. 943 (Oct. 17, 1780); 31 *id.* 589 (Aug. 29, 1786) (reproducing documents citing Vattel). Richard Harison, a prominent New York lawyer, invoked Vattel when urging the state legislature to recognize the independence of Vermont. Richard Harison, *Remarks on an Act Recognizing the Independence of Vermont*, Mar. 28, 1787, Founders Online, at https://founders.archives.gov/documents/Hamilton/01-04-02-0067.

69 Martens, *supra* note 3.

70 I have omitted as an eighteenth-century authority Robert Ward, An Enquiry into the Foundation and History of the Law of Nations in Europe, from the Time of the Greeks and Romans, to the Age of Grotius (1795) (2 vols.). Ward's work was not published until 1795 and was limited to a discussion of the law before Grotius.

C. William Blackstone and the Legally-Literate American Public

Today most Americans would be hard pressed to identify any legal scholar. This was not as true during the Founding era, due to the extraordinary legal literacy of the American population. Edmund Burke commented on it in his famous *Speech on Conciliation with America*, delivered in Parliament on March 22, 1775:

> Permit me, Sir, to add another circumstance in our Colonies which contributes no mean part towards the growth and effect of this untractable spirit. I mean their education. In no country perhaps in the world is the law so general a study. The profession itself is numerous and powerful; and in most provinces it takes the lead. The greater number of the deputies sent to the [First Continental] Congress were lawyers. But all who read, and most do read, endeavor to obtain some smattering in that science. I have been told by an eminent bookseller, that in no branch of his business, after tracts of popular devotion, were so many books as those on the law exported to the Plantations. The Colonists have now fallen into the way of printing them for their own use. I hear that they have sold nearly as many of Blackstone's Commentaries in America as in England. General Gage marks out this disposition very particularly in a letter on your table. He states that all the people in his government are lawyers, or smatterers in law . . . .[71]

Understanding this legal literacy enables us to reconcile two statements about the Constitution that otherwise might seem contradictory: (1) It contained many legal terms of art[72] and (2) it was designed to be understood (with some assistance from its sponsors) by the average, engaged eighteenth-century American.

William Blackstone (1723-1780), the author mentioned by Burke, was perhaps the most influential of all commentators on English law. He served as the first Vinerian Professor at Oxford University, as a Member of Parliament, and as a judge of the Court of Common Pleas.[73] The four volumes of his *Commentaries,* which were based on his Oxford lectures, were published in English between 1765 and 1769.

As Burke suggested, Blackstone was enormously popular in the America. Citizens without direct access to the works of Grotius, Pufendorf, Barbeyrac, Wolff, Burlamaqui, or Vattel more likely had access to Blackstone.[74]

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71 Edmund Burke, *Speech on Conciliation with America*, Mar. 22, 1775, *available at* https://www.fulltextarchive.com/book/Burke-s-Speech-on-Conciliation-with-America/.

72 Robert G. Natelson, The Original Constitution: What It Actually Said and Meant 34 (3d ed. 2015) (discussing the misunderstandings that can arise from unfamiliarity with the Constitution's legal terminology).

73 *Sir William Blackstone, English jurist*, Encyclopaedia Britannica, https://www.britannica.com/biography/William-Blackstone.

74 *Infra* note 79 and accompanying text; Wolf, Book Culture, *supra* note 3, at 156-59 (1988) (describing the success of Blackstone in Philadelphia).

D. The Influence of these Authors on the Founding Generation

During the eighteenth century, Grotius, Pufendorf, and Vattel all were regularly cited in and by American courts;[75] Wolff less so.[76] Contemporaneous citations to Blackstone are too numerous to list.[77]

Grotius's and Pufendorf's volumes were being sold in Philadelphia as early as the 1740s.[78] Surveys of American eighteenth-century libraries show that books by several of our authors were common holdings. Pufendorf's work was tied for the tenth most common holding among law books in libraries in colonial (i.e., pre-1776) Virginia.[79] A survey of the holdings in eighteenth century American libraries whose records are still extant (necessarily a limited set) identified no single law book owned by more than thirteen libraries. Blackstone's *Commentaries* was in ten, Vattel's *Law of Nations* in five, Grotius's *De Juri Belli ac Pacis* in three, and a shorter book by Grotius in five.[80]

Leading Founders relied freely on the authorities considered here. Thus, in the course of his 1774 essay defending the rights of the colonies against Great Britain,[81] John Dickinson cited Grotius, Pufendorf, and Burlamaqui.[82] John Adams' *Novanglus No. 6* cited Grotius, Pufendorf, and Barbeyrac.[83] James Wilson's *Collected Works* include pre-ratification references to Burlamaqui.[84] At the Pennsylvania ratifying

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75 *Grotius*: Anderson v. Winston, Jeff. 24, 28 (Va. Gen. Ct. 1736) (multiple citations); Robin v. Hardaway, Jeff. 109, 111 (Va. Gen. Ct. 1772) (argument of counsel); Brimley v. Avery, Kirby 22, 23 (Conn. Sup. Ct. Errors 1787); Hoare v. Allen, 2 U.S. 102 n.12 (Pa. S.Ct. 1789); Dulaney v. Wells, 3 H. & McH. 20, 25 (Md. Gen. Ct. 1790), *reversed* (Md. Ct. App. 1795); Tucker v. White, 1 N.J. L 94, 101 (1791) (argument of counsel).
Pufendorf: Anderson v. Winston, Jeff. 24, 28 (Va. Gen. Ct. 1736); Robin v. Hardaway, Jeff. 109, 111, 116, 121 & 122 (Va. Gen. Ct. 1772) (arguments of counsel); Harrison v. Sterett, 4 H. & McH. 540, 545 (Md. Prov. Ct. 1774) (argument of counsel); Respublica v. Sparhawk, 1 U.S. 357, 363 (Pa. 1788); Camp v. Lockwood, 1 U.S. 393, 395 (Pa. Ct. Com. Pl. 1788) (argument of counsel).
Vattel: Government v. McGregory, 14 Mass. 499 (Mass. 1780) (argument of counsel); Talbot v. Commanders & Owners of Three Brigs, 1 U.S. 95, 100 & 106 (Pa. High Ct. Err. & App. 1784); Bayard v. Singleton, 1 N.C. 5 (1787); Respublica v. Sparhawk, 1 U.S. 357, 362 (Pa. 1788) (argument of counsel). Dulaney v. Wells, 3 H. & McH. 20, 25 (Md. Gen. Ct. 1790), *reversed* (Md. Ct. App. 1795) (multiple citations); Tucker v. White, 1 N.J. L 94, 99 (1791) (argument of counsel).

76 *But see* Hoare v. Allen, 2 U.S. 102 n.12 (Pa. Sup. Ct. 1789) (citing Wolff).

77 Thirty-two citing cases were produced by an Aug. 20, 2022 Westlaw search of the relatively sparse reported pre-1791 American case law. The query "adv: DA(bef1791) & Blackstone" was entered in the Allstates database.

78 Wolf, Book Culture, *supra* note 3, at 135-36.

79 William Hamilton Bryson, Census of Law Books in Colonial Virginia xvii (1978).

80 Herbert A. Johnson, Imported Eighteenth-Century Law Treatises in American Libraries, 1700-1799 59 & 63 (1978). The work held in thirteen libraries was Knightly D'Anvers' *Abridgement*. *Id*. at 59. It was published in 1727, much earlier than either Blackstone or Vattel, and thus presenting a longer opportunity for acquisition.

81 1 The Political Writings of John Dickinson 329 (J. Dickinson ed. 1801).

82 *Id.* at 338 (Grotius), 340 (Burlamaqui), 339 (Pufendorf) & 341 (Pufendorf).

83 The Revolutionary Writings of John Adams 58-60 (C. Bradley Thompson ed. 2001).

84 1 Wilson, *supra* note 3, at 5n & 66-67. *See also* Ray Forrest Harvey, Jean Jacques Burlamaqui: A Liberal Tradition in American Constitutionalism 79-105 (1937) (documenting the dissemination of Burlamaqui's work in America); *id.* at 109 (describing

convention Wilson listed "Grotius and Puffendorf down to Vattel."[85] In his lectures on law, delivered shortly after the ratification, Wilson discussed all these authors at some length, including Wolff.[86]

References to these authorities also appear in the correspondence of John Adams,[87] Abigail Adams,[88] Alexander Hamilton,[89] Thomas Jefferson,[90] James Madison,[91] John Francis Mercer,[92] James Monroe,[93] and

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Burlamaqui's influence on the Revolutionary generation) & 142-65 (describing his influence on American constitutionalism).

85 1 Wilson, *supra* note 3, at 211.

86 *See, e.g*., *Of the General Principles of Liberty and Obligation*, 1 *id.* at 473-74, 475n, 479n, 485-90, 493n & 495n (all citing Pufendorf), 476n (Grotius), 478n (Barbeyrac), 481 (Wolff), 483 (Vattel), 490 (Burlamaqui).

87 John Adams to John Quincy Adams, Jan. 23, 1788, Founders Online, at https://founders.archives.gov/documents/Adams/04-08-02-0097 (stating "To Vattel and Burlamaqui, who you Say you have read you must Add, Grotius and Puffendorf and Heineiccius"); John Adams to John Quincy Adams, May 19, 1783, Founders Online, https://founders.archives.gov/documents/Adams/04-05-02-0088, James Lovell to John Adams, Jan. 1, 1778, Founders Online, at https://founders.archives.gov/documents/Adams/06-05-02-0229 (calling upon Adams' knowledge of "Grotius Puffendorf Vattel &c.") (recommending Barbeyrac).

88 Abigail Adams to Royall Tyler, Jul. 10, 1784, Founders Online, at https://founders.archives.gov/documents/Adams/04-05-02-0207 ("with pleasure have I seen your delight in the company, and Society, of Grotius, Puffendorf, Bacon, Vatel [*sic*] and numerous other writers cal[c]ulated to inform the mind and instruct the judgment"); Abigail Adams to Abigail Adams Smith, Aug. 11, 1786, Founders Online, at https://founders.archives.gov/documents/Adams/04-07-02-0118 (reporting seeing the statue of Grotius at Delft).

89 Alexander Hamilton, *A Letter from Phocion to the Considerate Citizens of New York*, Jan. 1-27, 1784, Founders Online, at https://founders.archives.gov/documents/Hamilton/01-03-02-0314 (referring to "Vatel" and Grotius).; Alexander Hamilton, *Second Letter from Phocion*, Apr. 1784 (exact date uncertain), Founders Online, at https://founders.archives.gov/documents/Hamilton/01-03-02-0347 (citing "Vatel"). *But see* Phillip W. Magness, *A Phony 'Phocion': Alexander Hamilton and the election of 1796*, https://philmagness.com/2016/08/a-phony-phocion-alexander-hamilton-and-the-election-of-1796 (contesting Hamilton's authorship of the "Phocion" essays).

90 Thomas Jefferson to James Madison, May 25, 1784, Founders Online, at https://founders.archives.gov/documents/Madison/01-08-02-0021 (stating that he would be sending from Paris books by "Wolfius" and Grotius); Thomas Jefferson to Walker Maury, Aug. 19, 1785, Founders Online, at https://founders.archives.gov/documents/Jefferson/01-08-02-0321 (cover letter with a shipment of books for his nephew, including works by Grotius and Pufendorf).

91 James Madison to Thomas Jefferson, Mar. 16, 1784, Founders Online, at https://founders.archives.gov/documents/Madison/01-08-02-0002 (suggesting purchase of "Wolfius"); James Madison to James Monroe, Nov. 27, 1784, Founders Online, at https://founders.archives.gov/documents/Madison/01-08-02-0083 (citing Vattel); James Madison to Thomas Jefferson, Jan. 7, 1785, Founders Online, at https://founders.archives.gov/documents/Madison/01-08-02-0122 (citing Grotius, Pufendorf, and Vattel); James Madison, *Notes on Ancient and Modern Confederacies* (1786), Founders Online, at https://founders.archives.gov/documents/Madison/01-09-02-0001 (citing Grotius on the "Belgic" [Netherlands] confederacy).

92 John Francis Mercer to James Madison, Dec. 23, 1786, Founders Online, https://founders.archives.gov/documents/Madison/01-09-02-0114 (citing Vattel).

93 List of Books Sold to James Monroe, May 10, 1785, Founders Online, at https://founders.archives.gov/documents/Jefferson/01-07-02-0191 (purchase list including Barbeyrac, Vattel, and "Wolf").

Edmund Randolph.[94] These authorities also surfaced in the constitutional debates of 1787-90. Delegates to the Federal Convention cited Blackstone[95] and Vattel.[96] Participants in the subsequent ratification controversy, among them Alexander Hamilton,[97] cited Blackstone extensively.[98] Hamilton and Madison mentioned Grotius in Federalist Nos. 20 and 84,[99] several other debate participants cited him,[100] and a Rhode Island antifederalist wrote a public letter over the name of the great Hollander.[101]

Other participants in the ratification debates referenced Pufendorf[102] and, much more often, Vattel.[103] Some listed several of these scholars in one place—as when the Federalist author writing under the pseudonym "Margery" commended "a Constitution, which is the combined result of all the wisdom of Grotius, Puffendorf, Barbeyrac, and Burlamaqui."[104]

Several of these scholars also made their appearance in the state ratifying conventions and associated proceedings. As noted above, James Wilson cited Grotius, Pufendorf, and Vattel at the Pennsylvania convention.[105] At the Virginia convention, William Grayson, an antifederalist, asked, "If nine states give [navigation rights to the Mississippi] away, what will the Kentucky people do?

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94 Edmund Randolph to James Madison, Jan. 27, 1784, Founders Online, at https://founders.archives.gov/documents/Madison/01-07-02-0213 (author's note describing Randolph's enclosure, indicating that he had consulted Vattel); Edmund Randolph to Thomas Jefferson, Jan. 30, 1784, Founders Online, at https://founders.archives.gov/documents/Jefferson/01-06-02-0377 (reporting his consulting Vattel).

95 1 Farrand, *supra* note 3, at 472 (Jun. 29, 1787) (Yates) (reporting a speech by Alexander Hamilton, 2 *id.* at 448 (Aug. 29, 1787) (Madison) (reporting comments by John Dickinson).

96 1 *Id.* at 437 & 438 (Jun. 27, 1787) (Madison) (reporting a speech by Luther Martin).

97 The Federalist No. 69, *reprinted in* 16 Documentary History, *supra* note 3, 387, 392-93 & No. 84, *reprinted in* 18 *id*. 127, 129.

98 For a list of references as recorded by the Documentary History, *supra* note 3, enter "Blackstone" at https://search.library.wisc.edu/digital/ATR2WPX6L3UFLH8I.

99 The Federalist No. 20, *reprinted in* 13 Documentary History, *supra* note 3, at 410, 411; Federalist No. 84, *reprinted in* 18 *id*. 127, 136

100 *E.g.*, "An Impartial Citizen," *Letter V*," Petersburg (VA) Gaz., Feb. 28, 1788, *reprinted in* 8 Documentary History, *supra* note 3, at 428, 430 (referring to "Montesquieu, Grotius, and other writers on government and the law of nations"); "Examiner," *Letter II*," N.Y. J., Dec. 14, 1787, *reprinted in* 19 *id*. at 423 (referring to, among others, Grotius and Pufendorf); *Newspaper Report of House of Deputies and House of Magistrates Proceedings* (Rhode Island), Mar. 1, 1788, *reprinted in* 24 *id*. 129, 132 (reporting references to Grotius and Pufendorf during legislative debate on a bill to call a ratifying convention).

101 "Grotius," *Proposed Prefatory Resolutions to Instructions*, United States Chronicle (Providence), May 27, 1790, *reprinted in* 26 Documentary History, *supra* note 3, at 890.

102 *E.g.*, "Cincinnatus," *Letter V, To James Wilson, Esquire*, N.Y. J., Nov. 29, 1787, *reprinted in* 14 *id.* at 303, 308 (citing "Barbeyrac's Puffendorf"); *Extract of a letter from a gentleman in South Carolina, dated Jan. 30, 1788, to his friend at this place*, Poughkeepsie (NY) Country J., Mar. 11, 1788, *reprinted in* 20 *id*. 853, 856 (citing "Puffendorf," among others); see also sources cited *supra* note 99.

103 For a list of references as recorded by the Documentary History, *supra* note 3, *see* enter "Vattel" at https://search.library.wisc.edu/digital/ATR2WPX6L3UFLH8I.

104 "Margery," Letter VIII, Mar. 20, 1788, *reprinted in* 34 Documentary History, *supra* note 3, at 1073, 1075. *See also* "Examiner," *Letter II*, N.Y.J., Dec. 14, 1787, *reprinted* in 19 *id.* at 423 (citing Grotius and "Puffendorf", among others).

105 *Supra* note 85 and accompanying text.

Will Grotius and Puffendorf relieve them?"[106] During the South Carolina legislative session leading to a convention in that state, Charles Cotesworth Pinkney cited Burlamaqui [107] and he and Rawlins Lowndes debated comments by Vattel.[108]

We can say with confidence, therefore, that the Founders considered these writers on the law of nations to be reasonably authoritative.

IV. Positions on Immigration

A. Summary of the Views of the Founding-era Authorities

Pufendorf, Barbeyac, Vattel, Martens, Blackstone, and—more obliquely, Grotius and Burlamaqui— all addressed limits on immigration when writing on the law of nations. These authors consistently recognized the prerogative of governments to impose immigration restrictions. That prerogative was qualified in cases of necessity (for example, a ship being driven by storm onto a foreign shore), and in the cases of exiles and fugitives. As to voluntary immigrants, however, all but Grotius—the earliest of the writers— recognized that the power to restrict was nearly absolute. Grotius made an exception for foreigners who wished to settle on barren lands. Later writers rejected that exception.

The remainder of this Part summarizes in more detail the positions of these seven authors.

B. Grotius

Hugo Grotius treated the issue of trans-border migration within his wider discussion of the law of nations. On the then-controversial subject of emigration, he wrote that the legal default position was that a person had a right to leave his homeland. However, he added, "[O]ne is not to go out of the State, if the Interest of the Society requires that he should stay in it."[109] The effect of that statement was to validate restrictions based on the sovereign's view of the interests of society.

In his discussion of immigration, Grotius did not set forth a default position explicitly, but assumed that, absent special circumstances, a person may not immigrate to a foreign nation without permission from the sovereign of that nation. Thus, he wrote, "To receive particular Persons as are willing to remove from one Prince's Territories into another's, is no Breach of Friendship; for this Liberty is not only natural, but has something favourable in it (as we have said elsewhere)."[110] Of course, if states were required to admit foreigners, the statement would be unnecessary because complying with a mandatory rule could not be a "Breach of Friendship."

Grotius did offer several qualified exceptions to the rule that immigration requires the permission of the receiving country. One exception applied to those who seek only a short sojourn "on account of their Health, or for any other just

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106 3 Elliot's Debates, *supra* note 3, at 350.
107 2 *Id.* at 280.
108 2 *Id.* at 279 (Pinckney) & 310 (Lowndes).
109 2 Grotius, *supra* note 3, at 554.
110 3 *Id.* at 1575.

Cause."[111] Such people could even erect a temporary shelter in which to stay.[112] Another exception applied to exiles, because "a fixed Abode ought not to be refused to Strangers, who being expelled from their own Country, seek a Retreat elsewhere."[113] His most controversial exception was as follows:

> And if there be any waste or barren Land within our Dominions, that also is to be given to Strangers, at their Request, or may be lawfully possessed by them, because whatever remains uncultivated, is not to be esteemed a Property, only so far as concerned Jurisdiction, which always continues the Right of the antient People.[114]

As we shall see, none of the later authorities agreed with Grotius on that point.

C. Pufendorf

One modern commentator claims that, "Samuel Pufendorf . . . denied to the sovereign a right to exclude aliens, so long as they had lawful reasons, including economic ones, for seeking admission into states."[115] Another classifies Pufendorf's views on the power to restrict immigration as "ambiguous."[116]

Nothing could be further than the truth. Although Pufendorf commended the virtue of hospitality, he made it clear that in cases other than fugitives or exiles, whether a foreigner could immigrate was subject to the decision of the receiving nation. Speaking of travelers, Pufendorf wrote:

> The Case is somewhat like that of a private Man, who in his House or Gardens, possesses some rare Curiosity, or other valuable Sight; such an one does not apprehend himself tied freely to let in all Spectators; but whoever is thus gratified either rewards, or at least acknowledges, it as an extraordinary Favour.[117]

He then expanded the point to include permanent immigration as well as travel:

> And farther, it seems very gross and absurd, to allow others an indefinite Right of travelling and living amongst us, without reflecting either on their Number, or on the Design of their coming; whether supposing them to pass harmlessly, they intend only to take a short view of our Country, or whether they claim a Right of fixing themselves with us forever. And that he who will stretch the Duty of Hospitality to this extravagant Extent, ought to be rejected as a most unreasonable, and most improper judge of the Case.

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111 2 *Id.* at 446.
112 *Id.*
113 *Id.* at 447.
114 *Id.* at 448.
115 *Nafziger*, *supra* note 7, at 811.
116 *Cleveland, Powers*, *supra* note 19, at 83-84.
117 Pufendorf, *supra* note 3, at 245.

* * * *

> As to our main Question, it is look'd on by most as the safest way of resolving it, to say, That it is left in the power of all States, to take such Measures about the Admission of Strangers, as they think convenient; those being ever excepted, who are driven on the Coasts by Necessity, or by any Cause that deserves Pity and Compassion.[118]

Even in the cases of refugees and exiles, there were limits to hospitality:

> Humanity, it is true, engages us to receive a small number of Men expell'd their Home, not for their own Demerit and Crime . . . But no one will be fond of asserting, that we ought in some manner to receive and incorporate a great Multitude . . . Therefore every State may be more free or more cautious in granting these Indulgences, as it shall judge proper for its Interest and Safety.[119]

Pufendorf enumerated factors a state should consider in weighing whether to accept exiles and fugitives. Among these were the fertility of the country, the density of the existing population, whether the prospective newcomers were "industrious, or idle," and whether they could be located so as to "render them incapable of giving any Jealousy to the Government."[120]

Pufendorf's position was clear: A state should consider both interest and the duties of humanity, but exactly where it drew the line was a matter for its own discretion. There is no indication that he accepted Grotius' view that a state was obligated to accept immigrants willing to settle on unused ground.

D. Barbeyrac and the Edinburgh Commentator

Jean Barbeyrac's annotations of Pufendorf's immigration coverage revealed no objection to that author's positions. But Barbeyrac's annotations of Grotius's work sharply criticized Grotius's claim that a state must allow immigrants to settle on vacant land:

> I am not of our Author's Opinion on this Point; nor can I think the Reason here alledged [*sic*]solid. All the Land within the Compass of each respective Country is really occupied; tho' every Part of it is not cultivated, or assigned to anyone in particular: It all belongs to the Body of the People. The Author here reasons on a false Idea of the Nature of taking Possession . . . The Inundations of so many barbarous People, who under Pretense of seeking a Settlement in

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118 *Id.* at 245.
119 *Id.* at 246.
120 *Id.*

> uncultivated Countries, have driven out the native Inhabitants, or seized on the Government, are a good Proof of what I advance. See Pufendorf, *B*. III. *Chap*. III, § 10.[121]

Another commentator on Grotius also dissented from the master on this point. In 1707, the University of Edinburgh, Scotland published a "Compendium" (literally, "short cut"—an abridgement) of Grotius's *De Jure Belli ac Pacis* for student use.[122] The *Compendium*, which was published in Latin, consisted of successive extracts from Grotius's work, followed by unsigned commentary on each extract. The commentary on Grotius's view that foreigners have a right to settle in vacant territory generally follows Barbeyrac's position:

> However, to receive any and all migrants into the state is not only dangerous, but is not a position appropriate for any state; for the purpose of the state is the happiness of its citizens, which is obstructed by the indiscriminate receiving of all and the introduction of foreign customs. In this respect mercy must be tempered, lest we ourselves become objects of mercy to others. And it should be properly considered whether the productiveness of our soil is such as can support them comfortably, whether they are a skillful or lazy group of people who should be admitted, whether the newcomers can be so distributed and located so that they pose no threat to the state.
>
> If, moreover, some place is given by us to them for settlement, then it should be accounted an accommodation to them; from which it follows that they can't take any location they please or that they can occupy any place that happens to be vacant as if it were a matter of right—since no place within our territory can be reckoned without ownership by either private or universal public occupation. Therefore, whatever uncultivated and deserted land is found within the kingdom, then the decision of the authorities awards it to a person who desires it so that it is acquired by the possessors not by occupation but by assignment.[123]

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[121] 2 Grotius, *supra* note 3, at 448, n. 8 (notes by Barbeyrac). No doubt a premier example in Barbeyrac's mind was the fate of the Roman Empire, after its attempt to accommodate wave after wave of "barbarian" immigrants.

[122] Edinburgh Grotius, *supra* note 3,

[123] *Id.* at 67-68. The original is as follows:

> Quoslibet autem recipere peregrinos in civitatem non modo periculosum est, sed nec civitatis cujusq; status id admittit; finis enim ejus est Civium beatitudo, quae impeditur promiscua omnium receptione, & barbarorum morum introductione. Hinc misericordia ita est temperanda, ut nos ipsi aliis non fiamus miserabiles; & probe considerari debet an ea sit agri nostri fertilitas ut commode eos alere possit, solers an ignava turba, quae recipi debet, an advenae ita distribui possint & locari, ut nullum Civitati periculum immineat. Cum porro quicquid a nobis in tales fuerit collatum id beneficii loco ipsis imputare possimus; inde sequitur, ut non ipsi, quae

Again, the message is clear: As a matter of the law of nations, the extent to which a state must admit immigrants is for that state to decide.

E. Wolff

Christian Wolff also has been the victim of distortion by a modern commentator, who claims Wolff adopted "a principle of free movement, subject to several stipulated exceptions within the discretion of states . . . Wolff was instrumental in taking account of political realities by according limited regulatory powers to the sovereign to protect morals, religion, public safety, and public welfare, while maintaining the principle of free migration."[124]

Wolff's text tells a different story.[125] It emphasized that "No people, nor any private traveler, can appropriate to himself anything in foreign territory,"[126] for the territory is subject to the nation or ruler thereof.[127] Because no traveler could appropriate any right in foreign territory, one was not permitted to violate the sovereign's barrier to entry. This was true whether the person sought to enter for no reason or for a special business, "insofar as the prohibition extends."[128]

> placuerint sibi capere, aut si quid forte vacui loci apud nos jacuerit velut jure suo occupare possint: cum intra Territorium nullus Locus excogitari possit vacuus a proprietate, vel privata, vel publica occupatione universali. Itaq; quicquid inculti & deserti soli in Regno invenitur, id omne arbitrium superioris expectat cui id velit addictum, ut non occupatione sed assignatione possessoribus acquiratur.

124 *Nafziger*, *supra* note 7, at 811.

125 Wolff's Latin is dense and idiosyncratic. Although I tried to keep my translations literal, I had to compromise when a literal translation would be inscrutable.

126 Wolff, *supra* note 3, at 228: §293 ("*In territorio alieno Gens nulla, nec privatus ullus peregrinus, jus quoddam sibi arrogare potest.").*

127 *Id.* at 228:

> *Etenim territorium, cum in eo imperium habeat, atque dominium Gens, cujus est terra habitat, vel Rector civitatis juri proprio Gentis, vel Rectoris civitatis subbjecta [sic] est. Quamobrem cum vi juris proprii excludantur ceteri omnes, . . . in alieno quoque territorio Gens nulla, nec privatus peregrinus ullus jus quoddam sibi arrogare potest*.

That is:

> It follows if a nation (or people) should have ownership of a territory it occupies, it has governance over it, then it is deemed occupied land; or if the ruler of the state according to the rights of the nation or his own rights then it is deemed subjected land. For that reason all others may be excluded by the force of appropriate law. . . No nation or private traveler may assume for himself any private right in the territory of another.

128 *Id.* at 229:

Moreover, to ensure that a prohibition on entry had practical effect, the sovereign could devise penalties for disobedience.[129]

Like other writers, Wolff was somewhat more forgiving toward exiles. But even as to exiles he permitted denial of residence if there was good reason.[130] Good reasons included, among other factors, the convenience of the people, living space, prejudice to religion or culture, and the risk of admitting criminals.[131]

Ultimately, Wolfe's view was that access to a foreign country depended entirely on the will of that country's sovereign.[132]

F. Burlamaqui

Jean-Jacques Burlamaqui's work was more about natural and domestic law than about the law of nations, and his treatment of immigration was more oblique than the treatment by most of our other authors. In keeping with the spirit of the times, Burlamaqui believed that immigration should be encouraged:

> First then it is evident, that the force of a state, with respect to war, consists chiefly in the number of its inhabitants; sovereigns therefore ought to neglect nothing than can either support or augment the number of them.
>
> Among the other means, which may be used for this purpose, there are three of great efficacy. The first is, easily to receive all strangers of a good character, who want to settle among us . . . .[133]

> *Similiter quia nemo peregrinus jus quoddam sibi arrogare potest in territorio alieno; contra prohibitionem domini territorii nemine peregrino in idem ingredi licet, sive simpliciter, sive certi negotii causa, prouti tulerit prohibitio.*
>
> Similarly because no traveler can appropriate for himself any right in foreign territory, it is not permitted for any traveler to enter the same contrary to the prohibition of the ruler of the territory, whether on his own account or for any particular business, until the ban has been lifted.

[129] *Id.* at 230:

> *Quoniam contra prohibitionem domini territorii nemini peregrino in id ingredi licet . . . , prohibitionis vero effectus nulus [sic—should be "nullus"] est, nisi poenis ad non faciendum obligentur, qui quid facere prohibentur . . .*
>
> Granted that no traveler is permitted to enter against the ban of the lord of the territory, there really is no effect to the ban unless those who are prohibited from doing something are bound by a punishment for doing it.

[130] *Id.* at 118 ("*Exulibus perpetua habitatio a Gente in terris suis denegari nequit, nisi obstent rationes singulares*" — that is, "Perpetual Residence cannot be denied to exiles by a nationality in its own territory without specific reasons").

[131] *Id.* at 118 (listing "*plures . . . rationes, ob quas receptus denegari potest*"—that is, "very many reasons for which a reception can be refused").

[132] *Id.* at 231 ("*A dominii territorii voluntate unice dependet, sub qua lege accessum peregrinis permittere velit*."—that is, "It depends solely on the will of the lord of the territory, and that will is the law by which he permit access to travelers.")

[133] Burlamaqui, *supra* note 3, at 450.

Yet, an inference from this statement is that a sovereign could withhold permission to immigrate. The same inference follows from several other statements:

- a sovereign may prohibit the importation of foreign commodities;[134]
- a sovereign may refuse another country passage over its lands;[135] and
- once a person entered a foreign country, he is bound by the local laws—presumably including laws against his being there in the first place.[136]

Some confirmation comes from Burlamaqui's statements on *emigration*. Although Burlamaqui wrote that the right to emigrate "is a right inherent in all free people,"[137] in fact, he sharply qualified it in several ways. He concluded that "If the laws of the country have determined any thing in this point, we must be determined by them; for we have consented to those laws in becoming members of the state.[138]

G. Vattel

When the Constitution was written, Emer de Vattel's treatise was the most recently-published international law book freely available, and probably the most influential. For that reason—and because some modern commentators have suggested that Vattel's work does not support the power of a sovereign to restrict immigration[139]—we will examine his treatment of the subject in some detail.

Vattel's work comprised four books. Book I was entitled "Of Nations considered in themselves." A major theme of Book I was the derivation of rules of governance from natural law principles. Among his conclusions:

- "A nation or state has a right to every thing that can help to ward off imminent danger;"[140]
- nations may limit or ban imports;[141]
- nations may refuse to trade with others;[142]
- a nation may—indeed, in some cases, should—restrict emigration;[143] and
- nations may restrict immigration: "[I]t belongs to the nation

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134 *Id.* at 459-60.
135 *Id.* at 456.
136 *Id.* at 298.
137 *Id.* at 366.
138 *Id.* at 367.
139 *Nafzinger*, *supra* note 7, at 807 (claiming that the case for immigration restrictions based on Vattel's work was built from "highly selective snippets"); *Cleveland, Powers, supra* note 19, at 84 (claiming that Vattel was "ambiguous" on this subject).
140 Vattel, *supra* note 3, at 88.
141 *Id.* at 134.
142 *Id.*
143 *Id.* at 127 (arguing that useful workmen should be restrained from leaving the state); *cf. id.* at 221-225 (discussing when citizens should be permitted or restrained from leaving the country temporarily or permanently).

> to judge, whether her circumstances will or will not justify the admission of that foreigner."[144] Indeed, the nation "has a right, and is even obliged, to follow, in this respect, the suggestions of prudence."[145]

Vattel's belief that a state may restrict immigration influenced his definition of "inhabitants." That term included both citizens and "foreigners, *who are permitted* to settle and stay in the country."[146]

One might object that the title of Book I—"Of Nations considered in themselves"—suggests that it was devoted only to domestic, intra-state law. If so, one might contend, the immigration restrictions listed in Book I could be mere municipal regulations rather than part of the law of nations.

It is true that much of Book I addressed purely domestic questions, such as how legislation is adopted, how a sovereign should relate to its subjects, and rules of private and state property. Yet it also addressed transborder issues of the kind arising among sovereignties—that is, issues within the realm of international law. One usually can tell from the context whether the author was discussing an issue of municipal or international law.[147] Still, discussion of immigration restrictions in Book I does not prove that Vattel considered those restrictions to be matters of international law or that violations of those restrictions were "Offenses against the Law of Nations."

Book II was entitled "Of a Nation Considered in its Relation to Others," and was, in fact, devoted wholly to the law of nations. (The third and fourth books were about war and peace, respectively.) Book II leaves no doubt that immigration was a "law of nations" issue. Here is part of Book II's treatment of immigration:

> The sovereign may forbid the entrance of his territory either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the state. There is nothing in all this, that does not flow from the rights of domain and sovereignty: every one is obliged to pay respect to the prohibition; and whoever dares to violate it, incurs the penalty decreed to render it effectual.[148]

Vattel added that "the least encroachment on the territory of another is an act of injustice . . ."[149] Like other writers, he rejected Grotius's view that a sovereign must suffer immigrants to enter deserted territories under the control of the sovereign:

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144 *Id.* at 226.
145 *Id.* at 227.
146 *Id.* at 218. (Italics added.)
147 Thus, in Book I Vattel classified a rule among some European states denying citizenship to foreigners as part of the local "law of nations, established there by custom." VATTEL, *supra* note 3, at 224. If a rule pertaining to citizenship for foreigners was part of the law of nations, then immigration restraints would seem to fall into the same category *a fortiori*. (Vattel didn't like the custom of denying citizenship to foreigners, but that is beside the point.)
148 VATTEL, *supra* note 3, at 309.
149 *Id.* at 308.

> As every thing included in the country belongs to the nation,—and as none but the nation, or the person on whom she has devolved her right, is authorised to dispose of those things . . . ,— if she has left uncultivated and desert places in the country, no person whatever has a right to take possession of them without her consent. Though she does not make actual use of them, those places still belong to her: she has an interest in preserving them for future use, and is not accountable to any person for the manner in which she makes use of her property.[150]

The categorical right to exclude also implied the right to admit under conditions:

> Since the lord of the territory may, whenever he thinks proper, forbid its being entered . . . , he has no doubt a power to annex what conditions he pleases to the permission to enter. This, as we have already said, is a consequence of the right of domain.[151]

The law of nations also encompassed an individual duty to obey: "We should not only refrain from usurping the territory of others; we should also respect it, and abstain from every act contrary to the rights of the sovereign;"[152] and "[E]very one is obliged to pay respect to the prohibition; and whoever dares to violate it, incurs the penalty decreed to render it effectual."[153]

Apparently, in Vattel's view, a sovereign that does not restrain its inhabitants from breaching another country's immigration laws also violates the law of nations: "If a sovereign, who might keep his subjects within the rules of justice and peace, suffers them to injure a foreign nation either in its body or its members, he does no less injury to that nation, than if he injured it himself."[154] Or, more specifically: "[T]here is another case where the nation in general is guilty of the crimes of its members. That is when by its manners and by the maxims of its government it accustoms and authorizes its citizens to plunder and maltreat foreigners, to make inroads into neighboring countries, &c."[155]

Like other international law writers familiar to the Founders, Vattel believed a sovereign had some obligation to consider admitting exiles and fugitives. However, those making the decision had to weigh the consequences, and could either deny refuge altogether or place conditions on it.[156]

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150 *Id.* at 306.

151 *Id.* at 312. On the same page, Vattel wrote that in making his decision on whether to permit entry, the ruler ought to "respect the duties of humanity." However, this statement was precatory only. Vattel left to "the following chapter the examination of the cases in which he cannot refuse an entrance into his territory." *Id.* In the following chapter, Vattel treated the exceptions mentioned by earlier scholars: cases of necessity, exiles, and refugees. *Id.* at 322-23.

152 *Id.* at 308.

153 *Id.* at 309.

154 *Id.* at 299.

155 *Id.* at 301.

156 *Id.* at 328-29.

H. Martens

Georg Friedrich von Martens was forthright on the power of a sovereign to exclude foreigners:

> From the moment a nation have taken possession of a territory in right of first occupier, and with the design to establish themselves there for the future, they become the absolute and sole proprietors of it, and all that it contains; and have a right to exclude all other nations from it, to use it, and dispose of it as they think proper . . . .[157]

Martens deduced several conclusions from this general proposition. One was that because foreigners could be excluded entirely, they also could be admitted on condition. Speaking of taxation, Martens wrote, "A foreigner enjoying the protection of the state, cannot, while he remains in it, expect to be entirely exempted from imposts. Besides, it may be made a condition of his admission . . . ."[158] For the same reason, a sovereign could admit foreigners on the condition that they sacrifice their inheritance to the state:

> From the right of excluding all foreigners from the territory is derived another right, the *Droit d'Aubaine*. In virtue of this right, the heritage [i.e., inheritance] of a foreigner, who dies without leaving heirs in the country, falls to the sovereign, or to the chief magistrate of the place where he dies, to the exclusion of the heirs that he may have out of the country.[159]

The fact that Martens included this material in a book on the "law of nations" precisely when the Constitution was being composed and debated strengthens the inference that the contemporaneous meaning of the "law of nations" included power to control, or even prohibit, immigration.

I. Blackstone

William Blackstone's work dealt principally with the common law of England, but he also outlined some general rules from the law of nations. One was that, with minor qualifications, a state had the right to exclude foreigners:

> Upon exactly the same reason stands the prerogative of granting safe-conducts, without which by the law of nations no member of one society has a right to intrude into another. And therefore Puffendorf very justly resolves, that it is left in the power of all states, to take such measures about the admissions of strangers, as they think convenient; those being ever excepted who are driven

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157 Martens, *supra* note 3, at 67.
158 *Id.* at 97.
159 *Id.* at 99-100.

> on the coasts by necessity, or by any cause that deserves pity or compassion.[160]

Clearly, Blackstone believed that the sovereign's prerogative to exclude was very extensive.

Conclusion

In my popular writing, I have identified a process, occurring primarily during the nineteenth century, in which constitutional writers lost the original meaning of certain constitutional provisions and phrases.[161] One reading the old property law standby, *Pierson v. Post* (1805),[162] witnesses the beginning of this process. In *Pierson*, the plaintiff was chasing a fox, but had not yet captured the animal when the defendant intervened and seized the creature for himself. The plaintiff sued, and the New York Supreme Court was faced with the question of whether the plaintiff's chase gave him sufficient property in the fox to justify a legal remedy.

The majority opinion, written by Daniel D. Tompkins (later Vice President of the United States) held that a person generally acquired a sufficient property right in a wild animal to maintain such a lawsuit only if he had reduced the animal to possession. Tompkins relied for this conclusion on works by, among others, Grotius, Pufendorf, and Barbeyrac.[163]

The dissent, penned by Brockholst Livingston (later associate justice of the U.S. Supreme Court), deprecated Justice Tompkins' appeal to traditional authority: "This is a knotty point," he wrote, "and should have been submitted to the arbitration of sportsmen, without poring over Justinian, Fleta, Bracton, Puffendorf, Locke, Barbeyrac, or Blackstone, all of whom have been cited."[164] Thus did a future U.S. Supreme Court justice urge Americans of the emerging nineteenth century to disregard the past.

It happens that many Americans, eager to leave the Old World behind and advance into the New, agreed with Livingston. I suspect most modern casebook writers and law professors would agree as well.

The late Alan Watson, the celebrated Scottish comparative law scholar, thought they were being unduly hasty. He sharply criticized a leading twentieth-century property law casebook that was as dismissive of historical authorities as Justice Livingston had been, Watson wrote:

> A second part of the answer is the great importance attributed to these works. Justinian's restatement of Roman law was—still is—regarded as the foundation stone of subsequent Western law. Puffendorf, who was much admired in the U.S. at the time, was attempting to set up on rational principles rules that ought to be

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160 1 William Blackstone, Commentaries *251.

161 Robert G. Natelson, *The Great Forgetting*, https://i2i.org/the-great-forgetting/.

162 3 Caines 175 (Sup. Ct. N.Y. 1805).

163 *Id.* at 177-79.

164 *Id.* at 181. Blackstone was cited by Pierson's lawyer, not by the court. *Id.* at 176. Neither the reported argument nor the opinion of the court mention Locke.

> valid everywhere in the civilized world, hence including New York. Naturally, in the circumstances of the time, these principles very much derived from the Roman law of Justinian. Fleta and Bracton give the English connection. Dukeminier and Krier [the casebook authors] do the student no service when they say the opinions "are peppered with references to a number of obscure legal works and legal scholars."[165]

I agree with Professor Watson. One can understand the desire to get on with things, but doing so heedlessly has cost us an understanding of parts of our own Constitution—the Define and Punish Clause representing one example. A similar lack of understanding plagues other sections of the document, particularly sections that populate the majority of the text disregarded in constitutional law courses.[166] The result is fruitless debate and endless uncertainty.

Fortunately, I have found that one often can resolve the uncertainty by a few hours' immersion in the legal and literary canon of the Founding era.[167] This turned out to be true for the Define and Punish Clause. The Founding era authorities leave little doubt that that constitutional provision is the source of Congress's power to restrict immigration.

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165 Alan Watson, *Introduction to Law for Second Year Students?* 46 J. Leg. Ed. 430, 438-39 (1996).

166 Several years ago, when choosing a constitutional law case book for my own students, I surveyed all such books on the market. Most of the Constitution received either summary coverage from them or none at all. On average, these case books devoted two-thirds of their coverage to two percent of the Constitution—the two percent being the First Amendment and Sections 1 and 5 of the Fourteenth Amendment. I do not think it is coincidental that those are the parts of the document most often at issue when a case involves pornography, sex, or race.

167 Many of my publications report the results of this immersion. *See, e.g.*, Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 Harvard J.L. & Pub. Pol. 1017 (2008) (resolving the dispute over whether Coinage Clause was understood to authorize paper money); *What the Constitution Means by "Duties, Imposts, and Excises"—and Taxes (Direct or Otherwise)*, 66 Case Western Res. L. Rev. 297 (2015) (resolving the dispute over the meaning of "direct tax," largely by exploring eighteenth century tax statutes); *New Evidence on the Constitution's Impeachment Standard: "high . . . Misdemeanors" Means Serious Crimes*, 21 Fed. Soc. Rev. 24 (2020) (determining that the phrase "high misdemeanor" was a Founding-era legal term designating a serious crime not requiring the death penalty).

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Founding Authority: Authority, the Authoritative, and John Marshall's *McCulloch*

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ABSTRACT

Lacking the powers of the "purse or the sword," the U.S. Supreme Court is particularly dependent upon maintaining "authority" in order to ensure recognition of its constitutional rulings. Such authority allows the Court to operate against the majority and to survive as a political institution despite lacking a basis in popular will. In one understanding of the Court's position, that authority sits outside of politics, and calls upon a pre-existing and accepted relationship in order to navigate the absence of power and force. Linking authority to a pre-existing relationship and a non-political role, the Supreme Court can be seen as countermajoritarian by design. Calling on an authority which sits outside of political life, by necessity it lacks attachment to the political majority of any given era, and instead binds the nation to a constitution which sits above and beyond politics. However a second approach to authority emphasizes not a relationship to a past moment or pre-political relationship but rather the collective recognition of authority. This view of authority looks to Flathman's conception of "the authoritative," defined in terms of "the web of conventions" that link power and authority, to situate authority within the current moment. Examining a central moment within the development of the U.S. Supreme Court's authority, the case of McCulloch vs. Maryland, this article argues that it is the second view of authority that most readily captures the authority of the Court. Through a close reading of Chief Justice John Marshall's opinion in McCulloch vs. Maryland, the article shows that while appeals to a founding moment were important within that opinion, these appeals can be productively understood as reflective of the authoritative ethos of the early American Republic. Framed in this manner, the opinion sought to generate authority not by a link to the past but through connection to a contingent sense of the authoritative. Crucially, such an approach positions constitutional authority within the contemporary political realm and offers the possibility of a constitutional politics less anchored in a particular historical moment of founding.

KEYWORDS

John Marshall, McCulloch v. Maryland*, Authority, U.S. Supreme Court, Early Republic*

CONTENTS

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Introduction

Discussion of the role of the United States Supreme Court within the political system of the United States usually begins with an observation of its institutional weakness. Often encapsulated by Alexander Hamilton's description of a lack of "the sword or the purse," this view highlights the Court's lack of "force or will," and its consequential reliance upon "judgment."[1] Without access to direct levers of power, the Court is said to be particularly dependent upon maintaining "authority" in order to ensure recognition of, and—perhaps—obedience to, its constitutional rulings.[2] Such authority allows the Court to operate against the majority and to survive as a political institution despite lacking a basis in popular will. Indeed, for one close student of authority and the Court, Hannah Arendt, it was the Court's very identity with authority that allowed the Constitution of the United States to endure. In such an understanding of the Court's position, that authority sits outside of politics, and calls upon a pre-existing and accepted relationship in order to navigate the absence of power and force. In this sense, authority can address another of the core characteristics of the Court— its association with the "counter-majoritarian difficulty"[3] —and retain a role for the Supreme Court within a democratic political system. The Court can be understood in terms of the guardian of a higher law constitution in the face of popular pressure, holding a secure position as a result of a pre-existing recognition of its non-political role.

This view of the Supreme Court's authority does much to address the democratic problems associated with its position. Linking authority to a pre-existing relationship and a non-political role, the Supreme Court can be seen as countermajoritarian by design. Calling on an authority which sits outside of political life, by necessity it lacks attachment to the political majority of any given era, and instead binds the nation (and its temporary majority) to a constitution which sits above and beyond politics. This depiction of a non-political Court presents some constraints however. The notion of a pre-political authority is suggestive of an authority that finds its origins in a historical moment of founding—a constitutional "Big Bang" in which authoritative institutions are created and grounded, but before the advent of a politics to which they might be participants. That in turn premises authority on a continuous connection to that moment. But neither continuity nor non-politicalness have been universally present in the history of the Court. Interruptions in its authority (*Dred Scott*, the New Deal) have occurred, and they have been linked to moments in which the Court has acted politically. Such occasions point towards a theory of the Court's authority that explains such moments, and more significantly the endurance of the Court's authority despite them.

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1 Alexander Hamilton, *No. 78 A View of the Constitution of the Judicial Department in Relation to the Tenure of Good Behaviour*, *in* The Federalist 401–408, 402 (George W. Carey & James McClellan eds., 2001).

2 See for example, Dahl's account of the Court as rarely acting against a dominant political alliance. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 50 Emory L. J. 563, 580 (2001). For an example of the theory that the Court can only act with allies cf. Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (1991).

3 Most famously articulated by Bickel. Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16–23 (1962).

It is not necessarily the case that "authority" sits in opposition to a popular will. Approaches to authority offered by Carl F. Friedrich and Richard E. Flathman emphasize not a relationship to a past moment or pre-political relationship but rather the collective recognition of authority. Following this line of thought, this article looks to Flathman's conception of "the authoritative," defined in terms of "the web of conventions" that link power and authority, and on the basis of this articulation of authority re-examines the construction of the Court's authority in the early American Republic.[4] A significant moment within the development of the U.S. Supreme Court's authority, the case of *McCulloch v. Maryland* marked an attempt to assert national authority over the states while also locating constitutional authority within the juridical realm of the Supreme Court.[5] Reading Chief Justice John Marshall's opinion in *McCulloch v. Maryland* in this light, the article shows that while appeals to a founding moment were important within that opinion, these appeals can be productively understood as reflective of the authoritative ethos of the early American Republic. Framed in this manner, the opinion sought to generate authority not by a link to the past but through connection to a contingent sense of the authoritative. Crucially, such an approach positions constitutional authority within the contemporary political realm and offers the possibility of a constitutional politics less anchored in a particular historical moment of founding.

The article proceeds in five parts. In the first instance it turns to Arendt's writings on authority and the American Founding in *What is Authority?* and *On Revolution* in order to elucidate the theory of authority as pre-political. The article then offers an alternative approach to conceptualizing authority in which connection to an authoritative ethos plays a central legitimizing role. Following this, a discussion of Sylvia Snowiss's understanding of Marshall's jurisprudence explains why *McCulloch v. Maryland* ought to be regarded as a pivotal moment within construction of the U.S. Supreme Court's authority. Then the fourth part of the article examines Marshall's opinion in *McCulloch* and his discussion of it in contemporaneous pamphlets in light of the earlier discussions of authority. The final section of the article turns to the broader questions of constitutional authority raised by these discussions, their significance for conceptualizing authority, and its relationship to politics.

I. The U.S. Supreme Court's Authority in Arendt's Thought

Arendt opened her essay, *What is Authority?* with the suggestion that the titular question ought to have been "What was—and not what is—authority?" as it was the case that "authority has vanished from the modern world."[6] The ruptures with the past and undermining of tradition that characterized the modern world lead to a necessary "crisis of authority," with the reach of the crisis ever-growing.[7] Arendt located authority amongst a triumvirate of tradition, religion, and authority under

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4 Richard E. Flathman, The Practice of Political Authority: Authority and the Authoritative 151 (1980).

5 Sylvia Snowiss, Judicial Review and the Law of the Constitution 171–73 (1990).

6 Hannah Arendt, *What Is Authority?*, *in* Between Past and Future: Eight Exercises in Political Thought 91–141, 91 (1961).

7 *Id.* at 91.

siege in the modern era. Authority here rested "on a foundation in the past as its unshaken cornerstone, [which] gave the world the permanence and durability which human beings need…"[8] Locating the origin of the concept of authority in Rome, Arendt noted the association between authority and augmentation brought together in the act of augmenting the foundation.[9] Turning and adding to the foundation were sacred Roman acts reflecting the inconceivability of a new beginning in place of or alongside the founding of Rome—"the central, decisive, unrepeatable beginning of their whole history, a unique event."[10] Bound with religion—"to be tied back, obligated, to the enormous, almost superhuman and hence always legendary effort to lay the foundations, to build the cornerstone, to found for eternity"—political activity meant engaging in the preservation and augmentation of the founding.[11] It is within the context of connection to the act of foundation that Arendt located authority and identified its bearers as those who personify a link to that foundation. For the Romans, those "endowed with authority were the elders, the Senate or the *pares*, who had obtained it by descent and by transmission (tradition) from those who had laid the foundations for all things to come…" and such authority was always "derivative" to the extent that the "authority of the living… [depended] upon the authority of the founders."[12] And though rooted in the past, it was nonetheless present: "Authority, in contradistinction to power (*potestas*), had its roots in the past, but this past was no less present in the actual life of the city than the power or strength of the living."[13]

The contradistinction between authority and power in the previous quote is demonstrative of Arendt's view that authority ought to be understood as not pertaining to relationships characterized by violence or persuasion. Where external coercion is utilized (force) Arendt suggests that authority has "failed" and where initial equality is presumed (persuasion), authority is "in abeyance."[14] Just as Plato sought a basis for authority in relationships that already contained a compelling basis of obedience within the framework of the relationship—shepherd-flock, master-slave, captain-passenger—Arendt noted the "most conspicuous characteristic of those in authority is that they do not have power."[15] Authority sits outside of the interplay of force and persuasion, augmenting or confirming the decisions of others, adding to them but without any capacity to enforce them, engaged primarily in the recognition—or in not recognizing—their location within the continued thread springing from the foundation.[16] This makes authority particularly susceptible to association with prepolitical relations including those involved in the rearing of children and between teacher and pupil.[17] Indeed Hoye and Nienass have argued on

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8 *Id.* at 95.
9 *Id.* at 121.
10 *Id.* at 120.
11 *Id.* at 121.
12 *Id.* at 121, 122.
13 *Id.* at 122.
14 *Id.* at 92.
15 *Id.* at 108, 122.
16 *Id.* at 123. This approach to defining authority has received wide acceptance—for example, *cf.* Frank Furedi, Authority: A Sociological History 9 (2013); Christopher McMahon, Authority and Democracy: A General Theory of Government and Management 25 (1994).
17 Arendt, *supra* note 6 at 92.

this basis that authority in Arendt's work "is defined by its prepolitical nature insofar as it functions outside the realm of discursive contestation, persuasive speech, and political action."[18] This interpretation is echoed in Arendt's claim elsewhere that the "source of authority in authoritarian government is always a force external and superior to its own power… which transcends the political realm."[19]

Arendt understood the success of the American Revolution to lie in its establishment of such authority.[20] In *What is Authority?* Arendt suggested that this success owed a great deal to the particular historical setting of the America Revolution:

> It may also be that the founding fathers, because they had escaped the European development of the nation-state, had remained closer to the original Roman spirit. More important, perhaps, was that the act of foundation, namely the colonization of the American continent, had preceded the Declaration of Independence so that the framing of the Constitution, falling back on existing charters and agreements confirmed and legalized an already existing body politic rather than made it anew.[21]

The Constitution—here representative of that successfully acquired authority—offered continuity with the colonial charters that came before it, ensuring that the American Revolution need not manufacture legitimacy from new cloth.[22] This capacity to seek legitimacy in an appeal to, or at least continuation of, a pre-existing order accorded with Arendt's understanding of authority necessarily rooted in the past.

In Arendt's telling, the association of authority with a lack of imminent power is what makes the success of the American Revolution so astounding and at the

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18 J. Matthew Hoye & Benjamin Nienass, *Authority Without Foundations: Arendt and the Paradox of Postwar German Memory Politics*, 76 Rev. Pol. 415–37, 418 (2014).

19 Hannah Arendt, *Authority in the Twentieth Century*, 18 Rev. Pol. 403–17, 406 (1956). By "authoritarian government" Arendt refers here to government supported by appeal to authority.

20 Arendt, *supra* note 6 at 140. That is to legitimize itself without recourse to violence or to an absolute that would fail to ensure the stability that would preclude violence. *cf.* Bonnie Honig, *Declarations of Independence: Arendt and Derrida on the Problem of Founding a Republic*, 85 Am. Pol. Sci. Rev. 97–113 (1991); Jason Frank, Constituent Moments: Enacting the People in Postrevolutionary America (2010); Hoye and Nienass, *supra* note 18 at 115–19. Although scholars have been fond of pointing to the historical errors in Arendt's account of the American Revolution. Young-Bruehl documents widespread criticisms of the historical account of *On Revolution* in the 1960s —"fabulous in the literal sense of the word." Elizabeth Young-Bruehl, Hannah Arendt: For Love of the World 403 (2004). A more recent critique on a similar basis is offered by Disch. Lisa Disch, *How Could Hannah Arendt Glorify the American Revolution and Revile the French? Placing On Revolution in the Historiography of the French and American Revolutions*, 10 Eur. J. Pol. Theory 350–71, 351 (2011).

21 Arendt, *supra* note 6 at 140.

22 Including the Declaration of Independence. *Id.* at 140. On this aspect cf. Disch, *supra* note 20 at 353–4. Honig remained skeptical of such an approach, contrasting it with Derrida's belief that the performance of the Declaration of Independence marks the entry of the absolute. Honig, *supra* note 20.

same time makes the U.S. Constitution so central to its success. Arendt elaborated on this sketch of the American case in *On Revolution* where she outlined in greater detail the relationship between authority and the Constitution drawn up in 1787-88 and in doing so placed greater emphasis on the latter's role as a moment of foundation as well as a link to previous foundations. In the words of Hoye and Nienass, in *On Revolution* "Arendt asserts a direct relation between the positive political act of founding—of acting in concert on the basis of mutual promise, of new beginnings—and the authority which the deed itself, manifest in the constitution, ultimately held in anchoring the legitimacy of the republic."[23] Indeed Arendt claims "… that their [the American's] revolution succeeded where all others were to fail… one is tempted to think, was decided the very moment when the Constitution began to be 'worshipped', even though it had hardly begun to operate."[24] The speed with which this process took place is noted elsewhere in *On Revolution* and framed as a key component of the Revolution's success. "Many historians," Arendt notes, "… have found it rather disconcerting that the Constitution … should have *become overnight* the object of 'an undiscriminating and almost blind worship'…"[25] And again in the context of the Constitution's and Revolution's success:

> … perhaps the political genius of the American people, or the great good fortune that smiled upon the American republic, consisted precisely in this blindness, or, to put it an other way, consisted in the extraordinary capacity to look upon yesterday with the eyes of centuries to come.[26]

It was, Arendt suggests, the dual capacity to recognize their own participation in the foundation (Constitution) as an "absolute" and to quickly come to regard this as pertaining to the past, that enabled the American's founding to gain an authority absent in the French and later Russia Revolutions.

As Arendt gave more significance to the Constitution as a "positive political act of founding" in *On Revolution,* she also both located its authority within the institution of the Supreme Court and re-emphasized the latter's essential political powerlessness.[27] Developing thoughts offered in *What is Authority?* Arendt drew a parallel between the Roman Senate and the American Supreme Court pointing to them as institutions of authority but resultantly of limited power.[28] Arguing that constitutional authority is located within the Supreme Court, Arendt approvingly quoted Alexander Hamilton to the effect that the Court is "beyond comparison the weakest of the three departments of power," before insisting that "it is lack of power, combined with permanence of office, which signals that the true seat of the

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23 Hoye and Nienass, *supra* note 18 at 416; *cf.* Jeremy Waldron, *Arendt's Constitutional Politics*, *in* The Cambridge Companion to Hannah Arendt 201–09, 213 (Dana Villa ed., 2000).

24 Hannah Arendt, On Revolution 190–91 (1963).

25 *Id.* at 190. Emphasis added.

26 *Id.* at 190.

27 Hoye and Nienass, *supra* note 18 at 416.

28 Arendt, *supra* note 24 at 192–93. In "What is Authority?" Arendt noted the similarities between the Roman Senate and the judicial branch within the thought of Montesquieu. Arendt, *supra* note 6 at 122.

authority in the American Republic is the Supreme Court."[29] Just as in Rome where the Senate had operated to make the "spirit of foundation … present" so too did the American Supreme Court exist as (in words attributed to Woodrow Wilson) "a kind of Constitutional Assembly in continuous session" making the initial act of mutual promise ever-present.[30] Moreover, the very authority of the Supreme Court here is itself a witness to the mutual promising of the founding moment—"The Supreme Court derives its own authority from the Constitution as a written document."[31] Linked to that founding text, the Court can be simultaneously the location of authority and an institution of relative powerlessness.

II. Authority and "The Authoritative"

Writing in the same period as Arendt, Carl J. Friedrich developed a similar understanding of the Roman Senate's authority to reach a different conclusion about the nature of authority.[32] Friedrich follows Theodor Mommsen's account of the etymology of *Auctoritas* to suggest that the significant augmentation was that appended to the will; "*Auctoritas* thus supplements a mere act of the will by adding reasons to it."[33] In the case of the Roman Senate this operated as the "advice which can not be properly disregarded" by dint of coming from the deliberation of the "old ones," but in a broader sense it suggests authority rests on a particular claim to greater insight and a corresponding "potentiality of reasoned elaboration"—that the figure of authority possess the capacity to issue communications that are accepted as authoritative on the supposition that he or she could, if required, justify them with a reasoned explanation.[34] Such a figure is one of authority precisely because they can "say things which may be thus elaborated"—a capacity that varies significantly between particular individuals.[35]

Friedrich's intervention locates authority within communication while at the same time maintaining the Arendtian distinction between authority and power. The association of authority with the potentiality of reasoned elaboration leads to the view that "authority is a *quality* of communication," and the consequence that "authority is *not* power, but it may cause it."[36] The latter consequence arises from the observation that the capacity to offer reasoned elaboration bestows some power upon its holder, but by no means is this power determinative—"Nero exercised power without authority, while the Senate of his time possessed authority yet little or no power."[37] Such power rests upon the willingness of others to recognize that authority and to accept the validity of the reasoning that supports it. Here,

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29 Arendt, *supra* note 24 at 192.
30 *Id.* at 193, 192.
31 *Id.* at 192–3.
32 Carl J. Friedrich, *Authority, Reason, and Discretion*, 1 Nomos 28–48 (1958). On Friedrich's importance for conceptualizing authority and differences with Arendt cf. Jeremy F. Plant, *Carl J. Friedrich on Responsibility and Authority*, Pub. Adm. Rev. 471–82 (2011).
33 Friedrich, *supra* note 32 at 30.
34 *Id.* at 30, 35.
35 *Id.* at 37.
36 *Id.* at 36, 37.
37 *Id.* at 37.

Friedrich makes the crucial point that, given the constant sifting of opinions, values, and beliefs, such authority is inherently fluid and subject to deterioration. It also opens the possibility of different theaters of authority —a political leader may hold authority with his or her followers but lack authority amongst the wider community. The contingent nature of authority—even in instances of institutional authority discussed further below—and its limited relation to power necessitates an understanding of power and authority as at times corresponding but oftentimes existing in a relative absence of the other.

The dependence of authority upon its compatibility with the values of the community within which it exists is suggestive of the importance of the category of "the authoritative." In his consideration of political authority, Richard E. Flathman argues that "[i]n order for there to be rules that carry and bestow *authority* … there must be values and beliefs that have *authoritative* standing among the preponderance of those persons who subscribe to the authority of the rules."[38] The authoritative, Flathman suggests, is the context within which claims can resonate with those upon whom they place a burden. And such a context is authoritative precisely in terms of that preponderance of subscribers—"Being true, valid, or otherwise meritorious is not the same as being authoritative."[39] Attention to the manner in which the authoritative is attuned to socially held values and beliefs highlights for Flathman the extent to which authority is "a feature of an association," made possible in part by the "values and beliefs shared among the associates."[40]

Focusing upon the associational aspect of authority allows Flathman to add important elements to our view of authority. In the first instance, this understanding of the conceptual importance of the authoritative allows Flathman to develop an analysis that bridges the apparent divide between *in* authority (*e.g.* holding office) and *an* authority (e.g. being a renowned expert) by arguing that—in light of the authoritative—both are reliant upon a community willing to subscribe to a set of beliefs that support such claims. In the second instance the concept of the authoritative provides a framework for examining the relationship between power and authority. For Flathman,

> "Power" and "authority" share not only a post or station in our discourse but also the quality of being interwoven with the web of conventions that partly constitutes the practices, associations, societies, cultures and even civilizations in which they fill that post or station; they are interwoven with what we have been calling the authoritative.[41]

Consequently, power and authority are linked by the existence of the authoritative, which makes possible what might be termed "legitimate" power—that which compels an individual to conform with the claim of another but which is not wholly coercive.[42] This rendering of power and authority, echoing Friedrich, points to

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38 Flathman, *supra* note 4 at 6. Original emphasis.

39 *Id.* at 22.

40 *Id.* at 31.

41 *Id.* at 151.

42 Or perhaps doesn't compel, but at least transfers some element of duty to conform on to the former individual. Flathman suggests that individuals might disregard a claim

authority as not transcending society but actually constantly under reinvention and renewal (to the extent that culture is itself ever in flux). As the authoritative churns, so too will the nature of claims of authority—and so too, by extension, must the forms of legitimate power.

Such a depiction of authority—churning and ever in flux—shifts the locus of authority away from the past and to the present, and from a hierarchical relationship to one based on mutual agency. Where Arendt framed authority within a preexisting relationship, the latter understanding of authority (while not wholly rejecting the possibility of a preexisting relationship) suggests a relationship that is given meaning through its recognition by the parties in the moment of its invocation. This brings us to the notion that the parties could withdraw their recognition of this authoritative relationship—and that at bottom, authoritative claims are reliant upon a degree of consent.[43] Shannon Hoff makes the important point in her discussion of Lockean political authority that a "political authority is legitimate if its exercise of power reflects the individual's *own* agency, even when this authority effectively *restrains* this agency."[44] Although Hoff's discussion is consciously framed within a Lockean order of consenting individuals, the notion that individuals participate in an invocation of authority through acceptance of the authoritative holds for broader frames of reference as well. In this wider frame we can say that it is through the individual's acceptance that a claim to a particular action on the part of that individual by another can be located within the authoritative that such a claim comes to be coded as from authority. In this way—as Hoff notes—the individual exhibits agency and submission to restraint, with the necessary possibility that such agency is enacted as rejection of the legitimacy of the claim. To flesh this out with an example, it is not because of a doctor-patient relationship that the patient follows the doctor's advice but because the patient recognizes the location of a doctor as operating within the broader medical-scientific approach to biology and that the doctor's advice is transmitted in that register. In this scenario the doctor's authority is subject to fluctuations in the support of the wider medical-scientific context, the ability of the doctor to make claims within that framework, and the patient's willingness to recognize either.

Returning to the issue of the Supreme Court's authority, these interventions suggest that the connection between the Court, the Constitution, and the (authority of) the founding cannot be regarded as assumed or static. Part of Arendt's concern for authority resided in her belief that its underpinnings in tradition and religion were giving way in the Twentieth century, breaking a long chain that ran from the Roman republic, through the Medieval Church and to the present moment. Perhaps

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by authority but that it still be legitimate on the basis of a broader acceptance of it as compatible with the authoritative. In expanding upon Arendt's view of the power and authority relation, Flathman suggests Arendt both recognized this and misapplied it insofar as she located authority in the power embodied in "action in concert." While accepting that legitimate power (grounded in the authoritative) can arise from the authority associated with action in concert, Flathman denies that all action in concert can be the fount of legitimate power and that all acts of a legitimate institutionalization of action in concert would necessarily be of authority. cf. *Id.* at 148–67.

43 Such a view has been given extended treatment by Shannon Hoff in her examination of Lockean thought as it relates to political authority. Shannon Hoff, *Locke and the Nature of Political Authority*, 77 Rev. Pol. 1–22 (2015).

44 *Id.* at 13. Original emphasis.

for this reason, she equated the authority of the Supreme Court with its capacity to link back to the past and to reanimate the line of mutual promising that the Constitution drew upon. But the discussion here suggests that authority is marked by contingency, not continuity. If this is the case, then the Supreme Court could not assure its authority merely by placing itself in the position of the past; rather its ability to wield authority was dependent on locating its claims within the context of the authoritative. This latter view has the advantage of being a closer approximation of the issues faced by a Court acting against the backdrop of a revolution that marked a conscious break with existing authorities rather than a continuity. Indeed, one commentator suggests that if "it could be said that an "American tradition" had existed at all at the time of the framing of the Constitution, its life was so brief that an impressive defense of it was almost impossible."[45] While continuities between the colonial and postcolonial political experiences existed, it is undoubtedly true that politically powerful actors in the early Republic understood themselves to have made a break with the past in the form of initiating a government on a popular basis.[46] The problem facing the Supreme Court was therefore precisely to show authority while emphasizing rupture, not continuity. To understand how this might be achieved, we now turn to the Marshall Court's defining attempt to assert its authority over the federal government and state governments respectively.

III. The Supreme Court as Constitutional Authority

As numerous scholars have powerfully argued, the Supreme Court's emergence as co-equal branch of the federal government was neither immediate nor inevitable.[47] These accounts have pointed towards institutional constraints on the Court's ability to assert supremacy over constitutional interpretation, in order to posit that the process was drawn out and contested. As Crowe notes the "story of the judiciary's transformation … is not a single moment of revelation but a series of battles."[48] Such institutional competition speaks in part to the emergent and solidifying institutional capacity of the Court explored in numerous works; however these developments alone would not—and did not—ensure the emergence of the Court as the institutional locus of constitutional authority.[49] As the dichotomy of power and

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45 Norman Jacobson, *Knowledge, Tradition, and Authority: A Note on the American Experience*, 1 Nomos 113–25, 120 (1958).

46 Christian G. Fritz, American Sovereigns: The People and America's Constitutional Tradition Before The Civil War 3 (2008).

47 Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004); Keith E. Whittington, Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History (2007); Stephen M. Engel, *Before the Countermajoritarian Difficulty: Regime Unity, Loyal Opposition, and Hostilities toward Judicial Authority in Early America*, 23 Stud. Am. Pol. Dev. 189–217 (2009); Justin Crowe, Building the Judiciary: Law, Courts, and the Politics of Institutional Development (2012).

48 Crowe, *supra* note 47 at 8.

49 The institutional development of the Court can be seen in numerous measures. Evidence of this process of institutional development can be seen in, for example, (1) the transition from seriatim opinions (each justice presenting an independent opinion) to the idea of an opinion of the Court, (2) the emergence of the figure of the Court reporter, (3)

authority suggests, the accumulation of institutional capacity is not the same thing as the ability to use that capacity authoritatively. For the Supreme Court to emerge as "the true seat of authority" something more than institutional building would be needed—and given Chief Justice Marshall's ambitions, was required.[50]

Sylvia Snowiss has posited that Marshall was engaged in a fundamental transformation of the meaning of constitutional law and judicial enforcement of it during his time on the bench.[51] Snowiss suggests that during the period between the publication of *Federalist 78* and *Marbury v. Madison* judicial review was regarded as an extraordinary mechanism of enforcing the fundamental law as made explicit in the form of a written constitution.[52] In line with this understanding, judges engaged in judicial review were seen to act in place of popular revolution against the "concededly unconstitutional act" and so ensure the continued observation of the accepted limits on sovereign power.[53] The written-ness of the Constitution in this sense was a mechanism for conveying and publicizing that fundamental law that provided the judiciary with no particular responsibility for, or power of, interpretation. Following *Marbury,* Marshall's innovations over subsequent cases nonetheless meant that "judicial enforcement of the Constitution lost its character as revolutionary defense of explicit fundamental law and became judicial application and interpretation of supreme written law."[54] A central moment within this transformation was the opinion in *McCulloch v. Maryland* in which Snowiss suggests that Marshall treated the Constitution as "supreme ordinary law."[55]

Snowiss develops this claim in subsequent treatment to argue that *Marbury* and *McCulloch* represent distinct but linked moments.[56] In this reading, *Marbury* represented a development of earlier arguments attesting to the judiciary's responsibility to "expound" ordinary law and "its authority in common with other branches to "regard" or "not close its eyes to" explicit American fundamental

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the development of the habit of shared living and eating quarters for the Justices, (4) the expansion of the rules of the Court and (5) the increasing use and development of precedent by the Court. Scott Douglas Gerber, *Introduction*, *in* Seriatim: The Supreme Court before John Marshall 1–25 (Scott Douglas Gerber ed., 1988); Donald G. Morgan, *Marshall, the Marshall Court, and the Constitution*, *in* Chief Justice John Marshall: A Reappraisal 168–85 (W. Melville Jones ed., 1956); Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendency*, Mich. L. Rev. 1291–391; Robert K. Faulkner, *The Marshall Court and the Making of Constitutional Democracy*, *in* John Marshall's Achievement: Law, Politics, and Constitutional Interpretation 13–32, 16 (Thomas C. Shevory ed., 1989); Henry Wheaton, A Digest of the Decisions of the Supreme Court of the United States, From Its Establishment in 1780, to February Term, 1820 vii–xiv (1821); Timothy R. Johnson, James F. Spriggs & Paul J. Wahlbeck, *The Origin and Development of Stare Decisis at the U.S. Supreme Court*, *in* New Directions in Judicial Politics 167–185 (Kevin T. McGuire ed., 2012).

50 Arendt, *supra* note 24 at 192.

51 Snowiss, *supra* note 5.

52 *Id.* at 1–3.

53 *Id.* at 6.

54 *Id.* at 4.

55 *Id.* at 3.

56 Sylvia Snowiss, *Text and Principle in John Marshall's Constitutional Law: The Cases of Marbury and McCulloch*, 33 J. Marshall L. Rev. 973–1021 (2000); Sylvia Snowiss, *The Marbury of 1803 and the Modern Marbury*, 20 Const. Comment. 231–54 (2003).

law."[57] The assertion in Marshall's *Marbury* opinion that it is the Court's role to "say what the law is" refers not to modern conceptions of judicial supremacy but instead to the judiciary's responsibility to expound ordinary law.[58] The necessary consequence of this responsibility is that courts annunciate ordinary law in ways compatible with fundamental law—working to "preclude a court from enforcing an act that in its conceded unconstitutionality was void or not law."[59] In contrast to this narrow reading of "judicial review" *McCulloch* advances a conception of the Constitution as a form of law substantively distinct from ordinary law. This latter form of constitutional law stresses that constitutional provisions "by design, lack the "prolixity" or substantive content of conventional legal text."[60] Coupled with a concern for grants of power and the principles of the constitutional settlement, the Constitution of *McCulloch* allows for—even requires—judicial engagement in interpretation of the written text.

Positioned as an interpreter of the constitutional text rather than an enforcer of the widely understood fundamental law, the *McCulloch* Court is brought into contact with the question of authority in a new and significant way. As an expounder of ordinary law, the Court fulfilled a judicial function – and prior to *Marbury* acted in the place of the people when enforcing the fundamental law. But with the developments traced by Snowiss, constitutional enforcement became juridical rather than popular, and the Court acted not in place of the people but as a court in enforcing the constitutional law as expressed in the constitutional document.[61] This mode of enforcement saw "constitutionality [become] an external, continuously operating legal restraint on legislative and majority will analogous to the restraint of ordinary law on individuals."[62] As a consequence "Marshall … introduced the judicial supremacy of [the post-*Marbury* period] and the unresolved tension between judicial review and democracy."[63] In short, Marshall's innovations positioned the Court as *the* interpreter of the constitutional text, a position which—in the absence of the sword and the purse—it could only enact with the forbearance of those restrained by its interpretations (the people). To return to Flathman's view of authority, the Court sought "legitimate power" through an acknowledgement of its authority within the realm of constitutional interpretation. And as the previous discussion of Flathman suggests, to do so Marshall was required to make an appeal couched within the authoritative. In order to see how Marshall attempt this, we now turn to *McCulloch v. Maryland* itself.

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57 Snowiss, *supra* note 56, at 981.

58 Snowiss, *supra* note 56, at 234; Snowiss, *supra* note 56, at 988.

59 *Id.* at 234.

60 *Id.* at 973.

61 *Id.* at 119.

62 *Id.* at 119.

63 *Id.* at 120. For Snowiss, this tension is never resolved—the place of *Marbury* within popular consciousness reflects the weaknesses of the *McCulloch* Constitution in explaining the basis of the powers it claims for the Court: "The Marbury constitution stays alive because the McCulloch constitution cannot legitimate authoritative judicial adaption of principle. However, the Marbury constitution has an equivalent defect, that it legitimates an enforcement or preservationist practice that does not and cannot exist." Snowiss, *supra* note 56 at 1015–6.

IV. John Marshall's McCulloch

Chief Justice John Marshall's role in the development of constitutional thought in the United States has scarcely been understated.[64] Central to the popular mythology of Marshall is his role in authoring, and unifying the Court around, the opinion in *Marbury v. Madison* in 1803. But while *Marbury* sought to bind the Court to the Constitution (by positioning the Court as a protector of the Constitution), in *McCulloch* the Constitution is bound to the Court (by positioning the Court as interpreter of the Constitution). As noted above, this second development required an explanation of the Court's authority and so it is in the *McCulloch* opinion that we see a more systematic attempt to both justify the Court's responsibility for interpretation (rather than enforcement) and an attempt to locate this justification within the early republic's framework of the authoritative. Focusing here on the Marshall Court's second great case—and the one the generated the most contemporaneous discussion—we can trace Marshall's attempt to generate authority. [65] Marshall taps the democratic spirit of the early Republic to offer an account of the founding in a manner aimed at persuading his audience of the authority of the Court and denying authority to its rivals.

Accounts of Marshall's opinion in *McCulloch v. Maryland* tend to focus upon what Richard Ellis has described as, given the historical context of the opinion, its "extremely nationalist interpretation of the Constitution."[66] However, that nationalism can perhaps be productively be read through the prism of a sense of democratic nationalism which foregrounded the idea of the authority of a popular sovereign and which in turn was crucially mobilized in support of the Supreme Court's own authority. As Ellis notes, Marshall conceived of the case as a return to the Federalist and Anti-federalist debates of 1787-1788 in which States' Rights proponents sought to return the United States to an institutional framework similar to that of the era of the Articles of Confederation. Ellis suggests that it is to this end that Marshall offers an "enduring nationalist interpretation of the origins and

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64 George Haskins would suggest that to Marshall, "more than to any other single person, belongs the credit for establishing the foundations of constitutional interpretation." Robert Faulkner argued that "Marshall and his associates raised the Supreme Court from erratic obscurity to semipolitical eminence as the voice of the semisacred fundamental law." More recently Matthew J. Franck has described Marshall as "the Socrates of American constitutional law." George Lee Haskins & Herbert A. Johnson, History of the Supreme Court of the United States: Volume II Foundations of Power: John Marshall, 1801-15, 14 (1981); Faulkner, *supra* note 49 at 13; Matthew J. Franck, *Union, Constitutionalism, and the Judicial Defense of Rights: John Marshall*, *in* History of American Political Thought 248–68, 249 (Bryan-Paul Frost & Jeffrey Sikkenga eds., 2003).

65 In the eyes of some not even second. Justice Frankfurter would regard *McCulloch* as Marshall's greatest opinion and Marshall's biographer, Beveridge, in typically triumphal fashion, notes the opinion "so decisively influenced the growth of the Nation that, by many, it is considered as only second in importance to the Constitution itself." Richard K. Matthews, *Marshall v. Jefferson: Beyond "Sanctimonious Reverence" for a "Sacred" Law*, *in* John Marshall's Achievement: Law, Politics, and Constitutional Interpretation 117–34, 118 (Thomas C. Shevory ed., 1989); Albert J. Beveridge, The Life of John Marshall: Volume IV 168 (1919).

66 Richard E. Ellis, Aggressive Nationalism: McCulloch v. Maryland and the Foundation of Federal Authority in the Young Republic 105 (2007).

nature of the Constitution," which even supporters of the decision found hard to stomach.[67] Marshall's framework for interpreting the founding was, in reality, very similar to the one held by a majority of Federalists in the midst of the ratification debates (including Marshall himself), and partially by Marshall himself in 1803.[68] In addressing the challenges of the States' Rights opponents of the Bank in 1819, Marshall returned to this model of the Constitution's creation in order to argue for the authority of the Court.

In this return to the Constitution's creation, Marshall offers a strong endorsement of the democratic spirit of the Constitution and as such endorses the authoritative frame of rule of the people. As Christian G. Fritz has documented, early America was gripped by a belief that "All *lawful* authority originates from the people" and elites—like Marshall— sought to advance their arguments within that framework.[69] This is done in two stages— in the first Marshall narrates the founding as a moment of popular action and in the second he argues that the very nature of the constitutional document is suggestive of its popular nature. In order to support the idea that the Court held authority over the Constitution, Marshall offered an account of the founding that rejected the States' Rights theory of a compact between sovereign states. In his opinion Marshall denied that the Constitution emanated from the "sovereign and independent" states rather than the people, and offered a strong articulation of the Constitution as the work of the people. Marshall stated that, "The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it."[70] Echoing James Wilson during the Ratification debates, Marshall lodged the authority of the Constitution in the people's ratification of it: "From these [state] Conventions the constitution derives its whole authority. The government proceeds directly from the people: is "ordained and established" in the name of the people… the people were at perfect liberty to accept or reject it; and their act was final."[71] Grounding his nationalizing ruling in the establishment of a nation *by the people*, he cut the states out of the Constitution's authorization process – as indeed Madison, and others in 1787, had hoped the ratification process would do. Rejecting the argument that the States had authorized the Constitution, Marshall stated "[t]he government of the Union … is, emphatically, and truly, a government of the people."[72] In *McCulloch,* then, he

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67 *Id.* at 4, 105.

68 Marshall would reflect on his participation in the ratification debates of 1787-88 in later life by recalling "the wild and enthusiastic democracy with which my political opinions of that day were tinctured." To Joseph Story [ca. 25 July] *in* The Papers of John Marshall: Vol. XI: Correspondence, Papers, and Selected Judicial Opinions April 1827-December 1830 35–49, 38 (Charles F. Hobson ed., 2002).

69 Samuel Chase, quoted in Fritz, *supra* note 46, at 125. Original emphasis.

70 McCulloch v. Maryland, 17 U.S. 316, 403 (1819).

71 *Id.* at 403–04. In James Wilson's oft-quoted words, the constitution opened "with a solemn and practical recognition of that principle: "We, the people of the United States […] do ordain and establish this Constitution for the United States of America." It is announced in their name—it receives its political existence from their authority: they ordain and establish." The Debates in the several State Conventions on the adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787… in Five Volumes: Volume II, 434–35 (Jonathan Elliot ed., 1968).

72 McCulloch v. Maryland, 17 U.S. 316, 404.

sought to expand and lay out the assumptions of popular authority as a basis for arguing for the Court's authority.

With regard to the claim that the form of constitutional document was indicative of its popular nature, Marshall linked the requirement of interpretation with democratic sanction. Dismissing the notion that the Constitution could be understood as only granting the powers explicitly listed, Marshall connected the possibility of implied powers to the nature of its adoption. While the opinion in *McCulloch* is noted for the idea that a constitution contains implied powers and must avoid the "prolixity of a legal code," it is not as often noted how that observation is intertwined with the idea that a constitution is linked to popular ratification.[73] Partially, it was that the Constitution required authorization by the people which meant it could never "contain an accurate detail of all the subdivisions of which its great powers will admit."[74] To do so would render it incomprehensible to the popular body that must approve it as it "would probably never be understood by the public."[75] Instead it was necessary that it contain only the "great outlines."[76] Marshall allied that argument about the procedural need for an expansive constitution within a democratic polity to an argument that the popular origin itself attested to implied powers. In a series of essays expounding and supporting the opinion written under the pseudonym "A Friend of the Constitution" he argued that the government was "created by the people, who have bestewed [sic] upon it certain powers for their benefit, and who administer it for their own good."[77] Later in the same essays he expanded upon this point:

> It [a constitution] is the act of a people, creating a government, without which they cannot exist as a people. … The object of the instrument is not a single one which can be minutely described, with all its circumstances. The attempt to do so, would totally change its nature, and defeat its purpose. It is intended to be a general system for all future times, to be adapted by those who administer it, to all future occasions that may come within its own view.[78]

Against this background *McCulloch's* famous claim that "we must never forget, that it is *a constitution* we are expounding" bears more significance than as a claim that a constitution is of a particular nature and so must countenance implied powers – that observation is intimately tied to the origins of a democratic constitution in the latter's popular sanction.[79] The central basis of *McCulloch's* holding, that there are constitutionally implied powers, is firmly rooted in the depiction offered by Marshall of a democratic process of constitutional assent.[80]

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73 *Id*.
74 *Id.*
75 *Id.*
76 *Id.*
77 John Marshall, *Essays from the "Alexandria Gazette": John Marshall, "A Friend of the Constitution"*, 21 Stan. L. Rev. 456–99, 459 (1969).
78 *Id.* at 467.
79 McCulloch v. Maryland, 17 U.S. 316, 407 (1819).
80 On this point Daniel A. Farber has written, "Constitutional law is generally thought to involve the interpretation of a text. But in *McCulloch*, it may be more accurate to say that

Having linked the authority of the Constitution to its historic democratic claims Marshall pushed this argument further in *McCulloch*. Using this understanding of the founding he not only affirmed the constitutional review proffered in *Marbury*—that the constitutional text could be used as a basis to strike down the acts of other departments (tying the Court to the Constitution)—he also used the narrative of the founding to frame the Court itself as the chosen inheritor of the people's authority (tying the Constitution to the Court). In both *McCulloch's* opinion and the *A Friend of the Constitution* essays defending it, Marshall would depict the Court as the constitutionally appointed institutionalization of the people's constitutional authority. In *McCulloch* the ability of the Court to make the ruling was itself presented as a result of the people's sanctioning of that ability through the Constitution, albeit without the explicit acknowledgement of that connection. Developing the tendency of *Marbury,* the authority of the *popular* founding was absorbed into the authority of the constitutional document. In *McCulloch,* Marshall merely stated without elaboration "On the Supreme Court of the United States has the constitution of our country devolved this important duty."[81] Implicitly the democratic authority of the Constitution established elsewhere in the opinion was put to the service of legitimizing the Court—"by this tribunal alone can the decision be made."[82] In "*A Friend of the Constitution*" the discussion of this point was more thoroughly developed.

In the eighth and ninth essays of the series Marshall directly addresses the question of whether the Court has jurisdiction and in doing so considers at length the nature of the Constitution's creation. Once again, the authoritative concept of democratic government is invoked. Fundamental to his conclusion on this question is that the "constitution of the United States is not an alliance, or a league … but is itself a government, created for the nation by the whole American people, acting by convention assembled in and for their respective states."[83] Once accepted, Marshall moves to his central point of examination: "the powers actually conferred by the people on their government."[84] These include "a judicial department; which, like the others, is erected by the people of the United States."[85] The conduit of this popular origin of the authority is once again the Constitution. Marshall emphatically declares that "[t]he right asserted by the court [to decide this case], is then, expressly given by the great fundamental law which united us as a nation. … this is not now a question open for consideration. The constitution has decided it."[86] Moreover, to resurrect the question of the Court's authority is itself a challenge to the Constitution/people as the "judicial right to decide on the supremacy of the constitution, [is] a right which is inseparable from the idea of a paramount law, a

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Marshall was interpreting an *action*: the agreement of the peoples of the various states to transform the existing league into a nation, in the process transforming themselves from thirteen separate state peoples into "We, the People of the United States."" Daniel A. Farber, *The Story of McCulloch: Banking on National Power*, 20 Const. Comment. 679–714, 714.

81 McCulloch v. Maryland, 17 U.S. 316, 401.

82 *Id.*

83 Marshall, *supra* note 77 at 490.

84 *Id.* at 491.

85 *Id.*

86 *Id.* at 494–95.

written constitution."[87] As with *Marbury*, Marshall moves in this line of argument to blur the distinction between sanctioned by the text and granted by the people, but the cumulative effect is to portray the Supreme Court as the popularly sanctioned defender of the Constitution. "It is the plain dictate of common sense, and the whole political system is founded on the idea, that the departments of government are the agents of the nation, and will perform, within their respective spheres the duties assigned to them."[88] From this Marshall draws out extensive authority for the Court: "Each [department] is confined to the sphere of action prescribed to it by the people of the United States… On a judicial question then, the judicial department is the government, and can alone exercise the judicial power of the United States."[89]

In *McCulloch* then the authority of the founding as a popular act and the authority of the textual constitution as the product of that act are utilized to make an argument for the authority of the Supreme Court within the authoritative context of support for democratic modes of legitimation. Intertwined and blurred, Marshall utilizes them to position the Court as the adjudicator of an expansive and nationalizing Constitution. Defending this claimed authority against challenge in his *A Friend of the Constitution* essays, Marshall elaborates and shores up this view. Responding to his interlocutor Hampden's attack on the Court's role in the case, Marshall argues that it is an American principle that imposed on the judiciary "the duty, of preserving the constitution as the permanent law of the land."[90] Taken together, the cumulative effect is to attach the people's authority in a constitutional text, and then to actualize that authority in the institution of the Court.[91] Thus two transfers of authority are supposed; authority is moved from the people to the text, and then authority is transferred to the Court. Nonetheless, this transfer originates in the authority of the people—the authoritative frame of the early Republic. Throughout the opinion in *McCulloch* and the *A Friend of the Constitution* essays, Marshall makes his argument for the authority of the Court by a return to the claim that the people exercised direct and legitimate power in the creation of the Constitution—the Court's authority rest on a claim made through the early Republic's notion of the authoritative.

V. Conclusion: Authority and the Supreme Court

As the discussion above shows, Marshall's attempt to garner authority for the Supreme Court in the *McCulloch* opinion sought to locate that claim within the early Republic's authoritative understanding of democratic governance. In seeking to provide the Court with the "legitimate power" to constrain Americans to the former's constitutional interpretations, Marshall repeatedly and systematically

87 *Id.* at 495.
88 *Id.* at 497.
89 *Id.* at 496.
90 *Id.* at 458.
91 Norton has written of the Constitution in terms of transubstantiation, in which "we see not the word made flesh, but the flesh made word." In these opinions we can see the flesh of the people made word (text), and then once more made flesh in the Justices of the Court. Anne Norton, *Transubstantiation: The Dialectic of Constitutional Authority*, 55 U. Chi. L. Rev. 458–72, 458 (1988).

invoked the democratic nature of the American founding and linked it to the very nature of the constitutional document. This approach closely follows the understanding of authority developed by Flathman in which authority is reliant upon the ability of the claimant to tap into the values and beliefs extant in the society around them. Marshall's emphasis on the people's involvement in the founding reflected the strong democratic ethos of the time and enabled him to advance an argument for the Court's (national, judicial) authority while acknowledging the break in tradition that the founding represented. Such an understanding allows the generation of authority at this crucial moment in the Court's history to cohere more readily with the Supreme Court's later history. The travails of the *Lochner* Court, the New Deal Court, and the difficult implementation of rulings including *Brown v. Board of Education*, bear witness to neither constant nor gradually receding authority but instead an ebb and flow as the Court is buoyed along the waters of public opinion – at times its authority is diminished only to recover at a later date. In essence, every Supreme Court ruling is a claim to authority that can be accepted or rejected, a claim bolstered or retarded by the Court's own broader institutional authority within that moment in time. Every court makes that claim anew against the authoritative frame of that given moment.

The above understanding of authority differs from the Arendtian understanding of the Supreme Court as deriving authority from its existence within a line of historical moments. In *What is Authority?* Arendt's view of the Supreme Court as a link back to the founding is predicated on the notion that authority operated in a similar mode to tradition—resting on a preexisting relationship and not reliant upon the imminent "consent" of the bound to the compatibility of the appeal and the authoritative. Albeit modified in *On Revolution* in order to present the founding as a moment of mutual promising, the Supreme Court in Arendt's thought was significant as a bridge to a necessarily chronologically earlier grounding of authority. The Supreme Court's authority to issue constitutionally binding rulings came because it in some way embodied the past in the present moment and therefore called to mind the "preexisting" relations of the constitutional order. As the third part of a Roman trinity along with religion and tradition, authority was similarly legitimated by its origin in the past.[92] Arendtian authority—even the authority of the founding as a moment of mutual promising—required a prior basis. Marshall's *McCulloch* certainly relies upon a narration of the past, in the form of a story about a democratic founding. Nevertheless, in *McCulloch* we do not see Marshall locate the Constitution within a longer tradition of contracting nor is it the case that the Court calls upon a continuous line of authority to make its claim. Instead, Marshall offers a defense of the Court's authority by utilizing the early Republic's belief in democratic values and showing how the interpretative authority of the Court can be located within that ethos. There is a past there, but its value lies in its ability to connect to the authoritative frame of the (Marshall Court's) present.

Marshall's actions in *McCulloch* suggest that in thinking about authority it would be productive to move away from Arendt's view of authority. Reliant upon her understanding of authority as dependent upon an unbroken trajectory, Arendt saw the rupturing of the lines of tradition and religion as necessarily fatal to authority. The Supreme Court remained a potent exception to this insofar as

92 Arendt, *supra* note 6, at 125.

it kept alive the line that connected the American founding to the contemporary moment. But if the argument above is correct, then the Court does not represent that link so much as it represents the ability of the institution, person, or idea to generate authority by appeal to the authoritative. Authority is here not fragile and backward looking, but dynamic and contingent—authority does not disappear in moments of rupture but is always capable of actualization and renewal within a fresh conception of the authoritative. As I have shown elsewhere, the authority of the Constitution within the United States is periodically reinvented, even as those reinventions rely upon and recreate historical accounts that connect the present to a past.[93] The continued authority of the Supreme Court is not evidence of a line connecting today to the founding, but rather evidence of the persistent capacity of actors to rearticulate such connections anew.

The view of authority as contingent and rooted in the present moment opens up new possibilities for understanding the Court's authority as a political claim. Identifying a modern rupture with the past, Arendt prescribed a decline of authority and an associated loss of its ability to make claims that transcend politics. The conception of authority as contingent developed here and located in Marshall's *McCulloch* opinion suggests that the U.S. Supreme Court's authority does not transcend politics but is rather intensely political insofar as its claims are made against a contemporary sense of the authoritative and subject to acceptance of the legitimacy of these claims on the part of subscribers. Where Arendt saw contestation of claims to authority as evidence of an absence of authority, we might more productively see the political struggles inherent in these authority claims. Constantly evolving and subject to contestation and consent, claims to authority are decidedly political. With particular attention to the authority of the Supreme Court and other such constitutional courts, it reminds us that even insofar as authority is deployed to differentiate them from more "political" institutions, courts and law are inseparable from the broader, and even contested, notions of the authoritative within any given political society.

[93] Simon J. Gilhooley, *"And Then They Begin to Look After the History of Their Founders": (Re)configurations of the Founding in the early Republic*, *in* Founding Moments in Constitutionalism 93–112 (Richard Albert, Menaka Guruswamy, & Nischal Basnyat eds., 2019).

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Article V and the Law of Constitutional Conventions

Roman J. Hoyos[1]

ABSTRACT

Can an Article V convention be limited? While there is an emerging consensus that it can, in this paper I focus on John A. Jameson's legal treatise on constitutional conventions and the jurisprudence it spawned to help round out our understanding of both Article V in particular, and of constitutional revision more generally. Jameson's treatise was directed to the larger question of whether constitutional conventions in general could be limited. Since its initial publication in 1867, courts have relied upon Jameson's insights to build a law of constitutional conventions at the state level. Several components of this jurisprudence are particularly relevant to Article V, including the distinction between constitutional and revolutionary conventions, the distinction between amendment and revision, and the requirements of convention acts and ratification votes, in addition to the preclusion of a robust role for the electorate in the Article V convention process. This jurisprudence is readily available for courts to help guide them in determining the nature and limits of an Article V convention.

KEYWORDS

Constitutional change, state constitutional law, John Alexander Jameson

CONTENTS

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> "The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress.…"
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> U.S. Constitution, Article V

Can an Article V constitutional convention be limited? This "recurring question" taps into both our fears and aspirations about the federal constitution.[2] It is either a cure or a vehicle for corruption. But the debate has largely grounded to a stalemate. And our national "constitutional conventionphobia"[3] has failed to press the issue to resolution — better the devil you know. This phobia is not an entirely new phenomenon. William Gaston, a well-respected North Carolina judge and delegate to North Carolina's 1835 constitutional convention, admitted that he went to that convention with "fear and trembling" of the changes the convention might attempt to make.[4] But Gaston was in the distinct minority in the nineteenth century, when constitutional conventions dotted the constitutional landscape. From 1830 to 1880 no less than ten conventions per decade were held. In the 1860s alone over thirty conventions were held.[5] By contrast, it has been decades since a constitutional convention was held in the United States, despite numerous referendums on the issue. Fear and trembling, it appears, has forced us to defer meaningful amendment, even in the states, until there is an overwhelming consensus supporting it.[6]

More recently, though, scholars have begun to push through what Robert Natelson calls "this narrative of uncertainty," a narrative in which "we have no idea how participants in an amendments convention would be chosen, how they might be allocated, how voting rules would be formed or what they looked like, how officers would be selected, how the scope of the convention could be limited

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2 Charles L. Black, Jr., *The Proposed Amendment of Article V: A Threatened Disaster*, 72 Yale L. J. 957, 964 (1963); Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 Yale L.J. 189 (1972); Walter E. Dellinger, *The Recurring Question of the 'Limited' Constitutional Convention*, 88 Yale L. J. 1623, vol. 1979 (1979); Dellinger, *Who Controls a Constitutional Convention?: A Response,* Duke L. J. 999 (1979); Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv. L. Rev. 386 (1983); Paulsen, *A General Theory of Article V*, 103 Yale L. J. 677 (1993). *But see* William van Alstyne, *The Limited Constitutional Convention: The Recurring Answer*, Duke L. J. 985, vol. 1979, 985-986 (1979); Damian O'Sullivan, *Structural Analysis of Article V: The Constitutionality of a Limited Convention to Propose Amendments*, 22 U. Penn. J. Con. L. 291 (2019).

3 Gerald Benjamin & Thomas Gais, *Constitutional Conventionphobia*, 1 Hofstra L. & Pol'y Symp. 53 (1996).

4 North Carolina Convention Debates (1835).

5 This number is complicated by Reconstruction, a period during which ex-Confederate states held multiple conventions within a handful of years of one another.

6 Which may have been Article V's intended function. Huq Aziz, *The Function of Article V*, 162 U. Penn. L. Rev. 1165 (2014).

– or whether it could be limited at all."[7] Professor Natelson and others have done an important job of growing our understanding of Article V, both in terms of introducing new sources, and in diving more deeply into the Founding sources and precedents for an Article V convention.[8] Their work has produced an emerging consensus that an Article V convention can be limited. While this scholarship quite sensibly focuses on Article V precedents, commentary, and jurisprudence, I want to move in a different direction.

Rather than focus on Article V itself, I want to explore how Americans have dealt with the parallel question of whether their state constitutional conventions could be limited, and how that experience might provide insight into whether a federal convention could be limited. The question about whether a state constitutional convention could be limited generated intense debate throughout the nineteenth century, forming, in fact, one of the most important constitutional questions of the era. The question about the scope of a convention's authority was closely connected to the meaning and nature of popular sovereignty, which was foundational to the creation of republican governments at both the state and national levels for over a half century following the American Revolution. The convention embodied the people's constituent power, which provided the motive force for the development of new republican governments. Here, I want to explore the questions raised, and the methods and answers posed to the larger question of a whether a convention can be limited. Approaching the question that way should help to round out our understanding of the history and jurisprudence of constitutional revision in America, and demonstrate that Article V is part of a longer, centuries-long conversation about self-governance in America.

At the center of that jurisprudential history is the treatise literature on the law of constitutional conventions, and John Alexander Jameson's treatise in particular. Following the Civil War, Jameson published the first-ever legal treatise on constitutional conventions, drawing upon the rich American constitution-making experience of the nineteenth century to invent a law of constitutional conventions. Jameson's work makes a systematic and powerful case for the idea that constitutional conventions are by definition limited institutions.[9] At the very least, this treatise, and the jurisprudence it spawned, should be part of the discussion about the scope of an Article V convention's authority.

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7 Robert G. Natelson, *Is the Constitution's Convention for Proposing Amendments a 'Mystery'?: Overlooked Evidence in the Narrative of Uncertainty*, 104 Marq. L. Rev. 1, 5 (2020).

8 *See, e.g., id*.; Natelson, *Proposing Constitutional Amendments by Conventions: Rules Governing the Process*, 78 Tenn. L. Rev. 693 (2011); Natelson, *Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments*," 65 Fla. L. Rev. 615 (2013); Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 28 Const. Comment. 53 (2012); Note, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 Harv. J. L. & Pub. Pol'y 1005 (2007); Michael Stern, *Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention*, 78 Tenn. L. Rev.765 (2011); John R. Vile, Conventional Wisdom: The Alternate Article V Mechanism for Proposing Amendments to the U.S. Constitution (2016).

9 That would require a reconceptualization of American constitutionalism that is beyond the scope of this paper.

I. This Great Work of Liberty

There was nothing that could be said to constitute a law of constitutional conventions before the Civil War, at least not in the sense of courts playing a role in limiting the scope of convention authority. Indeed, there were very few cases that directly presented the question of the powers of the convention, and those that did were largely ignored or became embroiled in judicial reform politics, limiting their reach. As an "offspring of revolution," as a judge would put it in the 1870s, the convention was understood to embody and exercise the people's constituent power. As James Kent explained, "The constitution is the act of the people speaking in their original character, and defining the permanent conditions of the social alliance."[10] Another treatise writer elaborated the idea in more detail.

> It should be observed that a constitution of a state is a form of government instituted by the people in their sovereign capacity, in which just principles and fundamental law is established. It is the supreme will of the people, permanent, and fixed, in their original, unlimited, and sovereign capacity; and in it are determined the conditions, rights, and duties of every individual of the community. From the decrees of the constitution there is no appeal, for it emanated from the highest source of power, the sovereign people.[11]

This relationship between popular sovereignty and the constitutional convention was forged during 1770s and 1780s, before finding its way into American jurisprudence in the early nineteenth century.

The constitutional convention helped to make popular sovereignty the operating principle of the newly-founded republican governments by visibly embodying the people in a distinct institutional form. As Frederick Grimke explained, the invention of the constitutional convention meant that "the popular mind, and not merely the popular will, should have so direct an agency in the formation of a constitution of government." Through the convention, "the people" had gained the capacity to both act and reason, marking "an entirely new era in the history of society."[12] The convention rendered the people capable of action as a single collective whole, and enabled them to exercise their constituent power to create the institutions by which they would govern themselves.[13] In the century following the American

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10 James Kent, 1 Commentaries on American Law 421 (1826).

11 E. Fitch Smith, 1 Commentaries on Statute and Constitutional Law and Statutory and Constitutional Construction 313 (1848).

12 Frederick Grimke, Considerations upon the Nature and Tendencies of Free Institutions 124-25 (1848).

13 Edmund S. Morgan, Inventing the People: The Rise of Popular Sovereignty in England and America (1988); Gordon S. Wood, The Creation of the American Republic, 1776-1787 (1998); Willi Paul Adams, The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era (2001); Christian G. Fritz, American Sovereigns: The People and America's Constitutional Tradition Before the Civil War (2007); R.R. Palmer, The Age of Democratic Revolution: A Political History of Europe and America, 1760-1800, I (1959); Merrill D. Peterson, ed., Democracy, Liberty,

Revolution, people throughout the country exercised their most fundamental right to alter or abolish government to write, re-write, and re-write again, their state constitutions, making the constitutional convention one of the most important political and constitutional institutions in the United States, and certainly the most innovative institution invented by the Americans.[14]

Today, while we still seem to view the convention as the embodiment of the people, it does not seem to carry the same meaning; the very idea of popular sovereignty has been "dulled."[15] Both juridically and politically there have been fundamental changes in how Americans think about and use the constitutional convention. John Jameson's legal treatise on constitutional conventions was a crucial turning point in that change in perspective. Prior to the Civil War, judges largely ignored the question of convention power and authority, and treatise writers tended to extol the virtues of constitutional conventions. There was little serious or sustained effort to critically examine the source and extent of the powers of the constitutional convention. The convention as an institution thus remained largely where it began, as an "offspring of revolution,"[16] as the embodiment of the people and their sovereign or constituent authority, as an institution that lay beyond law.

Nevertheless, by 1860, the constitutional convention had become a common and regularized institution, for both statehood and reform. Between 1790 and 1820, most of the conventions held were statehood conventions, organized to create a constitution in order to be admitted as a state into the Union. The early statehood conventions were organized at the initiation of the territorial governments. Eventually, however, Congress made it a requirement for the statehood process.[17] Slowly during this period, however, existing states began organizing constitutional conventions to reform their constitutions. In the 1820s and 1830s, a conventional revision culture began to emerge. One problem facing reformers was that many constitutions did not include provisions for conventions in their original constitution. This did not prevent states from assembling conventions, however. They relied upon the right to alter or abolish government for authority, and the state legislature for the assembling of a convention. Occasionally, conventions were organized without the aid of state legislatures. But this was more commonly a threat to prod the legislature into assembling a convention. As the nineteenth century wore on, constitution-makers regularly began to include convention clauses in their revised constitutions in order to resolve ambiguity about whether legislatures possessed the power to call or provide for the assembling of a convention.

By the middle of the nineteenth century two traditions of constitutional revision had emerged, although it was not quite apparent to constitution-makers at the time. One was a revolutionary tradition. In times of constitutional crisis, a convention

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and Property: The State Constitutional Conventions of the 1820s (1966); Jack P. Greene, Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States, 1607-1788 (1986).

14 Palmer, *supra* note 13, at ch. 8.

15 Daniel T. Rodgers, Contested Truths: Keywords in American Politics Since Independence 80 (1987).

16 *Woods's Appeal*, 75 Pa. 59, 65 (1874). Stowe was the trial judge in the case.

17 Bayrd Still, *An Interpretation of the Statehood Process, 1800-1850*, 23 Miss.Valley Hist. Rev. 189 (Sept. 1936).

assembled to fill gaps in government, and to create a new constitutional order by drafting a new constitution. It was through the drafting and enacting of the new constitution that the constituent power revealed itself; this is popular sovereignty in its most elemental form. These were the conventions of the 1770s and1780s. The second tradition was a constitutional tradition. Conventions in this tradition were bodies used to create or change constitutions, but in times of peace not of violence, upheaval, or revolution; the regular governmental institutions continued to operate until the new constitution was ratified. Many constitution-makers believed that they had successfully combined the two traditions (if they even perceived a distinction), occasionally referring to the constitutional tradition as "peaceful revolution." Over the first half of the nineteenth century, the tension between the revolutionary and constitutional traditions became more apparent and more pressing, with the two traditions finally colliding in secession.

The dividing line between the revolutionary and constitutional traditions is the question of limits, the very question at the center of debates over Article V conventions. For many decades, constitution-makers were able to suspend the distinction, as they only occasionally pushed conventions in radical directions. But beginning with the Kansas crisis, and culminating in secession and a war-time convention in Illinois in 1862, the idea of an unrestrained people exercising their sovereignty at will through a convention appeared dangerous to both government and liberty. That this idea could potentially lead to disunion, or "anarchy" as President Lincoln termed it, made the question of limits urgent.[18]

The constitutional discourse of secession, like that of constitutional conventions, was grounded in popular sovereignty, particularly its connection to the constitutional convention. Nearly every state that seceded from the Union did so by way of a constitutional convention. As the embodiment of the people's sovereignty, the convention was the most constitutionally legitimate means of seceding. Secession, then, was not, as President Lincoln characterized it, "the essence of anarchy;" it was simply the people's exercise of their right to alter or abolish government. Secession was, to be sure, an extraordinary exercise of that right, but it was also thoroughly conventional, in both senses of the term.[19] And that was precisely the problem. Secession exposed dramatically the line between revolutionary and constitutional conventions.

Secession itself may have been enough of a spur for Jameson to write his treatise. He certainly pointed to it as a motivating factor. But as an Illinois Republican, Illinois' 1862 constitutional revision convention brought the issue immediately to his door. Illinois' convention was oddly timed, coming as it did amidst the early part of a war. The voters had approved a referendum for a convention in 1860, before the war, and when Democrats gained control of the legislature in 1861, they set about to provide for its organization. While most observers in the state agreed that the 1848 constitution needed reform, the timing and composition of the convention raised questions about the objectives of many of the delegates. In fact, the convention seemed to catch Republicans off-guard, or at least the Republican editors of the Chicago *Tribune*. They apparently paid little attention to the delegate

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18 Abraham Lincoln, "First Inaugural Address" (Mon., March 1, 1861).

19 Roman J. Hoyos, *Peaceful Revolution and Popular Sovereignty: Reassessing the Constitutionality of Secession*, *in* Signposts: New Directions in Southern Legal History 241 (Sally Hadden & Patricia Minter, eds., 2013).

elections. But after the election returns put Democrats clearly in control of the convention, 55-19, the editors suddenly became concerned.[20]

Upon realizing the Democratic dominance of the convention *Tribune* editors fretted that, "It is probably one of the most ultra Democratic bodies ever got together in this State, and there is nothing they may not do." It was this last aspect that proved most frightening, as "The more radical members are for refusing to submit the Constitution to the people and for turning out all the State officers."[21] As Republicans understood it, Democrats wanted control of the state government in order to subvert the Union military effort, and possibly even use the convention to take the southern part of the state (commonly known as "Egypt") out of the Union entirely. The election of John W. Merritt as Assistant Secretary of the convention seemed to indicate the secessionist leanings of the Democratic majority. Merritt, the *Tribune* explained,

> is (or was) editor of a newspaper at his place of residence in Marion county. At the time of the fall of Fort Sumter, he was sympathizer with the secessionists, loudly exulting over the triumph of the South Carolinians, and bitterly denouncing the President for calling our volunteers to maintain the supremacy of the Constitution and laws. If we mistake not, he went so far as to endeavor to raise men to fight on the side of the rebels.[22]

It was only after members of his community threatened to shut down his paper, the paper reported, that he backed down.

Republicans had been worried about secessionists in southern Illinois since the fall of Sumter, and the convention's early actions resonated with those fears. Although the military condition of the state had been strengthened by the end of 1861, Union victory was not imminent.[23] Moreover, Illinois' neighbor, Missouri, was being ripped apart by divisions within the state, which threatened to spill over into Illinois. Eventually, the *Tribune* entered into sensationalist reporting, inventing rumors that some delegates were engaged in secessionist activities, allegations the convention investigated but found no evidence to support.[24]

More ominous than the Merritt appointment, though seen in part through it, was the convention's appointment of a committee to draft a report on the extent of the convention's powers. "It is unfortunate," declared the *Tribune*, "that the very first act of the Constitutional Convention, at Springfield, should have been the appointment of a committee to consider and report 'how far the act of the Legislature calling the Convention limited the action thereof.'" The editor assumed that this was an attempt by Democrats to come up with a rationale for not submitting the constitution to the electorate ratification, which it deemed "a grave

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20 O.M. Dickerson, *The Illinois Constitutional Convention of 1862*, 1 U. Illinois: The University Studies, no. 9 (1905).

21 Chicago Tribune, Jan. 8, 1862.

22 *Id.* at Jan. 9, 1862.

23 Tracy Elmer Strevey, *Joseph Medill and the Chicago Tribune During the Civil War Period* 103-104 (unpublished Ph.D. diss., University of Chicago, 1938).

24 Jack Nortrup, *Yates, the Prorogued Legislature, and the Constitutional Convention*, 62 J. Ill. St. Hist. Soc'y 10-11 (1969).

public danger."[25] The editor could not believe "the airs of supreme sovereignty which the Egyptian members of the Convention are putting on,"[26] and suggested that the convention adjourn until after the war.[27] When the convention failed to adjourn, the *Tribune* stepped up the attack, and began referring to the convention as "the great usurpation," "that mob at Springfield," and "King Mob."[28]

These epithets soon led to a more legalistic analysis of the convention. One problem, as the *Tribune* saw it, was that the convention was not even properly organized, as the delegates had not taken a proper oath. Instead of swearing to support the federal and state constitution, delegates were simply required to swear support to the federal constitution. Moreover, this oath was distinct from the one required by the state constitution.[29] What the paper failed to report was that that was a common practice in conventions by 1862. Nevertheless, the *Tribune* accused the convention of "defy[ing] the existing laws, set[ting] aside the Constitution, and arrogat[ing] to itself the right to exercise the supreme power of the State." The convention thus appeared to be "a revolutionary assemblage, which, under the name of law, attempts the most flagrant innovations upon private and popular right"— "a Jacobin Club encroaching upon the safeguards of public law and justice."[30]

Particularly rankling was that the Democrats did not deny these accusations. "Thirty-eight pro-slavery Egyptians, constituting a majority of the Convention, and representing constituencies numbering but one-third of the popular of the State, claim that the sovereign power of the whole people of Illinois is concentrated inside of their skins. As two sovereignties cannot exist in the State at the same time, therefore the people—the two millions of inhabitants of Illinois—at this moment are divested of the attributes of sovereignty, and can never recover them while the Convention chooses to exist. …[T]hey are no longer self-governing freemen. They have no political power left in their hands. The thirty-eight Egyptians have absorbed it all."[31] Such "crazy and absurd attempts to seize the reins of sovereign power, or climb into the saddle, … will only get just far enough up to show what

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25 *A Grave Public Danger,* Chicago Tribune, January 9, 1862. According to Dickerson, the reason for this report was the determination of a printer for the convention. Dickerson identified three instances in which the convention considered its own powers: its right to appoint a printer, its right to ratify the proposed amendment to the federal constitution, and its authority to reapportion congressional districts. Dickerson, *supra* note 20, at 32-41.

26 *Too Big for Their Boots*, Chicago Tribune, Feb. 8, 1862.

27 *Let the Convention Adjourn Until the War is Over*, Chicago Tribune, Jan. 29, 1862.

28 *That Mob at Springfield*, Chicago Tribune*,* Feb. 17, 1862; *King Mob at Springfield*, Chicago Tribune, Feb. 24, 1862.

29 *King Mob.* The *Tribune* had taken up the oath issue more fully in a separate editorial. The issue was whether the convention was bound by the oath in the convention which required the delegates to swear to support both the U.S. Constitution and the existing state constitution. As the convention took an oath only to support the U.S. Constitution, the *Tribune* and others argued that the convention was an illegal body. *Is the Convention Legally Organized?* Chicago Tribune, Jan. 16, 1862.

30 *The Great Usurpation*, Chicago Tribune, Feb. 11, 1862.

31 *Usurpation*, Chicago Tribune, Feb. 12, 1862. Rumors were apparently rampant around Illinois, that Knights of the Golden Circle, secessionist sympathizers, were delegates. After the *Tribune* published an account of these rumors, the Convention created a committee to investigate them. Chicago Tribune, Feb. 13, 1862.

a prodigious ass it can make of itself."[32] As a "child of the people," and an unruly one at that, the convention was at best an immature embodiment of the people, governed by its passions rather than by deliberate reason.[33]

The *Tribune*, though, did not limit itself to a critique of the Democratic delegates and their decisions. It soon began a more positive exploration of the "plain and simple" powers of constitutional conventions. It wouldn't be surprising if Jameson wrote some of these editorials himself. Jameson was one of the earliest members of the Chicago Republican Party, and was described by a friend as "devoted to the perpetuation of its principles in power, [defending] its course at all times with argument and personal devotion."[34] Moreover, the ideas developed in the pages of the *Tribune* were strikingly similar to those later found in Jameson's treatise.

According to the writer, whoever it was, the first thing to understand was that a convention was no more than a committee, appointed by the people to perform a particular act. And it was only the joint act of the committee and the electorate that produced a constitution: "The one framed the amendments, put the changes wanted into proper shape, and the other, the people, gave them vitality by adopting them." As a "committee," the convention was more of an administrative body than a sovereign one. "The Convention has no power of attorney from the people beyond that described in the act of the Legislature, which declares that whatever amendments to the Constitution may be framed, shall be submitted to the people for ratification. In other words, it is simply a conveyancer employed to fill up the instrument for the people to sign, and until they do sign it, the ordinances are utterly lifeless." As a "conveyancer" the convention was limited simply to proposing a constitution, not enacting one. Thus, to "suppose the committee should take it into their heads that they possessed supreme power, and might draw up any resolutions they pleased, and declared them passed and binding upon the meeting" was usurpation and tyranny. Any constitution drafted and approved by the convention, the writer concluded, had to be submitted for ratification by the state's voters. There was "no wilder notion" than that the constitution making power allowed a convention to "seize the sovereign authority of the State, and make or unmake, set up or pull down, at once any law it pleases."[35]

Whatever broad claims Democrats had initially made about the convention's authority, the convention ultimately submitted its work to the electorate for ratification. Most of the amendments it proposed were rejected by the voters. The secessionist threat appeared to be thwarted. But this did not solve the larger problem. In fact, one historian has written, Republicans' "private correspondence discloses no elevated feeling" regarding the triumph of democratic politics.[36] Recent experience in Kansas, the seceding South, and Illinois seemed to suggest that only violence and disunion could result from broad claims about the convention's relationship to the people. Something more binding and enforceable was needed. As fortune would

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32 *The Convention and the Ass*, Chicago Tribune, Feb. 26, 1862.

33 *The Convention — The Child of the People*, Chicago Tribune, Feb. 18, 1862.

34 Francis Newton Thorpe, In Memoriam: John Alexander Jameson 18 (1890).

35 *Power Necessary to Change the Constitution*, Chicago Tribune, Feb. 13, 1862.

36 Nortrup, *supra* note 24, at 20. *See also* Bessie Louise Pierce, 2 A History of Chicago, 1848-1871, 261-65 (1937). Chicago voted for the new constitution by almost 1,000 votes. *Id.* at 265.

have it, a legal entrepreneur witnessing the events unfold in Illinois, and perhaps seeking to make a name for himself,[37] recognized this need.

Secession and the Illinois convention had a profound impact on Jameson, a Republican activist, University of Chicago law professor, and future Chicago judge.[38] "In 1862," he explained in the preface to the 1887 edition of his treatise, "certain influential members of the Illinois Constitutional Convention … set up for that body, in debate, a claim of inherent power amounting to almost absolute sovereignty." "Alarmed by this claim of power," he continued, "the author commenced a study of the Convention as an American institution … with a view to ascertain whether the claim of power … was warranted either by history or by constitutional principles."[39] For four years following the Illinois convention, Jameson devoted himself to ascertaining and adumbrating the limits of constitutional conventions.[40]

Jameson easily could have let the arguments against the claims made by delegates in Illinois' convention lay in *Tribune's* editorials. This was the usual course following a battle over a convention's power. Occasionally, convention critics would gather materials into a pamphlet. This happened in South Carolina, for instance, where a debate over the scope of authority of its nullification conventions generated newspaper commentary and even judicial opinions. Those opposed to the conventions gathered the opinions into a pamphlet, suggesting that the debate was at least as political as it was legal.[41] A similar pamphlet containing the attorneys' arguments in *Luther v. Borden* concerning the scope of a constitutional convention in Rhode Island also appeared in the 1840s.[42] But that was as far as convention critics went. That Jameson pressed forward with a legal treatise was, alone, a major step toward creating a law of constitutional conventions.

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37 This, according to Joel Bishop, was often a reason for writing a treatise. Joel Prentiss Bishop, The First Book of the Law, Explaining the Nature, Sources, Books, and Practical Applications of Legal Science, and Methods of Study and Practice. 127 (1868).

38 Thorpe, *supra* note 34, at 24. Jameson initially worked on his treatise as a lecturer in constitutional law at the first University of Chicago. *Id.* at 20. In 1865, while still working on the treatise, he was elected to the Superior Court of Chicago, where he served until 1883. He was also a founder of the American Academy of Political and Social Science, an editor for the American Law Review, and "an accomplished linguist." *Id.* at 22, 24. He also received an appointment to be a lecturer in American constitutional history at the University of Pennsylvania in 1890, but died before starting. He was 67. *Id.* at 24.

39 John Alexander Jameson, A Treatise on Constitutional Conventions: Their History, Powers, and Modes of Proceeding, rev'd, corr'd, and enl'd ed. iii, (4th ed. 1887). The 1887 edition was the final edition of Jameson's treatise, and it was the only one in which he included a preface. The other editions were published in 1867, 1869, and 1873.

40 Thorpe, *In Memoriam*, *supra* note 34, at 18.

41 The Book of Allegiance; or A Report of the Arguments of Counsel, and Opinions of the Court of Appeals of South Carolina, on the Oath of Allegiance, Determined on the 24th of May, 1834 (1834). Jameson would rely upon the allegiance cases to help develop his arguments in his treatise.

42 The Rhode Island Question: Mr. Webster's Argument in the Supreme Court of the United States in the Case of Martin Luther v. Luther M. Borden and Others, January 27th, 1848 (1848).

II. Inventing a Law of Constitutional Conventions

Jameson picked up where the *Tribune* left off. Although he did have precedents from which to work, no one had undertaken a full-scale systematic study of constitutional conventions. Such a study required an in-depth examination not only of cases and the treatise literature, themselves sparse, but of the convention debates, as well. The project was enormous,[43] and Jameson's treatise remains the best and fullest account of the nature of the constitutional convention to date.[44] First published in 1867, the same year as the first set of congressional Reconstruction Acts requiring the constitutional reorganization of the ex-Confederate states, Jameson's treatise quickly went through four editions over the following two decades. The rapidity of revision indicates its popularity and significance, as well as the dynamic constitutional changes that occurred during Reconstruction. Constitution-makers at all levels of state and federal governments were wrestling with questions about the nature of constitutional conventions and their limits with a new-found urgency. That jurists would lead the transformation in making the constitutional convention an "offspring of law"[45] suggests just how dramatic a transformation it was.

Jameson's purpose was not simply to recount what the conventions had done, but to subject them to legal limits. The main problem, as Jameson saw it, was that the convention was an "ill-defined assembly," which had led to the "prevailing maxim" that the convention embodied the people.[46] The war-time experience with constitutional conventions had challenged that maxim. Secession and war were now evidence of the dangers posed by conflating popular sovereignty with constitutional conventions. Destroying the convention-secession-popular sovereignty connections entailed the construction of new relationships between law and popular sovereignty. Jameson's primary questions sought to address the problem of ill-definition, and should be of interest to anyone concerned with Article V conventions:

> Is this institution subject to any law, to any restriction? What claims does it itself put forth, and what do the precedents teach, in relation to its nature and powers? When called into existence, is it the servant of the master, of the people, by whom it was spoken into being?[47]

Two classification schemes were key to Jameson's reconstruction effort. Jameson first divided conventions into types, ranging from the spontaneous to the revolutionary. The "lower species of conventions" were the spontaneous and ordinary legislative. Spontaneous conventions were "voluntary assemblages of citizens, which characterize free communities in advanced stages of civilization," and are important

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43 I can personally attest to the fact that such a project is an at-times mind-numbing experience, especially when dealing with the multi-volume, multi-columned octavo-sized books.

44 There are others, however, who prefer Roger Sherman Hoar's, Constitutional Conventions: Their Nature, Power, and Limitations (1917).

45 *Woods's Appeal, supra* note 16, at 74 (opinion of Agnew, C.J.).

46 Jameson, *supra* note 39, at 3.

47 *Id*. at 2.

"manufactories of public opinion." But they are "wholly unofficial" bodies; they could only help to shape public opinion. Spontaneous conventions were quite common in the nineteenth century, dealing with topics ranging from rivers and harbors to women's rights. But they could be even more spontaneous than that, like town meetings on a pressing local issue. The ordinary legislative convention (i.e. a legislature), on the other hand, was wholly official, "it can do nothing except by the authority contained in the [constitution]."[48] The legislative convention can help to shape public opinion, like spontaneous conventions, but its chief value was its duty to act. The legislative convention's duty was to translate public opinion into law, to govern.

But Jameson's more important distinction was between revolutionary and constitutional conventions. According to Jameson, revolutionary conventions are bodies that wield essentially illimitable power. Their "principal characteristics" are

> that they are *dehors* the law; that they derive their powers, if justifiable, from necessity,—the necessity, in default of the regular authorities, of protection and guidance to the Commonwealth, —or, if not justifiable, from revolutionary force and violence; that they are possessed accordingly to an indeterminate extent, depending on the circumstances of each case, *of governmental powers;* finally, *that they are not subaltern or ancillary to any other institutions whatever, but lords paramount of the entire political domain*.[49]

Because they exist outside of law, there are no definite forms of organization or operation for revolutionary conventions. Instead, a revolutionary convention is a "body which can, violently and *without law*, uproot all existing institutions."[50] During a time in which one form of government is being cast off, and no other institutions exist to take over some basic governing or constitution functions, a revolutionary convention fills the void. The obvious examples of such conventions are the committees of safety that appeared in the 1770s as the American colonies seceded from the British empire.[51]

What separated the constitutional from the revolutionary conventions was law. "If a Constitutional Convention step outside the circle of the law," Jameson explained, "it does not continue to be a Constitutional Convention, but, so far, becomes that whose powers or methods it assumes, - a Revolutionary Convention. It leaves the domain of law, which is one of specified and restricted powers, and enters upon that of arbitrary discretion, within which law is silent, and where he is master who wields the greater force."[52] A *constitutional* convention was thus "subaltern" to the constitution, or wholly within the "domain of law." The very notion of a *constitutional* convention implied that it was subject to limits.

A second classification scheme underscored the limited nature of constitutional conventions. Jameson added two branches to the traditional three-branch formula. The first addition, at the apex, was the electorate. The electorate constituted "the

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48 *Id*. at 4-5.
49 *Id*. at 6.
50 *Id*. (emphasis added).
51 Adams, *supra* note 13.
52 Jameson, *supra* note 39, at 11.

people," but only in a "qualified" sense, as the true people could only be found in public opinion. Its distinguishing characteristic was that it acted without assembling, unlike the other branches; a sort of disembodied representative.[53] Jameson's second addition was the constitutional convention.[54] Jameson further divided these branches of government into "mediate" and "immediate" representatives of the people. Only the electorate was an immediate representative of the popular sovereign. But Jameson emphasized that none of the branches were actually sovereign. Instead, it was a question of proximity. The relative importance of the branch was determined by its proximity to the sovereign. According to these determinants, Jameson ordered the branches listing the constitutional convention third behind the electorate and the legislature. Now, not only was the convention no longer sovereign, it was no longer the institution closest to the sovereign. Jameson had reduced it to another branch of government, to which was delegated a specific, narrow task: the drafting of a constitution.[55]

Two more elements rounded out this new law of constitutional conventions—the convention act and ratification, both of which made the convention and its work "legitimate and safe."[56] To remain constitutional, a convention had to be assembled according to a proper mode, through a convention act passed by the legislature, which ensured both that "public opinion should have settled upon its necessity." This ensured that "all the legal restraints of which it is susceptible" would be thrown around it.[57] Second, constitutional conventions were charged with merely proposing specific changes; popular ratification of those changes was now required. The ratification vote placed limits on the back end of the convention process.[58] This was one of the lessons the 1862 Illinois convention had taught. Subsequent treatise writers would place great emphasis on ratification. Charles Borgeaud, for instance, referred to it as the "American system."[59]

Jameson, then, laid the basic foundation for the law of constitutional conventions. In distinguishing between revolutionary and constitutional conventions, he treated the *constitutional* convention as simply a branch of government, removing it from any association with the people's constituent power. By subordinating the

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53 *Id*. at 23.

54 *Id*.

55 *Id.* at 24.

56 *Id.* at 106.

57 *Id.* at 109 *et seq*. A separate but related issue was whether a legislature could bind the convention on substantive issues. For Jameson, it was a question of the extent to which a legislature could act. *Id.* at 350-89.

58 *Id.* at 381; *id.* at 440-77.

59 Charles Borgeaud, Adoption and Amendment of Constitutions in Europe and America 181-91 (1895). *See also* Charles Sumner Lobingier, 1 The People's Law, Or, Popular Participation in Law-Making From Ancient Folk-Moot to Modern Referendum: A Study in the Evolution of Democracy and Direct Legislation 340 (1909); Woodrow Wilson, The State: Elements of Historical and Practical Politics, rev'd ed. 476-77 (1904); H. von Holst, The Constitutional Law of the United States of America 263-67 (Alfred Bishop Mason, trans., 1887); James Quayle Dealey, Growth of American State Constitutions From 1776 to the End of the Year 1914 142-45 (1915). *But see* Walter Fairleigh Dodd, The Revision and Amendment of State Constitutions 62-71, esp. 69 (1910). Dodd, however, went on to hold that the convention "is in no sense a revolutionary or extra-constitutional body and does not supersede in any way the organs of the existing government." *Id.* at 72.

constitutional convention to convention acts and ratification votes, he rendered it incapable of independent action, and ultimately subject to judicial oversight.

Jameson's treatise was published to favorable reviews. Francis Thorpe thought his treatise took "rank with Story, with Hurd, with Cooley, and with Kent."[60] The *North American Review* thought it a timely work, especially "now, when the people of ten States are to make new or remodel their old constitutions, it contains matter of especial interest and importance, not only for those who are to make new constitutions, but for those who have declared that those constitutions shall be of a certain character."[61] The *American Law Register* also appreciated its timeliness. "In no other country could such a book have been produced, and certainly at no other time even here could it have been produced so opportunely." Moreover, the reviewer continued, Jameson

> has gone deeper, and in the present work has examined the legal powers of the people themselves in the formation of their governments and the principles by which they are properly guided in the establishment or change of constitutions under the forms of law. *In one sense this may be called an inquiry into the precise limits of the ultimate right of revolution and the proper or justifiable occasions for its exercise*.[62]

Reviewers understood the timeliness of Jameson's treatise, as "even now many of the rules which should govern [conventions] are undetermined," and "of all our institutions, [the convention was] the one through which sedition and revolution would most naturally seek to make their approaches, the only check upon it being the power of rejection which the people should have over all its recommendations."[63] The *North American Review* found Jameson's distinction between revolutionary and constitutional conventions particularly useful. "The confounding of the distinction between these two conventions has been the origins of dangerous misconceptions," the reviewer wrote.[64] Jameson's classifications, the reviewer perceived, were key to subjecting conventions to legal restraints. On this point, the noted Michigan jurist Thomas Cooley found Jameson's "work is so complete and satisfactory in its treatment of the general subject, as to leave little to be said by one who shall afterwards attempt to cover the same ground."[65]

But reviews were one thing. The more important question was the influence it would have on judges.[66]

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60 Thorpe, *In Memoriam*, *supra* note 34, at 26. *See also* John W. Burgess, [*Review*], 3 Political Science Quarterly 545 (1888). Jameson had his critics of course. Dodd, *supra* note 59. Their criticisms did not, however, undermine Jameson's larger project of legalizing conventions.

61 *Review of Jameson,* The Constitutional Convention, 104 N. Am. Rev. 646, 647 (1867).

62 *Review of Jameson,* The Constitutional Convention, 16 Am. L. Register 382 (1868) (emphasis added).

63 *Id*. at 653.

64 *Id.* at 647.

65 Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 33 (1868).

66 Or convention delegates themselves. It turned out that delegates were the first adopters of the treatise.

III. The "Offspring of Revolution" Reconsidered

After the war, convention cases became increasingly common. The earliest postbellum convention cases came out of the southern and border states. Courts in 1866 and 1867, but even as late as 1871, sought to avoid the issue of convention power. A Texas court in 1866, for instance, found that it was "unnecessary for us to consider that grave question, which in other states has frequently elicited discussion and differences of opinion among the ablest jurists."[67] A North Carolina court was invited to hold that the convention was subject to limitations, but sidestepped the issue, noting simply that, "without pursuing the argument, we do not admit that the powers of the Convention were limited, except by the Constitution of the United States."[68] An opinion from Maryland in 1864 suggests the pragmatism behind this abstention. Noting that it had been "invoked to enter into the constitutional powers of the convention, and express opinions upon the validity of their acts," the court declined. "If we cannot subdue the strife," the court explained, "we will not add fuel to the flame. All that we can do is, to show reverence for Constitutional government, by confining ourselves to the strict limits of our authority, as may induce others, who love 'liberty regulated by law,' to cherish all its muniments, and observe all their obligations."[69] In a case the following year, the Maryland court continued to abstain, determining that the "wisdom" of constitutional changes "is for the people to determine."[70]

It was becoming clear, though, that the convention's authority, and its relationship to law, was now in flux. Attorneys were pressing the issue before courts in ways they never had before. No doubt this was part of the factional politics of Reconstruction, as well as a dissatisfaction with congressional Reconstruction. But courts were beginning to understand that convention power broadly conceived was becoming problematic. As an Alabama court noted, "What the legitimate powers of a popular convention are, will possibly never be settled, so as to suit and harmonize with all the arguments upon this subject."[71] Similarly, a South Carolina court declared that, "It is not easy to define the powers which a convention of the people may rightfully exercise."[72] These doubts were generally absent in antebellum judicial opinions, whatever views they held about convention power. But courts were in a precarious position. Ruling on convention authority could call their own status into question. Thus the earliest acknowledgments of convention limits relied on the supremacy of the federal constitution, especially its prohibition of *ex post facto* laws and bills of attainder, and its protection of contracts, in addition to the guarantee clause.[73] But these limits did not quite get to the issue of convention sovereignty.

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67 L.C. Cunningham & Co. v. Perkins, 28 Tex. 488, 490 (1866).

68 State v. Sears, 61 N.C. 146, 150 (1867).

69 Miles v. Bradford, 22 Md. 170, 185-86 (1864).

70 Anderson v. Baker, 23 Md. 531, 613 (1865); *see also* State v. Cummings, 36 Mo. 263 (1865); Duerson's Adm'r v. Alsop, 68 Va. 229 (1876).

71 Scruggs v. Mayor of Huntsville, 45 Ala. 220, 223 (1871).

72 Gibbes v. Greenville & C.R. Co., 13 S.C. 228, 242 (1880).

73 *See*, *e.g.*, Cochran v. Darcy, 5 S.C. 125 (1874); Calhoun v. Calhoun, 2 S.C. 283 (1870); State v. Keith, 63 N.C. 140 (1869); Bradford v. Shine, 13 Fla. 393 (1869); McNealy v. Gregory, 13 Fla. 417 (1869); State v. Sears, 61 N.C. 146 (1867). Implied in Brown v. Driggers, 62 Ga. 354, 357-58 (Ga. 1879).

After 1867, the year Jameson's treatise was published, courts became more aggressive. The Missouri Supreme Court, for instance, rejected its earlier position despite no change in its personnel. The idea of convention sovereignty, claiming "omnipotent powers and [holding] themselves emancipated of all restraints," the court denounced "as breathing the worst spits of the worst men in the worst times. Such has been the tyrant's plea from the beginning of the world." Convention sovereignty was now an "unqualified tyranny."[74] In 1871, the Arkansas Supreme Court held that it could "find no traces of any such dogmas or heresies" in the early history of conventions. The idea's first appearance, the court argued, was in New York's 1821 convention. But it wasn't until secession when "the infection assumed its most malignant character, and swept like an angel of death over" the southern states that the idea reached fruition. "Such force, fraud, usurpation, and treachery on the part of the servants of the people … was never beheld in the civilized world."[75] While the court did not cite Jameson's treatise, Jameson's fingerprints were all over it. By 1875, the Alabama Supreme Court, only four years after noting that the power of the convention might never be resolved, held that a court could in fact determine "the power and duty of the convention," "bear[ing] in mind the purpose to be accomplished."[76]

But the most important and influential cases arose out of Pennsylvania's 1873 convention, *Wells v. Bain*[77] and *Woods's Appeal*.[78] These cases built upon and extended Jameson's new conception of the relationship between law and conventions.

IV. Convention vs. Court

Pennsylvania's 1873 convention was largely a response to Simon Cameron's political machine,[79] one of "the most powerful political machine[s] in the nation's history."[80] Cameron had been one of the founders of the Republican party, and was Lincoln's Secretary of War briefly in 1861 before accepting a diplomatic post to Russia. Eventually, he was appointed as a U.S. senator from Pennsylvania, and became a key cog in President's Grant's spoils system. Cameron's political machine in Pennsylvania was centered in Pittsburgh and Philadelphia where its members held key local offices that controlled the main channels of legal and economic business, such as the recorder of deeds, receiver of taxes, the clerk of

74 Blair v. Ridgely, 41 Mo. 63, 98 (1867).
75 Penn v. Tollison, 26 Ark. 545, 572 (1871).
76 Plowman v. Thornton, 52 Ala. 559, 566 (1875).
77 75 Pa. 39 (1873). According to Thorpe, *Wells* was the first case to cite Jameson's treatise. Thorpe, *In Memoriam*, *supra* note 34. However, the earliest case I have found is Kirtland v. Molton, 41 Ala. 548, 564 (1868). The court there held that the convention did not possess legislative power. According to the court, "Its power was limited to the formation of a State constitution, and no legislative power was conferred on it by any competent authority...." *Id.*
78 75 Pa. 59 (1874).
79 Frank Bernard Evans, *Pennsylvania Politics, 1872-1877: A Study in Political Leadership* (1966).
80 John D. Stewart II, *The Great Winnebago Chieftain: Simon Cameron's Rise to Power, 1860-1867*, 39 Pennsylvania History 20-39 (1972).

the quarter sessions court, and the prothonotary (clerk) of the district court.[81] At the state level, the key post of treasury secretary was held by a Cameron adjutant, Robert Mackey, who used it to create the "Treasury Ring." In addition to these strategic financial positions the Cameron machine also controlled elections through the Registry Act of 1869, which gave the Republican Party complete control over the registration of voters.[82] This enabled the machine to control the state legislature, where it consolidated its power through special and local legislation designed to dole out party favors.[83] Reformers proved unable to break the control of the Cameron machine through party politics, and eventually turned to the constitutional convention.

Convention bills were introduced repeatedly in the state legislature between 1867 and in 1871, when reformers secured a referendum vote on whether to hold a constitutional convention, which passed overwhelmingly.[84] The Pennsylvania legislature then passed a second act providing for the organization of the convention that would ultimately spur the controversy that led to *Wells* and *Woods's Appeal*. The legislature's convention act provided for the mode of election, determined how many delegates would be elected and how, some limitations on what subjects the convention could consider, and required ratification of any proposed constitution or amendments. Two sections would become particularly important. Section 5 of the act required that the convention submit the new constitution to the people for ratification "at such time or times, and in such manner as the convention shall prescribe." Section 6, on the other hand, required that the ratification election would be held "as the general elections of this Commonwealth are now by law conducted." For many delegates, this appeared to give too much power to the Cameron machine.[85]

Fearing obstruction by the Philadelphia machine, the convention passed an ordinance in which they appointed five commissioners of election to carry out the election in the Philadelphia. It gave the commissioners power to register voters, and to appoint judges and inspectors for each election district. Treasury Secretary Mackey refused to distribute state funds to pay for these special election officials. But the convention's commissioners continued their work without pay.[86] Meanwhile the Philadelphia city council appropriated money to the regular election officials under the 1869 Registry Act. Those officials, though, supplied the convention's election officials with the materials for conducting elections. It was this machinery that led to the convention cases.

On November 24, Francis Wells and other "citizens and voters of Philadelphia," sought an injunction against the city commissioners to prevent them from spending money on the election. They also sought an injunction to prevent the election

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81 *Id*. at 15.

82 *Id.* at 7-18.

83 Evans, *Pennsylvania Politics*, *supra* note 79, at 43. According to Evans, of more than 9,200 pieces of legislation passed between 1866 and 1874, over 8,700 were special legislation. *Id.* at 74.

84 *Id*. at 27.

85 For a narrative account of the Pennsylvania ratification struggle, see Mahlon Howard Hellerich, The Pennsylvania Constitution of 1873, ch. 9 (1956) (unpublished Ph.D. dissertation, University of Pennsylvania).

86 *Id.* at 90.

commissioners appointed by the convention from holding an election. In addition, John Donnelly, an existing election commissioner, sought an injunction against the convention-appointed commissioners to prevent them from interfering with his duties as an inspector and from appointing other election officers. All of these plaintiffs were part of the Philadelphia political machine.[87] Each injunction was granted by the Pennsylvania Supreme Court. The special election commissioners created by the convention were enjoined and "strictly" prohibited from directing the election; they were also "especially enjoin[ed] and prohibit[ed]" from making appointments. A "special injunction" was issued to the city commissioners from spending any money on the election provided for by the convention. But the specific outcome of the case was less significant than how the court got there.

What was really at issue was the scope of the convention's power, which the Pennsylvania Supreme Court addressed in two separate cases. In *Wells*, the court addressed the revolutionary authority of the convention, while in *Woods's Appeal*, the court addressed the question of sovereignty. Chief Justice Agnew wrote both opinions. Agnew himself had been a delegate to Pennsylvania's 1837-38 convention, where he demonstrated his constitutional conservatism, as well as a first-rate legal mind. Throughout that convention Agnew insisted that the convention should take a narrow view of the convention's powers. He consistently argued against changes to the constitution, holding that the convention should be limited to those "evils" complained of, rather than "some imaginary evil."

As a delegate, Agnew insisted the convention should be guided by three inquiries. The first was whether a subject was within the convention's jurisdiction, or, as he put it, "the propriety of introducing such a subject into the constitution."[88] In particular, he argued that the convention did not possess, and should not exercise, legislative power. It was upon the legislative power, the power to make laws, that "*the preservation of the liberty the people*" depended, and its exercise should be limited to the legislature.[89] The second inquiry was to figure out "what evil is intended to be remedied."[90] As he put it later in the convention, "the question is, whether the practical operation of the present constitution, has been such as to show that it has failed of its objects in this particular."[91] Agnew believed that the convention should not engage in experimentation, especially when dealing with issues that were more within the province of the legislature.

The third inquiry involved consideration of the effects of a proposed reform.[92] Agnew believed that a proposed reform had to have "intrinsic merits," rather than merely "a choice of the less obnoxious, between two defective modes."[93] There had to be clear positive benefits to constitutional changes, not merely speculative ones. Thus Agnew opposed the election of justices of the peace, because it would

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87 Meanwhile in Pittsburgh, the machine sought an injunction against the Secretary of the Commonwealth and the county sheriff from holding a ratification election, arguing that the convention acts themselves were unconstitutional. *Id.* at 91.

88 6 Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania, 402 (1837).

89 6 *Id.* at 403.

90 3 *Id.* at 440.

91 6 *Id.* at 404.

92 3 *Id.* at 617.

93 *Id.* at 619.

only marginally improve the problem of partisanship and patronage resulting from governor appointments.[94] Yet while he was no radical reformer when it came to constitutional change, at no point did he suggest that law could operate as a limit on the convention and its powers. He had directed his arguments to the delegates themselves, to consider the scope of their own authority. It was only as a supreme court justice that he began to elaborate legal limits on convention power.

In *Wells*, Agnew began with a discussion of popular sovereignty, specifically the right to alter or abolish government. This right had formed the basis of early constructions of convention authority, and was instrumental in connecting conventions to the people's sovereignty. But Agnew read this right narrowly, bending it away from revolution and toward law. "A self-evident corollary" to the right to alter or abolish government, he wrote, "is, that an existing lawful government of the people, cannot be altered or abolished unless by the consent of the same people, *and this consent must be legally gathered or obtained*."[95] He spent the remainder of the opinion discussing the implications of this idea. First, he argued that the right to alter or abolish government "in such manner as [the people] may think proper," referred to "three known recognized modes" by which the people could change their constitution: that provided in the constitution itself, "a law" calling for and organizing a convention, or by revolution.[96] "The first two are peaceful means through which the consent of the people to alteration is obtained and by which the existing government consents to be displaced without revolution." Law, Agnew reiterated throughout his opinion, was the defining element of popular sovereignty in times of peace.[97]

Between *Wells* and *Woods's Appeal*, the Pennsylvania convention weighed in with its views. In December 1873, the convention created a committee to inquire into the convention's powers.[98] The committee's majority report began with a preamble that was directed at *Wells*. "A proceeding, to which the Convention was not a party, has, in its effect and result, brought into controversy some of the fundamental principles of constitutional government," the report declared. "The opinion that has been pronounced in this proceeding contains doctrines, which, in our judgment, ought not to be left unchallenged. We believe them to be subversive of some of the absolute rights of the people."

The report then offered two resolutions. The first declared that the convention had been called by the people, and that the first convention act providing for a referendum vote was the only true mandate; "this vote was a mandate to the Legislature, which that body was not at liberty to disobey or modify." In other

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94 *Id.* at 617-20.

95 *Wells*, *supra* note 77, at 46 (emphasis added).

96 Before he does this though he makes an important definitional point about who constitutes "the people." "The people here meant are the whole — those who constitute the entire state, male and female citizens, infants and adults. A mere majority of those persons who are qualified as electors are not the people, though when authorized to do so, they may represent the people." In the next paragraph, Agnew summed up this idea when he wrote, "the whole people, the state."

97 *Wells*, *supra* note 77, at 47. After the *Wells* opinion, Agnew published a letter in which he claimed to support the new constitution on its merits, and explained that the issue in the case dealt only with the powers of the convention. Hellerich, The Pennsylvania Constitution of 1873, *supra* note 85, at 503-04.

98 8 Debates of the Convention to Amend the Constitution of Pennsylvania, 732-33.

words, the legislature had no authority to place any limitations on the convention in providing for its organization. The second resolution declared that no institution, except for the federal constitution, could limit the convention, as the people had "expressly" reserved to themselves the right to alter or abolish government. Thus, "this Convention deems it to be its duty to declare that it is not in the power of any department of an existing government to limit or control the power of the Convention called by the people to reform their Constitution."[99]

A minority report, authored by Harry White, responded that it was "inexpedient" to offer such resolutions. Other delegates not on the committee agreed with White's argument that the time was not ripe for such a determination. John Martin Broomall, for instance, agreed that it was not only inexpedient but dangerous, despite the fact that he agreed with the principles of the majority report. "That the positions asserted are sound," he argued, "nine lawyers out of every ten in the State will agree; but the propriety of our asserting them at this time, I think an equal proportion of the lawyers will agree with me upon." Moreover, he feared casting aspersions on the Pennsylvania Supreme Court. "It is important to the people of the State that the respect in which the supreme court has been heretofore held should not be impaired by any action of their representatives here." He thus favored adjourning "without saying anything whatever about the unfriendly action of the Supreme Court recently had."[100] The convention nonetheless passed the resolutions contained in the majority report, proclaiming its authority sovereign.

The Pennsylvania Supreme Court, however, would have the last word. Indeed, the convention's resolutions would largely disappear from constitutional view. In *Woods's Appeal*, the court went out of its way to address the convention's claims, though without citing the report. Despite acknowledging that the question in the case was moot, and that, "the adoption of the proposed Constitution since this decree, forbids an inquiry into the merits of this case," the court nonetheless pressed forward in discussing the issue of convention sovereignty, an idea "dangerous to the liberties of the people."[101] Where the convention saw its authority as from the people, the Court saw "usurpation of power" by "a mere body of deputies." To guard against "an assumption of absolute power by their servants," Agnew argued that the convention held only delegated powers. Indeed, it seemed strange to him that the people would delegate their sovereignty to a convention, as it would make the servants masters.

Agnew then made an important move, separating rights from powers, and placing the judiciary in between to protect the people's rights. Because the people retained their rights against encroachment, only those powers "clearly expressed, or as clearly implied, in the *manner* chosen by the people to communicate their authority" could be imputed to the convention. Rather than the convention itself being the exercise and protection of the people's rights, it was now the job of the judiciary to make such a determination. Agnew placed great emphasis on the "manner" by which power was conferred, often using italics for the term. Thus, the right to alter or abolish government depended on "such *manner* as *they* may think proper." The people could delegate as much or as little of their right to alter or abolish government as they chose. This delegation of authority meant that "A

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99 *Id.* at 742.
100 *Id.* at 743-44.
101 *Woods's Appeal*, *supra* note 16, at 68-9.

convention has no *inherent* rights; it exercises powers only." This was the very definition of delegated power, and delegated powers meant that courts had a role in determining the scope of that delegation. Only a revolutionary convention could be said to be possessed of the people's sovereignty.

In a telling paragraph at the end of his opinion, Agnew revealed the reasons why constitutional conventions needed to be subject to law. He began, like Jameson, with secession. "In our day," he wrote, "conventions, imputing sovereignty, to themselves, have ordained secession, dragged states into rebellion against the well-known wishes of their quiet people, and erected in the midst of the nation alien state governments and a Southern Confederacy." But that was not the end of the problem. The nation was still in the midst of great revolutions. "The negro is now a citizen and an elector, and yet the time is not long gone by since the word 'white' was voted by a former convention into the article on elections." The point here seemed to be two-fold. First, conventions might potentially engage in a social policy-making that may have disturbed Agnew's conservative mind. Second, new people were gaining political and electoral power, people who were ostensibly unschooled in self-government. The next sentence was telling: "Who can foretell the next subject of agitation?" If the convention was actually unlimited in its power, there was no telling what sort of tragic experimentation it might engage in. "The times abound in contests," Agnew continued. "Labor and capital are strife. Agriculture wars on transportation. Communism, internationalism, and other forms of agitation excite the world." These concerns seemed to tap into Agnew's deeply-held convictions against constitutional social policy-making. "Let conventions in such seasons possess, by mere imputation, all the powers of the people," he concluded, "and what security is there for their fundamental rights?"[102]

In this context, then, no longer could (or even should) the convention embody the people. Conventions may stray far from simply determining how to organize a government; they might instead use their power to legislate social reform, not just constitutional reform. This would not only subvert the purpose of the convention, but more fundamentally institutionalize conflict and violence into constitutional reform. "The fundamental rights of the people, the true principles of civil liberty, the nature of delegated power, and the liability of the people to temporary commotion, all rise up in earnest protect against such a doctrine of imputed sovereignty in the mere servants of the people."[103] This was the lesson of secession. In a turbulent, rapidly industrializing society, talk of sovereignty and revolution, peaceful or otherwise, could be dangerous. Thus, Agnew, like Jameson, and other jurists, positioned law as the protection against social and political dissolution.

V. An "Offspring of Law"

In a post-Jameson world, the idea of an unlimited convention, or convention sovereignty, appeared more like "Frankenstein's Monster," than as the fullest expression of popular sovereignty.[104] Some of the earliest cases to re-imagine the convention were directed at the Reconstruction conventions that were assembled

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[102] *Id.* at 74. *See also* Koehler & Lange v. Hill, 60 Iowa 543 (1883).

[103] *Id*.

[104] Carton v. Secretary of State, 151 Mich. 337, 381 (1908).

under the Reconstruction Acts.[105] The Florida Supreme Court, for instance, held that Florida's Reconstruction Act convention was limited to considering only those alterations necessary to restore the state back into the Union.[106] The Arkansas Supreme Court was less equivocal. "Conventions are not omnipotent," it declared. Not only because "The Constitution of the United States is above them," but more fundamentally because "They assemble to frame a form of government for the protection of their constituents in the enjoyment of life, liberty, property, and the pursuit of happiness, … they have no power to subvert these great rights, and defeat the very purposes for which they assemble."[107] Race was undoubtedly a factor in southern courts attempts to rein in the so-called "black and tan conventions" created by the Reconstruction Acts.[108] But the developing jurisprudence also occurred in northern states, too, away from southern Reconstruction politics. In general, courts built upon Jameson's work, even if they did not always cite or discuss it.[109] The result was a well-developed jurisprudence adumbrating the limits of constitutional conventions.

Several courts have picked up Jameson's distinction between constitutional and revolutionary conventions. As the Kentucky Supreme Court explained, citing Jameson, "This conception or doctrine, that a constitutional convention inherently possesses unlimited sovereign power, seems to have had its origin in

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105 For a discussion of southern conventions during and after the war, *see* Paul Herron, Framing the Solid South: The State Constitutional Conventions of Secession, Reconstruction, and Redemption, 1860-1902 (2017).

106 Bradford v. Shine, 13 Fla. 393 (1869); *see also* Berry v. Bellows, 30 Ark. 198 (1875).

107 Berry, *supra* note 107, at 203. *See also Ex parte* Birmingham, 145 Ala. 514 (1905) (convention has delegated not inherent powers); Cummings, *supra* note 70 (nothing in state constitution prevents limited convention); Illustration Design Group v. McCanless, 224 Tenn. 284 (1970)(*reaffirming* Cummings); Snow v. City of Memphis, 527 S.W.2d 55 (Tenn. 1975).
But see Opinion of the Justices, 263 Ala. 152 (1955)(Alabama Constitution does not allow limits on conventions)(distinguishes Reconstruction Act and statehood conventions); Pryor v. Lowe, 258 Ark. 188 (1975)(Fogelman, J., concurring), 193 ("To me it is clear that this attempt to call a 'limited constitutional convention' would clearly remove the delegates from their status as agents of the people for the purpose of acting in their stead in the exercise of their inherent, sovereign power"); Malinou v. Powers, 114 R.I. 399, 402 (1975)("Obviously the convention did not consider itself bound by the Legislature's agenda restrictions, and neither the people nor the Legislature now challenges its actions. Indeed, the people voted their acceptance of art. XLII of amendments to the constitution, an amendment clearly not contemplated by the legislative call.").

108 Richard L. Hume and Jerry B. Gough, Blacks, Carpetbaggers, and Scalawags: The Constitutional Conventions of Reconstruction (2008).

109 For cases citing or discussing Jameson, *see* State *ex rel.* Wineman v. Dahl, 6 N.D. 81 (1896); *Ex parte Birmingham*, *supra* note 108; *Carton*, *supra* note 105 ("child of *organic* law," contra Jameson's "child of law"); State v. Taylor, 22 N.D. 362 (1911); Ellingham v. Dye, 178 Ind. 336 (1912); People *ex rel.* Stewart v. Ramer, 62 Colo. 128 (1916); Bennett v. Jackson, 186 Ind. 533 (1917)(Lairy, J., dissenting); State v. State Board of Canvassers, 44 N.D. 126 (1919); State ex rel. Donnelly v. Myers 127 Ohio St. 104 (1933); *In re* Opinion to the Governor, 55 R.I. 56, 178 A. 433 (1935); Wise v. Chandler, (Ky. 1937); Staples v. Gilmore, 183 Va. 613 (1945); Gaines v. O'Connell, 305 Ky. 397 (1947); Board of Supervisors of Elections v. Attorney General, 229 A.2d 388 (Md. 1967); Harvey v. Ridgeway, 248 Ark. 35 (1970).

what are generally termed 'Revolutionary Conventions.'"[110] Such conventions owe their existence not to law, but to "revolutionary conditions which make their existence contrary to pre-existing law, rather than in conformity to existing law."[111] Revolutionary conventions were not illegitimate, but they were distinct from the more ordinary constitutional convention. And, "In the science of politics, it is an important point gained to have settled the limit where normal action under the Constitution ends, and revolution begins."[112] "If the spirit of our free institutions and republican form of government is to be preserved," explained the Nebraska Supreme Court, "*some orderly and lawful way, avoiding tumult or revolution*, must exist to make Constitutions conform to the will of the vast majority of the people."[113]

Like Jameson, courts anchored the line between revolutionary and constitutional conventions in law. First, the right to alter or abolish government was refashioned from a revolutionary to a legal right.[114] "The history of constitutional conventions is suggestive of the reasons for constitutional provisions, pointing out the way that amendments may be lawfully made, and how the danger of illy considered or revolutionary amendments avoided or lessened."[115] Second, the legislature was made a necessary agent in the organization of conventions. The North Dakota Supreme Court has declared, for instance, that without the involvement of the state legislature, "the movement is revolutionary."[116] Finally, the convention has been determined to hold merely an advisory role; its work is required to be submitted for ratification by the first branch of government, the electorate.

Courts have continued to harden the line between revolutionary and constitutional conventions by reimagining the right to alter or abolish government. In effect, they separated the right into two rights, the right to alter government and the right to abolish government. The right to alter government was the legal right to revise an existing constitution. The right to abolish government was revolution. This distinction has been most important in those states that assembled conventions despite the lack of a convention clause in that state's constitution. As a single right, the right to alter or abolish government was the expression of the people's constituent power. Thus, a convention could, as they often have, make the claim that once assembled it could ignore a convention act that attempted to limit it, and address any issue it saw fit. Moreover, it could claim to enact a new constitution

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110 *Gaines*, *supra* note 110, at 430. The court explained that "The reason for the view, therefore, fails under our firm and stable 'government of law.'" *Id.*; *see also* Riviere v. Wells, 270 Ark. 206 (1980)(acknowledging the death of convention sovereignty).

111 *Carton*, *supra* note 105, at 378.

112 *Ex parte Birmingham*, *supra* note 108,119-120 ("The result is that a convention cannot assume legislative powers. The safety of the people, which is the supreme law, forbids it.")

113 Baker v. Moorhead, 174 N.W. 430, 431 (Neb. 1919) (emphasis added). Francis Lieber made a similar point, describing conventions at "safety valves" for pent-up frustration with government. Francis Lieber, Manual of Political Ethics: Designed Chiefly for the Use of Colleges and Students at Law, vol. 2 468 (1839).

114 *In re Opinion to the Governor*, *supra* note 110 ("It is settled that the people alone cannot, without revolutionary action, call a constitutional convention, unless the Constitution provides the necessary machinery for that purpose.").

115 *Carton*, *supra* note 105, at 385.

116 Wineman v. Dahl, 6 N.D. 81, 68 N.W. 418, 419 (1896) (secession, civil war, Jameson end that idea).

itself, without the need for popular ratification, as members of Illinois' convention attempted to do in 1862. Separating the right to alter government from the right to abolish mitigated this problem, and opened constitutional conventions to legal controls. The reconceptualization of the right to alter or abolish government was not explicit. It was implicit in discussions about a number of issues, including the distinction between amendment and revision, as well as in discussions about the role of the legislature in constitutional revision, and ratification of the new constitution.

Courts have relied upon the right to alter government, while keeping the right to abolish government at bay, in building up the jurisprudence upholding the work of conventions in the absence of a convention clause. As the Alabama Supreme Court in one of the earliest convention cases explained, "The constitution can be amended in but two ways: either by the people, who originally framed it, or in the mode prescribed by the instrument itself."[117] The Pennsylvania Supreme Court has agreed in almost identical terms: "The Constitution of the state may be legally amended in the manner specifically set forth therein, or a new one may be put in force by a convention duly assembled, its action being subject to ratification by the people, but these are the only ways in which the fundamental law can be *altered*."[118] Even in the absence of a convention clause, then, the legislature retained the power to assemble a convention, as "The power to make constitutions and to amend them is inherent, not in the legislature, but in the people."[119] The power to make and amend the constitution, in this framework, is the right to alter government, not to abolish it. The elaboration of an amendment mechanism within a constitution, then, does not exhaust the means available to the people to revise or amend it. They may always assemble a constitutional convention. During times of peace, in the absence of a convention clause, the right to assemble a convention is contained in the right to alter government; in times of revolution, the right to abolish it altogether.

A second component to the law of conventions that has helped to maintain the distinction between revolutionary and constitutional conventions is the convention act, which Jameson highlighted in his treatise. Although rare, conventions have been assembled without the aid of the state legislature. One historian has dubbed these "circumvention conventions."[120] The most notorious example resulted in Rhode Island's Dorr War. By the early 1840s, Rhode Island was the lone state lacking a constitution. After decades of attempts to create one, the towns of the state assembled a convention without the aid of the state legislature, drafted a new constitution, ratified it, organized a new government according to its terms, and demanded that the existing Rhode Island government recognize its authority, and dissolve. The state government declined the offer, and eventually put down

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117 Collier v. Frierson, 24 Ala. 100, 108 (1854*). See also In re Opinion to the Governor*, *supra* note 110, at 438 ("It is also well settled that no other method can be legally employed for amending or revising a Constitution or substituting another one for it, unless such other method is expressly provided for in the Constitution itself."); Gatewood v. Matthews, 403 S.W.2d 716 (Ky. 1966); Smith v. Cenarusa, 93 Idaho 818 (1970); State v. Manley, 441 So.2d 864 (Ala. 1983).

118 Taylor v. King, 284 Pa. 235, 239 (1925) (overruled on other grounds by *Stander v. Kelly*) (emphasis added).

119 Holmberg v. Jones, 65 P. 563, 565 (Idaho, 1901).

120 George Parkinson, *Antebellum State Constitution-Making: Retention, Circumvention, and Revision,* unpublished Ph.D. diss.

the rebellion.[121] Subsequently, the legislature provided for the assembling of a convention despite having no such power granted to it by the Charter. Nearly a century later, the Rhode Island Supreme Court relied upon this experience to identify a custom against circumvention conventions.

> The method of doing this, which had been recognized as the regular and ordinary method and which had been used before 1843 by many states, when there was no provision for it in their Constitutions, was first, by the holding of a convention under a legislative enactment, second, by the framing of a new Constitution or the revision of the existing one, and, third, by the adoption of such new Constitution or revision by the people at an election provided for by law.[122]

The Rhode Island Court turned this custom into law, concluding that "if a Constitution is silent on the subject of its own alteration, the Legislature and only the Legislature is authorized to provide an explicit and authentic mode for ascertaining and effectuating the will of the people on this subject, i.e., by the convention method."[123] The Court tied this requirement for legislative action to the right to alter or abolish government, which, it determined, required conventions to revise constitutions, and a legislative act providing for the assembling of such a convention. Circumvention conventions were thus unlawful and illegitimate. They could be legitimated only by the right to abolish government (*i.e.* revolution), not the right to alter it. In the absence of a convention clause, then, the people require the aid of the legislature to help them exercise their revisionary (not revolutionary) power, their power to alter, not their power to abolish.

But if the legislature is necessary to effect the right to alter government, why not allow it to revise the constitution itself?

Americans discussed this problem during the American Revolution, determining that a body separate from the regular institutions of government was necessary to establish a constitution based upon the people's sovereign authority. But once we separate the right to alter from the right to abolish government, can the distinction hold? Conventions can be expensive, and it can be cheaper for legislatures to amend or revise the constitution itself. This was the issue in *State v. Manley*.

In *Manley*, the Alabama Supreme Court determined that "counsel mistakenly relies on the cases for the proposition that if the legislature has the authority to call a constitutional convention without a specific constitutional provision to such effect, then surely it has the authority to propose a new or revised constitution to

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[121] On the Dorr War generally, see Eric Chaput, The People's Martyr: Thomas Wilson Dorr and His 1842 Rhode Island Rebellion (2013); Rory Raven, The Dorr War: Treason, Rebellion, and the Fight for Reform in Rhode Island (2010); George M. Dennison, The Dorr War: Republicanism on Trial, 1831-1861 (1976); Marvin Gettleman, The Dorr Rebellion: A Study in American Radicalism, 1833-1849 (1973); Arthur May Mowry, The Constitutional Controversy in Rhode Island in 1841 (1895).

[122] *In re* Opinion to the Governor, *supra* note 110, at 438.

[123] *Id.* at 449.

the people." While the Court agreed that the legislature had the power to assemble a convention in the absence of a convention clause in the state, it nonetheless believed that counsel's "argument distorts the concept of the plenary power of the legislature as the arm of the state to which the legislative power has been given by the people…."

The Court then distinguished the legislative power from the power to revise the constitution. It recognized that the legislature has a plenary power, but it also recognized that that power concerns matters of governance – the powers to regulate, police, and tax. The power to revise a constitution does not fall within the legislature's plenary powers. Instead, the revision power belongs to the people, through their right to alter government.[124] The legislature's role in the revision process is simply to act as the people's agent, helping them to organize the appropriate institution to exercise the people's revisionary power.[125] As Chief Justice C. C. Torbert explained in his concurring opinion, "I think it clear that in the absence of specific constitutional provisions allowing for amendment or revision, the only method of proposing change in the Constitution is by action of a convention, not by legislative initiative, although the Legislature would be a proper authority to set in motion the convention process."[126]

So what does this tell us about the nature of the legislature's power to assemble a constitutional convention? First, the power to assemble a convention is distinct from a state legislature's power to legislate. The legislature's source of authority to assemble a convention is not its power to govern; rather, it flows out of the people's right to alter government. But the legislature's authority is not coterminous with the people's authority. Its role is merely to serve as a

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[124] *See also Wineman*, *supra* note 117 ; *Ex parte Birmingham*, *supra* note 8; People *ex rel.* Stewart v. Ramer, 62 Colo. 128 (1916). The U.S. Supreme Court has reached the same conclusion, but directed it to a different end: "the case of amendments is evidently a substantive act, unconnected with the ordinary business of legislation, and not within the policy, or terms, of investing the President with a qualified negative on the acts and resolutions of Congress." Hollingsworth v. Virginia, 3 U.S. 378 (1798). State courts have reached the same conclusion regarding the role of governors in the revision process. Opinion of the Justices to the Senate, 373 Mass. 877 (1977); Crenshaw v. Miller, 606 S.W.2d 285, 289 (Tenn. Ct. App. 1980) ("The Constitution does require the signature of the Governor on a measure submitting to the voters the question of calling a constitutional convention, even a limited constitutional convention such as that involved in the present suit.").

[125] The legislative drafting of new constitutions, outside of the Revolutionary period, does not appear to have gained much traction in the United States. Even a state like Mississippi, which has had conventions not only draft but enact new constitutions without a popular referendum, have understood the need for a convention rather than a state legislature for such purposes.

[126] *Manley*, *supra* note 118, 878 (2005)(Torbert, C.J., concurring); *see also In re Opinion to the Governor*, *supra* note 110, at 449 ("if a Constitution is silent on the subject of its own alteration, the Legislature and only the Legislature is authorized to provide an explicit and authentic mode for ascertaining and effectuating the will of the people on this subject, i.e., by the convention method."); *Holmberg*, *supra* note 120, at 565 ("While the power of the legislature to enact laws is inherent, so far as legislative enactment is concerned, yet the power to propose amendments to the constitution is not inherent. *The power to make constitutions and to amend them is inherent, not in the legislature, but in the people*.") (emphasis added).

conduit for assembling the institution that possesses the people's right to alter (or abolish) government. The conductive nature of the legislature's role within the convention process means that the legislature cannot act *sua sponte* in organizing a convention. It requires sanction from another agent of the people. As the Indiana Supreme Court has explained,

> It seems to be an almost universal custom in all of the states of the Union, where the Constitution itself does not provide for the calling of a constitutional convention, to ascertain first the will of the people and procure from them a commission to call such a convention, before the Legislature proceeds to do so. The people being the repository of the right to alter or reform its government, its will and wishes must be consulted before the Legislature can proceed to call a convention. 6 R. C. L. § 17, p. 27; Hoar, Constitution Conventions, p. 68 (1917).[127]

As an agent of the people, the legislature is charged with collecting the people's views on holding and assembling a convention, which requires, first, proposing the question of revision to the electorate.[128] If the electorate approves of assembling a convention, the legislature then passes a convention act, that is also subject to ratification, although sometimes the two votes are combined. In short, the legislature is a necessary agent in the convention process.

But if the convention act imposes limits upon a convention, how binding is it?

The convention act has been the source of a great deal of debate about the limits of constitutional conventions. Prior to Jameson's treatise, this question was debated at length by convention delegates themselves, without any particular resolution. Conventions largely stayed within their limits, even if they rejected the authority of the convention act. After Jameson's treatise was published, it was possible for courts to enter the discussion.

Courts have determined that a convention act limiting the scope of the convention's authority to specific topics or amendments is binding, because, as we've seen, the act comes from people's right to alter government. "The Legislature merely proposes the conditions. It is the vote of the people for the convention that ratifies them and makes them binding upon the delegates."[129] If the electorate accepts the legislature's proposal of a limited convention, then the convention may

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127 Bennett v. Jackson, 186 Ind. 533, 116 N.E. 921, 923 (1917).

128 The power to call for a convention is not unlimited. See, e.g., *id.* (no authority to call a convention after a state vote on question rejected).

129 *In re Opinion to the Governor*, *supra* note 110, at 452. *See also* Staples v. Gilmore, 183 Va. 613 (1945) (referendum on convention act makes limitations by people not legislature), 624 ("The convention does not possess all of the powers of the people but it can exercise only such powers as may be conferred upon it by the people. The people may confer upon it limited powers."); *Cummings*, *supra* note, at 70 (if limited convention act ratified, limited by people); Chenault v. Carter, 332 S.W.2d 623, 626 (1960) ("The delegates to the convention are the agents not of the legislature, but of the people themselves. As a principal may limit the authority of his agent, so may the sovereign people of this state limit the authority of their delegates. This they may do by accepting and approving, through a constitutional majority as set forth in sec. 258, a proposal for a limited constitutional convention.").

only be assembled according to the people's desire. "The constitutional convention is an agency of the people to formulate or amend and revise a Constitution. The convention does not possess all of the powers of the people but it can exercise only such powers as may be conferred upon it by the people. The people may confer upon it limited powers."[130] This is "the customary manner of calling constitutional conventions in the United States."[131]

Convention acts can, however, be used to thwart reform by unnecessarily limiting the scope of convention authority. The electorate might actually prefer an unlimited convention, or at least a convention with broader authority than that contained in a convention act. The electorate is then faced with a choice of either approving the act and getting the opportunity to achieve some reform, perhaps with the belief that once assembled the convention might go beyond its charge, or rejecting a proposed limited convention in the hopes of getting an act that more accurately expresses its desires. A convention act thus might not reflect the electorate's genuine preference.

Moreover, while on their face referendums and ratification votes appear to reinforce democratic norms of popular consent, they can also obstruct the desire for constitutional revision through voting exhaustion. As the Rhode Island Supreme Court explained, "If, after the Legislature has decided that such a convention ought to be called for the purpose stated, it is essential to the legality of the call that the people vote in favor of it at an election, then that makes necessary *four* popular elections, before their power of alteration can be effective. …The requirement of the second election clearly *impedes* rather than *facilitates* the exercise by the people of their power to control their governmental institutions."[132] This is not necessarily true, however. Multiple elections can be a legitimate technique to ensure that the constitutional changes accurately reflect the people's desire, and not simply the work of a fleeting majority. Moreover, failure to provide for any referendum on how a convention is to be organized could be seen as an attempt on the part of the legislature to limit or direct the convention in ways that would undermine the people's preferences.

It is probably unnecessary for a state to hold a referendum on a convention act providing for an unlimited convention, so long as there has been a vote on whether to hold a convention to draft a new constitution. However, the convention act can only reflect the vote on whether to hold a convention. So, for example, if the convention referendum question was whether to hold a convention to draft a new constitution, the convention act could not provide for a limited convention. Conversely, a convention referendum that posed the question of whether a convention should be assembled to address specific amendments, the legislature could not provide for an unlimited convention. In each case, the source of the legislature's power would be the convention referendum. If the referendum on the convention was contradicted by the convention act, the referendum on the convention act could be challenged as beyond the scope of the legislature's authority. But this could only occur prior to

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130 Staples, *supra* note 131, at 53-54.

131 *In re* Opinion of the Justices, 172 S.E. 474, 478 (N.C. 1933) (citing Miller v. Johnson, 92 Ky. 589); State v. Dahl, 6 N.D. 81; Opinion of the Justices II, 263 Ala. 152 (1955).

132 *In re Opinion to the Governor*, *supra* note 110, at 458 (emphasis in original). The four votes would be on whether to hold a convention, on the convention act, on the selection of delegates, and then on the proposed constitution itself.

the election. Courts have proved unwilling to provide a post-referendum remedy, holding that ratification cures the legislature's original lack of power.[133]

The ratification vote is a third critical component of the law of constitutional conventions. In his treatise on constitutional conventions, Roger Sherman Hoar used this vote to turn acquiescence into a central *legal* doctrine of popular sovereignty.[134] A "reference to the people for their approval or disapproval is a necessary and final step without which the work of the convention is lacking legality. It seems to us that the better practice, and the one most likely to insure a final vote of the people on the convention's work, would be for the General Assembly to enact a law for this purpose."[135] Almost any defect in the process of assembling a convention, including substantive defects, could be cured by the acquiescence of the people. The answer to the question, then, of "how far the legislature may go, as an agency of the people, in drafting a subject or a proposal for consideration by a limited constitutional convention,"[136] is how ever far the people (as embodied in the

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[133] A constitutional commission generally aids the legislature in identifying specific amendments, recommending them to the legislature for consideration. Commissions have also been charged with determining whether there is a need for assembling a convention.

While this discussion has focused mostly on questions of substantive limitations, there are also procedural question, such as the form of the ballot. This can often be a sign of whether the legislature is trying to obstruct the assembling of a convention. *See*, e.g., Priest v. Polk, 322 Ark. 673, 687 (1995) ("The form of the ballot proposed by a constitutional convention cannot be misleading."); Hawaii State AFL-CIO v. Yoshina, 84 Hawai'i 374, 377 (1997)("term 'ballots cast upon such a question' of constitutional convention, as used in State Constitution, means aggregate printed or written tickets, sheets, or slips of paper, on which convention question is printed, which are deposited in appropriate receptacle, and thus includes blank ballots and "over votes," or ballots in which both affirmative and negative votes are cast."); Chicago Bar Association v. White, 386 Ill.App.3d 955, 957 (2008)("We hold that the trial court was correct to characterize some of the language on the ballot as inaccurate and misleading, but we do not believe that any of the ballot deficiencies rise to the level of a constitutional question. As to the remedy ordered by the trial court, we affirm it in all respects as not constituting an abuse of discretion.")

[134] Constitutional Conventions, *supra* note 44.

[135] *In re Opinion to the Governor*, *supra* note 110, at 453; *see also Manley*, *supra* note 118 (ratification of legislatively proposed constitution would be lawful), 876 ("We have no doubt that if the electorate voted in favor of an amendment to §284, clearly giving the legislature the right to propose a new constitution under the procedure outlined in that section, such amendment would be effective to allow the legislature to act in the manner in which it attempted to act in this case. But until such time as that amendment is passed, the legislature's power to initiate proceedings toward a new constitution is limited to the provisions of §286."); 880 (Almon, J., Shores, J., and Beatty, J., dissenting) ("We not only dissent; we mourn the passing at the hand of six of our brothers of the most fundamental right upon which our government was founded. Until today in Alabama all political power resided in the people. The majority, by denying the people the fundamental and inherent right to express their will at the ballot box, has stripped them of the sovereignty they have held since this state was founded, by the simple expedience of ignoring the express language of our Constitution"). Once ratified, the legislature's duties become ministerial, and thus potentially subject to a mandamus action. *Chenault*, *supra* note 131.

[136] *Snow*, *supra* note 108, at 71 (Fones, C.J., concurring).

electorate) sanction, so long as it does not violate the U.S. Constitution.[137] As the Pennsylvania Supreme Court has explained,

> There may be technical error in the manner in which a proposed amendment is adopted, or in its advertisement, yet, if followed, unobjected to, by approval of the electors, it becomes a part of the Constitution. Legal complaints to the submission may be made prior to taking the vote, but, if once sanctioned, the amendment is embodied therein, and cannot be attacked, either directly or collaterally, because of any mistake antecedent thereto. Even though it be submitted at an improper time, it is effective for all purposes when accepted by the majority.[138]

The final ratification vote thus cures all defects related to the organization of the convention. Pennsylvania is not alone.

In *Kahalekai v. Doi*, the Hawai'i Supreme Court noted that "the cardinal principle of judicial review is that constitutional amendments ratified by the electorate will be upheld unless they can be shown to be invalid beyond a reasonable doubt." This cardinal rule is based upon the "corollary" that "the people are presumed to know what they want, to have understood the proposition submitted to them in all of its implications, and by their approval vote to have determined that the amendment is for the public good and expresses the free opinion of a sovereign people."[139] Thus, "The courts must indulge every reasonable presumption of law and fact in favor of the validity of a constitutional amendment, after it has been ratified by the people."[140]

The state constitutional jurisprudence on conventions thus reflects the core of Jameson's project. Jameson's insight separating revolutionary from constitutional conventions, celebrated by one of the initial reviews of Jameson's treatise, is the central spring for the jurisprudence. The procedural requirements for assembling a convention are designed to maintain this distinction. From requiring the state legislature to be the motive force for assembling a convention to the consistent involvement of the electorate in the process, courts have been largely successful in placing legal limits upon conventions.

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137 At least one judge, however, has analogized state legislatures to Parliament, which holds not only plenary authority, but the authority to change the kingdom's unwritten constitution, as well. This analogy, however, dissolves not only in the history of constitutional conventions in the United States, but also the norms of separation of powers and balanced government. *Manley*, *supra* note 125 (Beatty, J., dissenting) ("This same political authority exists presently. The Alabama legislature, as one of our branches of state government, is the people's representative, possessing all powers not allocated to the other branches of state government. No citation of authority is needed for this universally recognized principle. And '[a]ll that the legislature is not forbidden to do by the organic law, state or federal, it has full power to do. The power of the legislature except as limited by constitutional provisions is as plenary as that of the British Parliament.'") (citations omitted). Justice Beatty joined in another dissent with two other justices. Those two justices did not join Beatty's opinion.

138 *Taylor*, *supra* note 119, at 239.

139 Larkin v. Gronna, 69 N.D. 234, 285 N.W. 59, 63 (1939).

140 *Snow*, *supra* note 108, at 64.

VI. Article V Conventions Compared

Justice Black has argued that the Article V process is political from start to finish, and thus not subject to judicial review.[141] The state constitutional revision process is also political, but this has not stopped jurists from creating a law of constitutional conventions. The textual problems have been even more significant in those state constitutions that, unlike the federal constitution, lack or have lacked a convention clause. Beyond that, there are some differences between Article V and state conventions that make the Article V process more clearly legal than the state processes, and thus more easily susceptible to judicial regulation. At a general level, state conventions can be given more room for action because revision takes place within a larger constitutional context. The federal constitution remains a limit on state constitutional convention, for example. No such limit exists with respect to a federal convention.[142] But there are other more specific differences between state conventions and Article V.

A first difference is that Article V contemplates only "amendments." Article V delegates the power to "propose amendments" to Congress or a convention. As a point of comparison, consider that the Articles of Confederation included a power to "alter" the Articles.[143] This generic term—*alter*—is broader than *amendment*. We have seen this term elsewhere, in the people's right to alter or abolish government. But its use in the Articles has a slightly different reference point— the state legislatures. At the time the Articles were drafted, the state legislatures were virtually synonymous with the people. It was only after the Articles were drafted that institutions distinct from legislatures vested with the people's sovereign power to create constitutions became the norm.[144] It is curious, then, that the more specific term "amendment" is used in the federal constitution. It suggests at the very least that there was a desire on the part of the framers not only to make the alteration process easier, by not requiring unanimity, but also to limit the power of alteration to amendment only. Given what the 1787 convention did to the Articles of Confederation, and the extraordinary nature of the times in which it was done, the 1787 convention seems to have made a decision to delegate a lesser power of amendment to Congress and federal conventions in Article V. Article V does not say "alter," and so cannot be said to contemplate constitutional *revision* as a power delegated.

This distinction between amendment and revision is an important difference between the convention clause in Article V and convention clauses in state constitutions. In state constitutions, the amendment power is typically delegated to state legislatures, or to the electorate in the form of the initiative. The revision power, which includes the lesser amendment power, is typically delegated to conventions. That revision power is also reserved in right to alter or abolish clauses,

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141 Coleman v Miller, 307 U.S. 433, 459 (1939).

142 Although, I do wonder whether the state constitutions place limits on what a federal convention could achieve. For instance, does the existence of state constitutions preclude an unlimited, revolutionary federal constitution from destroying them?

143 Art. XIII.

144 The Articles of Confederation was drafted in 1777 and ratified in 1781. The idea that some differently constituted legislative/deliberative body was necessary to draft a constitution had been growing since the move toward independence began. Fritz, *supra* note 13; Adams, *supra* note 13.

in the absence of a convention clause. Courts have used this distinction between amendment and revision to limit the initiative as a technique of constitutional change by limiting it to "amendment," striking down initiatives that have crossed the line into "revision."

One of the foundational cases elaborating this distinction is *Livermore v. Waite*,[145] where the California Supreme Court found that the legislature's power to initiate an amendment and submit it to the electorate for ratification is a "limited power." That limit is the line between amendment and revision. The Court explained, as so many others discussed here, that a state constitutional convention embodies the people's right to alter government. As the electorate decides whether to hold a convention, and ratifies its work, the convention holds the people's revision power, even if not expressly stated in the constitution itself. A convention may also possess the lesser power to amend a constitution. However, any institution possessing only an *amendment* power—usually a legislature, constitutional commission, or electorate—does not include the greater power of revision, unless specifically granted. The line between amendment and revision cannot be drawn precisely, and courts have been reluctant to develop bright line rules. Instead, it is a matter of scale and scope. As the number of amendments increases, for instance, the closer we get to revision. However, a single amendment could be a "revision" if it were a substitute amendment containing wholesale changes to the existing constitution. But the larger point is that there is a distinction between *amendment* and *revision* that courts can and have policed.[146]

This distinction between amendment and revision, along with the 1787 convention's decision to use the term *amendment* rather than *alteration* suggests that Article V does not envision a general revision power either for Congress or an Article V convention.[147] Instead, Article V merely offers two distinct paths to *amendment*. One allows Congress to propose amendments when in its discretion it has identified a defect in need of change. The other allows states themselves to demand that Congress assemble a convention for such a purpose.[148] So a congressional convention act that purported to create an unlimited Article V convention would be beyond Congress' authority. And since Article V conventions only possess an amendment power, any attempt by the convention to draft a new constitution *sua sponte* would also be void.

A second difference between state and federal conventions is that Article V does not contemplate a significant role for the electorate in the amending process. With

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[145] 102 Cal. 113 (1894).

[146] State v. Taylor, 648 So.2d 701 (1995); Loring v. Young, 239 Mass. 349 (1921) (reorganization of a constitution is not revision); *In re Opinion to the Governor*, *supra* note 110; McFadden v. Jordan, 32 Cal.2d 330, 345 (1948)("It is amply sufficient, however, to demonstrate the wide and diverse range of subject matters proposed to be voted upon, and the revisional effect which it would necessarily have on our basic plan of government."); Rivera-Cruz v. Gray, 104 So.2d 501 (Fla. 1954)(daisy-chain ratification included 14 joint resolutions, none ratified unless all ratified is revision); Holmes v. Appling, 237 Or. 546 (1964); Opinion of the Justices, 264 A.2d 342 (Del. 1970).

[147] Cf. *In re* Opinion of the Justices, 254 Ala. 183, 184 (1950) ("The power to propose amendments to the Constitution is not inherent in the legislative department, and in the absence of a provision in the Constitution conferring such power on the legislature, it has no capacity thus to initiate amendments.")

[148] Dellinger, *The Recurring Question, supra* note 2; Van Alstyne, *supra* note 2.

respect to *state* constitutional revision, the electorate is the critical institution. Whether it is initiating amendments itself, or ratifying convention acts, legislative amendments, or amendments or constitutions proposed by constitutional conventions, the electorate can and does both initiate and legitimate the reform process. Throughout the state convention process, the electorate plays a critical oversight role. The electorate's sometimes-heavy involvement has curative properties, so that even if a convention goes beyond the charge contained in the convention act, electoral ratification will render the defect moot. This is the doctrine of acquiescence.

By contrast, Article V contemplates no significant role for electorates. Instead, state legislatures play the critical role in the Article V amendment process, as petitioners for a convention, as ratifiers, as assemblers of ratifying conventions, or as assemblers of the election process for delegates to a federal convention. The only space allowed in Article V for electoral participation is in the election of delegates. The doctrine of acquiescence is thus not available for Article V conventions, as it is for state conventions. Modern jurisprudence has made it clear that conventions themselves, even ratification conventions do not possess the people's sovereign authority. Only a referendum on a convention's work can trigger acquiescence. Importantly, state legislatures have no authority to add more electoral participation to the Article V process.

State legislatures' Article V power is narrower than their state constitutional amendment or revision power. First, the decision on the method of ratification of amending the federal constitution, either by state legislatures or by state ratification conventions, is delegated to Congress.[149] Congress has the discretion to choose the mode of amendment. This is a two-fold choice. The first is whether to propose amendments itself or to delegate that responsibility to a federal convention. The second is to direct ratification to state legislatures or state ratifying conventions.[150] If Congress chooses the convention method either for the drafting of amendments or for their ratification, the state legislatures power is limited to passing a convention act providing for the election of delegates, or for the assembling of a ratification convention. These processes are left to the state process governing the assembling of a convention, which, again, is the only space given to electoral participation in the process.[151] But they may not go any further.

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[149] State *ex rel.* Tate v. Sevier, 333 Mo. 662, 667-68 (1933).

[150] Dillon v. Gloss, 256 U.S. 368, 374-75 (1921) ("First, proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the states, there is a fair implication that it must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do."); *Coleman*, *supra* note 143 (1939)(political question); *Coleman*, 459 (Black, J., concurring)("The process itself is 'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point.")

[151] Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill. 1975). Opinion of the Justices to the Senate, 373 Mass. 877 (1977) (legislature does not mean legislative process); Opinion of the

The state legislature's most discretionary role in the Article V convention process is petitioning Congress for a federal constitutional amendment or convention. Courts have protected this discretion against electoral interference. In the 1980s and 1990s, for instance, constitutional reformers impatient with state legislatures, who they thought were obstructing their efforts to achieve balanced budget and term limits amendments, turned to the initiative process to force legislatures to petition Congress for a convention. State courts turned back these efforts on state constitutional grounds, holding that the state law governing the initiative could be used only to enact laws.[152] *American Federation of Labor v. Eu* was one of the earliest and most influential treatments of this issue. In that case, an initiative would have required state legislators to vote for a petition to Congress for a federal convention or forfeit their salary. The California Supreme Court, however, refused to allow the initiative to be placed on the ballot.

The *Eu* Court identified a deliberation ethic in Article V, which "envisions legislators free to vote their best judgment, responsible to their constituents through the electoral process, not puppet legislators coerced or compelled by loss of salary or otherwise to vote in favor of a proposal they may believe unwise."[153] Deliberation, another court found, requires that representatives be able to express themselves freely.[154] The Montana Supreme Court went a step further, holding "that whenever a state legislature acts to amend the United States Constitution under Article V powers, the body must be a deliberative representative assemblage *acting in the absence of any external restrictions or limitations*."[155] So even if the state initiative process allowed for a vote on the state legislature's petitioning power, Article V would render it nugatory. But even this discretion is limited.

In the 1960s, for instance, some state legislatures sought an amendment to overturn the U.S. Supreme Court's one person, one vote doctrine.[156] Essentially applying a version of unclean hands to the petitioning process, federal courts held that a malapportioned legislature could not petition Congress for an amendment that would overturn Supreme Court jurisprudence that addressed directly the problem of malapportioned legislatures.[157] This defect is not curable by the electorate, as even a referendum or initiative supporting such a petition would have no legal effect.

Justices, 673 A. 693 (Me. 1996). The U.S. Supreme Court punted on the issue of whether a lieutenant governor could vote on a convention bill. *Coleman*, *supra* note 143.

152 *See, e.g.,* State *ex rel.* Harper v. Waltermire, 213 Mont. 425 (1984); Donovan v. Priest, 326 Ark. 353 (1996); Opinion of the Justices, 673 A.2d 693 (Me. 1996); *In re* Initiative Petition No. 364, 930 P.2d 186 (Okla. 1996).

153 American Federation of Labor v. Eu, 36 Cal.3d 687, 694 (1984).

154 Simpson v. Cenarrusa, 130 Idaho 609 (1997) (instruction of non-incumbent candidates to pledge for petition violates free speech; requiring legislators who did not vote for amendment on ballot violates free speech).

155 State *ex rel.* Harper v. Waltermire, 213 Mont. 425, 432 (1984) (emphasis added). The idea that this tactic is an exercise of the right of instruction has not gained much traction. *But see American Federation of Labor*, *supra* note 155 (Lucas, J., dissenting)(people have power to direct legislature, distinguishing *Hawke* and *Barlotti*); *Simpson*, *supra* note 156 (Silak, J., concurring)(accord with right of instruction in constitution).

156 *See, e.g.,* Reynolds v. Sims, 377 U.S. 533 (1964)

157 Petuskey v. Rampton, 243 F. Supp. 365 (D. Utah 1965); Petuskey v. *Rampton* (10th Cir. 1970).

A more fundamental limit on state legislatures' Article V power is, of course, Article V itself. As Article V is the exclusive source of the federal amendment power, states cannot add to its requirements.[158] This includes adding institutions to the process. With respect to petitioning, Article V clearly identifies "legislatures" as the petitioning agent. As a federal court explained,

> The federal and state case law clearly reflect that Article V does not permit the people of a state to coerce their elected officers into acting in a specific way regarding proposal and ratification of amendments to the Constitution. *A citizen's role is outside the Article V process*. The citizen votes to elect the state's federal and state lawmakers. These elected officials, in turn, through a deliberative and independent process, propose and ratify constitutional amendments when this becomes necessary. Maine's Act, therefore, is legally incorrect in stating in its Preamble that "[t] he people, not Congress, should set Term Limits." 21-A M.R.S.A. 641-646, Preamble.[159]

The people's role in petitioning Congress for a convention is a political not a legal one. Citizens may attempt to persuade their state legislators and legislatures to act, but they cannot force them to act. Even initiatives that identify a candidate's position on petitioning Congress or on a proposed amendment are precatory. "The citizens' use of the initiative process to demand passage of a constitutional amendment clearly violates the strict language of Article V, which precludes state citizens from direct participation in the amendment process."[160] Outside of the election for delegates to an Article V convention or a state ratifying convention, there is no space elsewhere in the Article V process for electoral oversight that could provide evidence of acquiescence that would cure defects in the Article V process.

Similarly, the state legislature's power to assemble a ratification convention comes from Article V, and cannot be subject to referendum law.[161] As the Supreme

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158 *Tate*, *supra* note 151; *In re* Initiative Petition No. 364, *supra* note 154; Bramberg v. Jones, 20 Cal.4th 1045 (1999).

159 League of Women Voters v. Gradowski, 966 F. Supp. 52, 59 (D. Me. 1997) (emphasis added).

160 Morrissey v. State, 951 P.2d 911, 916 (Colo. 1998) (en banc). Neither can state legislatures instruct federal representatives. Opinion of the Justices, 673 A. 693 (Me. 1996). For other term limit amendment cases, see Gralike v. Cooke, 996 F. Supp. 901 (W.D. Mo. 1998) (amendment to state constitution requiring federal representatives use their powers to pass a term limits amendment, and requiring congressional candidates to support the amendment adds qualifications to Article 1); Barker v. Hazeltine, 3 F.Supp.2d 1088 (D. S.D. 1998); *Bramberg*, *supra* note 160; Miller v. Moore, 169 F.3d 1119 (8th Cir. 1999). State legislatures also cannot bind future state legislatures to apply to Congress for a convention. *Opinion of the Justices*, *supra* note 153.

161 Leser v. Garnett, 258 U.S. 130, 217-19 (1922)("the function of a state Legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution; and it transcends any limitations sought to be imposed by the people of a state."); *In re* Opinion of the Justice of the Supreme Court of Maine, 118 Me. 544, 107

Court of Ohio explained, "the calling of such convention is but a step necessary and incidental to the final action of the convention in registering the voice of the state upon the amendment proposed by the Congress. The action of the Legislature in performing this function rests upon the authority of article V of the Constitution of the United States. It is a federal function, which, in the absence of action by the Congress, the state Legislature is authorized to perform."[162] The legislature may solicit the voters' opinion with a non-binding initiative on whether to assemble a convention,[163] but a convention must remain free to deliberate.

Importantly, a convention's decision is not reviewable by the electorate. Referendums on legislative ratifications are barred, and there's no reason why that reasoning would not apply to a convention ratification. As the Ohio Supreme Court explained,

> It is the prevailing, though not unanimous, view of writers on the question that a resolution of ratification of amendment to the Federal Constitution, whether adopted by the Legislature or a

A. 673, 674 (Me. 1919)("the state Legislature in ratifying the amendment, as Congress in proposing it, is not, strictly speaking, acting in the discharge of legislative duties and functions as a lawmaking body, but is acting in behalf of and as representative of the people as a ratifying body under the power expressly conferred upon it by article 5"); Prior v. Nolan, 68 Colo. 263, 269 (1920)("in the matter of the ratification of a proposed amendment to the federal Constitution, the General Assembly does not act in pursuance of any power delegated or given to it by the state Constitution, but exercises a power which it possesses by virtue of the fifth article of the Constitution of the United States."); Decher v. Vaughn, 209 Mich. 565, 571 (1920) ("The action of the Legislature in ratifying an amendment is not, strictly speaking, a legislative act. It is but one of several steps required to be taken to change the federal Constitution.")

[162] State *ex rel.* Donnelly v. Myers, 127 Ohio St. 104, 105 (1933). *See also Tate*, *supra* note 151, at 668 ("Without doubt the enactment of House Bill 514, providing for the assembling of the convention, was but a necessary preliminary step preparatory to the final action of the state acting through the convention. If the final action of the convention is not a legislative act, it must logically follow that a preliminary step preparatory to such final action is not a legislative act."); Opinion of the Justices relative to the 18th Amendment, 262 Mass. 603, 605 (1928) ("Amendment of the Constitution of the United States and repeal of amendments thereof constitute federal functions derived in every particular entirely from the Constitution of the United States. That instrument transcends all provisions sought to be enacted by the people or by the legislative authority of any state. The voters of the several states are excluded by the terms of article 5 of the Constitution of the United States from participation in the process of its amendment. By that article all power over the subject is vested exclusively in the Legislatures of the several states."); *Opinion of the Justices*, *supra* note 133 ("But as the Constitution of the United States is silent on the subject, it would seem that the resolution calling a convention in the state solely for the purpose of ratifying or rejecting a proposed amendment to the Constitution of the United States need not be submitted to the electorate for approval.").

[163] Kimble v. Swackhamer, 439 U.S. 1385 (1978)(Rehnquist, J., circuit judge); Kimble v. Swackhamer, 94 Nev. 600 (1978)(merely assists legislature); State ex rel. Askew v. Maier 231 N.W.2d 821 (N.D.1975)("straw vote may be possible"); Howard Jarvis Taxpayer's Association v. Padilla, 62 Cal.4th 486 (2016)(part of the state legislature's investigation power); *Padilla* (Liu, J., concurring)(Article V power, not investigation power).

> convention, is irrevocable. This conclusion seems inescapable as to the action of a convention called for the purpose of acting upon an amendment. When it has acted and adjourned, its power is exhausted. Since the 'powers and disabilities' of the two classes of representative assemblies mentioned in article V are 'precisely the same,' when a Legislature, sitting, not as a lawmaking body, but as such an assembly, has acted upon a proposal for an amendment, it likewise has exhausted its power in this connection."[164]

Since the electorate can play only a limited role in the federal amendment process, electoral participation cannot cure procedural or substantive defects as it can in the state process.

Finally, an Article V convention could not itself provide for more electoral participation in the ratification of its work. Article V conventions can only "propose amendments." Its powers are exhausted once it returns its proposals to Congress, which it must, for Congress to distribute to the states for ratification. Thus, the convention could not *sua sponte* send its proposed amendments directly to state electorates. Nor could it require a national referendum on its work product. Congress does not possess such a power, either. Its decision with respect to ratification is limited only to choosing between state legislatures or ratification conventions.

VII. The Limited Article V Convention

And so we return to the ultimate question that we are all concerned about regarding an Article V convention: what would, or should, happen if an Article V convention deliberately exceeded its delegated powers, and either considered amendments not included in the convention act, or drafted an entirely new constitution?

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[164] Wise v. Chandler, 1027. Hawke v. Smith, 253 U.S. 221 (1920) (referendum on legislative ratification void), 229 ("This argument is fallacious in this – ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment."); National Prohibition Cases, 253 U.S. 350 (1920) (referendum provisions cannot apply to ratification); Hebring v. Brown, 92 Or. 176, 180 (1919)("To ascertain what is meant by the term 'bill' and 'act,' as used in the amendments quoted above, we must refer to the sense in which they were used in the Constitution before the initiative and referendum amendments were passed."); Whittemore v. Terral, 140 Ark. 493, 215 S.W. 686, 687 (1919) ("An analysis of this provision of our Constitution reveals the fact that the reserved referendum power of the people relates only to laws enacted by the General Assembly. The word 'act,' as there used, means an enacted law — a statute."); *Decher*, *supra* note 163 (referendum after amendment deemed ratified by Congress), 572 ("The right of the people to thus legislate in no way makes them a part of the Legislature, or changes the well-recognized meaning of that term."); State *ex rel.* Gill v. Morris, 79 Okla. 89 (1920) (issue settled by Hawke); State ex rel. Askew v. Maier 231 N.W.2d 821 (N.D. 1975); State ex rel. Hatch v. Murray, 165 Mont. 90 (1978) (per curiam); Walker v. Dunn, 498 S.W.2d 102 (Tenn. 1972) (referendum has no effect as it is a federally derived power). *But see* State *ex rel*. Mullen v. Howell, 105 Wash. 167 (1919) (referendum on ratification is law for purposes of state constitution, referendum thus valid); Trombeta v. Florida, 353 F. Supp. 575 (M.D. Fla. 1973).

This problem was one of Jameson's central concern, what he called "usurping conventions." A usurping convention is a convention that begins as a constitutional convention but assumes revolutionary authority. Ultimately, the law of constitutional conventions has been designed to address this problem. Whether an Article V convention exceeded its authority would not be a political question. The question would simply be whether the convention exceeded its mandate by considering issues beyond those included in the convention act creating the convention. If so, an injunction prohibiting the distribution of the proposed amendments or constitution could issue. Or, if already distributed, states could be barred from considering ratification. The lack of a curative power in the electorate means that courts could even overturn an amendment after it has been ratified. I imagine that courts would be reluctant to do so, and would be highly deferential to the ratification vote. But ratification should constitute merely a persuasive argument (if that) for upholding the ratification of an amendment, not a dispositive argument. It should not provide any persuasiveness, however, with regard to changes that cross the line into revision.

The only potential source for an unlimited federal convention in the federal constitution is the ninth amendment. We have seen already how the right to alter or abolish creates a power within a state legislature to assemble a constitutional convention when a state constitution lacks a convention clause. A similar logic could extend to the federal constitution. According to Akhil Amar, it does. "Indeed," he writes, "the most obvious and inalienable right underlying the Ninth Amendment is the collective right of We the People to alter or abolish government, through the distinctly American device of the constitutional convention."[165]

So what would be the difference between an Article V and ninth amendment convention? Most fundamentally, Congress's duty to assemble a ninth amendment convention would be discretionary, in contrast to its more ministerial duty under Article V. Congress would have to determine whether an unlimited convention was actually desired by the people, and not merely a portion thereof, a cabal perhaps. In fact, Congress could require a near-unanimous, or even a unanimous call for an unlimited convention, rather than the three-fourths required by Article V. Congress's main duty would be to determine a) whether a constitutional emergency existed, and b) whether the emergency demanded an unlimited convention. It was such an emergency that justified the first unlimited federal convention in 1787.

If Congress's convention act providing for the assembling of a constitutional convention intentionally provided for an unlimited convention, the first question would be whether Congress was acting under Article V or the ninth amendment. If Article V, then the act would be void, and a court could enjoin the assembling of the federal convention. If Congress relied upon the ninth amendment, on the other hand, two things would have to occur. First, electorates would have to be given a more prominent role in the convention process in order for it to reasonably reflect the people's exercise of their right to alter or abolish government. Second, some explanation of the need for the extraordinary choice of the ninth amendment rather than Article V should be required. But this would not necessarily place the convention beyond the reach of law.

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[165] Akhil Amar, The Bill of Rights: Creation and Reconstruction 120 (1998). For a fuller elaboration see Akhil Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V,* 55 U. .Chi. L. Rev. 1043 (1988).

A court could decide whether a legitimate emergency existed justifying the creation of an unlimited convention.[166] This is an important difference from the 1787 convention, which existed in a world without a U.S. Supreme Court. Until a new constitutional order has been created, the federal courts still exist, and can consider the legal limits of conventions, in this case by considering the basis for the emergency, and issuing an injunction prohibiting the assembling of a convention if necessary. Obviously, this would be a very high-stakes constitutionalism, so a court would want to move cautiously here. But the larger point is that the possibility that a constitutional convention could be assembled under the ninth amendment, and that even that convention could be limited, simply confirms the limited nature of an Article V convention.

VIII. Conclusion

The law of constitutional conventions has achieved Jameson's primary aim of subjecting conventions to limitations imposed by law. This jurisprudence, especially the distinction between revolutionary and constitutional conventions that lay at its core, can also provide a way for courts to think through the nature and scope of power of even an Article V convention. Having said that, the case for a limited Article V convention that I have just laid out provides me no comfort. I suspect that a case for an unlimited convention would neither. It only confirms to me how far we've come from popular sovereignty's original promise. As David Kyvig has written, "By the end of the eighteenth century, particularly in North America, optimism regarding human capacity for reason fostered the belief that fundamental changes could be wrought in otherwise enduring governments through a preordained and agreed-upon process that embodied republican values." "[C]onstitutional amendment," he continued, "offered a means of successfully balancing competing desires for stability and change, tradition and innovation, the wisdom of accumulated experience and democratic preferences for new definitions of government responsibility."[167] A well-developed law of constitutional conventions, by contrast, indicates a declining belief in the "human capacity for reason" as expressed through "democratic preferences," and a growing concern with the will to power.[168]

Perhaps conventions are simply no longer necessary to self-government. The constituent power was a necessary element in the move away from monarchies toward constitutional republics in the eighteenth and nineteenth centuries. It may well be that conventions have little role to play in post-democratic societies. But

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[166] Compare *Priest*, *supra* note 134 682 ("it is a judicial determination whether facts constituting an emergency are stated.") ("The test for determining if a real emergency has been stated is whether reasonable minds might disagree as to whether the enunciated facts state an emergency. If so, the emergency clause is upheld; if not, then the emergency clause is invalid. Emergency is defined as "some sudden or unexpected happening that creates a need for action.""") The court in *Priest* was interpreting an emergency statute.

[167] David E. Kyvig, Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995 ix (1996).

[168] For a brief discussion of "Recent Developments" in Article V advocacy that reinforces my skepticism, *see* Vile, Conventional Wisdom, *supra* note 8, at viii-x.

without conventions, through which the people have exercised their constituent power, the people no longer play a defining role in American constitutionalism. The people can no longer enact or constitute. Instead, they are simply left to offer "opinion," and the minor power of election and acclamation.[169] The turn to popular constitutionalism has attempted to unearth various ways in which groups of people outside of governmental institutions have effected constitutional change.[170] But such acts have rarely been positives exercises of a sovereign will. Given the scope and scale, the totality, of the modern state, this may be as much as the people can handle. In this context, the constitutional convention appears to be little more than a super-administrative body. Its function is no longer to embody and facilitate the people's ability to deliberate and reason, but simply to perform an administrative task. The important question, then, may not be whether a convention can be limited, but why a convention at all.

[169] Roman J. Hoyos, *Who Are the People?*, 11 Elon L. Rev. 23 (2019).

[170] *See, e.g.*, *A Symposium on The People Themselves: Popular Constitutionalism and Judicial Review*, 81 Chi.-Kent L. Rev. 809 (2006).

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Nomos, Narrative, and Nephi: Legal Interpretation in the Book of Mormon

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ABSTRACT

The Book of Mormon helped launch one of America's most successful religions, and millions around the world accept it as scripture. It is thus one of the more influential books to have been published in the United States. Ironically, precisely because of its role in the founding of Mormonism, the text of the Book of Mormon has often been ignored. Recently, however, the Book of Mormon has begun to attract the attention of scholars whose interest in the text goes beyond either religious devotion or the academic study of Mormonism. Rather, they look to the text as a literary creation of interest in its own right. This article brings this new approach into dialogue with the influential legal theory of Robert Cover. In so doing, it breaks new ground in the study of law and literature and shows how a close reading of the Book of Mormon text reveals a subtle debate about the nature of rule following that intersects with contemporary discussions in legal theory. These narratives illustrate an important feature of what we might call the phenomenology of legal experience, namely the way in which law carries within itself—rightly or wrongly—claims to transcendence.

KEYWORDS

Mormon Studies, Book of Mormon, Robert Cover, Jurisprudence, Law & Literature

CONTENTS

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I. Introduction

In 1827, a young man named Joseph Smith began reporting to family and friends that an angel had visited him and revealed gold plates buried in a hill not far from his family's farm in Palmyra, New York.[1] Smith later claimed to have recovered the plates, which he said were covered with ancient writing, and he began dictating a "translation" of the text "by the gift and power of God" to a series of amanuenses. By 1830, the oft-interrupted task of dictation was complete. Smith showed the plates, which he had previously refused to show to anyone, to a select group of friends who signed an affidavit stating that "Joseph Smith … has shown unto us the plates of which hath been spoken, which hath the appearance of gold; and as many of the leaves as the said Smith has translated we did handle with our hands. …"[2] Shortly, thereafter, Smith insisted, he returned the plates to the angel from whence they had come. Smith published his dictated text a short time later as the Book of Mormon. By April 1830 Smith had formally organized a church accepting the book as an additional volume of scripture to supplement the Bible, and converts began flocking to the new movement. Nearly two centuries later The Church of Jesus Christ of Latter-day Saints that Smith and his book founded claims just over 16.5 million official members.[3]

Since even before its publication, the text of the Book of Mormon has been a prisoner to the miraculous and outlandish story of its own origin. For Latter-day Saints, the Book of Mormon is primarily a sign. Until recently, they have been less concerned with the narrative or even theological content of the Book of Mormon than with its role in the founding myth of their religion.[4] For them, the book is a miraculous link between ancient prophets and Joseph Smith as the modern prophet of God's latter-day work.[5] For those outside the faith, of course, the stories of

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1 *See* Richard Bushman, Joseph Smith: Rough Stone Rolling 57–83 (2005) (recounting the production of the Book of Mormon text).

2 *See The Testimony of the Eight Witnesses in* The Book of Mormon (The Church of Jesus Christ of Latter-day Saints, 1981) (1830). The Book of Mormon has also been published since 1830 with a document entitled "The Testimony of Three Witnesses," an affidavit signed by three of Smith's close associates in which they report being shown the gold plates by an angel. *See* "Testimony of the Three Witnesses" *in id.*

3 *See* The Church of Jesus Christ of Latter-day Saints, Worldwide Statistics, https://newsroom.churchofjesuschrist.org/facts-and-statistics (visited June 15, 2020).

4 *See generally* Noel B. Reynolds, *The Coming Forth of the Book of Mormon in the Twentieth Century*, 38 BYU Stud. 7 (1999) (providing a content study of Mormon sermons and publications showing that prior to the 1980s the text of the Book of Mormon received relatively little attention among Latter-day Saints).

5 For example, in January, 1831, less than a year after the publication of the Book of Mormon, Joseph Smith's mother, Lucy Mack Smith, wrote a letter trying to convert her brother to the new faith:

> By searching the prophecies contained in the old testament we find it there prophesied that God will set his hand the second time to recover his people in the house of Israel. he has now commenced this work. he hath sent forth a revelation in these last days, & this revelation is called the book of Mormon, it contains the fullness of the Gospel to the Gentiles, and is sent forth to show unto the remnant of the house of Israel what great things God hath done for their fathers; that they may know of the covenants of the Lord & that they are not cast off forever, and also of the convincing of both Jew and Gentile that Jesus is the Christ the Eternal God and manifests himself unto all nations.

golden plates, angelic visitors, and ancient prophets have a very different meaning. Nearly a year before the publication of the Book of Mormon, the *Wayne Sentinel*, one of Palmyra's local papers, insisted that "the whole matter is the result of gross imposition, and a grosser superstition."[6] It is a way of treating the Book of Mormon that has not changed markedly in the almost two succeeding centuries. Thus in a 2006 *Slate* article, Jacob Weisberg adopted the same approach. Discussing why he would not vote for a Latter-day Saint, he wrote:

> I wouldn't vote for someone who truly believed in the founding whoppers of Mormonism. The LDS church holds that Joseph Smith, directed by the angel Moroni, unearthed a book of golden plates buried in a hillside in Western New York in 1827. … Smith was able to dictate his "translations" of the Book of Mormon first by looking through diamond-encrusted decoder glasses and then by burying his face in a hat with a brown rock at the bottom of it. He was an obvious con man.[7]

Mirroring Latter-day Saint readings, such dismissive treatments also take the Book of Mormon primarily as a sign rather than a text. The content of the book is less important than the conclusions that one draws from the story of its origin.

The gravitational force of the book's origin story has also infected the discussion of the content of the text. Latter-day Saints have tended to treat the Book of Mormon as a trove of theological proof texts. The authority of the text as scripture has vouchsafed the value of these textual snippets for believers. Indeed, because Latter-day Saints ground the value of the text in the miraculous story of its production, they have generally not felt called upon to understand or evaluate the text on its own terms. For non-Mormons, a similar, if inverted, dynamic arises. Mark Twain, who seems to have actually read large chunks of the Book of Mormon, insisted that it was "chloroform in print."[8] In his eyes the book consisted of little more than a chaotic pastiche of ideas and themes taken from the Bible and lacked any coherent form or message. Modern readers, including those sympathetic to Mormonism, have often come to similar conclusions.[9] Even the hit Broadway

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Lucy Smith to Solomon Mack, Jr., 6 Jan. 1831 *reprinted in* 1 Early Mormon Documents 215 (Dan Vogel ed., 1996).

6 *Wayne Sentinel*, 26 Jun. 1829 *reprinted in* 2 Early Mormon Documents 218–219 (Dan Vogel ed., 1998).

7 Jacob Weisberg, *Romney's Religion: A Mormon President? No Way*, Slate, 20 Dec. 2006.

8 *See* Mark Twain, Roughing It 127 (DSI Scanning 2001) (1886); Richard H. Cracroft, *Distorting Polygamy for Fun and Profit: Artemus Ward and Mark Twain Among the Mormons*, 14 BYU Stud. 272 (1974) (discussing Twain and the Latter-day Saints).

9 Literary critic Harold Bloom, despite his admiration for Joseph Smith's religion-making imagination, writes, "What is a contemporary non-Mormon, interested in American religion, to do with the Book of Mormon? I cannot recommend that the book be read either fully or closely, because it scarcely sustains such reading." Harold Bloom, The American Religion: The Emergence of the Post-Christian Nation 86 (1993); s*ee also id.* at 82. ("Whatever his lapses, Smith was an authentic religious genius, unique in our national history."). Like many other scholars, Bloom concludes that not only is the Book of Mormon not worth reading because of any intrinsic merit or interest that it might hold but that its text is not even particularly important for understanding

musical that took its name from the book contains virtually no content from the book itself, even as musical satire.

More recently, however, there has been a scholarly re-evaluation of the Book of Mormon. In the multi-volume Oxford History of the United States, Daniel Walker Howe claims:

> The Book of Mormon should rank among the great achievements of American literature, but it has never been accorded the status it deserves, since Mormons deny Joseph Smith's authorship, and non-Mormons, dismissing the work as a fraud, have been more likely to ridicule it than to read it.[10]

A number of treatments of the text's literary structure and content have appeared in scholarly presses for an academic audience.[11] Other works have looked at the complicated reception history of the book.[12] The Book of Mormon has been examined in comparative works looking at other religious and scriptural traditions.[13] Scholarly editions of the text have been produced.[14] Even Mormon theological

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Mormonism. *See id.* at 85 ("With the Book of Mormon, we arrive at the center of Joseph Smith's prophetic mission, but hardly at any center of Mormonism, because of Smith's extraordinary capacity for speculative development in the fourteen years that remained him after its publication."). Bloom goes on to write, ""[The Book of Mormon] has bravura, but beyond question it is wholly tendentious and frequently tedious." *Id.* at 86. Bloom here follows the work of Mormon historians who have identified Smith's main period of theological creativity with the so-called Nauvoo period from 1839 to 1844. *See generally* Thomas G. Alexander, *The Reconstruction of Mormon Doctrine: From Joseph Smith to Progressive Theology*, Sunstone, July-August 1980, 24. More recent work, however, throws into question the claim that Smith's Nauvoo period theology represented a sharp and discontinuous break with his earlier teachings. *See generally* David L. Paulsen, *The Doctrine of Divine Embodiment: Restoration, Judeo-Christian, and Philosophical Perspectives*, 35 BYU Stud. 6 (1995) ("My reading of the evidence leads me to reject two propositions: [1] that the doctrine of divine embodiment was articulated for the first time in 1838, and [2] that prior to 1838 Latter-day Saints understood God to be an immaterial being.").

10 Daniel Howe, What Hath God Wrought: The Transformation of America, 1815-1848 at 314 (2007).

11 *See generally* Grant Hardy, Understanding the Book of Mormon: A Reader's Guide (2010); Terryl Givens, The Book of Mormon: a Very Short Introduction (2009).

12 *See generally* Americanist Approaches to the Book of Mormon, (Elizabeth A. Fenton & Jared Hickman eds., 2019); Paul C. Gutjahr, The Book of Mormon: A Biography (2012); Terryl Givens, By the Hand of Mormon: The American Scripture That Launched a New World Religion (2003).

13 *See generally* Jad Hatem, Postponing Heaven: The Three Nephites, the Bodhisattva, and the Mahdi (Jonathon Penny trans., 2015).

14 *See generally* The Book of Mormon: The Earliest Text (Royal Skousen ed., 2009) (an effort to reconstruct in so far as possible the earliest, pre-publication version of the Book of Mormon based Skousen's multi-volume critical edition of the Book of Mormon text); The Book of Mormon (Laurie F. Maffly-Kipp ed., 2008) (1830) (a Penguin Classics edition of the text prepared for religious studies students); The Book of Mormon: A Reader's Edition (Grant Hardy ed., 2003) (1830) (an edition of the text designed to be read as a literary creation rather than a devotional volume, including a critical apparatus).

writings have been marked by increasingly sophisticated engagement with the text of the Book of Mormon.[15] All of this work is marked by a turning away from the traditional discussions of the book centered on polemics about its origins or its place in the biography of Joseph Smith and the movement he created. Rather, the most recent generation of scholarly work has focused on the Book of Mormon text itself, looking at its meaning, structure, and possible connections with discussions and debates beyond Mormonism.

This article contributes to this latest generation of scholarship by offering a close reading of some of the earliest narratives in the book from a legal perspective and bringing them into dialogue with contemporary legal theory.[16] I examine the Book of Mormon as a legal text, arguing that these narratives embody a surprisingly nuanced debate about the nature of legal interpretation. One of the central themes in the opening narratives in the book is the conflict between the character of Nephi and his brothers. Nephi, the narrator in this part of the text, structures his story around a series of confrontations with his older brothers, Laman and Lemuel, and one of his main rhetorical agendas is to justify himself and his father against their attacks. In large part, this conflict is ultimately about what it means to follow the law. From it emerge two quite different conceptions of the function and meaning of rules. For Laman and Lemuel following the law is a matter of the formal content of rules and conforming one's conduct to that formal content. For Nephi, in contrast, law is embedded within a much broader narrative that provides the law with meaning and importance. To follow the law is less a matter of the formal content of rules than of enacting in one's own life those narratives.

This divide between law as formal rules and law as narrative mirrors the discussion within contemporary legal theory between traditional positivist accounts of law and the jurisgenerative theory of Robert Cover.[17] According to Cover, one

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[15] *See, e.g.,* Joseph M. Spencer, An Other Testament: On Typology (2nd ed. 2016); An Experiment on the Word: Reading Alma 32 (Adam Miller ed., 2014); Reading Nephi Reading Isaiah: Reading 2 Nephi 26-27, (Joseph M. Spencer & Jenny Webb eds., 2011); A Dream, a Rock, and a Pillar of Fire: Reading 1 Nephi 1 (Adam S. Miller ed., 2017); Christ and Antichrist: Reading Jacob 7 (Adam S. Miller & Joseph M. Spencer eds., 2018); A Preparatory Redemption: Reading Alma 12-13 (Matthew Bowman & Rosemary Demos eds., 2018).

[16] The earliest appearance of the Book of Mormon in legal scholarship appears to have been in 1898. *See* James Williams, *The Law of the Book of Mormon*, 24 Law Mag. Rev. 138 (1898). The most comprehensive treatment of legal narratives in the book is John W. Welch, The Legal Cases in the Book of Mormon (2011).

[17] *See* Robert M. Cover, *The Supreme Court, 1982 Term—Forward: Nomos and Narrative*, 97 Harv. Law Rev. 4 (1983); Robert M. Cover, *Violence and the Word*, 95 Yale Law J. 1601 (1986). There is an extensive literature on Cover's thought. *See, e.g.,* Aviam Soifer, *Covered Bridges*, 17 Yale J. L. Hum. 55 (2005); Samuel J. Levine, *Halacha and Aggada: Translating Roberts Cover's Nomos and Narrative*, 1998 Utah L. Rev. 465 (1998); Judith Resnik, *Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover*, 17 Yale J. L. Hum. 17 (2005); Suzanne Last Stone, *Rabbinic Legal Magic: A New Look at Honi's Circle as the Construction of Law's Space*, 17 Yale J. L. Hum. 97 (2005); Robert A. Burt, *Robert Cover's Passion*, 17 Yale J. L. Hum. 1 (2005); Perry Dane, *The Public, the Private, and the Sacred: Variations on a Theme of "Nomos and Narrative,"* 8 Cardozo Stud. Law Lit. 15 (1996); Robert C. Post, *Who's Afraid of Jurispathic Courts: Violence and Public Reason in Nomos and Narrative*, 17 Yale J. Law Hum. 9 (2005); Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to*

of the important functions of law is its role in the creation of the narratives that undergird the normative structures (nomos) of communities. Taking Jewish law as his model, Cover points toward the possibility of a world in which law's connection to violence can be secondary to its role as an engine of social meaning. Within this framework, Nephi is offering a jurisgeneritive vision of law following. However, the Book of Mormon breaks with Cover's formulation by also gesturing toward the inadequacy of legal interpretation as a nomos sustaining activity. In the Book of Mormon narrative, it is only when interpretation is coupled with the imprimatur of supernatural intervention that a new nomos is created. Contemporary legal theories cannot, of course, look to the supernatural in grounding the law as an engine of nomos creation. However, the story of Nephi does point toward the inadequacy of founding the normative power of law purely on its interpretive fecundity. In so doing, my reading of the Book of Mormon offers both an example of Cover's approach and a critique of it.

This article proceeds as follows. Part II provides an account of the debate over the nature of following the law in the Book of Mormon, showing through a close reading of the story of Nephi's confrontation with his brothers their contrasting approaches to legal authority. Part III shows how Laman and Lemuel's approach to rule following fits within one of the main streams of analytic jurisprudence but how within that framework Nephi's response to their claims is largely incomprehensible. Part IV shows how Nephi's approach does make sense within Robert Cover's approach to law even as his story challenges Cover's central claim about how interpretation becomes law. Part V concludes.

II. The Debate Over Rule Following in the Book of Mormon

The Book of Mormon opens with the story of Lehi and his family. Lehi is living in Jerusalem in the decade just before the Babylonians destroy the city in 587 B.C.E. He has a vision of a pillar of fire in which he learns that unless the city repents it will be destroyed.[18] The people of Jerusalem reject his message, seek his life, and Lehi flees with his family into the desert.[19] For many years they wander in the wilderness,

the Jewish Legal Model in Contemporary American Legal Theory, 106 Harv. Law Rev. 813 (1993); Suzanne Last Stone, *Judaism and Postmodernism Law and Hermeneutics in Rabbinic Jurisprudence: A Maimonidean Perspective*, 14 Cardozo Law Rev. 1681 (1992); Suzanne Last Stone, *Justice, Mercy, and Gender in Rabbinic Thought*, 8 Cardozo Stud. Law Lit. 139 (1996).

[18] *See* 1 Nephi 1:6-13. The Book of Mormon has a structure similar to the Bible, with a number of internal "books," which are then divided into chapters and verses for ease of references. All references are to the chapter and verses of the 1981 edition of the Book of Mormon published by the Church of Jesus Christ of Latter-day Saints. The Book of Mormon has a complicated textual history, with a number of variant readings based on pre-publication manuscripts and post-publication editing of the text by Joseph Smith for later editions published in his lifetime. *See generally* The Book of Mormon, *supra* note 15. All quotations to the text in this article are from the 1981 edition, which represents a modern amalgamation of the versions of the text Smith produced between 1828 and 1844.

[19] *See* 1 Nephi 2:1-4.

suffering various difficulties, until they arrive at the seashore, a land they name Bountiful.[20] God directs them to build a ship, which they do, finally voyaging to a new promised land that the Lord has prepared for them.[21] The story's arc of exile, exodus, and arrival, however, is ultimately tragic rather than triumphal. From the beginning, conflict between Lehi's sons divides the family. His younger son, Nephi, believes Lehi, receives his own revelations from God, and embraces the family's exodus and search for a new promised land.[22] In contrast, Nephi's older brothers, Laman and Lemuel, are never fully persuaded of their father's prophetic bona fides. They insist that he has been led astray by "the foolish imaginations of his heart,"[23] constantly complaining that they have been forced to leave their comfortable life in Jerusalem for nothing. The conflict between Nephi and his brothers flares up repeatedly and violently in the desert. Upon arriving in their promised land, the family splits into warring tribes of Nephites and Lamanites.[24]

This opening portion of the Book of Mormon, which following the biblical convention is divided into "books" named 1 Nephi and 2 Nephi, is written in the first person. The narrator is Nephi, and we learn that he is composing his record many decades after the fact with a full knowledge of how conflict with his brothers will mature into permanent enmity and warfare.[25] The narrative is didactic rather than objective, and among the narrator's other agendas, Nephi is at pains to justify himself and his father against the accusations of his brothers. The action of the narrative consists of a series of incidents in which Nephi confronts the complaining and faithless Laman and Lemuel.[26] The tension and violence escalates, reaching a climax when God commands that the family build a ship to travel to their new promised land.[27] Surprisingly, at the heart of the conflict between Nephi and his brothers is what we can fairly characterize as a legal dispute. Their argument is ultimately in large part about what it means to follow the law. From it emerge two quite different conceptions of the function and meaning of rules. To see how this is so, however, requires careful attention to the book's narrative structure and in particular its extensive use of biblical allusion.

A. Strategies of Biblical Allusion in the Book of Mormon

Even the most casual reader of the Book of Mormon will notice its heavy dependence on the Bible. It is written in self-consciously archaic language that deliberately apes the Jacobean idiom of the King James Version. The characters within the narrative are aware of the biblical texts, and at various points they quote large portions of the King James Version nearly verbatim.[28] God, prophecy, prayer, visions, dreams,

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20 *See* 1 Nephi 17:4-5.
21 *See* 1 Nephi 17:8, 18:22-23.
22 *See* 1 Nephi 17:14-15.
23 *See* 1 Nephi 2:11.
24 *See* 2 Nephi 5:34.
25 *See* 1 Nephi 9:4.
26 *See* 2 Nephi 1:24-26.
27 *See* 1 Nephi 17:8.
28 *See generally* Joseph M. Spencer, The Vision of All: Twenty-five Lectures on Isaiah in Nephi's Record (2016) (discussing the use of Isaiah in the Book of Mormon); Reading Nephi Reading Isaiah, *supra* note 16 (same).

revelations, exodus, sin, redemption, promised lands, chosen people, holy records, apocalyptic expectations, and a host of other biblical themes and elements appear repeatedly. For many readers the intertextuality between the Book of Mormon and the Bible reveals the former as a clumsy copy of the latter.[29] On this view the Book of Mormon's use of biblical themes represents little more than random copying as Joseph Smith composed the narrative at breakneck speed in 1829. The problem with this approach to the text, however, is that presenting the Book of Mormon as an essentially mindless pastiche of biblical tidbits tends to foreclose the kind of careful attention to the text that reveals the underlying structure, complexity, and subtlety of its narrative.

Readers of the Bible face a similar interpretive choice. Certain narratives in the book clearly copy the basic structure of earlier narratives. Source critics provide us with an appreciation of the complex textual history of the Bible.[30] Such repetitions can thus be seen as simply the narrative seams left by earlier copying and redacting. As modern narrative critics such as Robert Alter and Meir Sternberg have pointed out, however, the danger of source criticism is its tendency to cast the final biblical text as a rather artless jumble of earlier sources.[31] What can be missed is the care and artistry employed by the final redactors. Hence, for example, Robert Alter argues that repetitions of certain narrative structures are deliberate allusions by reference to which the reader is supposed let the earlier narrative determine her response to the later narrative.[32] By making deliberate choices about how to structure the similarities and differences in the narratives, the author of the final biblical text adds layers of meaning and commentary through the Bible's own self-allusions.

A similar approach can be taken to the intertextuality of the Bible and the Book of Mormon. Rather than seeing the latter's reliance on the former as evidence of plagiarism, it is more fruitful to examine quotations and the borrowing of biblical themes and narrative structures as a part of a strategy of allusion by Book of Mormon narrators that serves often complex purposes.[33] For example, early on in the Book of Mormon story, Lehi sends his sons back to Jerusalem to obtain sacred records from a wicked man named Laban.[34] When they try to purchase the records, Laban beats Nephi and his brothers, steals their property, and drives them into the

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29 As one early 19th-century critic of the Latter-day Saints put it, "this book is bespangled from beginning to end not only with thoughts of sacred writers, but with copious verbal extracts from King James' translation." Grant Hardy, *The Book of Mormon and the Bible, in* Americanist Approaches to the Book of Mormon 115 (Elizabeth A. Fenton & Jared Hickman eds., 2019) (quoting Jonathan Turner, *Mormonism in All Ages* (1842)).

30 *See, e.g.,* Richard Elliott Friedman, Who Wrote the Bible? (1987) (providing an introduction to source criticism of the Hebrew bible).

31 *See generally* Robert Alter, The Art of Biblical Narrative (2d ed. 2011); Meir Sternberg, The Poetics of Biblical Narrative: Ideological Literature and the Drama of Reading (1987).

32 *See* Alter, *supra* note 31, at 55–78 (discussing type-scene narratives).

33 Readers of the Book of Mormon often miss this point. Devout Latter-day Saints regard the book as an ancient text rather than a production of Joseph Smith. They are thus often uncomfortable directly addressing the text's obvious reliance on the 17th-century King James Version. Non-Mormon readers immediately note the text's reliance on the KJV but tend to see that reliance as crude rather than subtle.

34 *See* 1 Nephi 3:4.

desert.[35] Nephi's older brothers, Laman and Lemuel, wish to abandon their quest for the records, and Nephi exhorts them by explicitly invoking the example of the biblical exodus:

> Therefore let us go up; let us be strong like unto Moses; for he truly spake unto the waters of the Red Sea and they divided hither and thither, and our fathers came through out of captivity, on dry ground, and the armies of Pharaoh did follow and were drowned in the waters of the Red Sea.[36]

At this explicit level, Nephi comes across as a cocksure little brother confident that he is going to re-enact the exodus story at its dramatic climax, with himself cast as Moses miraculously defeating the armies of Pharaoh.

The narrative structure, however, also contains a darker allusion to Moses, one at odds with the cocksure Nephi's invocation of triumph on the shores of the Red Sea. Nephi returns to Jerusalem and there comes upon the drunken Laban.[37] The story continues, "I was constrained by the Spirit that I should kill Laban; but I said in my heart: Never at any time have I shed the blood of man."[38] In the passage that follows Nephi argues with the Spirit until he is finally persuaded of the necessity of killing Laban. In contrast to the blithely self-confident character who invokes Moses parting the Red Sea at the beginning of the story, the Nephi who kills Laban is tortured by what he sees as the dreadful necessity of murder.[39]

Nephi's killing of Laban is also a reference to Moses. The narrative marks Nephi's first action in the story. Thus Nephi is introduced, as is Moses in the Bible, with a morally ambiguous homicide. The second chapter of Exodus recounts how Moses killed an Egyptian overseer he saw beating an Israelite slave. He hid the body in the sand, but when Pharaoh discovered the killing, Moses was forced to flee into the desert.[40] Like Nephi's confrontation with Laban, the killing of the overseer marks Moses's first action in the biblical narrative. The murder seems motivated by indignation at the overseer's unjust cruelty toward the Israelite slave, yet still Moses must conceal the killing and flee its consequences.[41] Likewise, Nephi kills Laban, who he says "had sought to take away my own life"[42] and had stolen all Lehi's property.[43] Yet Nephi shrinks from the act, fears that the killing will be discovered, and like Moses, flees into the desert.[44]

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35 *See* 1 Nephi 3:25.
36 *See* 1 Nephi 4:2.
37 *See* 1 Nephi 4:7-8.
38 1 Nephi 4:10.
39 Others have argued that the murder of Laban is narratively structured in such a way as to highlight Nephi's reconsideration of his original understanding of God's commands in at the opening of the Laban narrative. *See* Joseph M. Spencer, 1st Nephi: A Brief Theological Introduction 66–81 (2020) (discussing the Laban narrative in 1 Nephi).
40 *See* Exodus 2:11–15.
41 *See* Exodus 2:11-15.
42 1 Nephi 4:11.
43 *See* John W. Welch, *Legal Perspectives on the Slaying of Laban*, 1 J. Book Mormon Stud. 119 (1992) (arguing that the slaying of Laban should be read against the background of biblical rules governing theft and robbery).
44 *See* 1 Nephi 4:36, 38.

The narrative provides an ironic commentary on Nephi's glib call to his brothers to be like Moses. Nephi-as-narrator is in dialogue with the character of Nephi in the narrative. He is like Moses, yes, but not in the way that the character thinks. The irony of Nephi's glib identification with Moses emphasizes the real difficulty and moral anguish involved in actually following the Mosaic example. Far from being a mindless pastiche of biblical elements, the killing of Laban reveals how the Book of Mormon's allusions to the Bible are deliberately structured in ways that deepen the meaning of the book's narrative, adding layers of implicit commentary on the actions recounted by the narrator.

B. The Conflict Between Nephi and His Brothers

Careful attention to the use of explicit and implicit biblical allusion reveals the structure of the legal argument between Nephi and his older brothers. The key conflict comes in what is 1 Nephi chapter 17 in the modern edition of the Book of Mormon. The current structure of chapters and verses, however, is not native to the Book of Mormon text. Rather, it was adopted in an 1879 printing for ease of reference.[45] As a result, the narrative breaks signaled by the original seven chapters of 1 Nephi have been lost.[46] In the 1830 edition of the Book of Mormon, what is today chapter 17 came more or less in the middle of what was Chapter V.[47] The previous chapters close out the account of events in Jerusalem and its environs. Chapter V in the original text tells of the family's travels in the wilderness to a temporary stopping place at the seashore called Bountiful and from there across the sea to the new promised land.[48] The arc of the original Chapter V thus tells of the exodus of the Lehites from Jerusalem. Admittedly, they went into the wilderness as early as the original Chapter I, but prior to original Chapter V the narrative still centers on Jerusalem, with the brothers returning to get the records from Laban and then debating over their significance and the significance of Lehi's resulting

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45 This edition was prepared by Orson Pratt, a senior member of the Church's governing Quorum of Twelve Apostles and an influential Mormon intellectual. He created the system of chapters and verses that continue to be used in modern editions of the Book of Mormon. *See* Paul Gutjahr, *Orson Pratt's Enduring Influence on The Book of Mormon, in* Americanist Approaches to the Book of Mormon 95 (Elizabeth A. Fenton & Jared Hickman eds., 2019) (discussing the structure and lasting influence of the 1879 edition).

46 According to the convention in Book of Mormon scholarship, chapter numbers in the original text are giving using Roman numerals and are always capitalized while chapter numbers in the modern edition are given using Arabic numerals and are not capitalized. The original edition of the Book of Mormon contained no verse numbers. The original chapters of 1 Nephi and their corresponding chapter and verses in the modern edition of the Book of Mormon were: Chapter I (1 Nephi 1-5, telling the story of leaving Jerusalem and recovering the plates of brass); Chapter II (1 Nephi 6-9, telling the story of Lehi's Dream and Nephi's response); Chapter III (1 Nephi 10-14, telling the story of Nephi's Vision); Chapter IV (1 Nephi 15, telling the story of Nephi's argument with his brothers over the meaning of the visions); Chapter V (1 Nephi 16-1 Nephi 19:21, telling the story of traveling in the wilderness, building a ship, and traveling to the new promised land); Chapter VI (1 Nephi 19:22-21, containing Nephi's extensive quotations from Isaiah); Chapter VII (1 Nephi 22, containing Nephi's interpretation of the quoted Isaiah passages).

47 *See* 1 Nephi 16-1 Nephi 19:21 (the text contained in original Chapter V).

48 *See* 1 Nephi 16-1 Nephi 19:21.

prophetic dreams.[49] Thus the original Chapter V is the heart of the exodus narrative in 1 Nephi, the story of God's chosen people crossing the wilderness to their new promised land.

Chapter 17 in the current edition begins with the compressed account of 8 years of wandering in the wilderness, the entry into the land Bountiful, and God's command to Nephi to build a ship. The text says:

> And it came to pass that after I, Nephi, had been in the land of Bountiful for the space of many days, the voice of the Lord came unto me, saying: Arise, and get thee into the mountain. And it came to pass that I arose and went up into the mountain, and cried unto the Lord. And it came to pass that the Lord spake unto me, saying: Thou shalt construct a ship, after the manner which I shall show thee, that I may carry thy people across these waters. And I said: Lord, whither shall I go that I may find ore to molten that I may make tools to construct the ship after the manner which thou hast shown unto me? And it came to pass that the Lord told me whither I should go to find ore, that I might make tools.[50]

Like Moses in Exodus, God calls Nephi to the top of a mountain where he gives instructions on leading a chosen people to the promised land.[51] Like Moses, upon hearing God's command, Nephi is incredulous. Moses's response to the Lord on the mountain was "Who am I, that I should go unto Pharaoh, and that I should bring forth the children of Israel out of Egypt?"[52] Nephi asks "Whither shall I go that I may find ore to molten?"[53] As with Moses on the mount, God answers his servant's questions, and the servant then sets forth to obey the divine command.

After Nephi begins work on the ship, Laman and Lemuel taunt him, and when Nephi sorrows at the "hardness of their hearts,"[54] they say:

> We knew that ye could not construct a ship, for we knew that ye were lacking in judgment; wherefore, thou canst not accomplish so great a work. And thou are like our father, led away by the foolish imaginations of his heart; yea, he hath led us out of the land of Jerusalem, and we have wandered in the wilderness for these many years; and our women have toiled being big with child; and they have born children in the wilderness and suffered all things, save it were death; and it would have been better that they had died before they came out of Jerusalem than to have suffered these afflictions.[55]

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49 *See* 1 Nephi 1-1 Nephi 15 (the text contained in original Chapter I, Chapter II, Chapter III, and Chapter IV).

50 1 Nephi 17:7-10.

51 *Compare* Exodus 3.

52 Exodus 3:11. In all quotations from the Bible, I use the King James Version. Whatever its limitations as a translation, it clearly influences the language of the Book of Mormon, whose biblical allusions must be understood against the background of the KJV's language.

53 1 Nephi 17:10.

54 1 Nephi 17:19.

55 1 Nephi 17:19-20.

Tellingly, this passage seems to retell the story with which Nephi as narrator began chapter 17.[56] In contrast to their interpretation, however, Nephi presented the journey in the wilderness and the endurance of "our women" in providential terms of God's mercy.[57] In Laman and Lemuel's interpretation, "it would have been better they had died."[58]

The narrator invites the reader to interpret this passage against the background of Exodus. God's chosen people are led by revelation out of a wicked country and travel to the promised land. Their way is blocked, however, by a body of water that they are called to miraculously cross. In Exodus the body of water is the Red Sea, while in Nephi 17 it is "Irreantum, which, being interpreted, is many waters."[59] That being the case, the lament of Nephi's brothers also seems to echo the lament of the Children of Israel on the shores of the Red Sea. The Exodus story reads:

> And they said unto Moses, because there were no graves in Egypt, hast thou taken us away to die in the wilderness? Wherefore hast thou dealt thus with us, to carry us forth out of Egypt? Is not this the word that we did tell thee in Egypt, saying, Let us alone, that we may serve the Egyptians? For it had been better for us to serve the Egyptians, than that we should die in the wilderness.[60]

Both Nephi's brothers and the Children of Israel are enmeshed in a narrative irony. They both believe that they know how the story is going, but both are mistaken.

As Moses explains to the Israelites on the shores of the Red Sea:

> Fear ye not, stand still, and see the salvation of the Lord, which he will shew to you today: for the Egyptians whom ye have seen to day, ye shall see them again no more for ever. The Lord shall fight for you, and ye shall hold your peace.[61]

Likewise, Nephi will offer his own rebuke to his brother's accusations that he is a fool who cannot build a ship or cross the waters.

> And I said unto them: If God had commanded me to do all things I could do them. If he should command me that I should say unto this water, be thou earth, it should be earth; and if I should say it, it would be done. And now if the Lord has such great power, and has wrought so many miracles

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56 *Compare* 1 Nephi 17:1–4.

57 Grant Hardy has noted the paucity of references to women in the Book of Mormon, arguing that readers should be particularly attentive to situations, such as chapter 17, where the narrator makes repeated references to women. Such references, he argues, are more likely to mark deliberately structured narrative elements because of their rarity. *See* Hardy, *supra* note 11 at 18.

58 1 Nephi 17:2-3.

59 1 Nephi 17:5.

60 Exodus 14:11-12

61 Exodus 14:13-14.

> among the children of men, how is it that he cannot instruct me, that I should build a ship?[62]

Notice how Nephi's rebuke explicitly harks back to Moses before the Red Sea—"If he should command me that I should say unto this water, be thou earth, it should be earth"—reinforcing the sense that Laman and Lemuel don't really understand the story that they are inhabiting, the story of Moses and the exodus from Egypt.

Laman and Lemuel offer their own gloss on Moses in verse 22 and in so doing model a particular type of scriptural and legal interpretation. They say:

> And we know that the people who were in the land of Jerusalem were a righteous people; for they kept the statutes and judgments of the Lord, and all his commandments, according to the law of Moses; wherefore, we know that they are a righteous people; and our father hath judged them, and hath led us away because we would hearken unto his words; yea, and our brother is like him.[63]

There is a great deal that is going on in this sentence. It begins with an assertion that the people in Jerusalem were righteous. If this is true, of course, the entire journey through the desert has been pointless. The claim is justified by an appeal to Moses, but unlike the narrative references made by Nephi, the appeal is an explicitly legal one. The people of Jerusalem were righteous because they "kept the statutes and judgments of the Lord . . . according to the law of Moses."[64]

Whereas Lehi claimed that the people of Jerusalem were unrighteous because of a revelation from a pillar of fire, Laman and Lemuel come to the opposite conclusion on the basis of legal analysis.[65] Their response is rooted in a conclusion based on the formal application of rules. Note also the way that they understand Lehi's rebuke to the people at Jerusalem as a legal act—"he has judged them"[66]—one that he has performed badly. Indeed, whereas in Nephi's narrative, Lehi's preaching is evidence of his divine calling, Laman and Lemuel understand the preaching—"his words"—very differently.[67] For them the preaching, far from being prophetic or divine, was a purely rhetorical or sophistic exercise. It was an illegitimate way of getting power that is implicitly contrasted to the legitimacy of the "statutes and judgments of the Lord."[68]

Where Nephi locates Moses in the experience of his family's exodus, Laman and Lemuel locate Moses in the correct application of rules. "Statutes and judgments" dominate stories of preaching and fleeing the wrath that is to come. Nephi's response to his brothers directly attacks their understanding of Moses's significance. Where they see Moses as a law-giver whose "statutes and judgments"

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62 1 Nephi 17:50-51.
63 1 Nephi 17:22.
64 1 Nephi 17:22.
65 *See* 1 Nephi 1:6 (a pillar of fire appears to Lehi); *compare* Exodus 13:21-22 (the Children of Israel are guided through the desert by a pillar of clouds by day and a pillar of fire by night).
66 1 Nephi 17:22.
67 *Compare* 1 Nephi 1 (Nephi's account of his father's preaching).
68 1 Nephi 17:22.

provide a determinate and juridical criterion of righteousness, Nephi insists on the primacy of Moses as the hero of a story of exodus and desert redemption.

> And it came to pass that I, Nephi, spake unto them, saying: Do ye believe that our fathers, who were children of Israel, would have been led away out of the hands of the Egyptians if they had not hearkened unto the words of the Lord?[69]

Notice the way in which Nephi directly attacks his brother's criticism of Lehi's words as a means to illegitimate power. It was only by hearkening to the "words of the Lord" (not his "statutes and judgments") that the Children of Israel were redeemed. He then proceeds to recapitulate the story of the original exodus in a way that parallels the journey of the Lehite group out of Jerusalem. First, he says:

> Now ye know that Moses was commanded of the Lord to do that great work; and ye know that by his word the waters of the Red Sea were divided hither and thither, and they passed through on dry ground.[70]

This miraculous crossing of a water can be seen as a reference to the situation of Nephi before Irreantum, the great waters that he will pass through the miracle of God's revealed plan to build a ship. Next, Nephi invokes the story of the Children of Israel being fed by manna from heaven and the water that sprang forth when Moses struck the rock.[71] This also seems to be a reference to the experience of the Lehites. Immediately prior to the story of Nephi's attempts to build the ship, we have the story of how the family was threatened with starvation when Nephi broke his bow and the miraculous manner in which he was able to find food through the intervention of God.[72]

Nephi ends his recounting of the story of the exodus with the story of the invasion of Canaan.

> And after they had crossed the river Jordan he did make them mighty unto the driving out of the children of the land, yea, unto the scattering them to destruction. And now, do ye suppose that the children of this land, who were in the land of promise, who were driven out by our fathers, do ye suppose that they were righteous? Behold, I say unto you Nay.[73]

Notice that here Nephi is offering a counter criterion for judging the righteousness of a people. Where Laman and Lemuel look to the legal criteria of keeping "statutes and judgments," Nephi appeals to a violent, historical event. We can read this appeal to the invasion of Canaan against the background of Lehi's prophecies in Jerusalem. Lehi's "words," far from being an attempt to lead people into the desert and get power over them, actually consisted of an effort to save them from

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69 1 Nephi 17:23.
70 2 Nephi 17:26.
71 *See* 1 Nephi 17:28-29; *compare* Exodus 16-17 (the story of God's miraculous care of the children of Israel in the desert).
72 *See* 1 Nephi 16:18-31.
73 1 Nephi 17:32-33.

imminent military catastrophe. Nephi reads the story of Moses as ultimately judging righteousness in terms of geopolitical events.[74] This reading is reinforced by the fact that Nephi-as-narrator knows that after Lehi and his family left, Jerusalem was—like the Canaanites—destroyed by invaders—in this case the Babylonians—because of its wickedness.[75]

C. Two Approaches to Legal Interpretation

At its heart, the story in chapter 17 is about two dueling ways of understanding how one follows authoritative texts, how one follows the law. Laman and Lemuel offer a legal reading whereby scriptures provide rules that are then used to judge righteousness. Nephi, on the other hand, constructs his entire narrative around a competing view of scripture. On this view, scripture's normative power comes from the recapitulation of its stories in the lives of those that accept its authority. It orders the lives of those subject to its authority not through a set of juridical rules but rather through a set of narratives that transform existence from a mere sequence of events into the incarnation of God's working in the world.

Some readers may be skeptical of my claim that Nephi-as-narrator and his brothers are engaged in a legal debate. The text, however, supports such a legal framing. We are told that the records recovered from Laban that played such a prominent role in the early portion of the narrative contain, "the five books of Moses,"[76] and when Nephi recounts his internal dialogue justifying the murder of Laban he explicitly conceptualizes the records as a legal text. "I also thought," he says, "that they [*i.e.* his descendants] could not keep the commandments of the Lord according to the law of Moses, save they should have the law."[77] We thus cannot read Nephi as rejecting the authority of "the law" (tellingly, this is his term for the records), and the accusations of false judgment leveled by Laman and Lemuel in chapter 17 must be answered. If we don't read Nephi as offering a response to the legal claims of his brothers in chapter 17, then their central accusation is left unanswered, which seems an implausible reading given the clear self-justificatory agenda of Nephi-as-narrator. Nephi answers their charges by appropriating the narrative of Moses and exodus for himself and his father. Furthermore, this is presented as a fully adequate response to his brother's accusations of legal malfeasance. Later in the story, Nephi explains that in reading "things … which were written in the books of Moses … . I did liken all scriptures unto us, that it

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74 It should go without saying that Nephi's argument here is morally problematic, suggesting as it does that human war and violence reveal God's judgements on human beings as opposed to seeing war and violence as forms of human wickedness. Nephi as narrator is unconcerned with these objections, although later Book of Mormon narrators take a critical stance toward linking military events to judgments of wickedness or righteousness. *See* Nathan B. Oman, *Standing Betwixt Them and Justice: War and Atonement in the Book of Mormon*, *in* God Himself Will Come Down: Reading Mosiah 15 (Joseph M. Spencer & Andrew Smith eds., forthcoming) (discussing war in the Book of Mormon and the idea of discerning God's judgments in geopolitical events).

75 *See* 2 Nephi 1:4.

76 1 Nephi 4:11.

77 1 Nephi 4:15.

might be for our profit and learning."[78] In short, recapitulating in his life the story of the scriptures seems to be how Nephi seeks to "keep the commandments of the Lord according to the law of Moses."[79]

There is one final bit of evidence that Nephi is offering a legal hermeneutic. Much later in the Book of Mormon, after Nephi has been replaced as narrator by another character, we are given a glimpse of the law among his descendants:

> Now there was no law against a man's belief; for it was strictly contrary to the commands of God that there should be a law which should bring men on to unequal grounds. For thus saith the scripture: Choose ye this day, whom ye will serve.[80]

This is the only place in the Book of Mormon where a legal rule is explicitly derived from a biblical text. The scripture in this case is Joshua 24:15.[81] Strikingly, Joshua 24 is also a legal text. It presents the so-called Shechem Covenant, in which Moses's successor, Joshua, gathers the Children of Israel together at the end of his life and gives to them the choice of following God or choosing instead the gods of the Canaanites or the Egyptians.[82] The formal juridical content of Shechem covenant is given in verses 19-21, where it reads:

> And Joshua said unto the people. Ye cannot serve the Lord: for he is an holy God; he is a jealous God; he will not forgive your transgressions nor your sins. If ye forsake the Lord, and serve strange gods, then he will turn and do you hurt, and consume you, after that he hath done you good. And the people said unto Joshua, Nay; but we will serve the Lord.[83]

It would thus be entirely natural to read the Shechem Covenant as embodying the opposite rule as that given in the Book of Mormon. Far from proclaiming that there is "no law against a man's belief," the Shechem Covenant suggests that those who forsake God will be severely punished. One can, however, derive the Book of Mormon rule from the narrative content of Joshua 24. In effect, the Nephite rule puts the law follower in the position of Joshua and the Children of Israel, faced with the choice that they were given at Shechem, namely the choice to serve the Lord or "the gods which your fathers served that were on the other side of the flood, or

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78 1 Nephi 19:23.

79 1 Nephi 4:15.

80 Alma 30:7-8.

81 The verse reads, "And if it seem evil unto you to serve the Lord, choose you this day whom ye will serve; whether the gods which your fathers served that were on the other side of the flood, or the gods of the Amorites, in whose land ye dwell: but as for me and my house, we will serve the Lord."

82 This is the only passage in the Hebrew Bible where the children of Israel are given such an explicit choice to serve Yahweh or other gods. *See* Michael David Coogan, *Joshua, in* The New Jerome Biblical Commentary 110, 130 (Raymond E. Brown et al. eds. 1990) ("[M]ost remarkably, Israel is given a choice not to worship Yahweh."). This is sufficiently odd that Robert Alter suggests that the choice is meant sarcastically. *See* 2 Robert Alter, The Hebrew Bible: A Translation and Commentary 72 n.15 (2019).

83 Joshua 24:18-19.

the gods of the Amorites."[84] This is, of course, precisely the interpretive approach taken by Nephi in 1 Nephi 17, but in the later narrative it appears quite explicitly as a legal hermeneutic.

III. Laman, Lemuel, and Legal Positivism

The nature of rules and rule following has long been at the center of the philosophy of law. John Austin launched the modern debates on the topic by offering an account of rules based on the ideas of threats and punishment.[85] On his theory, a rule of law is a standing threat from a sovereign that under certain conditions he or she will mete out punishments to offenders. Austin's theory launched legal positivism by divorcing the structure of legal rules from moral norms, but it has now been rejected by virtually all positivists. As H.L.A Hart pointed out, Austin's approach to rules faces a number of difficulties.[86] Chief among these is that it fails to account for the law from an internal perspective. The good-faith rule follower makes a distinction between obeying a rule and reacting to the threats of the highwayman. Laws, Hart in effect argued, have a kind of normativity.[87] The normativity cannot be identified with moral obligations, but it cannot be reduced to the prudential avoidance of threatened sanctions.

The modern discussion of rule following has blossomed beyond the debate between Hart and Austin. Lon Fuller famously argued that governing through rules imposed certain minimal moral requirements on rulers.[88] One cannot subject human behavior to the governance of rules—Fuller's definition of law—without certain adverbial constraints on official action such as prospectively, generality, and the like.[89] More recently Frederick Schauer has developed a complex theory about the internal structure of rules.[90] Every rule, he argues, contains an implicit claim about the world. Consider the rule "No vehicles in the park." Such a rule rests on the judgment that it is dangerous to have vehicles in the park. In particular cases one might question this judgment. Perhaps driving a moped through the empty park at midnight presents no dangers. However, if one is following the rule such individual judgments are irrelevant. Rather one acts in accordance with the rule's empirical judgment as to the dangerousness of vehicles in the park regardless of one's own assessment of the fact of the matter. Schauer calls this process of deference to the implicit judgment embedded in a rule "empirical entrenchment."[91] The purpose of such entrenchment, or at any rate its effect, is to allocate decision making power between rule authors and rule followers. To obey a rule is to renounce personal judgments in favor of the authority of the rule.

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84 Joshua 24:15.

85 *See* John Austin, The Province of Jurisprudence Determined 1-25 (H.L.A. Hart ed., 1998) (1832) ("Lecture I" setting forth Austin's theory on the relationship between rules and threats).

86 *See* H.L.A. Hart, The Concept of Law 18–26 (2d ed. 1994) (setting forth Hart's criticism of Austin).

87 *See id.* at 89–91. (discussing the internal point of view of the law).

88 *See generally* Lon L Fuller, The Morality of Law (1969).

89 *See id.* at 34-94 (setting out "The Morality That Makes Law Possible").

90 *See generally* Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life (1991).

91 *See id.* at 47–53. (arguing the rules should be understood as entrenched generalizations).

Schauer's model of rules and obedience to them roughly captures Laman and Lemuel's approach to following the law. They see the righteousness of the people of Jerusalem in terms of rule following, of keeping the "statutes and judgments of the Lord." Notice that in identifying rules with God they emphasize the self-abdication involved in their allegiance to the rules. In contrast, they claim that Lehi – rather than God – has judged the people, putting Lehi's agency in the foreground. The primary function of the "statutes and judgments of the Lord" is to allocate power vertically. The emphasis is on control. The rule controls the rule follower by prohibiting certain acts. To use Schauer's language, it also controls rule appliers through the exclusionary force of empirical entrenchment. It is tempting, to read Nephi's approach as condemning this approach as mistaken. Yet in the opening chapter of the Book of Mormon, Lehi condemns the people of Jerusalem for their "abominations"[92] and he "testified [note the legal term] of their wickedness and their abominations."[93] In other words, taken on its own terms, Laman and Lemuel's legal claim is false. The people at Jerusalem were not a "a righteous people" and they had not "kept the statutes and judgments of the Lord."[94] Tellingly, Nephi's narrative makes this abundantly clear.

However, Nephi's broader approach to following the law is largely incomprensible within this framework of rule and rule following. When Nephi structures his narrative so as to draw comparisons to the story of Exodus with him and his father cast as Moses, he is making a point about following the law of Moses. He is providing a response to the accusations of unfaithfulness to the law leveled by his brothers. However, this response, with its emphasis on narrative and recapitulation, cannot fit within the framework of rule following that has developed from the contemporary debates in legal positivism and analytic jurisprudence. His approach to following the law requires a broader framework to be comprehensible.

IV. Nephi's Nomos and the Limits of Narrative

The legal theory of Robert Cover provides such a framework. Cover's approach to law places the meaning-making power of narrative at the center of our conception of law. In contrast to the dominant strains of contemporary legal philosophy, Cover relegates the process of formally applying and enforcing rules to a secondary and disfavored position in legal thought. His theory thus makes sense of the move that Nephi makes of placing the intertwining of life and narrative at the center of his response to his brothers' legal polemic. However, where Cover sees the subjective commitment to narrative at the center of law's authority, Nephi's story suggests commitment cannot ground law, which is always experienced as something in excess of subjective commitment, something that partakes of the structure of transcendence.

92 1 Nephi 1:13.
93 1 Nephi 1:19.
94 1 Nephi 17:22.

A. Robert Cover's Theory of Law

In his celebrated *Harvard Law Review* Forward, "Nomos and Narrative," Robert Cover offered a jurisprudence that placed the creation of shared meaning at the center of his conception of law.[95] According to Cover, "We inhabit a *nomos* – a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void."[96] For Cover a nomos arises out of narrative. He imagines a process of decentralized myth making within largely autonomous communities pursuing a constant process of internal story telling.

> The intelligibility of normative behavior inheres in the communal character of the narratives that provide the context of that behavior. Any person who lived an entirely idiosyncratic normative life would be quite mad. The part that you or I choose to play may be singular, but the fact that we can locate it in a common "script" renders it "sane" – a warrant that we share the same *nomos*.[97]

This process creates and maintains a normative universe independent of the official machinery of the state.[98] In the face of legal positivism, which since Austin has identified law with the state, Cover insists that the nomos created by this decentralized extra-judicial narrative making is law. He calls the process of nomos creation jurisgenesis.

The dominant model for jurisgenesis within Cover's theory is Jewish law.[99] The appeal of halakhah for Cover lies in its interpretive fecundity. The sages of the Talmud and the rabbis who have debated, expanded, and interpreted them over the intervening centuries were all engaged in a self-consciously legal project but one that operates without the support of a state and frequently in spite of it.[100] In the halakhah, Cover saw a model for law in which the creation of meaning was prioritized over the needs of brute social control. Rather, it provided a model of what he called the "paideic" use of law, namely as a resource for the creation of a nomos. Building on the insight of the 16th-century rabbi Joseph Caro, Cover writes:

> Caro's commentary and the pahorisms that are its subject suggest two corresponding ideal-typical patterns for commingling corpus, discourse, and interpersonal commitment to form a *nomos*. The first such pattern, which according to Caro is world-creating, I shall call "paideic," because the term suggests: (1) a common body of precept and narrative, (2) a common and personal way of being educated into this corpus, and (3) a sense of direction or growth that is constituted as the individual and his community work out the implications of their law.[101]

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95 *See generally* Cover, *supra* note 17.
96 *Id.* at 4.
97 *Id.* at 10.
98 *See id.* at 11.
99 *See id.* at 12.
100 *See generally* Chaim Saiman, Halakhah: The Rabbinic Idea of Law (2018).
101 Cover, *supra* note 17 at 12–13.

The second "ideal-typical pattern" that Cover identifies for the law is what he calls "the imperial mode."[102] In its imperial mode, law does not create a new nomos but rather seeks to maintain an already existing normative world through the process of cutting back new "paedeic" uses of law. It was an ideal that led Cover to an almost unrelentingly negative view of contemporary legal interpretation and adjudication. Indeed, in Cover's theory the activity of government courts is almost wholly destructive. Cover famously claimed:

> Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that this one is law and destroy or try to destroy the rest.[103]

For Cover adjudication is destructive in two ways. First, adjudication always involves choosing between rival legal interpretations. The judge faces litigants with a dispute. She must decide the case and in deciding the case, one or both of the litigants' interpretations of the law will be declared wrong, in effect killed and banished from the official legal community. Second, the decisions of judges are always tied to the violence of the state. As Cover evocatively wrote, "Legal interpretation takes place on a field of pain and death."[104] The law always contemplates violently ripping into someone's life and redirecting it in a way to which that person objects and does not choose or desire. This may be justified, but it is, in Cover's opinion, always violent and destructive in some way.

The final key concept in Cover's theory of law is commitment. There must be something that differentiates mere storytelling and interpretation from law. This is important because Cover is making the strong claim that world-creating mythmaking is an important element of the law.

> To live in a legal world requires that one known not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the "is" and the "ought," but the "is," the "ought," and the "what might be." Narrative so integrates these domains. Narratives are models through which we study and experience transformations that result when a given simplified state of affairs is made to pace through the force field of a similarly simplified set of norms.[105]

However, for these narratives to have the dignity of law they must do more than speculate about some possible utopian future. "[L]egal interpretation cannot be valid if no one is prepared to live by it."[106] He goes on to write, "The transformation of interpretation into legal meaning begins when someone accepts the demands of interpretation and, through the personal act of commitment, affirms the position

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102 *Id.* at 14.
103 *Id.* at 53.
104 Robert M. Cover, *Violence and the Word*, 95 Yale L.J. 1601 (1986).
105 Cover, *Nomos and Narrative*, *supra* note 17 at 10.
106 *Id.* at 44.

taken."[107] Cover thus offers a vision of the law that is centered on the power of narrative coupled with personal commitment to create a normative world that gives rules their meaning and power. The formal process of enforcement, which has been at the center of our thinking about law since at least Austin, is given the secondary and potentially destructive role of merely maintaining the nomos created by law in its paideic guise.

Nephi's approach to legal interpretation bears a striking resemblance to Cover's theory of jurisgenesis. Given what is ultimately their common origin in the reading of the Bible, this is unsurprising. Laman and Lemuel ostensibly seek to follow the law, the "statutes and judgments of God." They see those judgments only in terms of control and as ultimately, to use Cover's term, jurispathic. In effect, they wish to invoke legal rules in order to negate the new systems of meaning promulgated by Lehi and Nephi, systems of meaning that have upended the family's life. Nephi's approach to legal interpretation, in contrast, gives rise to a new nomos. By recapitulating the story of Exodus, Lehi and his family are following "the law of Moses" but in doing so they literally create a new nation in a new promised land. The Book of Mormon is thus faithful to Cover's injunction that "We ought to stop circumscribing the *nomos*; we ought to invite new worlds."[108] Nephi offers up a model of following the law of Moses that is far more open to new worlds than that proposed by Laman and Lemuel. Where they reduce the law to the narrow question of whether Lehi has correctly judged the people of Jerusalem according to "the statutes and judgments of the Lord," Nephi's narrative recapitulation of the story of the law creates a new chosen people, a new exodus, and a new promised land. This seems to be precisely the kind of nomos-creating interpretive fecundity that Cover celebrates.

In Cover's theory, Nephi's narrative would rise to the level of law because he "accepts the demands of interpretation" through "the personal act of commitment." Indeed, Nephi literally inscribes his new interpretation of the law on his life and the life of his family. He is not spinning merely discursive narratives and interpretations. Rather, the story of his family is written, to use the words of the colophon with which he introduces his narrative, in "their sufferings and afflictions in the wilderness."[109] Legal interpretation for Nephi also takes place on a field of pain and death, but it is not the pain and death meted out by the bureaucratized violence of the state lamented by Cover. Rather it is the pain and death of a story written on one's life, a life that cannot be recovered once it has been wagered on an interpretation of God's law. However while Nephi's story fits within Cover's approach to law, it also challenges the primacy Cover accords to commitment as the mechanism by which interpretation becomes law.

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[107] *Id.* at 45.

[108] *Id.* at 68.

[109] *See* 1 Nephi 1:1. The text of chapters and verses in 1 Nephi is preceded by a lengthy colophon summarizing the content of the book. Unlike the chapter headings in the current edition of the Book of Mormon, which were added in 1981 as a reference aid, this colophon is part of the original Book of Mormon text. *See generally* Thomas W. Mackay, *Mormon as Editor: A Study of Colophons, Headers, and Source Indicators*, 2 J. Book Mormon Stud. 90 (1993); John A. Tvedtnes, *Colophons in the Book of Mormon*, *in* Reexploring the Book of Mormon: A Decade of New Research 13 (John W. Welch ed., 1992).

B. Law Beyond Narrative

What seems to be missing from Cover's account of nomos is any role for the transcendent, for something beyond ourselves that presses in and makes demands. On his account of jurisgenesis, it is the process of narrative coupled with commitment that transforms interpretation into legal meaning. This is ultimately a highly subjective notion of how a nomos is founded. On his account the only outside force that interrupts the process of narrative and commitment is the imperial force of adjudication and violence. Cover's invocation of commitment – with its echoes of a self-creating existentialist morality, albeit one embedded within a communal discourse – is striking precisely because the examples of jurisgenesis on which he draws involve mainly insular religious communities.[110] These communities see themselves as called by God rather as founding themselves through narrative and commitment.[111]

Consider the famous Talmudic story of the Oven of Akhnai, a narrative that would seem to provide the quintessential example of Cover's ideal of jurisgenesis. The story begins with a dispute between Rabbi Eliezer and the other rabbis over the ritual status of a certain kind of stove.[112] Rabbi Eliezer defends the purity of the stove, but the other rabbis are unpersuaded. He then appeals to a series of miracles in favor of his interpretation. At his word, a tree uproots itself and moves across the land. "A carob tree is no argument," respond the rabbis.[113] The water of a brook then reverses direction. "A stream is no argument," they respond.[114] Rabbi Eliezer says, "If the law accords with my opinion, let the walls of this House of Study demonstrate it!" and the walls begin to bend.[115] Rabbi Joshua, however, rebukes the building. "If the Sages debate among themselves on a point of halakha, what has this to do with you?" he says.[116] Finally, Rabbi Eliezer appeals to heaven and a voice cries out from above, "Why do you challenge Rabbi Eliezer, for the halakha accords with him in all matters!"[117] Rabbi Joshua, however, remains unmoved. "It [*i.e.* the Torah] is not in Heaven," he says.[118] We then learn that God laughs and says, "My children have outvoted Me, my children have outvoted Me!"[119] The story is fascinating, suggesting as it does the primacy of individual interpretation and judgment over even the claims of divine authority. Cover's theory of law offers up something like this hope. He seems to imagine the halakhic tradition detached from claims to divine authority, a model in which a pluralistic process of jurisgenesis can proceed ad infinitum.

Whatever the attractions of such a vision, however, it is doubtful that the Oven of Akhnai story points toward such a process. The story responds to the condition

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110 *See, e.g.,* Cover, *supra* note 17 at 26-35.
111 See id.
112 The story is contained in Babylonian Talmud in the Second Tractate Bava Metzi'a 59a. *See* The Talmud: A Selection 469–472 (Norman Solomon tran., 2009).
113 *Id.* at 469.
114 *Id.* at 469.
115 *Id.* at 469.
116 *Id.* at 470.
117 *Id.* at 470.
118 *Id.* at 470.
119 *Id.* at 470.

of Jewish law in the generations after the destruction of the Second Temple.[120] Having lost the centralizing authority that existed prior to the Diaspora, the rabbis were looking for a mechanism to keep Judaism from fragmenting into a chaos of sectarian interpretive communities. The solution was not to embrace the joy of anarchic interpretation. Rather, it was to adopt a juridical rule in which the majority interpretation of the rabbis on a point of law was granted authority against contrary interpretations.[121] This is what happened between Rabbi Eliezer and the rival rabbis in the Oven of Akhnai story. Rabbi Eliezer was trying to justify his minority interpretation in the face of the majority. The Talmud ends the story by saying "On that day they brought all the things Rabbi Eliezer had declared pure and burnt them, then voted to place him under ban."[122] Far from celebrating individual interpretation or hermeneutic pluralism, the Oven of Akhnai is about subjecting interpretation to a non-interpretive rule of social control. To be sure, the story acknowledges the costs of this approach. After his excommunication, the grief of Rabbi Eliezer is titanic.[123] On Cover's view, one would be forced to see the ban against Rabbi Eliezer as a simple exercise of the jurispathic function by the other rabbis. However, something else is going on here as well.

In a sensitive essay on Cover's jurisprudence, Suzanne Last Stone argues that ultimately Jewish law cannot provide the counter narrative to modern jurisprudence for which Cover was searching.[124] He wished to frame law as independent of the violence of authority or the teleological search for some objective truth of the matter regarding legal texts. In its place, he hoped for a world in which legal interpretation—and especially constitutional interpretation—was an endlessly open system of plural meanings. The halakhah, Stone argues, is far more teleological than Cover's relentless prioritizing of jurisgenesis requires. She insists that:

> [Cover and his disciples] should be cautious not to derive too many lessons from the counter-text of Jewish law. For, in the final analysis, Jewish law is not only a legal system; it is the life work of a religious community. The Constitution, on the other hand, is a political document. It may even be a nomos, in the Maimonidean sense of the term. But it will not be Torah.[125]

There are similar limits on the model of jurisgenesis in the Book of Mormon. Nephi offers up a way of following the Law of Moses that is far more open to new worlds than that proposed by Laman and Lemuel. Where they reduce the law to the narrow

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120 *See* 1 Menachem Elon, Jewish Law: History, Sources, Principles 41-46 (1994) (discussing the periodization of Jewish legal history).

121 *See id.* at 245-247 (discussing how halakhic authority serves to limit sectarian schism); *see also id.* at 260-264 (discussing the Oven of Ahknai and halakhic authority).

122 The Talmud, *supra* note 110 at 470.

123 The Babylonian Talmud says upon hearing of the ban:

> Thereupon Eliezer himself rent his garments, removed his shoes, slipped from his seat and sat upon the ground. His eyes filled with tears, and as they did so the world suffered; olives, wheat and barley all lost a third, and some say that even the dough that women were kneading spoiled.

Id. at 471.

124 *See* Stone, *supra* note 17.

125 *Id.* at 894

question of whether Lehi has correctly judged the people of Jerusalem according to "the statutes and judgments of the Lord," Nephi's narrative recapitulation of the story of the law creates a new chosen people, a new exodus, and a new promised land. This seems to be precisely the kind of nomos-creating interpretive fecundity that Cover celebrates. However, Nephi's confrontation with his brothers ultimately presents the Oven of Akhnai in reverse. He does not seek to refute Laman and Lemuel's claim regarding "the statutes and judgments of the Lord" with arguments about the facts of the case, the scope of the rules, or even the spirit that animates them. Rather, the disagreement with his brothers turns violent. Nephi recounts how "they were angry with me, and were desirous to throw me into the depths of the sea."[126] His response to their violence is not argument but an appeal to the authority of supernatural intervention on his behalf. He says:

> In the name of the Almighty God, I command you that ye touch me not, for I am filled with the power of God, even unto the consuming of my flesh; and whoso shall lay his hands upon me shall wither even as a dried reed; and he shall be as naught before the power of God, for God shall smite him.[127]

It would be unfair to equate the morally serious Rabbi Joshua in the Oven of Akhnai narrative with the murderous Laman and Lemuel in the Book of Mormon. It is striking, however, that the Book of Mormon narrative vouchsafes Nephi's interpretation not through commitment or the jurispathic function of courts but through the literal presence of God's power. The Book of Mormon thus shares with the Oven of Akhnai a teleological concern with the preservation of community and the proliferation of interpretations. Where the aggadah in the Talmud points toward the principle of majority interpretation, however, the Book of Mormon accepts the authority of miraculously wandering trees, brooks turned upstream, bending walls, voices from heaven, and a younger brother smiting his faithless siblings with the power of God. In the end, Nephi's jurisprudence cultivates the interpretive fecundity of the law, but it also testifies to the inadequacy of mere commitment standing alone to found a community.

The climax of Nephi's story also points towards something more than simply "the imperial mode." It is a claim to law that rests on an eruption into the world of some transcendent authority. When Rabbi Joshua says that the Torah is not in heaven, he is making a similar claim. He is saying that the authority of the rabbi's interpretive project is dependent on the divine blessing placed on their activity when God committed the Torah to their care. In this, his claim is actually quite similar to the claim put forward by Nephi to ground his authority on miraculous power. Both appeal beyond interpretation and subjective commitment.

This claim can be made more precisely. From an "internal point of view," to borrow a phrase from H.L.A. Hart, law is founded on transcendence rather than commitment. As I have written elsewhere:

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[126] 1 Nephi 17:48.
[127] 1 Nephi 17:48.

> Law provides a kind of sacred space for secular societies. It guides and controls actions. It coerces. It may be justified or not justified. But it does more than this. It maintains the constant experience of something pressing in on us from beyond, a claim to authority that displaces our individual judgments. It creates an order, a *nomos* in Cover's terms, but not because it provides a place for our constant self-creation (although it may do this). Rather in claiming authority it points us back to the experience of transcendence, which seems to be a hunger that cannot be satiated even when we vociferously insist that our laws are not Torah and do not come from God.[128]

This is true even in our disenchanted world.[129] Law still functions within practical reasoning as a form of authority. When a lawyer is advising a client on what to do, the law purports to act as an exclusionary reason. In other words, it presses in on our normative deliberations and demands that we set aside our own all-things-considered judgments and abnegate ourselves before its superior claims.[130] To be sure, this claim to authority is suspect and in many cases it will be pernicious. My point is about the phenomenology of law not the legitimacy of its substantive claims. This is a claim about how we experience law, not a suggestion that human laws are divine or should be treated as such. However, as a necessary element of legal experience it must be grappled with by any jurisprudence perhaps especially one such as Cover's that purports to explain how mere interpretation can become law. The necessity of some transcendent element beyond interpretation or commitment is the ultimate burden of Nephi's account of law.

V. Conclusion

The Book of Mormon had a scandalous birth. It came into the world surrounded by stories of angels and miracles along with accusations of fraud and humbug. Too often it has been unable to escape the allure of its origin story. However, the text of the book reveals itself as far more subtle and complex than the polemics of belief and disbelief would suggest. It repays close reading. In the stories of conflict between Nephi and his brothers that open the book, we have an argument about rule following that implicates basic questions of how we think about law. Strikingly, Nephi's account of law following in terms of narrative re-enactment makes little sense within the traditional categories of analytical jurisprudence but fits well within Robert Cover's theory of jurisgenesis. The climax of Nephi's story,

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128 Nathan B. Oman, *Temple, Talmud, and Sacrament: Some Christian Thoughts on Halakhah*, 64 Villanova L. Rev. 743–56, 756 (2019).

129 The image of the disenchanted world was first offered by Max Weber as a description of a society dominated by desacralized formal bureaucracies. *See generally* Max Weber, The Vocation Lectures (David Owen ed., 2004). (As several writers have pointed out, however, the disenchantment has by no means been as total as Weber prophesized. *See generally* Yishai Blank, *The Reenchantment of Law*, 96 Cornell L. Rev. 633–670 (2011); Richard Jenkins, *Disenchantment, Enchantment and Re-Enchantment: Max Weber at the Millennium*, 1 Max Weber Stud. 11 (2000).

130 *See* Joseph Raz, The Authority of Law: Essays on Law and Morality 21–25 (2d ed. 2009) (arguing that law presents itself as a kind of exclusionary reason).

however, challenges Cover's account of how interpretation becomes law. Where Cover pointed toward the priority of commitment to narratives, Nephi points toward the direct intervention of the transcendent in narratives. This is a dramatic claim about the structure of legal experience. Law claims to come from beyond us. It is not something that we subjectively create through our commitment. Indeed, part of what makes it such a fruitful site for the myth-making valorized by Cover is precisely the fact that it comes at us from a higher authority rather than arising from our subjective commitment. In religious legal systems the divine provides the source of legal transcendence. This point is illustrated in different ways by both the Book of Mormon and the story of the Oven of Aknai. If Nephi's account of how interpretation and transcendence interact to create a nomos is correct, then Cover's account of legal interpretation must locate the source of legal authority outside of the process of interpretation and commitment. We must grapple with the way in which legal authority erupts into our lives from some place beyond subjective commitment.

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Government Speech

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ABSTRACT

The First Amendment commands government neutrality in regulating private speech, but government speech itself is exempt from this requirement. Courts have recognized that governance entails educational, informational, and persuasive speech, and have focused on distinguishing government speech from nongovernment speech. Some critics have argued that, instead, courts might do well to target government speech that manipulates public opinion or abridges private speech, as it is the consequences of the speech and not the nature of the speaker that really matters. The basic problem remains unsolved: If courts treat government speech as covered by the First Amendment, the practical utility of government speech disappears. But if courts deny that government speech is covered by the First Amendment, government speech may silence or overwhelm private speech and much of the practical utility of the First Amendment may disappear.

KEYWORDS

Government speech, First Amendment, neutrality

CONTENTS

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> "It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects– which is the main reason we have decided to elect those who run the government, rather than save money by making their posts hereditary."
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> Scalia, J., concurring, *National Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998).

"Governments must speak in order to govern."[1] Governance entails communication, that is, government speech. Government may, in a sense, speak to itself, when officials or agencies communicate with each other. But the government speech that has attracted by far the most interest is when officials or agencies speak to segments of the larger society or subsidize or designate others to do the speaking. Government speech here "provides the facts, ideas, and expertise not available from other sources [and thus is] a necessary and healthy part of the system."[2] Government speech seeks to influence our conduct (get vaccinated, obey traffic signs) and our thoughts (don't be racist, love your country), in large ways and small, and it never stops. A strict libertarian might reduce government speech substantially, but even he or she would not abolish it altogether – and, in any event, that position has almost no support. Government, then, speaks for the people and to the people.

The importance of government speech was probably self-evident to the first governments that were established thousands of years ago. In America, its impact has been greatly amplified over the past century and a half, partly as a result of governments taking on innumerable roles and functions and partly as a result of vast improvements in communications technology. Woodrow Wilson pointed to the salience of government speech in 1887, when he observed that the chief purpose of congressional deliberations was the education and enlightenment of the citizenry.[3] Today, however, when we think of government speech, we most often refer to the executive branch. Jeffrey Tulis, in his classic *The Rhetorical Presidency*,[4] argued that until Wilson, presidents spoke mostly to Congress, but since his administration have chosen to communicate directly with the public. Tulis may have exaggerated both the historical discontinuity[5] and the impact of the bully pulpit,[6] but there can be no question that modern presidents head a sizable communications apparatus of advisors, pollsters, speech writers, and others, and take the importance of government speech extremely seriously. In addition to the president, vast executive agencies at the national, state, and local levels have also undertaken communicative responsibilities that touch on nearly every aspect of life, utilizing thousands of websites as well as public and private meetings, television and radio, and traditional print media.

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1 Helen Norton, The Government's Speech and the Constitution 1 (2019).

2 Thomas I. Emerson, The System of Freedom of Expression 698 (1970).

3 Woodrow Wilson, Congressional Government: A Study in American Politics (1885). Subsequent members of Congress have echoed this belief, *e.g.*, J. William Fulbright, *The Legislator as Educator,* 57 For. Affs. 719 (1979).

4 Jeffrey K. Tulis, The Rhetorical Presidency (1987).

5 *See* Mel Laracey, *The Rhetorical Presidency Today: How Does It Stand Up?* 39 Pres. St. Q. 908 (2009).

6 *See* George C. Edwards III, On Deaf Ears: The Limits of the Bully Pulpit (2003).

I. The Birth of Government Speech

The importance of the category, government speech, lies in its exemption from the general rule that the First Amendment mandates government neutrality in its treatment of speech, that is, content neutrality as to subject matter and viewpoint neutrality as to how normatively the subject matter is addressed. There are a few isolated exceptions, like true threats, but otherwise content-based restrictions must meet the tough strict scrutiny test that requires that government justify abridging free speech by pointing to a compelling interest and a narrowly tailored law. The importance of the general rule of government neutrality is evident in the celebrated words of Justice Jackson: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[7] As Justice Thurgood Marshall phrased it, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content."[8] The importance of all this is widely taken for granted.

Why the fixation on speech neutrality? The central argument has always been that when the government speaks, its voice is not like that of everybody else, for it "is likely to be the biggest, loudest, best-funded speaker on the block—by far."[9] Perhaps, "the size of the audience [is] wholly irrelevant to First Amendment issues,"[10] but government possesses a unique capacity to amplify its speech, which carries with it a unique capacity to affect political, social, and economic discourse. Government begins with significant advantages over other speakers: it has an unparalleled capacity to get its messages to the public; it generates enormous amounts of information and has access to an incomparable range of information sources, some of them classified secret; portions of the population may regard its messages as inherently believable; and it may be able to use its monopoly over the use of legitimate force to intimidate, silence, or weaken opponents. In the words of Stephen Gardbaum, "A way of life that the state endorses and promotes, even through symbolic or persuasive means, is an 'authorized' way of life. … . individuals may defer to the state's authority, just as we normally wish them to do in the case of general obedience to the law."[11] On many subjects, not least its own preservation, government is not neutral. Sometimes, as with public schools, it speaks to a captive audience.[12] In all this, it is well to remember that government cannot speak; persons speak in its name, and these persons inevitably have their own interests to protect and advance. "Government" may present an abstract appearance, but its reality will have a personal dimension

However, government does not possess only advantages, for it is also true

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7 W. Va. State Bd. Educ. v. Barnette, 319 U.S. 624, 642 (1943).

8 Police Dep't v. Mosely, 408 U.S. 92, 95 (1972).

9 Steven D. Smith, *Why Is Government Speech Problematic? The Unnecessary Problem, the Unnoticed Problem*, and *the Big Problem,* 87 Denv. U. L. Rev. 945, 950 (2010).

10 United States v. Auto Workers, 352 U.S. 567, 595 (1957) (Douglas, J., dissenting).

11 Stephen Gardbaum, *Liberalism, Autonomy, and Moral Conflict,* 48 Stan. L. Rev. 385, 398 (1996).

12 In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Supreme Court ruled that states cannot monopolize education, but as the vast majority of students attend public schools, the captive audience phenomenon applies throughout the nation.

that unlike private persons, government may be held politically accountable for its speech. Too, a portion of the population regards government as inherently corrupt and hardly believes it at all. Still, the examples of abusive government speech in authoritarian societies—think Goebbels in Nazi Germany—have sensitized us to its extraordinary potential impact. In America, too, the periods of major attacks on political dissent—the sedition controversy under John Adams, the repeated repression of abolitionists prior to the Civil War, the suppression of anti-war speech during World War I, and the Red Scare of the 1940s and '50s—saw government speech playing a dominant role. Other high profile incidents, like the 1996 official harassment of a heroic security guard, Richard Jewell, as an Olympic bomber, have added to the public skepticism toward government speech.[13]

To the extent that government reflects the will of elected officials, it is not *supposed* to be neutral. To take an example, if elected officials decide to fund public schools, but not charter schools or parochial schools, government will favor public schools and not charter schools and parochial schools, and government speech will reflect that decision. Indeed, if government ignored the will of officials and in its speech was neutral as to charter schools, parochial schools, and public schools, we would say something was deeply wrong. Similarly, if government instructs those public schools to train students to be good citizens and instead schools were neutral on the question, we would also say that something was deeply wrong. If we do not expect government to be neutral, why would we expect (or demand) that government speech be neutral? The purpose of speech generally is to affect the conduct and beliefs of others; why should government speech be different?

The noted polemicist, Stanley Fish, answers that valorizing neutrality

> will always and necessarily proceed from the vantage point of some currently unexamined assumptions about the way life is or should be, and it is these assumptions, contestable in fact but at the moment not contested or even acknowledged, that will really be generating the conclusions that are supposedly being generated by the logic of principle. … . Judgment without partiality … is not an option for human beings.[14]

Neutrality, like other principles, is a rhetorical trick, a con that both justifies and hides the play of self interest. Yet there is a circularity here; of course, the self pursues what it is interested in and prefers. What else could it pursue? The real issue (which Fish dodges) is what the interest is. That I pursue my self interest need not be a bad thing or hostile to the public good, however this is conceived. Moreover, even if, *arguendo*, one accepts that abstractions are mere rationalizations, may they not be rationalizations for beliefs in tolerance and fair play? Taken seriously, Fish seems to reject the whole enterprise of rational justification, urging us to rely on our own moral commitments. But suppose these commitments are also

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[13] The episode was made the subject of a 2019 movie. *See* Richard Jewell (Warner Bros. Pictures 2019).

[14] Stanley Fish, The Trouble with Principle 3, 113 (1999). Jedediah Britton-Purdy et al. argue that the ideal of neutrality should be replaced by that of equality. Jebediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 Yale L. J. 1784, 1824 (2020).

mere rationalizations for self-interest? Why should they be exempt from this general phenomenon? Wouldn't examining these commitments through the lens of neutrality at least introduce the possibility of discouraging abuse? In the end, one is reminded of Voltaire's warning that the best can be the enemy of the good; the neutrality principle, like other human constructs, is radically imperfect, but this is not cause for its rejection. Indeed, it contributes to free expression's multiple goals, including political accountability,[15] the pursuit of truth,[16] self- realization,[17] and participation in self-government.[18]

Are there, then, too many goals? The political theorist, Judith Shklar, concluded that individualism and pluralism had ruled out a consensus on virtues, leaving a consensus only on a single goal: condemning cruelty as the worst vice. Hence, a political skepticism built on fear, in place of America's congenital optimism inferred from its exceptionalism.[19] The First Amendment, however, generally protects even cruel speech. The British philosopher and historian of ideas, Isiah Berlin, believed that value conflicts are "an intrinsic, irremovable element of human life," and that there is no moral hierarchy or common measure that commands a consensus that would allow us to resolve these conflicts to the satisfaction of all.[20] Accordingly, Berlin recommended not value relativism, which in the end leads to nihilism, but value pluralism, which enforces a kind of live-and-let-live toleration. This approach may most closely resemble the workings of the First Amendment. But in the context of government speech, how to enforce this attitude in the face of officials convinced that their speech will do good? As Charles Fried observed, "The greatest enemy of liberty has always been some version of the good."[21]

Until fairly recently, government speech received little attention. It had been addressed three-quarters of a century ago in a well publicized report from the Commission on Freedom of the Press[22] and also treated in a scattering of academic publications,[23] but the Supreme Court had not considered it in any depth. In *West Virginia Board of Education v. Barnette*, in the midst of World War II, the Court struck down government speech in the form of a pledge of allegiance mandated for school children.[24] In *Speiser v. Randall*[25], the Supreme Court reversed a statute that made a veteran's property tax exemption conditional on taking a loyalty oath. Speaking for the Court, Justice Brennan found it "a discriminatory denial [that] necessarily will have the effect of coercing the claimants to refrain from proscribed speech.'"[26] Thus, "to deny an exemption to claimants who engage in certain

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15 Vincent Blasi*, The Checking Value of First Amendment Theory*, 2 Am. Bar Found. Res. J. 521 (1977).

16 John Milton, Areopagitica (1644)

17 Emerson, *supra* note 2, at 6.

18 Alexander Meiklejohn, Political Freedom (1960).

19 Judith N. Shklar, Ordinary Vices (1984).

20 Isiah Berlin & Ian Harris, Liberty 213 (Henry Hardy ed. 2002).

21 Charles Fried, Modern Liberty 17 (2006).

22 Zacharia Chafee, Jr., Government and Mass Communications (1947).

23 *E.g.*, Ted Finman & Stewart Macauley, *Freedom to Dissent: The Vietnam Protests and the Words of Public Officials*, 1966 Wis. L. Rev. 632; Emerson, *supra* note 2, ch.19.

24 *Barnette*, 319 U.S. 624.

25 Speiser v. Randall, 357 U.S. 513 (1958).

26 *Id.* at 518, 519.

forms of speech is in effect to penalize them for such speech."[27] In dicta in *CBS v. Democratic National Committee* (1973), Justice Stewart, concurring, declared that the First Amendment "protects the press from government interference; it contains no analogous protection for the government."[28] In *Keller v. State Bar of California*,[29] Chief Justice Rehnquist observed, "if every citizen were to have the right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed."[30] If government speech was not limited by the Free Speech Clause, however, it remained limited by other constitutional provisions, including the Establishment Clause and the Equal Protection Clause.

In the development of the notion of government speech, by common consent[31] a key case is *Rust v. Sullivan* (1991). Like the earlier cases, it did not turn on government itself speaking, but on its compelling or designating others to give voice to a government message. For some years, the Department of Health and Human Services' family planning regulations had prohibited institutions receiving federal funds from using them to perform abortions,[32] but had permitted physicians to discuss abortion with their patients. This changed, when the Reagan administration published regulations in 1988 that denied physicians permission to "encourage, promote or advocate abortion as a method of family planning,"[33] even if the woman specifically requested the information. The key phrase, "method of family planning," was not defined. From the outset, the new policy was highly controversial.[34]

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27 *Id*. at 518.

28 412 U.S. 94, 139.

29 Keller v. State Bar of California, 496 U.S. 1 (1990).

30 *Id.* at 13. However, the Court ruled that the state bar's using mandatory dues to pay for political activities, subject to the approval of the California Supreme Court, did not constitute government speech.

31 *See e.g*., Legal Services Corp. v. Velazquez, 531 U.S. 533, 541 (2001); Alyssa Graham, *The Government Speech Doctrine and Its Effect on the Democratic Process*, 44 Suffolk L. Rev. 703, 707 (2011); Jessica Pagano, *The Elusive Meaning of Government Speech*, 69 Ala. L. Rev. 997, 1002-4 (2018); Andy G. Olree, *Identifying Government Speech*, 50 Conn. L. Rev. 365, 374, 412 (2009); Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental,* 83 N.Y.U. L. Rev. 605, 617 (2008); Alan C. Hake, *The States, a Plate, and the First Amendment: The "Choose Life" Specialty License Plate as Government Speech*, 85 Wash. U. L. Rev. 409, 422 (2007); David S. Ardia, *Government Speech and Online Forums: First Amendment Limitations on Moderating Public Discourse on Government Websites,* 2010 B.Y.U. L. Rev. 1981, 2011 Carl G. DeNigris, *When Leviathan Speaks: Reining in the Government-Speech Doctrine Through* a *New and Restrictive Approach*, 60 Am. U. L. Rev. 133, 140 (2010)..

32 42 U.S.C. § 300 a-6.

33 53 Fed. Reg. 2923-24, codified as 42 C.F.R. § 59 (1989). *See* Carole I. Chervin, *The Title X Family Planning Gag Rule: Can the Government Buy up Constitutional Rights?* 41 Stan. L Rev. 401, 406 (1989).

34 *E.g*., Editorial, *Get Rid of the Gag Rule*, N.Y. Times, July 13, 1991. Most legal commentary was hostile to the policy, *e.g.,* C. Andrew McCarthy, *The Prohibition on Abortion Counseling and Referral in Federally-Funded Family Planning Clinics,* 77 Calif. L. Rev. 1181 (1989) Alexandra A.E. Shapiro, *Title X, the Abortion Debate, and the First Amendment*, 90 Colum. L. Rev. 1737 (1990). But *cf.,* Theodore C. Hirt, *Why*

At issue was whether Dr. Irving Rust, the medical director of a Planned Parenthood clinic receiving Department of Health and Human Services family planning funds, could be prevented by law from discussing abortion with his patients. The speech was Rust's, not the government's, but by funding him, government in effect designated him as its agent.[35] The term "government speech" did not appear in the Court's opinion.[36] The law also required that if the clinic performed abortions, those facilities must be "physically and financially separate" from other facilities.[37]

Rust maintained that the regulation on its face violated the free speech rights of both doctors and patients. They were allowed to discuss continuing the pregnancy till birth but not the option of abortion, even though the Supreme Court had earlier established the woman's right to make that choice as a fundamental right.[38] A federal district court and the second circuit both found for the government, and the Supreme Court granted *certiorari* to hear Rust's appeal.

Chief Justice Rehnquist, speaking for a five to four majority, conceded that the "family planning" language of the statute was ambiguous,[39] but following *Chevron* deference,[40] thought the interpretation of the department was plausible and did not conflict with Congress' expressed intent. The legislative history was also so unclear as not to be determinative. The law provided that "None of the funds appropriated ... shall be used where abortion is a method of family planning,"[41] and Rehnquist thought the department was within its authority to ban counseling, referral, and advocacy under this heading. Nor did separating the abortion facilities from the remainder of the program compromise the program's integrity, for the law was so ambiguous that it was not clear that Congress intended that the health care system be integrated: in any event, the separation did "not represent a deviation from past policy."[42] The department's new regulation helped the public avoid the misimpression that federal funds were being used improperly for abortion activities. Bad patient experiences prior to the changed policy plus a public opinion that now was "against the elimination of unborn children by abortion"[43] also supported the ruling.

Only after these excursions into administrative law did Rehnquist address First Amendment concerns. He made explicit the importance of the canon requiring

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the Government Is Not Required to Subsidize Abortion Counseling and Referral, 101 Harv. L. Rev. 1895 (1988).

35 This was the interpretation made in subsequent cases, e.g., *Velazquez*, 531 U.S. 533, 541.

36 Justice Scalia thought it was not a government speech case, as it would be "hard to imagine what subsidized speech would not be government speech." *Id*. at 554.

37 C.F.R. § 59.9.

38 Roe v. Wade, 410 U.S. 113 (1973). The Court has since famously revisited this case in *Dobbs v. Jackson Women's Health Organization,* _U.S._, 142 S.Ct. 2228 (2022).

39 Rust v. Sullivan, 500 U.S. 173, 184 (1991).

40 Chevron v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984).

41 Public Health Service Act, title X, § 1008.

42 *Rust,* 500 U.S. 173, 188.

43 *Id*. at 187. Rehnquist's reading of public opinion is problematical. Sixty-nine percent of respondents in one poll favored the *Rust* ruling. Joyce Price*, Foley Admits Veto of Abortion Bill Could Be "Impossible to Override*," Wash. Times, June 25, 1991. At the same time, another poll found that over three-quarters of respondents supported legislation permitting discussion of abortion. Elaine S. Povich, *Democrats Alter Tactics in Abortion Rights Fight*, Chi. Trib., June 14, 1991.

courts to seek constitutional interpretations of statutes,[44] itself a corollary of the counter-majoritarian nature of judicial review. Following this, his principal point was that there "is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."[45] Government need not be neutral in encouraging activities, but may choose some and reject others. Here, "the government ... has merely chosen to fund one activity to the exclusion of the other."[46] In rejecting the funding of abortion counseling, it was under no obligation to subsidize the opposing view. To hold otherwise would be to embrace the absurd conclusion that when Congress created a National Endowment for Democracy, it also was "constitutionally required to fund a program [encouraging] communism and fascism."[47] Doctors were free to counsel abortions, as were medical agencies, but they simply were not entitled to have the government pay for their efforts. That women had a constitutional right to choose to have an abortion did not imply an affirmative duty on the part of government to fund that choice by paying for counseling. Thus, their free speech rights were unimpaired. Mandating government viewpoint neutrality would "render numerous government programs constitutionally suspect."[48]

There still remained the question as to whether the regulation conditioned the funding on relinquishing the constitutional right to speak. Rejecting this claim, Rehnquist maintained that "the government is not denying a benefit to anyone but is instead simply insisting that public funds be spent for the purposes for which they were authorized."[49] Unconstitutional conditions, he added, would "involve situations in which the government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program."[50] Here, however, "The employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project."[51] The government is free to advance its own message that abortion is an inappropriate means of family planning, and it does so by blocking contrary messages. By agreeing to accept federal funds, Rust implicitly agreed to follow this rule. Sometimes, government speech is intended to protect a manipulable audience imperiled by powerful speakers, for example, by mandating warning statements on cigarette packs and providing informational material with prescription drugs. Rehnquist, perhaps dismissing this practice as the acts of a nanny state, did not apply the principle to *Rust.*

As to the regulation's impact on the doctor-patient relationship, Rehnquist thought it was not significant. The program did not offer post-conception medical

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44 *Rust,* 500 U.S. 173, 190.
45 *Id*. at 193 (quoting *Maher v. Roe*, 432 U.S. 464, 475 (19770).
46 *Id*.
47 *Id.* at 194. "In sponsoring Nancy Reagan's 'Just say No' anti-drug campaign, the First Amendment did not require the government to sponsor simultaneously a 'Just Say Yes' campaign." DKT Int'l v. U.S. Agency for Int'l Devel., 477 F.3d 758, 761 (D.C. Cir. 2007).
48 *Rust*, 500 U.S. 173, 194.
49 *Id*. at 196.
50 *Id.* at 197.
51 *Id*. at 199.

services, and so patients would not expect that it would discuss abortions.[52] If indigent women suffered as a consequence of the policy, the fault lay with their indigence, not the policy.[53]

In a lengthy and angry dissent, Justice Blackmun had little patience with the majority's reliance on administrative law. In a case where "Congress intends to press the limits of constitutionality,"[54] he thought *Chevron* deference would not apply; instead, Congress must "express ... intent in explicit and unambiguous terms."[55] In the absence of this clear intent, as in this case, he thought it plain that the views of a politically accountable Congress should prevail over those of an unaccountable agency. He thus turned Rehnquist's point on the antidemocratic character of judicial review on its head.

The administrative law arguments seemed to Blackmun a "disingenuous"[56] distraction from the central First Amendment issue: "the extent to which the government may attach an otherwise unconstitutional condition to the receipt of a public benefit."[57] For "the first time," he wrote, the Court sanctioned "viewpoint-based suppression of speech simply because the suppression was a condition upon the acceptance of public funds."[58] The regulations compel the provider "to facilitate access to parental care and social services, including adoption services ... while making it abundantly clear that the project is not permitted to promote abortion by facilitating access to abortion through the referral process."[59]

The implication, Blackmun thought, was that courts would "tolerate any governmental restriction upon an employee's speech so long as that restriction is limited to the funding workplace."[60] This clearly amounted to a government effort to suppress what it took to be dangerous speech. But as the statute did not mention discussing abortion, the entire First Amendment issue could have been avoided simply by pointing this out.[61] In support of this, he cited a canon different from Rehnquist's, one that would have the Court "avoid passing unnecessarily upon important constitutional questions."[62] At the very least, the Court should have insisted that the interest of government in suppression be forced to compete with the interests of the doctor to speak and the patient to listen. The law did not even require doctors to inform patients that their inability to discuss abortion was the government's decision, and one they might not have agreed with.

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52 *Id*. at 200. Actually, the regulations did not confine the clinic only to family planning, but permitted it also to address breast cancer, sexually transmitted diseases, and gynecological concerns.

53 *Id*. at 203.

54 *Rust*, 500 U.S. 173, 207.

55 *Id*.

56 *Id*. at 205.

57 *Id*.

58 *Id*. at 204.

59 *Id*. at 209.

60 *Rust*, 500 U.S. 173, 212. Immediately after, one observer reported that *Rust* "sent shock waves through the arts, scientific, humanities, research, foundation, and university communities." James F. Fitzpatrick, *The Spread of* Rust, Colum. Journalism Rev. 1, 53 (Nov/Dec 1991).

61 *Rust,* 500 U.S. 173, 206.

62 *Id.* at 207. Justice Stevens made a similar point in his dissent (*id.* at 220-23), as did Justice O'Connor (*id.* at 224-25).

As in his famous opinion a few years earlier in *Roe v. Wade*,[63] Blackmun's chief concern seems to have been the regulation's impact on the doctor-patient relationship.[64] Suppressing talk of abortions denies the parties essential information they would need in making their decisions, weakens the patient's confidence and trust in her doctor, and impairs the doctor's ability to meet his professional ethical responsibilities. Patients, not understanding that the doctors' advice is limited by law and not by medicine, may be misled into ignoring the abortion alternative, thus suffering a "constitutional injury."[65] The government was using doctors, a highly credible group assumed to be quite apolitical, to sell its political message—and not informing women of the subterfuge.[66] Thus did the government contrive to have its message misattributed to a more trusted and valued source. For Blackmun, who as a youth seriously considered a medical career and later counted his years as general counsel for the Mayo Clinic as "the happiest of his professional life,"[67] all this may have grown out of personal experience.

Oddly absent from Blackmun's extensive discussion of the rights of women[68] was a realistic challenge to Rehnquist's central point concerning consent: employees and clients who take federal funds have implicitly consented to the applicable conditions. It may well be true that a doctor, who finds the ban on discussing abortion sufficiently onerous, might withdraw his consent and evade the ban by joining a private practice and offering abortion counseling there. But the indigent women who use the agencies' facilities probably have no such option, as they could not afford to see private physicians. For them, Rehnquist's advice is akin to Anatole France's famous observation: "The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal bread."[69]

From Blackmun's perspective*, Rust* posed an issue of grave constitutional importance: can the government, by asserting government speech, effectively prevent people from accessing information essential to their exercise of a fundamental right? If the effect of the regulation was to induce indigent women to waive their constitutional right to choose an abortion, did *Rust* violate the principle that such waivers must be knowing and voluntary?[70] Put more prosaically, can government use the government speech doctrine to force private speakers to back government policies? Government here is not joining a debate on the medical or ethical aspects of abortion, which some women might find illuminating, but by suppressing one side of the discussion, actually discouraging discussion. Government speech, in this sense, is here antithetical to private speech. As Randall Bezanson put it, "the government

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63 *Roe*, 410 U.S. 113.

64 *Rust,* 500 U.S. 173, 213-15, 217-19.

65 Norton, *supra* note 1, at 50.

66 Leslie Gielow Jacobs concluded, however, that "publicly visible regulations [meant] that the government in *Rus*t adequately informed the general public of its intent to speak through the private doctor 'agents' employed by the program." Leslie Gielow Jacobs , *Who's Talking? Disentangling Government and Private Speech,* 36 U. Mich. J. L. Reform 35, 58 (2002). Whether the indigent women using the clinic were familiar with these regulations appears extremely problematical.

67 Linda Greenhouse, Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey 18 (2005).

68 *Rust*, 500 U.S. 173, 214-20.

69 Le Lys Rouge ch. 7 (1894).

70 Johnson v. Zerbst, 304 U.S. 458, 464-66 (1938).

speech doctrine is mis-named. It is not just immunity for the government's act of speaking, but also for the government's exclusion of unwelcomed speech ... . government possesses the constitutional power of the censor."[71]

Government, from this perspective, in *Rust* used its power to monopolize the marketplace, crowding out other voices and engaging in deliberate deception.[72] Three decades later, monopolization may seem an unfounded fear in a society brimming with speakers taking every imaginable position on every imaginable topic, their energy amplified by the marvels of contemporary communications technology. But in *Rust*, the question of monopoly was joined: doctors were barred from discussing abortion, while government insisted that there was no monopoly as abortion information was available outside the venue of the agencies receiving federal funds. Dr. Rust insisted that the clinics enjoyed a de facto monopolization. His point was that it was the monopolization that made government deception so potent. If there are no easily and cheaply available alternative sources of information, the audience will find it difficult to critically evaluate government speech.

Attribution may play a significant role here. If the government's speech is presented as speech from independent experts, in this instance, doctors, it may well appear more believable. Hence, the irony that angered Blackmun: the wording and history of the First Amendment point to its protecting private speech against government action, not protecting government speech;[73] in *Rust*, it was exactly the reverse.

Notwithstanding these issues, *Rust* established the principle that government may exercise viewpoint discrimination when it utilizes private speakers to communicate government messages. These messages constituted government speech, even though the speakers were private parties. Caroline Mala Corbin has called this phenomenon First Amendment capture: "the government, which is supposed to be regulated by the First Amendment, gains control of speech."[74] However, as Martin Redish noted, "In a democratic society, a government may seek to influence the choices of the populace not by means of selective suppression, but rather by making its own contributions to the debate."[75]

II. Rust's Progeny

*Rust'*s progeny have produced mixed results. *National Endowment for the Arts v. Finley*[76] concerned a federal statute that required the NEA to take "into consideration

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71 Randall P. Bezanson, *The Manner of Government Speech*, 87 Denv. U. L. Rev. 809, 814 (2010).

72 Steven Shiffrin has made a similar argument concerning California referenda. The ballot contains only the government's view of the proposition. Other views may be available elsewhere, but voters may well encounter the issue only in the voting booth. To the extent that this is the case, the government will effectively monopolize the issue. Steven Shiffrin, *Government Speech*, 27 U.C.L.A. L. Rev. 565, 639 (1980).

73 David Fagundes argues that the First Amendment does protect government speech. David Fagundes, *State Actors as First Amendment Speakers*, 100 Nw. L. Rev. 1637, 1664-78 (2006).

74 Caroline Mala Corbin, *Government Speech and First Amendment Capture*, 107 Va. L. Rev. Online 224, 226 (2021).

75 Martin H. Redish, Commercial Speech as Free Expression 163-64 (2021).

76 National Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

general standards of decency and respect for the diverse beliefs and values of the American public" in its decisions to fund artists.[77] On these grounds, Karen Finley, a performance artist, was denied funding. She argued that the policy discriminated on the basis of viewpoint and was excessively vague.

Justice O'Connor, speaking for the Court, thought that as the NEA was forced to make esthetic judgments, the choice was "inherently content-based"[78] and "absolute neutrality [was] simply inconceivable."[79] Quality judgments unavoidably entail a good measure of subjectivity. These esthetic judgments that were not challenged on other grounds, moreover, were inherently at least as vague as the decency requirement; if we accept one, we cannot reject the other. Out of about 100,000 awards, she noted, "only a handful ... have generated formal complaints."[80]As to the "decency and respect" criteria, they helped to define artistic excellence and were not applied separately and on their own.[81] Nor was Finley silenced, for she remained able to produce her art and seek funding elsewhere.[82] In preserving the nation's artistic heritage, Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."[83]

In a scathing concurrence,[84] Justice Scalia declared that the statute "unquestionably constitutes viewpoint discrimination [but that] it makes not a bit of difference"[85] because the message is government speech, and thus free from First Amendment neutrality concerns.

Justice Souter, dissenting, drew a distinction between the government as speaker and the government as patron, where it "expends funds to encourage a diversity of views from private speakers."[86] The NEA falls within the second category and is bound by the First Amendment.

Departing from *Rust* was *Legal Services v. Velazquez*,[87] which involved a federal statute that prevented lawyers paid by federal funds to represent welfare benefits claimants from challenging existing welfare benefits laws.[88] Like *Rust,* it involved government limiting the advice funded professionals were permitted to dispense to

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77 20 U.S.C. sec. 954(d)(1).

78 *Finley*, 524 U.S. 569, 573.

79 *Id*. at 586.

80 *Id*. at 574.

81 *Id*. at 584. Similarly, Robert Post maintained that decency "is not matter of partisan politics. It is a shared value, not a preference." Robert C. Post, *Subsidized Speech*, 106 Yale L. J. 151, 187 (1996). Events, however, have shown that contrasting views of decency have assumed a very partisan character. *E.g*., Matthew Dowd*, If We Lose Our Decency, We Lose America*, ABC News, July 14, 2017; Jeffrey Frank, *Donald Trump, John McCain, and the Politics of Decency*, New Yorker, July 25, 2017.

82 *Finley*, 524 U.S. 569, 583.

83 *Id*. at 588 (quoting *Rust*, 500 U.S. 173, 173).

84 *Id*. at 593, 598. This is not the only instance of Scalia attacking O'Connor with thinly veiled contempt. See, *e.g., Webster v. Reproductive Health Services*, 492 U.S. 490, 532-34 (1989); *Hamdi v. Rumsfeld*, 542 U.S. 507, 573-77 (2004).

85 *Finley*, 524 U.S. 569, 593, 598.

86 *Id*. at 610-11, 613.

87 Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001).

88 110 Stat. 1321, sec. 504(a)(16).

their clients. The Court through Justice Kennedy thought the lawyers' speech was not government speech because they were the government's adversaries.[89] Where Rust had been an agent of government disseminating its message, Legal Services was a private speaker, facilitated by government, but with its own message. As "constitutionally protected expression," their speech was covered by the ban "against viewpoint discrimination."[90]

Perhaps favoring Legal Service's lawyers over *Rust's* doctors reflects the Justices' natural sensitivity to circumstances affecting the practice of their own profession. Lawyers might be unable to provide a zealous defense for their clients if they were prevented from pursuing all potential arguments.[91] However, both *Velazquez* and *Rust* saw professionals arguing against statutes that, by limiting their speech, also limited their ability to serve their clients and meet their professional ethical obligations.[92] When government subsidizes private speech, the result (as in *Rust*) is government speech, except (as in *Velazquez*) when it is not.

Justice Scalia, dissenting, labeled the law subsidized speech, which, like government speech which it closely resembled, granted government freedom from First Amendment restraints.[93] It seemed to him "embarrassingly simple"[94] that *Velazquez* was covered by *Rust.*

Pleasant Grove City v. Summum[95] concerned a Christian organization, Summum, which sought to erect a monument containing the chief tenets of its beliefs in a city park that already contained a monument featuring the Ten Commandments donated by a private organization decades earlier. The city turned Summum down, whereupon it brought suit, alleging viewpoint discrimination.

The ruling was unanimous, though it also produced no fewer than three concurring opinions. Justice Alito, speaking for a majority, thought the case pivoted on whether government had a history of using park monuments as a means of communication and whether government had direct control over the message conveyed.[96] He concluded that the facts indicated that these criteria were met; a "monument is, by definition, a structure that is designed as a means of expression," and the city granted approval, owned the monuments, and arranged for their upkeep.[97] Thus, the city's denial constituted government speech and need not be viewpoint neutral. However, Alito held that formally determining the message would be a "pointless exercise that the Constitution does not mandate,"[98] perhaps because if it were promoting religion, it might have activated church-state constitutional prohibitions. The refusal of the monument was an instance of government speech, though strangely the Court was unwilling to say what was said.

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89 *Velazquez*, 531 U.S. 533, 542.
90 *Id*. at 548, 542.
91 *Id*. at 546.
92 Steven H. Goldberg argued that *Velazquez* was like *Rust* "but in lawyers' clothing." *The Government-Speech Doctrine: "Recently Minted:" But Counterfeit*, 49 U. Louisville L. Rev. 21, 27 (2010).
93 *Velazquez*, 531 U.S. 533, 554.
94 *Id*. at 558.
95 Pleasant Grove City v. Summum, 555 U.S. 460 (2009).
96 *Id.* at 462.
97 *Id*. at 470, 473.
98 *Id*. at 473.

As the park is limited in space, the city cannot approve every proposed monument; there simply would not be enough room to accommodate them all. But imagine that the park exists only in cyberspace on the city's website, where space scarcity issues would disappear. The city might still retain discretionary approval powers—it would presumably refuse monuments to Ted Bundy or the ebola virus—but it would necessarily have only a qualitative rationale. Does government even need a quantitative rationale?

Justice Breyer, concurring, asked "whether a government action burdens speech disproportionately in light of the action's tendency to further a legitimate government objective."[99] He thought it did not.

Justice Souter, also concurring, urged that the determinative question was "whether a reasonable and fully informed observer would understand the expression to be government speech."[100] He evidently believed that this artificial construct might provide a workable solution to this problem.

Walker v. Texas Division, Sons of Confederate Veterans[101] asked whether specialty license plates could be considered government speech. Nearly forty years earlier, the Court had denied New Hampshire the power to require car owners to display license plates with the state's motto, Live free or die. The state had sought to "communicate to others an official view as to proper appreciation of history, state pride, and individualism," but the Court concluded that here "such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."[102] Though the decision preceded *Rust* and the acceptance of government speech, the Court used similar terms in declaring that the state could not force a driver to "use [his] private property as a 'mobile billboard' for the state's ideological message."[103]

In *Walker,* the Sons requested a specialty plate featuring the Confederate battle flag, and the Texas Department of Motor Vehicles Board twice turned them down, explaining that it had invited public comments and that "public comments had shown that many members of the public find the design offensive, and because such comments are reasonable."[104]

The Court speaking through Justice Breyer for a five to four majority determined the plates to be government speech; plates "long have communicated messages from the states;"[105] the messages on the plates "are often closely identified in the public mind with" the state;[106] the board had direct control of the licensing system; and the state maintains "direct control over the messages conveyed on the specialty plates."[107] It made no difference whether the idea for a specialty plate came from a private source. The final approval decision came from government.

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99 *Id.* at 484.
100 *Id*. at 487.
101 Walker v. Texas Division, Sons of Confederate Veterans, 576 U.S. 200 (2015).
102 Wooley v. Maynard, 430 U.S. 705, 717 (1977) (Burger, C.J.).
103 *Id*. at 715.
104 *Walker*, 576 U.S. 200, 206. The Sons' plate was far less extreme than a Virginia plate, ZYKLON B, that referenced the poison gas used to murder Jews in the Holocaust. Leef Smith, *Va. Man's License Tags Recall Holocaust Horror,* Wash. Post, May 13, 1997.
105 *Walker*, 576 U.S. 200, 211.
106 *Id*.
107 *Id*. at 213.

The law allowed the board to deny requests that were vulgar or obscene, and it could deny offensive plates, too. In this, Breyer echoed the government's attorney at oral argument in *Summum,* when he had declared that government speech "turns on control, right? So once the government takes control of something, then it's the government speaking."[108] This speech is not limited by the First Amendment. Thus, once government claims to be speaking, private speakers cannot shut it up or even have a right to voice their disagreement in the same venue. In these cases, government speech directly abridges private speech.

Justice Alito, dissenting, did not quarrel with the majority's version of government speech, but denied that it applied in this case. The message came from the Sons, he insisted, and denying it constituted viewpoint discrimination. He disagreed that the message on the plates would likely be attributed to the state. When Texas issues a "Rather Be Golfing" plate, it is not indicating that golfing is an official state policy or that Texas prefers golf to tennis.[109] He thought the plates contained some government speech (the name of the state and the identifying letters and numbers) and some private speech (the specialty message), and this differentiates it from *Summum.*

Which raises the question as to whether Souter's reasonable observer would view the license plate as government or private speech? If the driver attached the Confederate flag to the trunk of his car, a reasonable observer would understand the message as private speech. But if the message were on a license plate, would this imply government approval and thus constitute government speech? After all, the very existence of specialty plates was due entirely to a series of government decisions.

But Alito's driver might insist that the message was entirely his, and that the whole reason government created specialty plates was to facilitate the expression of private messages. Accordingly, the driver might well reject claims for neutrality with the jibe: If the plate bothers you, look somewhere else.

However, if the speech were considered entirely private, would the speaker necessarily avoid the neutrality requirement? Suppose the driver displaying the Confederate flag plate was in charge of overseeing a diversity program for a government agency, and his supervisor decided on that account to punish him. A court would ask whether the Confederate flag plate was actually likely to interfere with government operations, and it would insist that the driver was not being singled out in retaliation for the content of the message. If his supervisor concluded that the plate would lead his colleagues and clients to question his commitment, impeding his performance and justifying some disciplinary action, would the court agree?[110]

If the speech is a mixture of private and governmental, which should prevail? If the mixture is treated as private speech, the government's role will be obscured; if treated as government speech, the private speaker's role will be obscured. In either case, the audience will face barriers in apprehending the source of the

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[108] Transcript of Oral Argument at 32, Pleasant Grove City v. Summum, 555 U.S. 460 (2009). *See* also Daniel W. Park, *Government Speech and the Public Forum: A Clash between Democratic and Egalitarian Values*, 45 Gonz. L. Rev. 113, 114 (2010).

[109] *Walker*, 576 U.S. 200, 222.

[110] *Cf.* Locurto v. Guiliani, 447 F.3d 159, 179 (2d Cir. 2006).

message.[111] The Supreme Court has taken the position that mixed is not an option, in other words, that a choice must be made, either favoring government[112] or private speech.[113] Erring on the side of freedom and accountability suggests preferring private speech categorization, but this will not fit every case. Even to speak of these considerations is to raise the troubling issue of content discrimination. Yet it may be hard to avoid.

Which raises the matter of the message itself. While Alito noted that a given plate might well contain both government and private messages, the Court did not consider the possibility that different specialty plates might have different statuses. Perhaps, some plates, like New York's Yankee logo, would qualify as mostly private speech, on the theory that the state does not prefer baseball teams; others, like Louisiana's Choose Life featuring the state bird holding a baby, might qualify as mostly government speech, on the theory that it appears to be government endorsement of opposition to prevailing abortion policy.

Shurtleff v. Boston (2022) was a government speech case with church-state elements. Boston's city hall features three flag poles, one for the United States, a second for Massachusetts, and a third that displays either the city's flag or, temporarily, the flags of foreign countries or private organizations. Over the preceding dozen years, none of the 284 requests concerning the third flag pole had been turned down. Harold Shurtleff, head of a religious organization called Camp Constitution, asked to display a religious flag for only one hour, but Boston denied the request, saying that this might be seen as "an endorsement by the city of a particular religion" in violation of the First Amendment's establishment clause. Boston also feared that if it were forced to fly Shurtleff's flag, it might lose all control and later perhaps be compelled to fly flags of Nazis or terrorists. Boston also claimed that "all (or at least most) of the 50 unique flags it approved reflect particular city-approved values or views," like gay pride. The First Circuit Court of Appeals held for Boston, seeing the flag displays as a form of government speech.

The Supreme Court ruled unanimously in favor of Shurtleff, though the result was splintered with three concurring opinions. Speaking for the Court, Justice Breyer in one of his last opinions before retiring,[114] stated the central issue: did Boston [reserve] the pole to fly flags that communicate governmental messages, or instead [open] the flagpole for citizens to express their own views"? Following *Summum*, Breyer adopted a "holistic" approach, examining "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression." Here he found that though the flags "usually convey the city's messages," Boston did "not at all" control the flag raisings, and

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111 *Cf.* Corbin, *supra* note 31, at 605, 650, 654-55, 663-65. She would replace the binary categorization with a third mixed option to be determined by a five-pronged test. Government would be barred from viewpoint discrimination unless it passes an intermediate scrutiny test. Intellectually defensible, the proposal may be too cumbersome and complex to be workable, particularly, since the difficult five-pronged test would vastly expand the mixed category.

112 *Rust*, 500 U.S. 173, 173.

113 *Velazquez,* 531 U.S. 533, 540-41.

114 The opinion had a characteristically impish quality, with asides on the ugly architecture of city hall and the Boston Red Sox.

"that is the most salient feature of this case." Boston had never bothered to review flag requests in the past, having approved them all. Thus, government 's role was much smaller than in *Summum* or *Walker*. The flags represented speech by private groups, not government, so the neutrality principle prevailed and Boston's excuse for viewpoint discrimination evaporated.

In *Walker*, Breyer had argued that Texas' final approval of specialty plates made them government speech; in *Shurtleff*, he chose to emphasize the salience of Camp Constitution's input. Since it was not government speech, it did not amount to government endorsement of a religion.[115] Alito, concurring, insisted that neither control nor final approval was dispositive, maintaining that the true issue was whether the speech was "the purposeful communication of a governmentally determined message by a person exercising a power to speak for government," and whether government "did not rely on a means that abridges the speech of persons acting in a private capacity." A prominent constitutional lawyer, writing before the Supreme Court heard the case, dismissed it as "an interesting moment in the ongoing culture wars, but [of] almost no practical legal importance . . because it can so easily be limited to its extraordinarily peculiar facts."[116]

III. Government Propaganda

We could no more imagine government without government speech than breathing without air. At the same time, government speech is also inextricably tied to government power, and for this reason lends itself to a wide range of abuses, perhaps nowhere as clearly as when that speech takes the form of propaganda.[117]

Historically, "propaganda" derives from the Latin *propagare,* which means "to spread," and was first used by the Roman Catholic Church in the seventeenth century to refer to spreading or propagating the Gospel. The term has long since lost its theological connotation, and instead has taken on a decidedly unsavory character, most often described as psychological manipulation that "intentionally undermin[es] reasoned analysis."[118] A typical description states that propaganda must meet four criteria: It "must be said by the government [; it must] assert a verifiably false or misleading statement of fact [; it must] concern a matter of public interest [; and it must] be made with actual malice,"[119] that is, the speaker must be

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[115] In concurring opinions, Justices Gorsuch, Alito, and Kavanaugh expressed their displeasure with a major establishment precedent that requires that a "principal or primary effect" of a government policy can be one that neither "advances nor inhibits religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (Burger, C.J.).

[116] Sanford Levinson, quoted in Jeff Neal, *Supreme Court Preview: Shurtleff v. Boston*, Harvard Law Today, Jan. 7, 2022. Levinson accurately predicted the unanimous vote and speculated that Boston litigated the case to avoid being blamed for flying a religious flag.

[117] The issue is not peculiarly American. For example, the Conservative British government mailed anti-Brexit leaflets to every home, provoking an outcry from the opposition. *Taxpayer to Fund Anti-Brexit leaflets*, Daily Telegraph, Apr. 7, 2016.

[118] *E.g*., Jacques Ellul, Propaganda: The Formation of Man's Attitudes 61 (Konrad Kellen & Jean Lerner trans. 1965); Caroline Mala Corbin, *The Unconstitutionality of Government Propaganda*, 81 Ohio St. L. J. 815, at 818, 825.

[119] *Id*. Similarly, an analysis of opinion manipulation describes it as "imposing a hidden or covert influence on another person's decision-making." Daniel Susser *et al*., *Online*

aware that the statement is false or utter it with a reckless disregard for whether it is false.[120] In this telling, we are surely revolted by the thought that we might be unknowing puppets controlled by some master government puppeteer.

Yet a moment's reflection reveals the inadequacy of this definition. Must propaganda be said by government? What if government speaks through private actors, as in *Rust*? Is propaganda only about statements of fact? Certainly, governments lie; hence, the ubiquitous "credibility gap" charge.[121] But what of values? Sacrificing for the fatherland? The glorification of the Aryan race? "Verifiably false"? According to whom? The speakers may sincerely believe the statements to be true. Do we fault them for not employing sophisticated statistical analysis or ignoring the latest research? Suppose (as is normally the case) that their statements are partially true? Suppose the propaganda is entirely (and uncomfortably) true, like, for example, China's pointing to the Gulf of Tonkin incident as an example of American war escalation[122] and Operation Mockingbird as illustrating American efforts to shape world public opinion?[123] Indeed, the definition's implicit outrage at lying seems uncomfortably misplaced, partly because propaganda need not be lies, but also because it ignores the widespread cliché of the crooked politician that suggests that the public may not be so easily taken in. The outrage also runs counter to the stance of the Supreme Court, which in *United States v. Alvarez* noted the pervasiveness of lying in human affairs, the useful functions it sometimes serves, and the futility of imagining that it could be eliminated.[124] "Misleading"? It is a commonplace of political rhetoric (in fact, of rhetoric generally) to generalize from unrepresentative examples. The government's presentation of facts will always be incomplete, and thus always vulnerable to the charge that the facts omitted would have undermined the point made. When it urges the public not to smoke, must government also note that many smokers live long, healthy lives? And what of "public concern"? Does it also include matters of private concern, like gender identification, that much of the public seems concerned about? Like Justice Stewart and obscenity, we may think we know propaganda when we see it.[125] But this subjective confidence can hardly support a First Amendment rationale. The popular notion of propaganda as dishonest opinion manipulation has a slipperiness about it that undercuts its utility.

The importance of government propaganda today is vastly greater than it was in 1791, when the First Amendment was adopted, mainly because the role of

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Manipulation: Hidden Influences in a Digital World, 4 Geo. L. Tech. Rev. 1, 26 (2019). The opinion manipulation practiced by Stalin, Mao, and Hitler, however, was anything but hidden. In fact, it was its open, in-your-face quality that helped to make it so effective.

120 *Cf.* N.Y. Times v. Sullivan, 376 U.S. 254, at 180 (1964).

121 William M. Hammond, Public Affairs: The Military and the Media, 1962-1968 (1988).

122 *Gulf of Tonkin Incident a Clear-Cut Example of US Escalation, Warmongering towards Other Countries*, People's Daily Online, Nov. 11, 2021.

123 *CIA's Operation Mockingbird a Precursor of US Manipulation of World Public Opinion*, People's Daily Online, Nov. 9, 2021.

124 United States v. Alvarez, 567 U.S. 709, 723 (2012). Notwithstanding this ruling, the Biden administration created the Disinformation Governance Board within the Department of Homeland Security; following a public outcry the board was abolished. U.S. Dep't. Homeland Security, press release, *Following HSAC Recommendation, Department of Homeland Security Terminates Disinformation Governance Board*, Aug.24, 2022.

125 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

government in society has increased enormously and now touches nearly every aspect of life. The expanded role of government has naturally vastly expanded its role as a marketer of ideas and policies.[126] There is still, however, a potent tradition that views public opinion, autonomous and active, as a key factor rendering government policies legitimate.[127] Americans still recoil from what Walter Lippmann a century ago called the "manufacture of consent."[128] But where a later writer condemned government creation of a "falsified majority,"[129] Lippmann, ever the realist, acknowledged both that the public needs experts to explain the world to them and that the experts will often be corrupted by self-interest. How, then, can government remain neutral? Even if government merely gathers and publishes data, it will have to decide on questions and criteria. If it decides to acquire information on race, for example, it must first address contentious questions. Is a black person a person with at least "one drop" of black blood? Is "Asian" a viable category, considering the immense variety it covers? More fundamentally, it is certainly plain that government does not passively respond to an agenda conceived elsewhere, but instead seeks out issues it believes merit attention or contribute to its support. The point is to get the public, or at least the significant portion of the public, to see the issue as the government does.[130]

This involves not merely identifying an issue, but shaping its contours, for how questions are framed will heavily influence the answers proposed. Policymakers, for instance, may agree that energy is an important issue that government should address, but some may speak of it in terms of jobs and prosperity and others in terms of climate change and impending catastrophe; each side will try to define the various positions to its advantage. If government chooses to address energy (an issue it can hardly avoid), it will have to decide how to frame the issue (or, perhaps, to adopt multiple framings). Thus, as a practical matter, government will feel compelled to act as a marketer of ideas and policies, and this government speech will invariably be seen by its opponents as propaganda.[131] As A.V. Dicey observed in 1905: "Laws foster or create law-making opinion. This assertion may sound, to one who has learned that laws are the outcome of public opinion, like a paradox; when properly understood it is nothing but an undeniable though sometimes neglected

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126 Steven Smith suggests that the controversy over government speech reflects "the collapse of any working consensus about the proper domain and functions of government." Smith, *supra* note 9, at 946.

127 The free market economist, Friedrich Hayek, doubtless spoke for these critics, when he condemned the circular absurdity of government persuading the public to accept ever bigger government. Friedrich A. Hayek, The Constitution of Liberty 109, 293 (1960).

128 Walter Lippmann, Public Opinion (1922).

129 Mark G. Yudof, When Government Speaks: Politics, Law, and Government Expression 152-57 (1983).

130 Lawrence R. Jacobs & Robert Y. Shapiro, Politicians Don't Pander (2000); James N. Druckman & Lawrence R. Jacobs, Who Governs: Presidents, Public Opinion, and Manipulation (2015).

131 Hanna Pitkin tries to distinguish manipulation, which seeks to undermine public opinion, from leadership, which "succeeds only so long as [the people] are willing to follow," but it is hard to see how this could be applied to the real world. If the leader successfully manipulates the people, they will willingly follow him. Hanna Fenichel Pitkin, The Concept of Representation 233 (1967).

truth outside the pale."[132] This interaction between government and public policy, present even in Dicey's era preceding modern communications technology, is far more salient over a century later. Its supporters call it leadership, which is almost universally regarded as a virtue necessary for effective government.

Our natural reaction as consumers of government speech is to demand that government tell us the truth. To be lied to, we feel, is to be cheated and insulted. Machiavelli, however, cautions us that "Any man who tries to be good all the time is bound to come to ruin among those who are not good. Hence, a prince who wants to keep his authority must learn how not to be good."[133] Private virtues, that is, may not transfer to the public arena; indeed, the two sets of virtues will always be to some significant degree irreconcilable. The leader no longer merely looks out for himself and his family; his obligation now extends to the entire society, and in protecting and advancing its interests, Machiavelli teaches that the leader may have to resort to deception or force, choices that he might find repugnant on a personal level. He must choose evil in order to avoid a greater evil, and he must do this not merely in isolated times of extraordinary emergencies, but regularly on a day by day basis. "Truthfulness," as Hannah Arendt observed, "has never been counted among the political virtues."[134] The resulting government speech will sacrifice some veracity.

Nearly 2000 years before, Aeschylus observed that in war, truth is the first casualty. Sometimes, government will be convinced that an urgent response to some challenge will be required before public opinion can form;[135] often, the public is apathetic and ignorant;[136] occasionally public opinion will favor an unworkable or clearly immoral path. These options may each give rise to official deception, which we may justify, as necessary to sustain public support for a desirable policy, or reject, as merely serving to protect officials' reputation or position.

We don't like manufacturing consent and bitterly resent the idea that government is entitled to manipulate us, via the government speech doctrine. Yet if it produces results we like, the manipulation may not bother us greatly. We object to the means. But if we approve of the ends, would our objections melt away? Would we rule out government sponsored anti-smoking television commercials that utilize dying, disfigured smokers—even if this manipulative emotional approach is more efficacious than a presentation of graphs and tables? In the end, is the distinction between, say, education and propaganda simply a matter of whether one supports or opposes the speech? "So long as government neither monopolizes, coerces, or ventriloquizes," wrote Abner Greene, "its voice will be one of many, it will be

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132 Albert Venn Dicey, Lectures on the Relationship between Law and Public Opinion in England during the Nineteenth Century 41 (1914).

133 Niccolo Machiavelli, The Prince 42 (Robert M. Abrams trans. & ed. 2d ed.) (1992/1532). Max Weber distinguished between the ethics of responsibility (which stresses the consequences of choices) and the ethics of ultimate ends (which stresses the purity of intentions). From Max Weber 120 (trans. & ed. Hans H. Gerth & C. Wright Mills 1946/1923).

134 Hannah Arendt, *Lying in Politics: Reflections on the Pentagon Papers*, N.Y. Rev. of Bks., Nov. 18, 1971.

135 Thomas Halper, Foreign Policy Crises: Appearance and Reality in Decision-Making (1971).

136 Andrew F. Hayes et al., *Nonparticipation as Self-Censorship: Publicly Observable Political Activity in a Polarized Opinion Climate*, 28 Pol. Behav. 259 (2006).

one of persuasion not coercion, and the speech will clearly be in the government's voice."[137] But as government will always wish to prevail—why else try to persuade?—it will always be tempted to monopolize, coerce, or ventriloquize. In other words, if government seriously limits itself, there will be no problem, which hardly reassures us that there will be no problem.

Even if the goal is benign, the principle that government can intimidate, cajole, or surreptitiously pay off private parties to influence the public can only be disturbing. Good intentions—and they emphatically are not always good—do not rinse the paternalistic, antidemocratic stain from the practice. The government speech doctrine enables this practice, yet leaves us with a puzzle: government speech's potential power derives from its exemption from the neutrality principle; however, any court-imposed rule on government propaganda speech would necessarily be viewpoint based, and thus violate the same principle. How to formulate a rule distinguishing the acceptable from the unacceptable?

IV. Transparency, Attribution, and Accountability

Which raises the matter of transparency, for "the identity of the speaker is an important component of many attempts to persuade."[138] As one of the foremost students of government speech put it, "the government should pay for its ability to invoke the government speech defense by transparently taking political responsibility for its expressive choices."[139] How is the public to hold government accountable for its speech if it is unaware that government is speaking? This is not a new problem, as in nineteenth century America, "newspapers conducted many if not most of the opinion-shaping activities we now call campaigning."[140] Today, it is widely believed that attribution has become more difficult, as social media have greatly facilitated anonymous and pseudonymous messaging, offering countless opportunities to hide. If the public understands that government is the source of the information, presumably it may grasp the conflict of interest and approach the message with some skepticism. When President Trump tells us that covid-19 is nothing to worry about[141] or President Nixon's press secretary dismisses the Watergate break-in as a "third-rate burglary"[142] or President Clinton denies having sex with Monica Lewinsky[143] or President Kennedy rails against a "missile gap,"[144] we at least retain the power to match their claims with the source of the message.

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137 Abner S. Greene, *Government of the Good*, 53 Vand. L. Rev. 1, 25 (2000).

138 Ladue v. Gilleo, 512 U.S. 43, 56 (1994).

139 Norton, *supra* note 1, at 44.

140 Jeffrey L. Paisley, The Tyranny of Printers: Newspaper Politics in the Early American Republic 4 (2001).

141 Gina Kolata & Roni Caryn Robin, *"Don't Be Afraid of Covid," Trump Says, Undermining Public Health Messages*, N.Y. Times, Oct.5, 2020.

142 Ronald Ziegler, qtd. in *Watergate and the White House: The "Third-Rate" Burglary That Toppled a President*, U.S. News & World Report, Aug. 19, 1974.

143 January 26, 1998: Response to the Lewinsky Allegations, Miller Center for Public Affairs (1998), https://millercenter.org/the-presidency/presidential-speeches/january-26-1998-response-lewinsky-allegations.

144 Christopher A. Preble, John F. Kennedy and the Missile Gap (2004).

But suppose the role of the government in the messaging is hidden, so that the level of deception is taken to another level?[145] During both world wars, the government utilized mass media to raise morale and support the war effort, sacrificing truth whenever it seemed advisable. In World War I, George Creel's Committee on Public Information distributed thousands of articles to newspapers and magazines that published them, either to avoid trouble with the government or from a patriotic impulse.[146] In World War II, the Office of War Information's Bureau of Motion Pictures reviewed two-thirds of the 2,500 movies released from 1942-1945, altering nearly three-quarters of them; the head of OWI preferred working with movies because the people "do not realize they're being propagandized."[147] At the same time, the government, appealing to the patriotism of reporters, withheld important information throughout the war.[148] In these wars, then, government deceived us in pursuit of a goal, victory, we nearly all shared. Balancing means and ends, doubtlessly few of us would complain. In still more obvious circumstances, we understand that the government may deceive us because it cannot tell us the truth without sharing it with the enemy. Who would quarrel with President Roosevelt's decision to keep the upcoming D-Day invasion secret? Candor is not always our top priority. Sometimes we demand neutrality, and sometimes we don't.

Some situations, however, are not so clear cut. During the Cold War, the Defense Department's Motion Pictures Production Branch reviewed movie and television scripts to determine if they would be "in the interest of the Department of Defense or otherwise in the national interest,"[149] and thus justify military cooperation in the form of advice, equipment or personnel.[150] A result was a proliferation of movies that glorified the military, including *The Longest Day, The Green Berets,* and *Top Gun*. Did these movies and television programs contribute to an ambience supporting military adventures? We likely will never know.

Nor is this practice of co-opting private speech confined only to wartime. In domestic policy, to take another widely reported example, in the interest of fighting drug abuse, the government reviewed scripts of over 100 episodes of several popular television programs to ensure that they carried appropriate messages; in return, networks were freed from broadcasting a portion of their required public service announcements.[151] Instead of assuming an obligation of transparency, the

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145 Abner Greene has called this practice, when government surreptitiously uses others to speak for it, ventriloquism. Greene*, supra* note 136, at 49-52.

146 George Creel, How We Advertised America: The First Telling of the Amazing Story of the Committee on Public Information that Carried the Gospel of Americanism to Every Corner of the Globe (1920); Alan Axelrod, Selling the Great War: The Making of American Propaganda (2009).

147 Elmer Davis qtd. in Clayton R. Koppes & Gregory D. Black, Hollywood Goes to War: How Politics, Profits, and Propaganda Shaped World War II Movies 64 (1987).

148 Richard W. Steele*, Franklin D. Roosevelt and His Foreign Policy Critics*, 94 Pol. Sci. Q. 15, 24-31 (Spring, 1979).

149 Department of Defense Instruction 540.15.

150 Lawrence H. Suid, Guts and Glory: The Making of the American Military Image in Film (2002).

151 Don Van Natta, Jr., *Drug Office Will End Scrutiny of TV Scripts*, N.Y. Times, Jan. 20, 2000; Howard Kurtz & Sharon Waxman, *White House Cut Anti-Drug Deal with TV; Ad Credits Given for "Proper Message,"* Wash. Post, Jan. 14, 2000. Similarly, in

government thought it sufficient to leave disclosure to the television executives, knowing that they had no reason to come forward with revelations. Hundreds of local televisions stations also broadcast news segments produced and distributed by the federal government on a wide range of topics without any acknowledgement of government's role.[152] A broadcast commentator was also paid $240,000 by the Department of Education to support the administration's policies.[153]

Courts have repeatedly held that, however valuable transparency may be to democracy, it is not a constitutional requirement.[154] In support of this, Greene observed that "citizens will often know speech is dictated by the government even if no disclosure is made," adding that the question is "more a concern of political theory than of constitutional law."[155] However, that some citizens will know that government is speaking hardly argues against giving everyone the opportunity to know, particularly, as this can be easily achieved by simply identifying the government authorship or influence. Is the subject more a concern of political theory than constitutional law? It is hard to know exactly what this means, how it could be demonstrated, or what its relevance is.

There is an *ad hominem* quality to this distaste with deception, as it targets the source of the message and not the message itself. Yet we feel that knowing the speaker may help us understand his motives and intentions, and thus aid us in evaluating what he says. When government speaks or pays for someone else to speak, we naturally expect transparent disclosure. Why, it must be asked, would government insist on anonymity?

It is as obvious as water in a thunderstorm that the typical reason for government anonymity is to evade accountability. Transparency does not guarantee rigorous or even minimal accountability, but its absence greatly complicates achieving it. Furthermore, a lack of transparency not only is said to impede accountability. Also, the inevitable revelations gnaw away at the public's trust in government, generally, and the administration in power, specifically. It confirms the cynic's worst fears and leaves its supporters looking gullible, complacent, or stupid. Conspiratorial thinking is far from a recent development,[156] even if the audience for so-called fake

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Britain, the popular television series, *Coronation Street*, included stories to further the government's National Year of Reading. Bob Franklin, Packaging Politics 90 (2d. ed. 2004).

152 David Barstow & Robin Stein, *Under Bush*, *A New Age of Prepackaged News*, N.Y. Times, Mar. 13, 2005.

153 Mark Silva, *U.S. Paid Pundit to Push Program, Media Group Drops Commentator over $240,000 Deal*, Chi. Trib., Jan. 8, 2005.

154 McBurney v. Young, 569 U.S. 221, 233-34 (2013); Houchins v. KQED, Inc., 438 U.S. 1, 14 (1978). In NAACP v. Alabama, the Supreme Court rejected the state's demand for the organization's membership list as a potential intrusion into the members' freedom of speech and assembly. Past disclosures of NAACP membership had made possible "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." NAACP v. Alabama, 357 U.S. 449, 462 (1958). But where the NAACP membership was vulnerable, government as the most powerful actor on the scene is largely immune from the organization's travails.

155 Greene, *supra* note 136, at 51.

156 Richard Hofstadter, *The Paranoid Style in American Politics*, Harper's Magazine 77 (Nov. 1964).

news websites is far smaller than popular accounts would indicate.[157] All this is said to be magnified by the "post-truth" tenor of the times.

The government may be "entitled to say what it wishes,"[158] but is it entitled to hide its authorship? The answer must be "it depends," for transparency, like nearly everything else, is decidedly a mixed blessing. An emphasis on accountability, for instance, may contribute to a dysfunctional "culture of suspicion."[159] The Brandeis cliché that "sunlight is said to be the best of disinfectants"[160] takes no account of the practicalities of negotiation and compromise, which may be made impossible by transparency.[161] Moreover, as Michael Gilbert has pointed out, transparency makes public information that may be used for corrupt purposes.[162] Transparency, a means and not an end in itself, can only be evaluated in specific contexts.[163]

How, then, to counter potential abuse? The answer, the Court advances, is "accountability to the electorate and the political process for its advocacy."[164] As Justice Kennedy explained, "When the government speaks, for instance, to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position."[165] And again, "it is the democratic electoral process that first and foremost provides a check on government speech."[166]

At the outset, a logical problem emerges like a punch in the face. If accountability depends on information made available to the public and government speech effectively controls that information, how can the public hold government accountable? When government is most abusive—that is, most effective at controlling information— t is also most impervious to accountability.

More broadly, much of the rhetoric on accountability is built on fanciful presumptions.[167] Is the public sufficiently interested in the subject to read, analyze,

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157 Andrew Guess et al., *Exposure to Untrustworthy Websites in the 2016 U.S. Presidential Campaign*, 4 Nature Human Behav. 472 (2020).

158 Rothenberger v. Univ. of Va., 515 U.S. 819, 833 (1995).

159 Onora O'Neill, A Question of Trust 77 (2002).

160 Louis D. Brandeis, *What Publicity Can Do*, Harper's Weekly 10 (Dec. 20, 1913).

161 A study of legislative negotiations found that "sunshine" laws had contributed to gridlock. Cathie Jo Martin, *Conditions for Successful Negotiation: Lessons From Europe*, in Negotiating Agreement in Politics: Report of the Task Force on Negotiating Agreement in Politics 127 (Jane Mansbridge & Martin eds. 2013).

162 Michael D. Gilbert, *Transparency and Corruption: A General Analysis*, U. Chi. Leg. Forum 117, 138 (2018).

163 David Pozen, *Seeing Transparency More Clearly*, 80 Pub. Admin. Rev. 326 (2019)

164 Bd. of Regents of the Univ. of Wis. System v. Southworth, 529 U.S. 217, 235 (2000).

165 *Id*.

166 *Walker,* 576 U.S. 200, 207.

167 The conventional view thus resembles the idealized mode of opinion change advanced by certain fashionable theorists of deliberative democracy, in which open minded people at the periphery of civil society seeking the common good come together in pursuit of rational solutions to social problems, in the process gradually influencing the administrative state to adopt their ideas. *See*, *e.g.,* Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy,* in Democracy and Difference 67 (Benhabib ed. 1996); Joshua Cohen, *Deliberation and Democratic Legitimacy,* in Deliberative Democracy 67 (James Bohman & William Rehg eds. 1997); Jurgen Habermas, Between Facts and Norms ch. 8 (William Rehg trans. 1996).

and remember what the government said? Is the subject sufficiently important to the public for it to form opinions on this government speech and support or oppose government on that account?[168] As consumers, our choices likely have direct and immediate effects on our lives; we buy chocolate ice cream because we love how it tastes. But political choices usually are so remote that we typically do not bother to assume that they have any practical effect. We may conclude that a candidate is on our side, but even if we are correct in this (which is necessarily problematical in a context of wholesale dissembling), we will almost certainly be incapable of adequately evaluating his policy proposals? Will trade protectionism help us? Reducing immigration? Taxing capital gains at a higher or lower level? As politicians obsessively seek to claim credit and avoid blame and so much in politics takes place behind closed doors, it is commonly hard to know to what extent they are even responsible for the policy. In such a context, as Anthony Downs observed, for most people most of the time, the rewards of becoming politically informed do not exceed the costs, in time, effort, rejected alternative activities, and so forth.[169] Given this widespread rational ignorance, most of the public will not enforce accountability in the idealized fashion: they might never have heard of the issue to which accountability applies, they may have misunderstood the subject, they may have failed to act on their understanding of the subject. The voter may react simply on the basis of "whatever makes him feel best. When a person puts on his voting hat, he does not have to give up practical efficacy in exchange for self-image, because he has no practical efficacy to give up in the first place."[170] Most people, in any case, will not usually approach issues with a truly open mind.

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168 A 2017 report by the Program for the International Assessment of Adult Competencies (PIAAC) found that 19% of U.S. adults could only read brief texts, enter personal information on forms, and employ a basic vocabulary. PIAAC 2017 U.S. Results 3 (2019).

169 Anthony Downs, An Economic Theory of Democracy (1957). *See also* Ilya Somin, Democracy and Political Ignorance (2d ed. 2016); Russell Hardin, How Do You Know? The Economics of Ordinary Language (2009). Thus, in its most encouraging poll, the Annenberg Public Policy Center found that fifty-six percent of adults could name the three branches of government; twenty percent could name none. All this despite multiple efforts in school and elsewhere to convey this elementary political fact. Annenberg Public Policy Center, Americans' Civic Knowledge Increases during a Stress-Filled Year (Sep. 14, 2021). Even political elites are surprisingly ignorant about constituency opinion. David Broockman & Christopher Skevron, *Bias Perceptions of Public Opinion among Political Elites*, 112 Am. Pol. Sci. Rev. 542 (2018).

170 Bryan Caplan, The Myth of the Rational Voter: Why Democracies Choose Bad Policies 132 (2007). Applying what he calls the "competence principle," Jacob Brennan argues that if we do not permit unqualified people to, say, practice medicine, we should not permit unqualified (that is, ignorant) people to vote, as elections may also have powerful consequences. Jason Brennan, Against Democracy ch. 6 (2016). Mill would have allotted extra vote to university graduates and those with intellectually challenging occupations. Considerations on Representative Government ch. 7 (1861). Plato favored rule by the wise. Plato, The Republic bk. IV (G.R.F. Ferrari ed. & Tom Griffith trans. 2000). On the other hand, David Estlund asks, "You might be right but who made you boss?" David Estlund, Democratic Authority: A Philosophical Framework (2008). For many years, literacy tests were widely abused in the American South to prevent blacks from voting.

The influence of government is also undercut by the two-step flow phenomenon.[171] Many of us belong to small groups, in which public affairs is not very important; as we care little, we may rely on a member of the group who cares more to act as an intermediary, passing on information and opinions from outside sources and altering them in the process because he is also subject to selective perception, confirmation bias, and other inherent distorting filters. What we learn from the opinion leader may be quite different from what the government or the media intended to convey.[172] All of this is to say that the Court's implicit assumption that voters reach decisions on the basis of a specific government speech is, except in the most extreme possible examples, preposterous.

Accountability is also weakened and made much less coherent by the whole package principle. When we vote on a candidate, we do not have the option of approving his position on one issue and disapproving his position on another. We must accept or reject the whole package. I may approve his position on the abortion gag rule, the NEA grant criteria, the Legal Services prohibition, the park monuments policy, the license plate standards, and the flag pole decision, yet vote against the official for other reasons that I find more salient. Retrospective voting, in any event, is likely tainted by ignorance.[173]

The Court's assumption that the public's appetite for information is dictated by truth seeking is also hard to sustain. People look for information sources that share their beliefs,[174] they believe these sources to be more credible and less biased,[175] their partisan identification likely slants their evaluation of political information,[176] and they share the information they acquire with people who share their beliefs.[177] People may imagine that they are searching for truth, but they may merely be searching for confirmation. Academics and others influenced by fashionable postmodernism, furthermore, are uncomfortable with the notion of objective truth, holding instead that "all judgments are contingent cultural products."[178] Thus,

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171 Elihu Katz & Paul F. Lazarsfeld, Personal Influence: The Part Played by People in the Flow of Mass Communications (1955).

172 Whether the social media have produced a one-step flow is unclear. A Korean study found the two-step flow still valid in online public forums. Sujin Choi, *The Two-Step Flow of Communication in Twitter-Based Public Forums*, 33 Soc. Sci. Computer Rev. 696 (2015). A Taiwan study of online shoppers also found the two-step flow still valid. Shu-Hua Chien et al., *Building Online Transaction Trust in a Two-Step Flow of Information Communications*, 16 J. Glob. Info. Tech. Mgt. 6 (2013).

173 Christopher H. Achen & Larry Bartels, Democracy for Realists: Why Elections Do Not Produce Responsive Government (2016).

174 Sylvia Knobloch-Westerwick & Jingbo Meng, *Looking the Other Way: Selective Exposure to Attitude-Consistent and Counterattitudinal Political Information*, 36 Communication Res. 426 (2009).

175 Dimitri Kelly, *Evaluating the News: (Mis)perceptions of Objectivity and Credibility*, 41 Pol. Behav. 445 (2019).

176 Toby Bolsen et al., *The Influence of Partisan Motivated Reasoning on Public Opinion*, 36 Pol. Behav. 235 (2014); Erik Peterson & Shanto Iyengar, *Partisan Gaps in Political Information and Information-Seeking Behavior: Motivated Reasoning or Cheerleading*? 65 Am. J. Pol. Sci. 133 (2020).

177 Ro'ee Levy, *Social Media, News Consumption, and Polarization: Evidence from a Field Experiment*, 111 Am. Econ. Rev. 831 (2021).

178 Eric Blumenson, *Mapping the Limits of Skepticism in Law and Morals*, 74 Tex. L. Rev. 523, 527-28 (1996).

"there can be no such thing as knowledge of reality; what we think is knowledge is always belief and can apply only to the context within which it is asserted."[179]

Likely, a plethora of factors—childhood socialization, socioeconomic status, partisan affiliation, and many more—predetermine our political positions. Most of us do not gather evidence and then make up our minds; we make up our minds and then gather evidence. Thus, when President Trump said that he "could stand in the middle of Fifth Avenue and shoot somebody and I wouldn't lose any voters,"[180] he was basically correct, in that most of his supporters would subconsciously find a way to reduce the dissonance and continue their positive evaluation of him and his message.[181]

The major misinformation problem, in a word, remains demand, not supply. We demand information congenial to our pre-existing beliefs, and ignore the vast supply of uncongenial information. That accurate information is clearly more readily available today than ever before has not banished the problem, which like a drunk at a wedding, simply will not go away. Nor is it a recent phenomenon. There is no shortage of blatant and consequential examples of misinformation in years past, for example, the white South's antebellum belief in the happy slave and many Germans' belief that World War I was lost on account of a "stab in the back." Even becoming well informed does not guarantee sound opinions; research on the 2016 presidential election revealed that "visits to fake news websites are highest among people who consume the most hard news."[182] Nor do well informed people necessarily resolve their differences or agree; differences typically turn on values and preferences, which are not susceptible to confirmation or disconfirmation.

This is not to argue that accountability is a mirage. On high profile, large issues—war/peace, inflation/depression—it may engage large numbers of the public, and on small targeted issues—threats to a particular industry, taxes directed at a particular group –it may engage small but perhaps decisive numbers of the public. Government speech may here take on central importance. It is widely believed, for example, that government speech during the covid pandemic in favor of closing schools and having children wear masks was sufficiently potent to affect election results.[183] Still, accountability has a hit-or-miss quality about it, and doubtless the vast bulk of government speech will provoke no reaction that can be translated into accountability. Transparency, widely considered "the sine qua non of good governance"[184] and cloaked with a "quasi-religious significance,"[185] cannot by itself solve the problem.

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179 Peter C. Schanck, *Understanding Postmodern Thought and Its Implications*, 65 S. Cal. L. Rev. 2505, 2508 (1992). Of course, no one can live his life on this arid basis, wondering whether he *knows* his name, where he lives and works, and so forth.

180 Qtd. in Colin Dwyer, *Donald Trump: "I Could Shoot Somebody, and I Wouldn't Lose Any Voters,"* NPR, Jan. 23, 2016. This phenomenon is by no means confined to Trump.

181 *See* Leon Festinger, A Theory of Cognitive Dissonance (1957).

182 Andrew M. Guess et al*., Exposure to Untrustworthy Websites in the 2016 U.S. Election*, 4 Nature Human Behav. 472 (2020).

183 *E.g.,* Michael Hartney & Renu Mukherjee, *Closures and Consequences*, City Journal, Dec. 8, 2021.

184 Gregory Michener, *Policy Evaluation via Composite Indexes: Qualitative Lessons from International Transparency Policy Indexes*, 74 World Development 184 (2015).

185 Christopher Hood*, Transparency in Historical Perspective, in* Transparency: The Key to Better Governance? 3 (Hood & David Heald eds. 2006).

Another practical problem bedeviling accountability is the principle of separation of powers. When the executive and legislative branches engage in government speech, they invariably regard judicial interference as intrusions into areas the Constitution has designated as their province. Courts, as the least dangerous branch wielding counter-majoritarian judicial review, may be loathe to enforce constitutional accountability.

V. Some Conclusions

Some government speech would appear controversial only to the lunatic fringe, for example, informational speech in the form of a School Crossing sign intended to safeguard children or details on when and where a civil service examination would be given. But even informational government speech may be controversial. Consider the Miranda warning given to criminal suspects, bathroom instructions for transgender persons, or pleas to get vaccinated during a pandemic. An ostensibly informational message may also have a subtext that presents policies or officials in a favorable or unfavorable light,[186] for example, the Warren Commission Report,[187] and some informational speech, like a political press conference, has an obviously mixed governmental and partisan rationale.[188] All this suggests that government speech, like government streets, is beset by potholes that may undo the unwary.

How, then, do we regard government speech? Jud Campbell maintains that the Court did not embrace neutrality until the late 1960s and early 1970s, when it displaced the focus on toleration.[189] Paul Stephan dates the change in the 1930s,[190] Genevieve Lakier counters that neutrality "has been a feature of free-speech law ... since the eighteenth century."[191] Whenever the origin, there is no question that the First Amendment has taught us that, in general,[192] "government has no power to restrict expression because of its message, its ideas, its subject matter or its content."[193] We take its obligation of neutrality for granted. But we also take for granted that government will inform and educate us on a wide range of topics, and understand that this responsibility is incompatible with neutrality. Hence the conclusion of one careful observer, "It is plausible to view the development of the government speech doctrine in large part as an effort to relieve the government of the suffocating demands of the prohibition on viewpoint discrimination."[194] "When government speaks," as the Court put it, "it is not barred by the Free Speech Clause

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186 Justin Grimmer et al., The Impression of Influence 28-29 (2015).

187 Presidential Commission on the Assassination of President Kennedy, Report (1964).

188 Shiffrin, *supra* note 72, at 603-4.

189 *The Emergence of Neutrality*, 131 Yale L. J. 861, 865 (2022).

190 Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 Va. L. Rev. 203, 215-18 (1982).

191 Genevieve Lakier, *A Counter-History of First Amendment Neutrality*, Yale L.J. Forum, 873, 875 (Jan. 31, 2022).

192 Although "[c]ontent -based regulations are presumptively invalid . . . our society . . . has permitted restrictions upon the content of speech in a few limited areas." *R.A.V. v. St. Paul*, 505 U.S. 377, 382-83 (1992).

193 *Police Dep't*, 408 U.S. 92, 95.

194 Smith, *supra* note 9, at 949.

from determining the content of what it says."[195] How to distinguish speech from government that requires neutrality from speech from government that does not?

Academics, it must be conceded, have not been very helpful. Elena Kagan, writing before she joined the Supreme Court, focused on the element of controversy, presumably having in mind a practical solution. In considering whether a government's no-smoking campaign would be bound by the neutrality requirement, she offered three criteria: does the topic offer "the hope of right and wrong answers ... subject to verification and proof;" has "society ... reached a shared consensus on the issue;" and does "one side of the debate ... do great harm."[196] The most obvious problem is accepting the power of consensus. As Mill famously wrote, "If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."[197] Kagan's is the path to conformity and timidity, not liberty and curiosity; too many consensuses have vanished for us to suppose them to be infallible. Even on its own terms, the proposal makes little sense. Consider her topic, smoking. Stopping smoking may be a question of weighing risks and rewards, but it is not a matter of right and wrong; nearly sixty years after the Surgeon General's famous report,[198] the claim of consensus is still challenged by tens of millions of smokers; and the question of harm arguably requires individual answers. Kagan found a consensus in 1992; fifty years earlier, the consensus favored smoking. If government, seeking to combat the harmful effects, had initiated a stop smoking campaign in 1942, would it have had to submit to the neutrality requirement, perhaps featuring Chesterfield's claim that it was the brand that doctors smoke?

Thomas Emerson, in his magisterial *The System of Freedom of Expression*, concedes that "government has a broad right to engage in expression as part of its regular functions," but believes that this right "does not extend to any sphere that is outside the governmental function." A problem with this formula, he admits, is that "the governmental function certainly covers an extensive area."[199] His formula sounds straightforward and sensible until we recall that government will always defend its speech as within its functioning ambit. Indeed, as government can rationalize almost any but the most brazenly partisan speech as tied to a governmental function, it is hard to see this as serving as much of a practical limitation.

Helen Norton, having devoted an entire book to government speech, devised some useful criteria.[200] Her three questions, however, are actually six questions, and most of the questions themselves are subdivided further. The result is a scheme that, however sensible if considered bit by bit, is simply too complicated to be usefully applied.

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195 *Walker*, 576 U.S. 200, 207.

196 Elena Kagan, *The Changing Faces of First Amendment Neutrality*: R.A.V. v. St. Paul, Rust v. Sullivan, *and the Problem of Content-Based Under-Inclusion*, 1992 Sup. Ct. Rev. 29, 75.

197 John Stuart Mill, On Liberty ch.2 (1859).

198 Advisory Committee to the Surgeon General of the Public Health Service, Smoking and Health (1964).

199 Emerson, *supra* note 2, at 699.

200 Norton, *supra* note 1, at 6-10, 68-211.

What, then, exactly are the contours of government speech? How do we know when it is government that is speaking, given the myriad problems of attribution, which, in any case, is "easily manipulated"?[201] Under what conditions does it extend to others acting as proxies of the government, even unwilling proxies? Has burgeoning privatization meant that firms performing public functions, like running schools or prisons, should have their speech characterized as government speech? If government speech reflects a consensus, what voice is left for those who dissent? If the consensus dissipates, will the government speech label dissipate with it? Does the Constitution that famously protects our right to speak against government interference also protect the government's right to silence us? Government silencing of private speech is not *per se* bad. To accomplish their work, school teachers may force their students to be quiet. Should this rationale also keep Dr. Rust from telling his patients about abortions? What to do about mixed government-private speech? If the defining quality of government speech is that the message is effectively controlled by the government, do we ignore considerations of intent and effect? The questions come in crowds.

The Court's answers, sad to say, have not been very helpful, hence their routine description as "unprincipled,"[202] "nefarious,"[203] or "intellectually undeveloped."[204] Perhaps, one reason for this failing is the set of cases the Court has used to construct the doctrine. Except in peripheral ways, none of these cases addresses the core problem: How to distinguish between government's power to inform, educate, and persuade and its power to manipulate? How to prevent government speech from abridging private speech? Apart from *Rust*, few people even care about the key cases' practical consequences. It is hardly surprising that the parched soil of NEA grants, license plates, park monuments, and city hall flags produced such scrawny plants.

Surveying the Court's efforts is not very uplifting. Rehnquist in *Rust,* downplayed First Amendment concerns, presenting the case mostly as a matter of administrative law. The impact of governmental coercion was dismissed with the hollow observation that if doctors found the regulations unacceptable, they could seek employment elsewhere. *Finley* also saw no real effort to devise a workable jurisprudence, O'Connor agreeing that if artists find the regulations unacceptable, they can also seek funding elsewhere. These rationales not only place heavy burdens on those affected. They also amount to granting "government nearly carte blanche ability to exclude speakers and speech on the basis of viewpoint so long as the government can show that it 'effectively controlled' the message being conveyed."[205] Consistency is undercut, when *Velazquez*, a case similar to *Rust,* produced the opposite result. Alito in *Summum* thought the key questions were whether government had a history of using the particular means of communication

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201 Richard C. Schragger, *Of Crosses and Confederate Monuments: A Theory of Unconstitutional; Government Speech*, 63 Ariz. L. Rev. 1, 45 (2021).

202 Donald W. Park, *Government Speech and the Public Forum: A Clash between Democratic and Egalitarian Values,* 45 Gonz. L. Rev. 113, 1134 (2010).

203 Kelly Sarabyn, *Prescribing Orthodoxy*, 8 Cardozo Pub. L. Pol'y & Ethics 367, 372 (2010).

204 Mark Strasser, *Government Speech and the Circumvention of the First Amendment*, 44 Hastings Const. L. Q. 37, 38 (2016).

205 Ardia, *supra* note 31, at 1983-84.

and whether it had direct control over the message. In an era when new means of communication arise like mushrooms after a rainfall, an emphasis on history seems misplaced. It also assumes that past practice was acceptable, which may sometimes be quite dubious. And the term "direct control" contains a hidden ambiguity: does it refer to the government's composing the message or merely approving it, which may in practice be *pro forma*? In *Summum,* Alito ruled that approving monuments in parks constituted government speech, though he was unwilling or unable to say what the message was, because final government approval was required. In *Walker*, he maintained that final approval counted less than the authorship of the message. Breyer, concurring in *Summum*, was even less helpful. He wrote of government "disproportionately" burdening private speech, but the word is so hopelessly vague and subjective that adopting it as a standard could only breed disagreement and confusion. Justice Scalia was surely correct that all these cases saw government decisions driven by viewpoint considerations, but in rejecting the relevance of that fact, he also added little to doctrine.

Perhaps, the most ambitious Justice was Souter, who did not speak for the Court in any of these principal decisions. In *Finley,* he differentiated between government as patron and government as speaker. In *Rust* and *Velazquez*, government, like a Renaissance aristocrat, acted as patron, indirectly affecting speech in the public marketplace by granting or denying subsidies to the speakers. Government itself was not speaking; private health care providers and public defenders were. In these situations, Souter found that the speech was really not government speech, and so it should not be exempt from the standard obligation of neutrality. On the other hand, if government were speaking, maybe in a pamphlet or online, this would constitute government speech and avoid the neutrality issue altogether. The problem is, however, that the test does not address the central issue, government speech manipulating public opinion.

The other distinction Souter drew was in *Summum*, when he asked how a reasonable, fully informed observer would understand the speech: would it seem to him government speech or private speech? This approach has the advantage of taking into account the audience for the speech, even if in an idealized fashion. Of course, it poses the question: how to describe such a person? He or she is not the average person drawn from empirical or statistical data nor a person markedly superior in morality, temperament and perception. Rather a reasonable person is a kind of hybrid of the two, that is, common enough to apply generally, but normatively prone to do the correct or prudent thing, so he or she acts as an ordinary person *should* act. Presumably, how such a person would behave would gradually be mapped out as courts would fill in the details as they ruled in particular cases. The result would be a set of more or less objective criteria that could be applied without inquiring into "the infinite variations of temperament, intellect, and education which make the internal character of a given act so different to different men."[206] This approach, which in a way mimics the tort law's concept of the reasonable person of ordinary prudence, might encourage transparency and objectivity, while generating precedents that might offer some clarity.[207]

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[206] Oliver Wendell Holmes, Jr., The Common Law 108 (1881).

[207] In a libel case decided over a century ago in England, barristers began referring to the reasonable person as the man on the Clapham omnibus. *McQuire v. Western Morning News*, [1903] 2 K.B. 100, 109 (Collins, L.J.).

Of course, applying the observer construct would not always be easy. Would a reasonable observer understand the constraints imposed on Dr. Rust? The Court could not agree. Even in *Summum*, the answer might be in doubt. Are the specialty license plates so small and near the ground that literally there rarely would be observers? Unlike, say, billboards, plates do not thrust themselves on an indifferent or unwilling audience, but must be actively sought out. Ordinarily, viewing them closely enough to read the message requires a specific decision and action to do so. More fundamentally, do we really want to so empower the observer that he might override the First Amendment or spare government from meeting the neutrality standard? The observer, from this perspective, would not exactly wield the notorious heckler's veto,[208] but it might be close enough to be cause for concern.

What is so troubling about government speech is that its purpose and effect is to empower government, already the most powerful set of institutions in the nation, "in the sense that [government speech] is used to fend off other First Amendment claims by private speakers and government employees."[209] By freeing government from the usual obligation of viewpoint neutrality, government speech imperils the traditional marketplace of ideas because government is so much stronger than all the other participants. If the bedrock rationale of the First Amendment is, in Justice Brennan's famous words, "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[210] government speech would seem sometimes to protect and elevate speech whose chief impact is profoundly hostile to the freedom of speech. Of course, sometimes government speech that silences private speech is a phenomenon we take for granted, as with a Marine drill instructor and his cadets. But government speech, amoeboid in its boundaries, is not confined to these unexceptional cases. Why endorse government speech that includes government's power to prevent private persons from speaking?

What this suggests is that both academics and courts may well have sailed off in the wrong direction. The real issue is not, as they imagine, how to distinguish government speech from non-government speech. Rather, it is, how to distinguish government speech that abridges free speech from that which does not. This second question may appear merely a rewording of the first. But its import lies in its focus on the consequences of the speech, not the nature of the speaker. Put differently, the choice is between government political speech, on which there are nearly always major differences of opinion, and government nonpolitical speech, on which there is typically consensus. It is, after all, the political consequences that justify our interest in the topic, not the point of origin.

The basic problem remains. If courts treat government speech as covered by the First Amendment, the practical utility of government speech disappears. But if courts deny that government speech is covered by the First Amendment, government speech may overwhelm or silence private speech and much of the practical utility of the First Amendment may disappear. Government speech may stimulate private speech, enhance tolerance, promote health, security, and prosperity. Or it may not.

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208 Feiner v. New York, 340 U.S. 315 (1951).

209 Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?* 65 Iowa L. Rev. 1259, 1261 (2010).

210 *N.Y. Times*, 376 U.S. 254, 270; Owen Fiss, The Irony of Free Speech 5 (1996).

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The Time-traveling Lawyer: Using Time Travel Stories and Science Fiction in Legal Education

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ABSTRACT

Science fiction and time travel can be used to inform and enhance the education of law students in profound ways. Within the broader field of law and literature, the relationship between law and science fiction, especially time travel stories, is rich and useful. Themes and concepts in time travel can be applied in the exploration of existing legal philosophies as well as a more expansive and engaging study of power, authority, freedom, and a number of global issues. As governments and people worldwide wrestle with climate change, armed conflict, pandemics, and the increasing significance of artificial intelligence and other advances in technology, time travel stories give students unique contexts in which to consider what law is and the degree to which it defines human experience. For generations, brilliant science fiction writers have offered thought-provoking stories and worlds that law professors and their students can use to reimagine legal thought and practice. Like its close relatives, mythology and fantasy, the science fiction genre is untethered to current social or political experience or projections necessarily corrupted by narrowly conceived historical perspectives. Science fiction writers are interested in illuminating possibilities by considering identifiable problems in unidentifiable environments. It is no accident that gender identity, racism, reproductive rights, extremist ideologies, global health crises, and various recognizable forms of labor exploitation are addressed in provocative and insightful ways by a number of the best science fiction writers. Law has a strong presence in their work. Judges, law givers, ruling groups, and other less familiar forms of power and control appear in these stories and help to move and shape the experience of the time traveler. Law students can draw on the work of these writers to consider old questions in new and refreshingly broad ways. The importance of communication and access to information are also strong themes common to law and science fiction. How are concepts of truth and propaganda significant to power? Is truth necessary for legitimacy? Information technologies introduced in the science fiction world now exist in real time in forms and with speed and volume unimagined even a few decades ago. As artificial intelligence becomes dominant in many aspects of our daily lives, law students must consider how it may change law making, court procedures, entire legal systems, and perhaps even concepts of justice. As a project, law students might develop a case and conduct a trial using an AI judge or try a case to an AI jury. How human is the law? The role of emotional intelligence and concepts like mercy, restorative justice, forgiveness, or retribution are also things they might explore in seminars or other classes using science fiction literature and other time travel media as a framework.

KEYWORDS

Law and Literature, Law and Science Fiction, Law and Time Travel, Artificial Intelligence, Emotional Intelligence and the Law

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CONTENTS

I. Introduction

> *The Roman God Janus famously has two faces. One looks backward, toward the past; the other looks forward, toward the future. Mythologists understand this two-faced depiction as complementary, not contradictory. It means that every beginning has an ending, every ending a beginning. Like a doorway, Janus looks both ways.* [1]

This is an article about the potential value of time travel and science fiction stories and concepts in legal education. Opportunities to use this imaginative and thought-provoking material in legal education, including doctrinal teaching and skill development, should be embraced and celebrated. Law professors are often seeking new ways to capture the interest and natural curiosity of their students and engage them in an educational experience as memorable as it is meaningful. In this context, "meaningful" is something beyond proficiency or competency in areas necessary to obtain the degree of juris doctorate, or the successful mastery of bar examination material. Time travel and other science fiction works are uniquely suited for use in law school. Science fiction writers explore the nature of law and authority in their work. They pull power, prejudice, and notions of what it means to be human out of the recognizable contexts of history and culture, allowing readers and viewers new ways of challenging underlying assumptions. Law and literature are already wrapped together in the world of ideas and philosophy, and useful approaches to their relationship have been put forth by legal scholars in earlier eras. In an age of interactive artificial intelligence, privatized space exploration, global pandemics, and rapidly evolving threats to both the integrity of public information and the planet's atmosphere, this relationship can be retooled and suited to strengthen legal education in remarkable ways.

This article begins with reflections on the emerging legal market and the challenges facing law graduates as they enter it—challenges driven not only by changing needs and demands of the profession, but a broader, aspirational challenge to establish a relevant and satisfying presence in that world. Following afterward, themes and ideas in science fiction and time travel literature are introduced and observed with a focus on the way law, authority, and social structure are used. The work of select scholars with important ideas in the field of law and literature is explored in the context of bringing these ideas forward. What are the possibilities for using science fiction and time travel literature in legal education and thought? The works of several science fiction writers with law-related themes are explored for their potential value, and as a means of re-imagining the legal landscape. Evolving technologies, especially artificial intelligence, are considered with respect for their great potential. This potential is tempered by caution, as those concerned with social justice, global health issues, climate change, and extremist politics observe the increasing presence of AI in every aspect of life. In conclusion, ideas about how science fiction and time travel literature might be incorporated into the law school curriculum are discussed.

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[1] Elec. Priv. Info. Ctr. v. Nat'l Sec. Comm'n on A.I., 466 F. Supp. 3d 100 (D.D.C. 2020). Judge McFadden references Donald. L. Wasson, *Janus*, Ancient Hist. Encyclopedia (Feb. 6, 2015), https://www. Ancient.eu/Janus/.

II. Law Graduates and Their New Paths in Evolving Culture

As this decade begins, law graduates are finding an evolving job market. They are looking for more and different ways to use their education. Though drawn to law school for any number of reasons, millennials take it for granted that the traditional competitive model for career paths and the results it produces are self-limiting. They do not want to be boxed in. As Robert N. Saylor and Molly Bishop Shadel note: "They are frightened about graduating with huge loans and no job in hand. But they are also disconcerted and depressed that the world does not invariably reward even the most dedicated." [2] Seeking roles in a "larger, noble goal"[3], these students have expanded expectations. They are restless, and they will likely redefine law practice to include broader and more sophisticated connections with the fields of technology, artificial intelligence, environmental science, and global health. They will also bring their "useful energy and focus" [4] to the forefront in social justice and human rights.

Science fiction can be used to refresh and re-energize the law school experience. The *what* and the *why* of curriculum needs shift and change. As they absorb what they are taught, students are also engaged at some level in deciding why it is important. Literature and other popular media can bring dimension to the classroom that is not possible with cases and textbooks alone. An example is climate-change fiction, or "cli-fi", a term coined by author Dan Bloom.[5] Students work harder when they can attach personal and social significance to their course material or assigned areas of study. "In a society where climate change effects marginalized groups disproportionately, imagining the future through climate change fiction becomes an act of resistance."[6] Science fiction is an ideal medium for writers who measure the distance between past, present, and future in unique units of science, culture, and human endeavor. Looking forward, they offer both utopian and dystopian views of the future. Traveling backwards, they explore history and culture through the meeting of different worlds, even if the present is only represented by a single human. Some provide elaborate detail, and others allow the reader to supply or avoid missing pieces of the stories in a way unique to time travel and science fiction literature. Whether it is the "angry optimism" of Kim Stanley Robinson,[7] the unparalleled psychological masterpieces of Octavia Butler, [8]or the spirited stories of Becky Chambers,[9] the goal is to inspire students and their professors to think in new ways.

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2 Robert N. Saylor & Molly B. Shadel, Tongue-Tied America 137 (2011).

3 *Id.*

4 *Id.* at 136.

5 Dan Bloom, *Can "Cli-fi" Help Keep Our Planet Livable?* The Medium (July 27, 2015), http://medium.com/@clificentral/can-cli-fi-help-keep-our-planet-livable-8b053bd4aa35.

6 Diego A. Ortiz, *How Science Fiction Helps Readers Understand Climate Change*, The BBC (July 6, 2019), https://www.bbc.com/culture/article/20190110-how-science-fiction-helps-readers-understand-climate-change.

7 *Id. See generally* Kim S. Robinson, 2312 (2012); Kim S. Robinson, The Mars Trilogy (Red Mars, Blue Mars, Green Mars) (1993).

8 *See* Octavia E. Butler, The Parable of the Sower (1993).

9 *See* Becky Chambers, The Long Way to a Small, Angry Planet (2019).

Can there ever be too many ways to think about law? Professor Milner S. Ball explored the possibilities of new and more humanistic conceptual metaphors for law in his 1985 book, *Lying Down Together: Law, Metaphor, and Theology*.[10] In a rich and far-reaching exploration of the conceptual metaphors of law, Ball identified the primary metaphor of law as a "bulwark of freedom" and considered the benefits and overall good of moving to a metaphor of law as "a medium of human solidarity" instead. [11] Ball used marine law to illustrate his points. However, his unique interdisciplinary treatment of the subject inspires us to see law in many places and many forms. The body of his work also reflects his passion for social justice and civil rights. [12] In the 1980s, Ball's choice of "medium" over "bulwark", and "the Peaceable Kingdom" over "Fortress America", was a kind-spirited challenge to rethink law into an uber-intelligent, inclusive, and accepting process. [13]Sealed in the image of a bulwark or fortress, law is inherently suited for the preservation of special interests, privilege, rigidity, and exclusivity. Lawyers and lawmakers of a newer generation naturally struggle to define their world with a new language. It is a world splintered with "isms", brands, and hashtags, yet obsessed with the ancient pilgrimages that move toward either unity or division, whether on climate change, voting rights, or the permissible limits of government. The metaphors of the cyber age sound and feel different from those of the 1980s. They inhabit the world of millennial lawyers, bringing faster, less predictable paradigms into play as earlier ways of thinking about law and professional identity fade or become ambiguous. Professor Ball recognized the power of metaphor in law when he said, "Conceptual metaphors for law can circulate, diversify, increase, stimulate the creating of other metaphors, and challenge the hegemony of monolithic conceptual thinking. If we can get the hang of it, law itself can be made a helping part of the cycle—keeping a gift moving, keeping a conversation going, establishing connections, breaking through walls." [14]

The idea of traveling backwards in time, or forward at an accelerated pace, landing on fixed or random points, experiencing environment, communication, relationships, and industry in an unfamiliar temporal world, has long fascinated. For law students, provocative questions are raised through these encounters. What better test for principles driving rules and authority? In imaginative contexts, students are free to explore the fragility or flexibility of contemporary concepts of law and justice. What aspects of time travel and science fiction literature might help elucidate practice values? If we ask students to identify and study recognizable assumptions in unrecognizable and almost unfathomable systems, we may equip them to be better problem solvers and better builders of the next legal world—smarter, braver, and more resourceful.

The bond between popular culture and law is a subject of spirited debate and discourse. As virtual realities, a whole menu of universes with new worlds, alien cultures, and undreamed of and liberating technologies, play out across jurisdictions,

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10 Milner S. Ball, Lying Down Together: Law, Metaphor, and Theology (1985).

11 *Id.* at 28-35.

12 *See In Memory of Milner S. Ball*, U. of Ga. (n.d.) https://www.law.uga.edu/memory-milner-s-ball.

13 Ball, *supra* note 10, at 123. Understandably, Ball found the term "kingdom" to be imperfect. For reasons discussed in the text, he chose to keep it anyway.

14 Ball, *supra* note 10, at 17.

there are surely ways lawyers can project themselves toward a richer experience as the ones self-chosen to inhabit the legal world of the present.

Science fiction and law share themes and concepts. Sometimes easily recognized and other times obscure, these include power, legitimacy, conformity, isolation, communication, privacy, control, freedom, fear, stability, and self-determination. Psychological themes are also present. These include alienation, aggression, apathy, otherness, love, loyalty, mortality, mercy, empathy, aesthetics, and safety. Professors and other mentors can help define the role of law graduates in the next decades by referencing the broad range of ideas and imaginative thinking of science fiction writers. The language and metaphors of the genre are already in our shared experience and consciousness. [15] A central question will be whether the legal community will be a positive, optimistic force for the future, or a dull and largely unresponsive mass, without momentum or vision.

In her January 2020 op ed, *The Darkness Where the Future Should Be*, New York Times Columnist Michelle Goldberg asked, "What happens to a society that loses its capacity for awe and wonder at things to come?" [16] Borrowing Goldberg's question for a narrower context, what happens to a legal system that loses *its* capacity for self-reflection, flexibility, and adaptation? As Goldberg suggests, awe and wonder are the necessary fuels to move forward with a healthy level of confidence in the possibilities for positive change. Goldberg noted an alarming downward spiral in well-being and outlook among millennials in the nation's political climate. [17] Law students are especially prone to this unsettling phenomenon. If they are truly engaged in their education, the ways that law creates, colors, and animates the world in their field of vision will be immeasurable. A worthy challenge for professors is to find ways of helping students see that world not only with clarity, but with empathy and compassion. The demands of the legal world are not always familiar or predictable. In periods of crisis, they must be broadly, rapidly, and honestly defined. Extraordinary skills and judgment are necessary in a world that assumes *unknowns*. The need for these strengths would be less critical in a world of certainty.

Law is unique in its relationship to society. In varying degrees, it affects everyone and everything. If we carry Professor Ball's concept of law as a medium forward,[18] it may help us understand why ancient themes of empathy, mercy, and forgiveness attach to newer and newer realities in law, however scientific or *novel* the terrain. In a democracy, the capacity for awe and wonder and the capacity for empathy are precious partners.

To prepare tomorrow's lawyers as if they were time travelers, traditional notions of hindsight, foresight, and *insight* are helpful but ultimately inadequate. Time loops have replaced the notion that history repeats itself. Knowledge is an accepted source of power, but if knowledge alone does not lead to a successful break from inadequate and self-perpetuating institutions, a search for more radical ideas may yield a better energy field for the profession. Free to mingle ideas from

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15 *See* Peter Stockwell, The Poetics of Science Fiction (2000).

16 Michelle Goldberg, *The Darkness Where the Future Should Be*, N. Y. Times (Jan. 24, 2020), https://www.nytimes.com/2020/01/24/opinion/sunday/william-gibson-agency.html)

17 *Id.*

18 Ball, *supra* note 13.

their own experience with those from the assumption-free fiction of time travel, students might explore any number of questions. Will historically mistreated and oppressed people find themselves in a newer and even more sinister model of discrimination? Will our ability to communicate with one another evolve or devolve? Will the power of ideas thrive or diminish? Will the term "compromise" come to mean something different, darker, or aspirational? Will that term fall out of use altogether? Will there be a language of hope? As humans become more reliant on artificial intelligence, how will we define truth?

Science fiction offers students unique ways to consider law and its relevance in different contexts. Law is highly visible in some, and in others, it is hidden or notably absent. Law can be redefined or deconstructed. Students can question its nature. It can be branded, marketed, and reinvented. Its value can be questioned. Its relation to other forces in society can be scrutinized without the limitations of real-time culture. Is law porous enough to contain or absorb empathy? Can we conceive of law without human characteristics? Is law definable without notions of uniformity, conformity, or value judgments? How much of the legal world is defined by propaganda?

The language and ideas of science fiction are present in business, design, and the self-help industry. Notable pioneers in these fields have been influenced by both dystopian and utopian visions of the future. Elon Musk, founder and CEO of Space-X, product architect for Tesla, founder of research companies OpenAI and Neuralink, and co-founder of the company which ultimately became Paypal, is a striking example. Musk is a controversial twenty-first century engineering and technology visionary strongly influenced by science fiction writers like Isaac Asimov.[19] Musk says, "an asteroid or a super volcano could destroy us, and we face risks the dinosaurs never saw: an engineered virus, inadvertent creation of a micro black hole, catastrophic global warming, or some as-yet unknown technology could spell the end of us." [20] In brighter moments, Musk has also spoken hopefully of humans becoming an "interplanetary species" with the technology and resources to do somewhat better than the dinosaurs. "It's insurance of life as we know it, and it makes the future far more inspiring if we are out there among the stars and you could move to another planet if you wanted to." [21]

In a different vein, Deepak Chopra, popular speaker and author in the areas of personal growth and spiritual awareness, writes about becoming "metahuman". [22] It is significant that Dr. Chopra has chosen this term, which was coined in the DC Comics world to refer to individuals with superhuman powers, generally derived from genetic mutations. [23] Chopra has also been vocal about using Blockchain

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19 Matt Weinberger & Avery Hartmans, *How billionaire Tesla & SpaceX CEO Elon Musk went from getting bullied as a child to becoming one of the most successful & controversial men in tech*, Bus. Insider (Oct. 21, 2021) https://www.businessinsider.com/the-rise-of-elon-musk-2016-7.

20 *Elon Musk Quotes*, Brainyquote, https://brainyquote.com/quotes/elon-musk-567310, (n.d.).

21 Neil Strauss, *Elon Musk—the Architect of Tomorrow*, The Rolling Stone (Nov. 15, 2017), https://www.therollingstone.com/culture-features/elon-musk-the-architect-of-tomorrow-120850/.

22 Deepak Chopra, Metahuman: Unleashing Your Infinite Potential (2019).

23 *See, Metahumans,* Fandom, https://dc.fandom.com/wiki/metahumans, (visited Aug. 10, 2020).

technology for suicide prevention during the crisis brought on by the coronavirus pandemic. He has referred to the platform as a "merger between technology and meditation." "I am a big student of emergence, which means when you have a shared vision, when you value people's differences, something happens when there is true transparency, everything is measurable. Blockchain moves us in that direction." [24] Elsewhere, Yazin Akkawi has written about the influence of science fiction, and of sci-fi writers like Arthur C. Clarke, in the design world. [25] Given its influence in so many areas of popular culture, science fiction is a natural draw for easily bored law students as they search for ways to make their educational experience exciting and appealing.

In films such as *The Time Machine*, [26] an early drama based on H.G. Wells' classic story, [27]and *Idiocracy*, a 2005 comedy, [28] time travelers encounter cultures populated with non-thinkers. In *Speech Sounds*, [29] one of many thought-provoking stories by Octavia Butler, readers encounter a society crippled by the loss of communicative abilities. These are examples of work that could be used to highlight essential practice skills in addition to stimulating ideas about the way information is generated, manipulated, stored, or restricted. Communication and understanding are often taken for granted in law. Their role is critical to the process of justice. The connection between communicative ability and mutuality or commonality of understanding is important for students to consider. How often do we question whether everyone is on the same page? Students should be encouraged to consider the relationship between communication, authority, and legitimacy. They should explore the extent to which a willingness to communicate and the desire to assist in understanding and exchanging ideas denote acceptance and inclusion. It is essential in the struggle to achieve equality. When are words being used to facilitate understanding, and when are they being used instead to frustrate and confuse?

There are nods to hard science and technology throughout much time travel literature, and there are also works of complete fantasy. Competing ideas about history are found in science fiction. One is that history as mutable. A second is that history is immutable. The third is a free-standing idea of "alternate history" [30] Each of these models has been used creatively to illustrate the ways humans cope with profound and novel dilemmas. Time-traveling characters experience moments of shocking realization and clarity in both personal and cultural dilemmas. They are tested and challenged in ways characters of traditional fiction are not. For the time traveler, paths of problem-solving must somehow shift into places and times that are unfamiliar and perhaps impossible to navigate.

In sci-fi stories and movies, characters sometimes find themselves in time loops,

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24 Jason Brett, *Deepak Chopra Leverages Blockchain to Fight Covid-19 Mental Health Crisis*, Forbes, (Aug. 20, 2020), https://www.forbes.com/sites/jasonbrett/2020/08/20/deepak-chopra-leverages-blockchain-to-fight-covid-19-mental-health-crisis/?sh=36b6c91e42c9.

25 Yazin Akkawi, *The Role of Science Fiction in Design: should we be worried?* Medium, (Mar. 14, 2018), https://blog.prototypr.io/the-role-of-science-fiction-in-design-3777f13e66cd.

26 The Time Machine (Metro-Goldwyn-Mayer 1960).

27 H.G. Wells, The Time Machine (William Heinemann 1895).

28 Idiocracy (20th Century Fox 2006).

29 Octavia E. Butler, *Speech Sounds*, *in* Asimov's Science Fiction Magazine (1983).

30 *Time Travel,* Time Travel Site, (n.d.), https://timetravelsite.wordpress.com/time-travel/.

repeating minutes, hours, or days. Examples are popular films such as *Groundhog Day* [31] and the futuristic action film *The Edge of Tomorrow*, [32]also marketed as *Live, Die, Repeat*. In varying degrees, science fiction writers draw on theories from the academic and scientific communities. There are competing ideas about the nature of time. In the theory of *presentism*, time is essentially an illusion, viewed only as a change in events. In *eternalism*, past and future are conceived to exist. [33] Sci-fi writers flirt and experiment with the ideas of scientists and philosophers like Albert Einstein, father of the theory of relativity, [34] J.M.E. McTaggart, author of *The Unreality of Time*, [35]Lee Smolin, author of *Time Reborn*, [36]and Marina Cortez, co-author with Smolin of *The Universe as a Process of Unique Events*. [37]McTaggart subscribed to the theory of presentism. Smolin and Cortez are examples of scientists who reject presentism in favor of a dimensional concept of time. In *The Universe's Time Machine*, Trace Dominguez, host of the PBS Series *Stargazers*, notes that modern calculations place the speed of light at 186,000 miles per second. This means that stargazers are actually "seeing" distant stars and planetary systems as they existed at an earlier point in time, and not as they exist in the moment. [38]

III. Science Fiction, Possibility, and Reality

Popular culture has been greatly enlarged with time-travel and science fiction, in all forms of media. Some is pulp quality, and some is masterful. Women and African American writers have belatedly achieved hard-won recognition in these fields. Their presence is extremely important in the genre. Ursula K. Le Guin, one of the first women to receive recognition as a writer of time travel and science fiction, rejected conventional definitions and limitations on concepts of gender, parenting, and family in her work, much of which is set in the fictional Hainish universe.[39] Other Hugo Award winners like the late Octavia Butler [40]and N.K. Jemisin have written unique and compelling stories. Jemisin's story, *The Obelisk Gate*, [41]centers on the lives of a mother and daughter who have been separated by catastrophic climate change.

On the importance of science fiction in the battle against climate change, Diego Arguedo Ortiz writes, "for much of science fiction history white males have dominated the genre—with the figure of the male scientist or the white explorer

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31 Groundhog Day (Colombia Pictures 1993).

32 Edge of Tomorrow (Warner Bros. 2014), also marketed as Live, Die, Repeat.

33 Time Travel *supra, note* 30.

34 *See* Ryan Jackson, *First Black Hole Image Puts Einstein's Famous Theory to the Test*, CNET, (Oct. 1, 2020), https://www.cnet.com/news/first-black-hole-image-puts-einsteins-famous-theory-to-the-test/.

35 J.M.E. McTaggart, *The Unreality of Time, in* Mind 17, 457-473 (1908).

36 Lee Smolin, Time Reborn: From the Crisis in Physics to the Future of the Universe (2013).

37 Marina Cortez & Lee Smolin, *The Universe as a Process of Unique Events*, 90 Phys. Rev. D 084007 (2014).

38 *Stargazers: The Universe's Time Machine* (PBS television broadcast Dec. 16, 2019).

39 Ursala K. Le Guin, The Left Hand of Darkness (1969).

40 Butler, *supra* note 8.

41 N.K. Jemisin, The Obelisk Gate (2017).

commonplace—and the voices of women, indigenous groups, and people of color have been marginalized, even if they were also writing and publishing."[42] Ortiz is discussing the work of Shelley Streeby, Professor of literature and ethnic studies at UC San Diego. Streeby says, "Science fiction gets people thinking in a way that another report on climate change doesn't." She goes on to argue, "we need to consider the multiple versions of the future we get from different groups. If we let these stories proliferate and we hear them, they will give us a lot more possibilities than if there is only one." [43]

Octavia Butler's time travel and science fiction stories are provocative and magnificent. Butler won multiple awards for her diverse body of work, which includes a time traveling woman's experience of slavery in *Kindred* [44] and the exploration of a society recovering from a catastrophic pandemic that has impacted the ability to speak and communicate. In *Speech Sounds*, [45]Butler grasped the very roots of civilization and the attending truth about the critical value of communicative ability. Prophetically, Butler wrote of a pandemic that led to the breakdown of trust between individuals, and ultimately to a complete disintegration of government. Through the voices of her female characters, Butler addressed the nature of authority, domination, and betrayal, especially in the context of a male-dominated society. In *The Parable of the Sower*, Lauren, a woman with "hyperempathic" power, makes this observation about the God of the Old Testament:

> "God says he made everything and he knows everything so no one has a right to question any of it. Okay. That works. That Old Testament God doesn't violate the way things are now. But that God sounds a lot like Zeus—a super-powerful man playing with his toys the way my younger brothers play with toy soldiers. If they're yours, you make the rules. Who cares what the toys think. Wipe out the toy's family, then give it a brand new family." [46]

In Butler's work, parallels to current events in all spheres of life, especially politics, governmental accountability, and the struggle to achieve racial and gender equality, are striking.

In time travel, as in other types of storytelling, there is drama, tragedy, comedy, suspense, romance, intrigue, and mystery. One peculiar hallmark of time travel is the tension between the world of the time traveler, represented by the experience, reactions, and choices of the traveler, and that of the past or future. Is there an understanding? If so, what is it? Will it change anything in the world of the traveler upon the return journey—if there is one? The traveler, whether detached or engaged, is in a discovery process readers and movie watchers adopt. In many instances, law and its core subjects are involved. In *Will There Be Justice? Science Fiction and the Law*, lawyer and science fiction author Christopher Brown writes, "Stories of science fictional law breaking have profound potential to highlight the

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42 Ortiz, *supra* note 6.

43 *Id. See also* Shelley Streeby, *Radical Reproduction: Octavia E. Butler's HistoFuturist Archiving as Speculative Theory*, 47 Women's Stud. 719 (2018).

44 Octavia E. Butler, Kindred (1979).

45 Butler, *supra* note 29.

46 Butler, *supra* note 8, at 16.

injustices we accept without question in real life—using the speculative prism to show truths about our world that realism cannot." [47]

Whether the tension is between present and past, present and future, or present and an alternate history, the traveler learns and reacts to things which can be made to look quite familiar, even if they cannot be known in real time. The ideas that set time travel apart from other literature necessarily flow from these unknowns—the writer's projected vision of order, authority, life, and limitation. There are novel and sometimes futile, sometimes transformative relationships between the travelers and the time-distant environments of the stories.

IV. Sci-fi in the Lens of Law and Literature

As a branch of the field of law and literature, law and time travel are a natural pairing. The study of law and literature offers students ways to think about the professional identity of lawyers, values ascribed to law by members of society, the language and communicative properties of law, and its aesthetic properties. The same is true and perhaps amplified in time travel literature.

Ideas about law and literature have evolved over the last century, beginning with questions about whether a relationship exists and, if it does, what value it holds. The nature of the relationship has been discussed and debated with enthusiasm by numerous legal scholars, including Justice Benjamin Cardozo, Richard Posner, James Boyd White, Richard Weisberg, and Robin West.

Professor West has referred to three separate theories of law and literature, or "quite different interdisciplinary projects", as "the literary, the jurisprudential, and the hermeneutic." In the first, law as a subject in great works of literature is often insightfully treated. In the second, literature past, present, and future is viewed as having or capable of having the force of law. In the third, literature is viewed as a path to interpretation of legal texts. [48]

With time travel literature, as with other genres, arguments can be made for the value of each of these theories. Given the variety of unique topics and perspectives among time travel writers, even within the discrete areas of science fiction and what might be called "dream" fiction, the election of one theory over others might pose unnecessary limitations. The need to use traditional models at all is questionable. However, they serve as a good starting point. It is worthwhile to observe that the relationship has been considered intently and expressed in rich and varied terms.

Justice Cardozo professed the view that the law *is* literature: "We are wasting our time, so many will inform us, if we bother about form when only substance is important. I suppose this might be true if anyone could tell us where substance ends and form begins." [49] In his preface to *The Legal Imagination*, James Boyd White wrote, "I think that the law is not merely a system of rules (or rules and principles),

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47 Christopher Brown, *Will There Be Justice? Science Fiction and the Law,* TOR.COM, (June 3, 2020), https://www.tor.com/2019/08/07/will-there-be-justice-science-fiction-and-the-law.

48 Robin West, *Literature, Culture, and Law — at Duke University*, 1 (Geo. Pub. L., Working Paper No. 1201867).

49 Benjamin N. Cardozo, *Law and Literature, in* Selected Works of Benjamin Nathan Cardozo 339-346 (Margaret E. Hall, ed., 1947).

or reducible to policy choices or class interests, but that it is rather what I call a language, by which I do not mean just a set of terms and locutions, but habits of mind and expectations—what might also be called a culture. It is an enormously rich and complex system of thought and expression, of social definitions and practices, which can be learned and mastered, modified or preserved, by the individual mind. The law makes a world." [50] In *Poethics: And Other Strategies of Law and Literature*, Richard Weisberg wrote, "Wonderfully equipped for the task, literature teaches about law in two discreet if related ways, first, by the *how* of literature, or how literature means, to paraphrase John Ciardi—and second, by the *what* of literature—as the rationalized re-articulations of its 'lessons' for law." [51]

In time travel literature, issues driving contemporary debate on social policy and legislation are pervasive. Consider the Victorian author, Charles Dickens. Ebenezer Scrooge was not a lawyer, but he *was* a time traveler. What might Scrooge's transformative experience offer that cannot be found in Dickens's famously cynical look at the law itself, *Bleak House*? [52] In *A Christmas Carol*, [53]the ghosts of past, present, and future cast a brilliant and harsh light on issues of labor, employment, exploitative business practices, unrestrained capitalism, public health, and the overwhelming impact of poverty.

Dickens's story is useful for legal education in other ways. Decades before the significance of early childhood development was fully recognized, he brought the reader along with Scrooge, his time traveler, to confront the painful and life-changing experiences of an emotionally isolated childhood. Unlike characters in conventional fiction, time travelers have the advantage of the moment, experiencing the past without the limitations of memory and the future outside the narrow space of their own imagination or need for wish fulfillment. In practice, lawyers can draw upon these concepts for "a day in the life" videos in personal injury cases or mitigation in capital murder cases.

Bringing ideas about law and literature forward from the very fruitful period of the 1980s, they can breathe new life into law curriculum of the twenty-first century. It is also possible to bypass this question—the precise nature of the relationship between law and literature—and view the intersect of law and the world of science fiction with an appropriately unique vision. Attempts to categorize it may diminish the opportunity to explore its characteristics with abandon. An atmosphere that is both self-aware and selfless surrounds the time traveler in these encounters. Whether the emphasis is on origins, environment, socio-political landscapes, artificial intelligence, or some extraordinary pairing of these, time travel informs the study of law in its own way.

Robin West has noted a more recent focus on law and culture as opposed to law and literature. She says this about the shift: "as our focus in humanistic studies of law shifts—and broadens—from literature to culture, we should be careful not to lose our attentiveness to the critical perspectives contained within imaginative literature and culture both, and no matter how each of those terms are defined". [54]

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50 James Boyd White, The Legal Imagination xiii (1973).

51 Richard H. Weisberg, Poethics: And Other Strategies of Law and Literature 4 (1992).

52 Charles Dickens, Bleak House (Penguin Books 1971)(1853).

53 Charles Dickens, A Christmas Carol (Puffin Classics 2019) (1843).

54 West, *supra* note 48, at 3.

The connections between law, literature and culture are arguably stronger and more complex as daily life activities move from brick and mortar buildings to virtual places. Readers may choose a virtual library, especially in periods of public health crisis. Art, music, literature, and forums for all kinds of communication have migrated increasingly into cyber theatres and galleries. Needs for any type of information or commodity can be gratified almost instantly. At the same time, the personal quality of information and forms of expression have undoubtedly been compromised. The inestimable amount of information crossing before us threatens to diminish the special character of literature, but it also makes it more accessible and more egalitarian.

If we think of ways law embraces the culture and spirit of time travel and science fiction, we naturally tend toward the positive. Positive concepts of transhumanism and the predominance of futurism in fantasy have pushed Orwellian dystopia to one side, although it is still useful to scrutinize that side. Professor Ball's search for conceptual metaphors inspires us to look beyond our world and our time for additional ways of understanding law. Drawing on his chosen metaphor, a medium, we might consider law's preservative properties. Conversely, mediums are reactive. They can stabilize or dissolve substance. They can be restorative, calming, or palliative.

When addressing doctrine, legal systems, judicial philosophy, or experiential law courses and skill development, time travel literature enlarges the discussion. Law figures prominently in science fiction and time travel. Time travelers encounter novel legal systems and thought-provoking dilemmas while recognizing or woefully failing to recognize a familiarity or affinity with things already known. *Star Trek*'s "prime directive", [55] an order to respect autonomy and refrain from interfering in developing alien societies, played out for a generation of viewers who grew up with colonialism, imperialism, and unprecedented international aggression. Exposure to other worlds necessarily invites comparison and judgment, and hopefully leads to reflection. Arriving just two decades after a global war, the holocaust, and the end of British imperialism in India, *Star Trek* captured attention. It is one example of the powerful mixture of imagination and science pushing us to think about our world in new terms. As the universe grows larger and larger in our consciousness, and our world grows proportionately smaller and smaller, our assumptions about law are bound to be tested.

Other glimpses of law in science fiction are darker. In H.G. Wells' *The Island of Dr. Moreau*, the "Sayer of the Law" is one of the beast folk chosen by a sadistic doctor to indoctrinate the others with a set of rules that resemble religious law. [56] In the dystopic world of *The Handmaid's Tale*, Margaret Atwood's female characters have lost the rights to their reproductive functions as well as other basic rights. [57] Enduring questions of what it means to be a person, a human, or a group member are raised in these stories. More recently, the merciless and sometimes frustrating *being* of artificial intelligence has become a prominent feature in science fiction.

Throughout the genre, bits and pieces of legal history and almost-recognizable reality are found alongside startling new ideas and sketched-in technologies that transcend reason. Compelling themes in the journals of time travelers are often

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55 *Star Trek* (NBC television broadcast, Gene Roddenberry prod. 1966-1969).

56 H.G. Wells, The Island of Dr. Moreau (1896).

57 Margaret Atwood, The Handmaid's Tale (1985).

subjects at the heart of law and social controversy in *our* time—the relationship between humans and their environment, the tension between development and the destruction of precious resources, reproductive rights, bioethics, concepts of childhood and parenting, religion and spiritualty, art and creativity, greed, prejudice, exploitation, privacy, and the corruption of moral codes by conquest.

Language is also a key part of the relationship of law and literature. This holds true for science fiction, and it is important for students to appreciate law's connection to language. Consciousness of language, along with its power and limitations, are companion subjects to law. These are celebrated in the work of James Boyd White. Professor White recognizes not only a comfortable dependence of law on literature, but a unique relationship between each lawyer and language. In *Success for the Lawyer and Writer: Establishing the Right Relationship with His Language*, he writes "it is fair to say that as lawyers we are not the products of a mass-production, assembly line education system, identical little lawyers lined up in a row. For some people, law leads to an ever duller and more restrictive life, to drudgery and routine; for others, to a life by comparison free and self-expressive, which seems to yield and form itself to the controlling intelligence or imagination." [58]

V. The Rich World of Sci-fi Writers

Science is an obvious element that helps define this genre, although time-travel literature falls into distinct categories. One is heavy with science and technology. Writers in this category are often respected scientists or at least well-educated in science. For example, Arthur C. Clarke[59] and Isaac Asimov[60] are known for the scientific realism in their stories. The other category is a softer mixture of fantasy, historical fiction, and projections of the future. In the former, travelers arrive at various points behind and beyond by way of time machines or other fantastical crafts powered with future technologies. In the latter, a bump on the head, a dream state, or a spiritual presence transport the traveler to the past or future.

Several well-known time travel stories are of the type outside the science-based category. For example, Dickens's *A Christmas Carol*, [61]Octavia Butler's *Kindred*, [62]Henry James's *A Sense of the Past* (later adapted for film as *Berkley Square*), [63] and Mark Twain's *A Connecticut Yankee in King Arthur's Court*. [64]

Most non-science time travel places the protagonist in an earlier era. The meeting of two—the traveler and the earlier environment—is the focus of the work, whether history is altered, or the traveler keeps any memory of the experience. Unlike other science fiction, these journeys and the messages readers discover in them do not depend on novel technologies or artificial intelligence. They provide

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58 White, *supra* note 50, at 39.
59 *See* Arthur C. Clarke, 2001: A Space Odyssey (1968).
60 *See* Isaac Asimov, I, Robot (1950).
61 Dickens, *supra* note 53.
62 Butler, *supra* note 48.
63 Henry James, A sense of the Past (1917); *See also* Berkeley Square (Fox Film Corporation 1933).
64 Mark Twain, A Connecticut Yankee in King Arthur's Court (Charles L. Webster and Co., 1889).

an immediate perspective on the way laws, societal norms, and prejudices change and adapt along with things like fashion and taste.

Many time travel stories either deal directly with law or land on it indirectly, by focusing on legal issues. Some of these are H.G. Wells' *The Time Machine*, [65] Wilson Tucker's *The Lincoln Hunters*, [66] Eleazar Lipsky's *Snitkin's Law*, [67] Ray Bradbury's *A Sound of Thunder*, [68] Lloyd Biggle Jr.'s *Monument*, [69] Ursula K. Le Guin's *Another Story or a Fisherman of the Inland Sea*, [70] Harry Kuttner's *The Time Locker*, [71] Poul Anderson's highly provocative *License* ("structured" crime is lawful), [72] or Phillip Dick's profound and disturbing story about predictive prosecutions, *Minority Report*, [73]which was the basis for Steven Spielberg's 2002 film of the same name.[74]

Time travel writers have the freedom and the challenges that come with addressing familiar issues in novel and unfamiliar contexts and settings. They use unique or ambiguous definitions for things readers recognize as racism, misogyny, slavery, genocide, oppression, ethnocentrism, and jingoism. Their work is rich with irony and suspense, but it moves beyond other forms of fiction with its ability to sidestep versions of reality understood and accomplished by humans thus far. It is not surprising that many writers of time travel and other science fiction were or are also lawyers. Examples are Eleazar Lipsky, Theodore Thomas, David Drake, Laura Montgomery, Charles Harness, and Christopher Brown. [75] Though not strictly time travel, other science fiction from the mid-20th century to the present dealing with law and lawyers includes *The Jigsaw Man* by Larry Niven (organ donation);[76] *CHECKSUM, Checkmate* by Tony Daniel (murder by an intelligent machine); [77]*License to Live*, by Sarah Hoyt and Laura Montgomery (space treaties and interplanetary settlement); [78]*The Cyber and Justice Holmes* by Frank Riley (artificial intelligence in the courtroom); [79]and *The People vs. Craig Morrison* by

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65 Wells, *supra,* at note 25.

66 Wilson Tucker, The Lincoln Hunters (1958)

67 Eleazar Lipsky, *Snitkin's Law*, *in* Fantasy and Science Fiction (1959).

68 Ray Bradbury, *A Sound of Thunder, in* The Best Time Travel Stories of the 20th Century 73 (Harry Turtledove and Martin H. Greenberg eds., 2005).

69 Lloyd Biggle, Jr., Monument (1974).

70 Ursala K. Le Guin, *Another Story or a Fisherman of the Inland Sea, in* The Best Time Travel Stories of the 20th Century 388 (Harry Turtledove & Martin H. Greenberg eds., 2005).

71 Harry Kutner, *The Time Locker, in* The Best Time Travel Stories of the 20th Century 20 (Harry Turtledove & Martin H. Greenberg eds., 2005).

72 Paul Anderson, *License, in* Fantasy and Science Fiction (1957).

73 Phillip K. Dick, *Minority Report, in* Fantastic Universe (1956).

74 Minority Report (20th Century Fox 2002).

75 Hank Davis & Christopher Ruocchio, Overruled 3 (Hank Davis & Christopher Ruocchio eds., 2020). This is a collection of science fiction about law and lawyers. Many of the authors are also lawyers.

76 Larry Niven, *The Jigsaw Man, in* Overruled 81 (Hank Davis & et al. eds., 2020).

77 Tony Daniel, *CHECKSUM, Checkmate, in* Overruled 123 (Hank Davis & et al. eds., 2020).

78 Sarah A. Hoyt &Laura Montgomery, *License to Live, in* Overruled 189 (Hank Davis & et al. eds., 2020).

79 Frank Riley, *The Cyber and Justice Holmes, in* Overruled 323 (Hank Davis & et al. eds., 2020).

Alex Shvartsman and Alvaro Zinos-Amaro (individual liberties vs. self-driving automobiles). [80]

Time travel and science fiction literature can be used in creative ways to help students develop skill in language, writing, problem solving, and persuasion. It can also be used topically. It is well-suited for courses addressing human rights, mental health law, ethics, legislation, law and technology, artificial intelligence, legal philosophy, and environmental law. What informs our assumptions about the legal world of the future? What role will lawyers play in the future? What will the impact of advancing technologies and artificial intelligence be? How do we envision the legal landscape? Are there enduring practice values in law? If so, what are they, and why are they enduring? Christopher Brown writes, "Science fictional extrapolation is such an ideal laboratory for imagining the policy changes incident to technological disruption that the tools of SF writers are increasingly being used by 21st century legal scholars as they wrestle with issues like what sort of tort liability should apply to autonomous vehicles, what legal rights or responsibilities an AI should have, how law can prevent the proliferation of killer robots (there is even a real-world NGO for that), and who owns the moon—and the minerals it contains." [81]

Unique and favorable characteristics set time travel literature apart from other literature and distinguish it for purposes of enhancing legal education. However, shared characteristics should also be considered. Time travel stories contain elements of myth, poetry, and fantasy. One particularly rich example is Robert Silverberg's *Sailing to Byzantium*. [82] In Silverberg's story, a "visitor" to the 50th century who conceives of himself as a 1980s New Yorker lands in a world where manual labor is performed by robots and service-oriented work is performed by non-human "temporaries". As he travels among five cities that are continually changed by demolition and rebuilding, he experiences a society where choices have been reduced to the whims of tourism—which city to visit and what to see in the city. With a stunning realization that he may himself be a historical recreation just like the continually changing cities, he persuades his aging human companion to seek a transformation to his form so the two can remain together and experience love. Silverberg allows readers to contemplate a society without manual labor, and to question the nature of life forms, the possibilities of culture with mixed human and non-human intelligence or consciousness, and the nature of emotion. To what extent is the need for control dependent on the level of activity in a society? Does it subside as the expectations of humans subside?

Myth is a relative of time travel literature. The two share elements. In *The Clash of the Titans*, [83] based on the Greek myth of Perseus, themes common to time travel include the origin of the universe and the forces within it, achieving order out of chaos, the nature of parenthood, the bond between offspring and parents, and the cost of betrayal. In *The Power of Myth*, [84]Joseph Campbell noted:

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80 Alex Shvartsman & Alvaro Zinos-Amaro*, The People v. Craig Morrison*, *in* Overruled 237 (Hank Davis & et al. eds., 2020).

81 Brown, *supra* note 47.

82 Robert Silverberg, *Sailing to Byzantium, in* The Best Time Travel Stories of the 20th Century 252 (Harry Turtledove & Martin H. Greenberg eds., 2005).

83 The Clash of the Titans (Metro-Goldwyn-Mayer 1981).

84 Joseph Campbell, The Power of Myth (1988).

> Mythology is not a lie, mythology is poetry, it is metaphorical. It has been well said that mythology is the penultimate truth—penultimate because the ultimate cannot be put into words. It is beyond words. Beyond that bounding rim of the Buddhist Wheel of Becoming. Mythology pitches that wheel beyond the rim, to what can be known but not told. [85]

Paradoxically, mythology *is* told and written, just as time travel is told and written. In each case, a sense of what is beyond the knowns drives the story. Or, viewing time travel as the alter ego to mythology, the reader encounters what can be told but not actually known. Concepts of heroism, courage, loyalty, and the struggle to attain good over evil figure heavily in myth and fantasy. Consider Campbell's work, *The Hero with a Thousand Faces,*[86] and his discussion of "the master of two worlds." [87]This is also true in science fiction and time travel. The *Dr. Who* series, created by Sydney Newman, C.E. Webber, and Donald Wilson, is a good example. Since 1963, Dr. Who has been traveling through time and the universe, encountering and vanquishing evil in various forms, with varying degrees of success. [88] Some of Dr. Who's foes are in the form of unknown beings (Daleks), and some are in historically recognizable literary or biblical form, at least outwardly (humans, angels). [89]

In trial, jurors search consciously and unconsciously for heroes. They identify heroes and anti-heroes in the courtroom. They respond to perceived acts of courage or heroism, and they respond to perceived acts of cowardice or evil. In opposite ways, these perceptions are strong motivators. Jurors and judges act on needs that appear in many forms in literature—needs for revenge, mercy, restorative justice, and safety. Safety is a powerful theme. It might be viewed as a defense to aggression or violence, or a condition of being protected. It is the absence of harm.

The relationship between truth and safety is explored in many ways in time travel and other science fiction. Assuming that truth is factual and that it is known, it is often critical to survival. Truth and safety can be viewed in different contexts—for example, one is the cliché that knowledge is power, and the more we know, the better we are at finding safety or remaining safe. Conversely, there is the idea that ignorance is bliss, that what we do not know cannot hurt us. Scientists seek truth. The need for objective truth, whether for survival or any number of lesser identified goals, is an underlying assumption of science. Accuracy and precision are highly valued. The need to be sure, with a related emphasis on testing, is a theme of science. Objectivity and the necessary independence to support it are fundamental. In recent years, the extraordinary politicization of science and the sponsorship of "alternative facts" [90]in the United States have highlighted these critical needs. Is truth optional? This is a broad theme in science fiction.

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85 *Id.*

86 Joseph Campbell, The Hero with a Thousand Faces 229-237 (1949).

87 *Id.*

88 *Dr. Who* (BBC television broadcast 1963).

89 Phttps://www.denofgeek.com/tv/doctor-whos-weeping-angels-are-perfecthorror-monsters-but-are-they-returning-villains/

90 Marilyn Wedge, *The Historical Origins of "Alternative Facts"*, Psychol. Today (Sept. 27, 2020), https://www.psychologytoday.com/us/blog/suffer-the-children/201701/the-historical-origin-alternative-facts.

The search for truth figures heavily in science fiction. The consequences of ignoring scientific or historical truth, limiting access to it, or hiding it altogether, are rich subjects for literature. The stories of H.G. Wells[91] and movies like *Twelve Monkeys* [92]explore the consequences of suppression or manipulation of truth. The relationship of truth to stability or truth to power are common subthemes. In law, truth is an almost accidental theme, taken for granted with legal scholars and practitioners alike. The way in which truth is obscured, hidden, denied, accessed, or handled underlies protest movements and other forms of civil disobedience. Truth-related themes, whether implicit or explicit, are critical in the courtroom.

Another common thread in time travel and law is courage. Courage is a core value of advocacy—particularly the willingness to take on a controversial or unpopular cause or client. Greatness in law might be defined as the skill of persuasion when the outcome is uncertain, or the likelihood of succeeding is almost zero. Persuasive ability is important, and the art of persuasion is of great value. However, it is ultimately courage, which we might define as a willingness to engage in advocacy with an *unknown* end, that unites law and the best time travel writing. The courage to stand up to authority, *especially* when it appears to be futile, and the recognition of values as goals in themselves, are strong supporting themes.

As the special subjects of time travel–science, technology, and artificial intelligence—become increasingly significant in daily life, their impact on law will likely be profound. However, a subtler and more elusive concern is their impact on law's *themes*, especially those that rest on emotional and psychological well-being. Law students navigate through all sorts of subjects with these underlying themes. Whether fully articulated or not, themes of safety, privacy, self-determination, mercy, courage, and hope are present. Sometimes they are open and obvious, and in other cases they are hidden in the details.

Ironically, time travel stories address issues that are newsworthy and controversial in present or real time. Racism, gender identity, sexuality, the displacement of human industry with machines, biological engineering, climate change, and environmental catastrophe are strong themes in time travel stories and movies. One example is the 1973 novel by Ursula K. Le Guin, *The Left Hand of Darkness*. Le Guin's graceful and matter-of-fact science fiction addresses non-traditional gender roles and sexuality. She was writing at a time when women's issues and sexual identity were just rising in national consciousness. [93]

VI. Technology and Artificial Intelligence

Technology and artificial intelligence are essential ingredients for resourceful science fiction writers. These subjects help foster an ideal interdisciplinary effort. In law, the importance of advances in technology and the increasing use of artificial intelligence are unquestionably high. Lawyers are expected to be educated and competent in technology as it relates to both practice and substance. Artificial intelligence has changed the landscape of practice in every area of law, and it will continue to do so as science progresses. Reflecting the significance of these areas,

91 Wells, *supra* notes 27 & 56.
92 Twelve Monkeys (Universal Pictures 1996).
93 Le Guin, *supra* note 39.

the Science and Technology Section of the American Bar Association[94] has an interdisciplinary committee on artificial intelligence and robotics, and a committee on space law. In most states, technology is part of the law school curriculum and dedicated continuing legal education courses.

Children of the sixties and seventies onward can close their eyes and recall favorite episodes of Gene Roddenberry's *Star Trek,* [95]or the classic movie *2001: A Space Odyssey*, [96]based on Arthur C. Clarke's work. Features of science and technology creatively imagined in early time travel works and other science fiction now appear in various forms in the daily lives of people everywhere, whether scientists or school children. Examples of commonplace items that have ancestors in groundbreaking science fiction include personal computers, cell phones, interactive systems like *Siri, Cortana,* or Amazon's cloud-based voice service, *Alexa*, robots that perform everything from cleaning to complex medical procedures, 3-D printers, space rockets, space stations, space travel, sophisticated satellites, and the virtual workplace. The global positioning system (GPS) is now almost 50 years old. Facial matching software is now in use. Forensic scientists and criminologists are racing to keep up with advances in methods of DNA testing and analysis and advances in other areas of forensics.

Evolving technology is central to issues in criminal justice, privacy rights, and first amendment law. [97]It is startling and difficult to consider the magnitude of these changes. As a primary consideration, the gathering and preservation of information, whether historical or scientific, has changed dramatically. Information was once maintained as oral history or in a tangible, non-permanent form, something prone to rot and decay. It could be forgotten, hidden, lost, or destroyed. Information is now stored in increasingly sophisticated electronic formats. It floats in theoretical clouds and resides in millions of theoretical files in cyber libraries. Although not immune to damage or corruption, information now has staying power well beyond the oral history, hand-written words, and humbly type-set stories and reports of past decades. Information can now be copied and shared in tiny fractions of a second. It can be e-mailed, texted, posted on social media and other websites, and tweeted.

Understandably, cyber security has become a huge industry. Databases can be corrupted or breached. The operational systems of corporations and agencies can be held for ransom. Hackers and their "clients" have become the new international villains. Piracy, now a rare occurrence on the high seas, has become a serious threat in cyberspace. On *Pluralsight*, readers are advised to prepare for "the fourth industrial revolution" and given a glimpse of the anticipated technologies and skill set necessary for the next decade. [98]

The broadening field of robotics also has its roots in science fiction. Scientist and author Isaac Asimov's three laws of robotics have the sound and feel of something profound—religious commandments, albeit without the forces of love, brotherhood, or sisterhood:

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94 See American Bar Association, https://www.americanbar.org/groups/environment_energy_resources/ (last visited July 9, 2020).

95 Star Trek, *supra* note 55.

96 Clarke, *supra* note 59.

97 *See* Riley v. California, 573 U.S. 373 (2014); Carpenter v. U.S., 138 S. Ct. 2206 (2018).

98 *Tech in 2025: 10 Technologies that will Transform the Global Economy*, Pluralsight (n.d.), https://learn.pluralsight.com/resource/offers/2019/tech-in-2025.

> First Law: A robot may not injure a human being or, through inaction, allow a human being to come to harm;
> Second Law: A robot must obey the orders given it by human beings except where such orders would conflict with the First Law;
> Third Law: A robot must protect its own existence as long as such protection does not conflict with the First or Second Law. [99]

As humans share an increasing percentage of their lives with interactive machines and grow to depend on them for a variety of needs both personal and professional, Asimov's laws will likely evolve into something beyond fantasy. Humans are drawn to cyber intelligence and interactive machines like moths to a lamp. In addition to *2001: A Space Odyssey*, [100]sci fi films with central themes revolving around non-human intelligence include *AI*, [101]*Her,*[102] and *I, Robot*. [103] There are many others. The subject enjoys a large, enthusiastic audience. Along with writers, lawyers and members of the scientific community are exploring the question of whether artificial intelligence has curiosity or personality. Are there broader ways of defining these terms? What are the limits of automated reasoning? What impact will AI have on essentially human problems like increasing feelings of isolation among members of large urban populations?

Author Stanislaw Lem created the fictional super-computer, *Golem XIV*, [104]a device created to assist the military in war, but ultimately capable of questioning the internal logic of that endeavor. In *Imaginary Magnitude*, Lem noted a single, remarkable characteristic his computer shares with humans: "curiosity—a cool, avid, intense, purely intellectual curiosity which nothing can restrain or destroy."[105]

In the field of artificial intelligence, algorithms are changing the way problem solving is approached. In some cases, AI algorithms are even changing the problems. Jeremy Barnett, a UK barrister specializing in fraud, insolvency, regulatory law, professional responsibility, environmental law, and climate change, has referred to algorithms as artificial persons. "AI algorithms are different from ordinary software as they adapt, learn, and influence the environment without being explicitly programmed to do so." [106]Algorithms are being used in ways that are widely accepted and in ways that are controversial. In *Judicial Analytics and the Great Transformation of American Law*, Daniel Chen notes that judicial analytics can be useful in the identification of extra-legal factors in sentencing, ultimately leading to a "debiasing" in the law.[107] Can analytics be used to shame judges out of improperly grounded sentencing decisions? On the other end of the spectrum, where should the line be drawn in the use of artificial intelligence for legal decision-

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99 Isaac Asimov, *Runaround, in* I Robot (Gnome 1950).
100 Clarke, *supra* note 59.
101 A I (Warner Bros., 2001).
102 Her (Warner Bros., 2013).
103 I, Robot (20th Century Fox, 2004).
104 Stanislaw Lem, Imaginary Magnitude (Mariner Books 1985) (1973).
105 *Id.* at 117.
106 Jeremy Barnett et al, *Algorithms and the Law,* 52 Computer 32 (2019); *See also* Jeremy Barnett et al, *Algorithms and the law*, LegalFutures (Aug. 22, 2017), https://www.legalfutures.co.uk/blog/algorithms-and-the-law.
107 Daniel L. Chen, *Judicial Analytics and the Great transformation of American Law*, 27 Artificial Intelligence & L. 15 (2019)

making? AI Algorithms can be used to ferret out bias in bond proceedings and sentencing. However, algorithms may also contain bias. [108]

There are open questions on the role of AI in judicial proceedings, especially in cases where a decision still depends on resolving credibility contests. Fact finders rely on different forms of information to determine truth-telling. Apart from advances in forensic science and technology, it is interesting to contemplate the future power of non-human intelligence in the justice system. In law, as in science fiction, there is a need to understand the value of emotional intelligence. How critical is emotional information in decision making? The relationship between emotional intelligence and fact-finding as well as fact-weighing is something good trial lawyers take for granted. It factors into determinations of credibility and bias, non-economic damages (pain and suffering), retribution, mercy, jury pardons, and other aspects of verdicts. On the extreme side, how would an intelligent machine handle reasonable doubt? Should intelligent machines have any decision-making role in capital murder cases? Looking at it from another angle, how much do we value the uniquely human connections between facts, emotions, and notions of justice?

Natural language processing (NLP) enables humans not only to interact with computers but to partner with them in oddly human ways. Decades after the arrival of Spellcheck, [109] computers have become de facto editors, translators, and co-writers. AI wordsmiths and translators have arrived. In 2019, the Supreme Court of India launched an app that translates judgments of the Supreme Court into nine different regional languages.[110] The benefits of these relationships in a discipline heavily dependent on clarity and accuracy are great. Conversely, the law is rich with adjectives and other subjective terms. In the "definitions" section of statutes, adjectives are liberally employed to amplify statutory phrases. This is also the case with jury instructions. Consider the definition of "reasonable doubt" in Florida.[111] Among adjectives and other subjective terms in Florida's instruction on the burden of proof are the terms "reasonable", "abiding", and "firm".[112] In Florida's standard instruction on weighing evidence, jurors are asked to consider whether a witness *seems* to have an *accurate* memory, and whether a witness was *honest* and *straightforward* when answering questions.[113] There are analogous terms in civil cases. Jurors often depend on subjective definitions when determining awards for pain and suffering, loss of enjoyment of life, and any other non-economic injury provided for in law. In the scheme of things, it is questionable whether the purpose of these definitions is to identify a narrow or isolated meaning or instead to allow more. Judges and jurors are empowered by subjectivity in law, even as it may be difficult to reach a consensus in individual cases. Lawmakers use terms to narrow or broaden the reach of law for their own purposes.

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108 Jamie Condliffe, *Algorithmic Bias is Bad. Uncovering It is Good*, N.Y. Times (July 9, 2020), https://www.nytimes.com/2019/11/15/technology/algorithmic-ai-bias-html.

109 Brags and Blunders of Lester Donald Earnest, https://web.stanford.edu/~learnest/ (last visited Aug. 22, 2020).

110 Smiriti Srivastava, *Supreme Court to Use Artificial Intelligence for Better Judicial System*, Analytics Insight (Nov. 27, 2019), https://www.analyticsinsight.net/supreme-court-use-artificial-intelligence-better-judicial-system.

111 3.7 Fla. Sta. Jury Instr. (Crim) (1997).

112 *Id.*

113 3.9 Fla. Sta. Jury Instr. (Crim) (2013).

Regardless of their level of sophistication, machines are all about data. Data is now obtainable in smaller and smaller increments. Whether collecting it, analyzing it, or using it in decision-making, machines must have data. Humans have inspiration, fear, prejudice, anticipation, vulnerability, ego, wonder, awe, pride, boredom, and faith, secular or spiritual. Despite the need for objectivity and some degree of internal consistency, if we hold the belief that law is about well-being, emotional intelligence is essential in our legal system.

The idea that humans might hi-tech themselves out of existence is a theme with many variations in science fiction. A quirky example of this is Arthur C. Clarke's *Time's Arrow*.[114] In Clarke's mid-century short story, paleontologists unearth familiar and unique tire impressions that demonstrate their ambitious military colleagues have been eaten by a dinosaur during a time travel experience. [115] It is a fair expectation that today's law students will wrestle with the proper uses of artificial intelligence in all forms of dispute resolution and decision-making powers.

Supercomputers are the thing now highest on the wish list for competitive colleges and universities. College administrators, researchers, and those who support their programs will play a pioneering role in exploring the potential of these super machines.[116] While the design, technology, and sophistication of supercomputers moves forward, there is an implicit assumption that humans are still the force behind the achievement. Whatever their personal motivations and goals, human beings are thus far responsible for pulling technology into bigger and ever more daring projects. As Peter Isakson opined on *Fair Observer*, "Artificial intelligence will never be as smart as Elon Musk."[117]

VII. Sci-fi and Time Travel in the Law School Curriculum

Motivated teaching faculty can pull science fiction and time travel literature into their classrooms in varying degrees, using it anywhere from illustrative purposes only to core topic. Seminars and other classes can be structured in ways to include concepts and ideas from science fiction and time travel. Dedicated courses are also an option. A simple example would be a seminar on law in science fiction. For reasons discussed earlier, societies and cultures in science fiction offer a unique space for students to test their ideas and assumptions about law. Untethered from historical and ideological perspectives bound to attach in our own world, sci-fi places can be explored from a refreshing distance. Who (or what) are the law makers? Who is subject to their authority? What is the source of authority for law-making? Are the objectives driving law-making fully and truthfully articulated? How are laws enforced? Is there a process to test or challenge law? What are

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114 Arthur C. Clarke, *Time's Arrow, in* The Best Time Travel of the 20th Century, 43 (Harry Turtledove & Martin H. Greenberg eds., 2005).

115 *Id.*

116 Betsy Foresman, *University of Florida builds supercomputer for AI research, education*, EDSCOOP (July 22, 2020), https://edscoop.com/university-florida-supercomputer-ai/.

117 Peter Isakson, *Artificial Intelligence Will Never be as Smart as Elon Musk*, Fair Observer, (Aug. 4, 2020), https://www.fairobserver.com/region/north_america/peter-isakson-elon-musk-will-ai-tech-news-tesla-space-x-founder-178671/.

the relationships between law-making, law, power, and other aspects of society like social and economic welfare? What is the language of the law, and how is it communicated to those who are its subject?

These relationships can also be explored in the context of race, gender, sexual orientation, spiritual or religious identification, or any factor that defines "other" or "different" in the culture. Students can consider whether a society is essentially static or changing, the pace of change, and the forces behind the change. They can engage in constructive criticism. They might also bring the community into the project, documenting and studying the ways members of diverse age groups, races, genders, and socio-economic groups relate or react to a sci-fi or time-travel story.

Realistic or "hard science" fiction would add an imaginative and useful dimension to courses addressing environmental law and climate change as well as those addressing AI, technology, and space law. Students could use sci-fi stories and movies to illustrate dramatic changes in applied science and technology, particularly those associated with privacy rights, advances in medicine and health care, and climate change. Using the culture or society in an assigned text or movie, students could draft legislation or work in group projects on public policy. Alternatively, they might focus on laws relating to a special topic like infectious disease.

VIII. Ground Zero

Law students can work individually or collectively to write science fiction or time travel stories with a variety of legal themes. They might focus on concepts of liberty, personal freedoms, and the nature of government. Alternatively, they might focus on natural resources or health care. Much thought should be devoted to the ways that technology and other environmental factors will alter human life as real time moves. For example, projecting the world a century or more beyond ours, students might build a penal code from the ground up. As part of the exercise, they might be limited to a certain number of laws or to a certain word limit in legal definitions. In a different project, they might imagine and populate a world where racial or ethnic differences can only be identified or observed by those who reach a certain age or elder status. In environmental law, they might draft a future global resource code, addressing water, air, agricultural needs, animal welfare, and other aspects of eco preservation.

Students can "travel" to planet earth centuries from now and draft lesson plans for a course on the 21st century American legal system. Conversely, they can travel back in time with the help of old legal codes and take on the task of identifying and rewriting or "repealing" laws that adversely impact groups, explicitly or implicitly, based on gender, race, or religion. As an evidence project, students might be asked to consider how principles of evidence will or should evolve. A model code might be drafted with attention to the impact of AI.

IX. Advocacy

As an advocacy project, students can prepare and present a trial as theoretical AI lawyers. This project would take a great deal of thought and planning, and it would engage students at many levels. Alternatively, students might present the case to an AI jury. They might reimagine and script a trial in a culture with limited language

ability. They might present a case to an AI judge. This would be a good project for collaboration with students from other colleges or departments. Civil cases with damages could be used as well as criminal cases. Students might be asked to draft jury instructions for an imagined jury of beings from another world—for example, they might consider jurors in a society with no word for "lie" or "falsehood". Conversely, students could try cases in past decades, with well-known individuals from history—actors, politicians, writers, scientists, or artists—as clients or jurors. In a different project, students might time-travel to argue a case in front of a jury at a distinct point in history. This might be the height of the Vietnam War, the middle of the flu epidemic, during Reconstruction, in the South of the 1920's, in the depression of the 1930's, or during the Reagan era.

A common task in these varied assignments is to recognize and identify essential values and enduring objectives in law. In unique and unfamiliar temporal and cultural dimensions, students will be encouraged to seek these. Thought-provoking fiction has always had potential for broadening the learning experience in law school. As new forms of communication and life-altering technologies enter and impact our present experience, the work of those who have been out ahead and beyond real time will be a natural draw for students who want to make positive change.

X. Conclusion

Law students can benefit from considering the issues and concepts that give this literature its unique appeal. As they prepare to practice, students also prepare to give new shape and dimension to the legal market and the provision of legal services. The challenges they will confront as they move along various career paths call for receptive, creative, and resourceful thinking.

What are the differences, beneficial or otherwise, between human and non-human decision-making? How will law and public policy be transformed in a post-human world? With a focus on topics like the economy, health care, national security, and climate change, how would an AI "leader" shape up against a human? What role will AI play in lawmaking? Can we identify practice values that withstand the passage of time? If so, what are they, and why do they endure?

As clinicians and other teaching faculty consider micro-lawyering and the complex array of skills needed to provide effective legal services to individuals, it is important to factor in change. Practice methods change. Issues change. Client expectations change. The speed with which lawyers and judges managed to successfully transition to virtual practice and even virtual court proceedings during the coronavirus pandemic is an encouraging example. Today's students are more likely to succeed if they leave law school with the sophistication to be adaptable, flexible, resourceful, and imaginative. One measure of outcomes in law teaching will be the degree to which the newest generations of lawyers are prepared to meet the unknowns.

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