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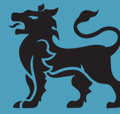

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# British Journal of American Legal Studies

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A Dark Shadow: The intensification and Expansion of Lethal Injection Drug Secrecy — *Austin Sarat, Theo Dassin, Aidan Orr*

An Overview of Environmental Justice in Brazil — *Ricardo Perlingeiro*

Keeping It Complex with Philip Hunton, John Locke, and the United States Federal Judiciary: On the Merit of Murkiness in Separation of Powers Jurisprudence — *Michelle M. Kundmueller*

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# A Dark Shadow: The Intensification and Expansion of Lethal Injection Drug Secrecy

Austin Sarat*, Theo Dassin**, Aidan Orr***

## ABSTRACT

*Over the last decade, many death penalty states in the United States have enacted secrecy laws shielding the identity of lethal injection drug suppliers and executioners. Death penalty defense lawyers, legislators, and scholars have examined the constitutionality and efficacy of these laws. However, little attention has been paid to the history of death penalty secrecy and its relationship to existing secrecy statutes. This article analyzes that history and relationship. It describes a surprising pattern of openness and transparency about the identities of executioners and others involved in America's capital punishment process. Current lethal injection secrecy laws break with that pattern and cast a virtually unprecedented shadow over the execution process. This article concludes by assessing the consequences of the recent intensification and expansion of execution secrecy.*

## KEYWORDS

*Death Penalty, Secrecy Statutes, Executioners, Methods of Execution, Lethal Injection*

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# I. Introduction

On May 28th, 2014, the Arizona Supreme Court set an execution date for Joseph Wood. Later that same day, the Arizona Attorney General's office sent a letter to Wood's counsel with details about the execution, including the state's intention to use a two-drug cocktail (midazolam and hydromorphone) to put Wood to death. Just a few months earlier, Ohio had used those same drugs in the brutally botched execution of Dennis McGuire.[1] Witnesses reported that McGuire struggled to breathe and gasped loudly while making choking sounds for at least ten minutes. It took twenty-five minutes for McGuire to die, in a process that should normally take between five and eight minutes.[2]

The Arizona Attorney General's letter to Wood's lawyer also said that the Department of Corrections (DOC) was trying to procure a different drug, pentobarbital, for use in Wood's execution and would alert his attorneys if it could do so. Just over a week later, Wood's lawyers asked for specific information about the source or supplier of the midazolam and hydromorphone, and the DOC's search for pentobarbital. Charles L. Ryan, the director of Arizona's DOC, refused this request. He said only that the drugs were "domestically obtained" and "FDA approved,"[3] and provided Wood's lawyers redacted copies of purchase orders, invoices, and order confirmations. On each document, the name of the drug supplier was also redacted.[4] Ryan cited a state statute forbidding disclosure of the identity of anyone on the "execution team."[5] Undaunted, Wood's counsel continued to press for additional information about the execution drugs, and Ryan and the DOC continued to deny those requests citing the same Arizona state secrecy statute.

On June 25th, Wood received final notice that he would be executed with midazolam and hydromorphone. A few days later, he filed a motion for a preliminary injunction seeking information about how the execution protocol was developed, the source and manufacturer of the drugs, and various other details about the drugs that would be used in his execution. On July 10th, a federal district court in Arizona denied this motion. Wood and his legal team appealed the district court's decision, and the Ninth Circuit Court of Appeals halted Wood's execution until he could receive information about the drugs.[6]

The court found that stopping the execution would not harm the state.[7] It said that "The public enjoys a First Amendment right to view executions from the

---

1 Wood v. Ryan, 759 F.3d 1076 (9th Cir. 2014).

2 *Problems Arise as Ohio Tries New Execution Procedure,* Death Penalty Information Center (Jan. 14, 2014), https://deathpenaltyinfo.org/news/problems-arise-as-ohio-tries-new-execution-procedure.

3 Wood v. Ryan, *supra* note 1.

4 *Id.*

5 Criminal Code, Ariz. Rev. Stat. §13–757 (2009).

6 Wood v. Ryan, *supra* note 1.

7 It came to this conclusion by applying the so-called *Press–Enterprise II* analysis, a test used to determine the public's right to access government proceedings. "Under the Press–Enterprise II First Amendment test, two "'complementary considerations'" inform the analysis: "(1) 'whether the place and process have historically been open to the press and general public [ ]' and (2) 'whether public access plays a significant positive role in the functioning of the particular process in question.' " California First Amend. Coal v. Woodford, 299 F.3d 868, 875 (9th Cir. 2002) (quoting Press-Enter. Co. v. Superior Ct. of California for Riverside Cnty., 478 U.S. 1, 8-9, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)) (alteration in original).

moment the condemned is escorted into the execution chamber, including those 'initial procedures' that are inextricably intertwined with the process of putting the condemned inmate to death."[8] It affirmed the significance of public scrutiny of state execution practices and, in particular, of the media's role in holding corrections officials accountable for what happens during executions.

However, the day before Wood's execution, the United States Supreme Court lifted the Ninth Circuit's injunction.[9] On Wednesday, July 23rd, 2014, Joseph Wood was put to death. His execution took almost two hours, making it one of the longest executions in US history.[10] During that time, officials injected Wood with a concentration of drugs 15 times greater than the amount allowed by Arizona's execution protocol. He was awake over an hour into the execution and gasped and gulped for air over 600 times before he died.

Joseph Wood's failed quest for information about the drugs that led to his botched to his botched execution was not an isolated event. Instead it provides a striking example of the connection between secrecy and problematic executions. Arizona is just one of many states that enacted statutes concealing the identity of drug manufacturers and information about the drugs they produce during the last decade. As we will show, their actions represent a significant departure from the practices that have governed executions throughout American history.

In what follows we argue that the United States has a longstanding, but not well understood, tradition of openness about executions, the identity of executioners, execution methods, and the people or organizations responsible for designing and supplying the instruments used to carry out executions. Existing scholarship does not discuss the way new lethal injection secrecy statutes fit into that history. We fill this gap in the literature by discussing the public's historical right of access to information about executions. Contemporary drug secrecy statutes, we will argue, represent an unwarranted and problematic intensification and expansion of execution secrecy. Those laws cast a dark shadow over America's death penalty.

## II. The History of Execution Secrecy

### *A. The Executioner*

Until 1936, executions in America were carried out in public. And even after they were moved behind prison walls, information about executions, executioners and execution methods was generally available to the public. In fact, states that now have secrecy statutes in the past often clearly identified who would carry out their executions.[11]

To understand the traditions surrounding the identity of executioners, let's start with the February, 1855 hanging of William Jung for murder by the state of

[8] Wood v. Ryan, 759 F.3d 1076, 1082–83 (9th Cir.), vacated, 573 U.S. 976 (2014).

[9] Indeed, on July 22, 2014-just one day before Wood's planned execution-the Supreme Court vacated the Ninth Circuit's preliminary injunction.

[10] *Id.*

[11] This is not to say that secrecy has never been part of the execution process in the United States. From time to time states have made efforts to conceal the identity of the executioner. Michael Madow, *Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York,* 43 Buff. L. Rev. 461 (1995).

Louisiana. *The Daily Delta*, a local newspaper, reported on Jung's execution and noted that his executioner wore a mask.[12] In its coverage of Jung's execution, the *New York Times* also drew attention to the executioner's hidden identity. It said "The face of this wretched minion of the law was concealed by a horrible black mask which gave to the ghastly ceremonial an altogether unnecessarily revolting aspect."[13]

However, just a few months later, the identity of Jung's executioner was made public by *The South-Western*, a newspaper in Shreveport, Louisiana. The paper not only provided the executioner's name, but also gave details about his life, previous executions he carried out, and how he got the job.[14]

In the ensuing decades, newspapers regularly followed the example set by *The South-Western* and published executioners' names. In 1859, the Richmond *Daily Dispatch* reported on Virginia's hanging of the famous abolitionist John Brown and identified the man responsible for cutting the rope as Sheriff Campbell.[15] A decade later in 1869, the *Idaho World* recounted Simeon Walters' execution *and* also published the name of his executioner.[16] In 1879 in Indiana, John Achey was hanged and the *Fort Wayne Daily Gazette* once again identified the executioner.[17] Each of these three states now has a statute prohibiting the identification of people on the execution team.

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[12] *The Execution of Yung*, The Daily Delta, Feb. 03, 1855, https://www.newspapers.com/image/262115256.

[13] *Execution of Wilhelm Jung*, N.Y. Times, Feb. 12, 1855, https://timesmachine.nytimes.com/timesmachine/1855/02/12/76443290.pdf?pdf_redirect=true&ip=0.

[14] *A Desperado,* The South-Western, June 20, 1855, https://chroniclingamerica.loc.gov/lccn/sn83016483/1855-06-20/ed-1/seq-1/.:

"[William] Martin, alias Diego Bill, the notorious hangman, was yesterday brought before the court…A long time ago [Martin] was arrested on a charge of robbing a poor negro who was on his way to market…The sheriff came to the city in search of a hangman, and Diego Bill, in consideration of being furnished with a new suit of clothes and $75 in cash, volunteered for the purpose. After performing the job, he returned to the city, committed another crime, and was again placed in jail. Frank Smith came up for hanging, and Diego Bill volunteered for the purpose. For this service he was again set at liberty—but was soon after arrested for robbery in the Third district. Here he remained until the execution of [William] Jung, when he was again released in consideration of his services as hangman."

[15] *Execution of John Brown*, Richmond Dispatch, Dec. 5, 1859, https://www.newspapers.com/image/?clipping_id=98005021&fcfToken=.: After previously identifying the sheriff as Sheriff Campbell, the article reads, "The Sheriff descended from the scaffold, and with one blow of his hatchet severed the cord, and the drop fell, landing John Brown into eternity. So perish all those who attempt insurrection, or invade the sovereignty of the State of Virginia."

[16] *Execution of Simeon Walters*, The Idaho World, Dec. 16, 1869, http://www.newspapers.com/image/321355585/.

*The World* wrote, "The Sheriff and his assistants placed the fatal noose upon his neck, adjusted the leather belt and straps for securing his limbs, drew the cap over his face, and all stepped back, leaving the unfortunate man standing alone on the drop… Sheriff Britten, who was standing with his watch in his hand, turned and starting down the steps, with a quick push of the lever sprung the bolts and Walters went down through the rap-way like a shot."

[17] *The Gallows*, Fort Wayne Daily Gazette, Jan. 30, 1879, https://www.newspapers.com/image/42900038/.: "At 12:20 p.m. Rev. Dr. Bayliss stepped back from the men, saying 'I commend you to the mercy of God.' Sheriff Pressly pulled the lever, and the souls of John Achey and Wm. Merrick were launched into eternity."

Occasionally executioners even achieved a kind of celebrity status. For example, later in the 19th century Arkansas's George Maledon was so well known that he was dubbed the "Prince of Hangmen."[18] Throughout Maledon's career as a hangman, Arkansas newspapers regularly reported his identity and his role in executions. The *Arkansas Democrat* released Maledon's identity to the public in 1988 after one of his first hangings.[19] A year later, the *Daily Arkansas Gazette* reported on Maledon's upcoming executions: "George Maledon, the expert hangman at Fort Smith, has been retained by Marshal Yoes. He will have five executions to make in one day next month, July 18th."[20]

Toward the end of Maledon's career, the *Arkansas Democrat* once again wrote about "the Prince of Hangmen." "George Maledon," it said "slim, lithe, smileless, and 68 years old, the man who hanged eighty-eight men, Judge Parker's able lieutenant, 'the Prince of Hangmen,' as they picturesquely put it in the west, the most famous executioner of modern times, is another figure of 'Hell on the Border.'"[21] A year later, the same paper announced Maledon's retirement in an article titled "George Maledon, the Celebrated Red Ax of Fort Smith, Returns to His Old Home." The article read, "Geo. J. Maledon, the once world famed character who achieved the notoriety of having hanged more men than any other hangman in the world, arrived here yesterday from Springdale, Ark, and will make his home in future with his Son Charles Maledon."[22]

Yet during the same decade in which Maledon earned his title "the Prince of Hangmen," the identity of other executioners was occasionally protected by a veil of secrecy. For example, in 1896, Utah hanged Charles Thiede for murder. The executioner was hidden by a curtain and his identity never released to the public.[23] Departures from the tradition of openness were generally matters of local practice rather than being legally mandated.

However, newspapers did publicize the identities of other people who were involved in Theide's execution: "Then active preparations for the last scene of the drama of death began. Deputy Sheriffs Montgomery, Neely, Johnson, and Gibbs stepped forward and in a few moments Thiede stood erect. His arms strapped to his thighs, which were strapped together. Another strap passed about his body, fastening his upper arms tightly."[24]

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[18] *Prince of Hangmen*, National Parks Service. U.S. Department of the Interior, Apr. 10, 2015, https://home.nps.gov/fosm/learn/historyculture/prince-of-hangmen.htm.

[19] *The Wages of Sin*, Ark. Democrat, Apr. 27, 1888, http://www.newspapers.com/image/153438716/?terms=arkansas%20democrat&match=1.: "Captain Maledon, the hangman, had made final preparations before dawn and everything was in place long before the march to the scaffold began."

[20] *Especially for Arkansas*, Daily Ark. Gazette, June 28, 1889, http://www.newspapers.com/image/138026980/?terms=five%20executions&match=1.

[21] *An Old Story*, Ark. Democrat, July 12, 1899, https://www.newspapers.com/image/149028560.

[22] *Arkansas at Large*, Ark. Democrat, Mar. 12, 1900, http://www.newspapers.com/image/149100085/.

[23] *Thiede Hung*, The Salt Lake Trib., Aug. 8, 1896, https://www.newspapers.com/image/12470536/.: "[A]t 10:301/2 Sheriff Hardy, by drawing his handkerchief from his pocket, gave the signal to the men behind the canvas screen. The lever was pulled and Thiede's body was jerked into the air."

[24] *Id.*

The turn of the 20th century saw the continuation of this same pattern of disclosure with most executioners identified and a few others not.[25] In Arizona's 1907 hanging of William Baldwin, the press clearly identified the executioner: "The sheriff was ordered to hang Baldwin until he is dead between the hours of 8 and 10 a.m. this morning at Solomonville …Sheriff Anderson gave the word to fall back, sprung the trigger, and the black murderer was shot downward."[26] In contrast, in its reporting of Indiana's 1907 execution of George Williams, *The Times* wrote, "No one but those who are most nearly concerned in the execution know the identity of the person whose manipulation of the lever plunged Williams into eternity."[27]

New methods of execution came on the scene in the late 19th and early 20th centuries, including the electric chair and the gas chamber. As was the case with hangings, newspapers continued reporting the names of those responsible for administering these new execution technologies.

For example, the day after North Carolina's first electrocution in 1910, newspapers published the identities of nearly everyone involved in the execution. *The News and Observer* of Raleigh told its readers that: "Physician McGeachy and Expert Davis with Warden Sale examined the sponge head-gear and leg strap that had been saturated with water… the condemned man appeared with prison guards N. S. Smith, K. B Ewing, W. R. Campbell and H. H Hunnicutt, two on either side."[28]

The paper went on to identify the people who pulled the switch, "With Warden Sale immediately by his side, the inventor of the electric chair, E. F. Davis, of New York, assisted in throwing the switch that carried the death current."[29] And finally, it released the names of doctors who participated in the execution: "The shirt front was unfastened, and Drs. McGeachy and Riddick found the pulse faint and the heart still throbbing. 'Going mighty hard,' said Dr. McGeachy and Dr. Riddick confirming his opinion, the powerful current was again thrown into the body for a couple of seconds."[30]

In some stories newspapers put identifying information about the executioner in the headlines: "Sheriff of Bladen County, Who Hanged Last Man in State, Opposed to Electrocution." The article, which focused on Sheriff J. M. Clarke's opposition to the electric chair, also reported that he presided over an execution just a week before the article was published.[31] Similarly, newspapers in Nebraska reported the name of the person who was responsible for carrying out all of its

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25 *A Legal End*, Wkly. Or. Statesman, Feb. 6, 1900, https://www.newspapers.com/image/79621172: "Just at 10:14 he was led upon the gallows. Sheriff Van Orsdel and Elder Riggs leading the way. Magers was supported by Deputy Sheriff J. T. Ford and W. E Williams, of Airlie… Sheriff Van Orsdel pinioned his arms and legs, adjusted the black cap and noose, and stepping to the lever, sprung the trap."

26 *Paid the Penalty*, Graham Guardian, July 12, 1907, https://www.newspapers.com/image/42344857/.

27 *Negro Murderer Goes to His Doom*, The Times, Feb. 8, 1907, https://www.newspapers.com/image/303938612/.

28 *The First Electrocution Ends Walter Morrison's Life*, The News & Observer, Mar. 19, 1910, https://www.newspapers.com/image/650704718.

29 *Id.*

30 *Id.*

31 *Id.*: "As a witness at the electrocution of Walter Morrison yesterday, was Sheriff J. M. Clarke, of Bladen county, who last week threw the trap that dropped into eternity the body of {Henry} Spivey, the last man to be legally hanged in North Carolina."

executions: "Warden T. W. Smith yesterday made arrangements with Detective Stryker of Omaha to take charge of the death-dealing machine. Stryker is coming to be recognized as the state executioner."[32]

However, a few states designed execution procedures to conceal the executioner's identity. Arizona's gallows included a number of buttons that would supposedly activate the trap door on which the condemned stood. One person was assigned to each button and the buttons were arranged so that no one could know which one actually sprung the trap. Everyone pressed their button at the same time so that the executioner's identity was unknown.[33]

The following decades are marked by a similar pattern of openness about the executioner's identity with a few exceptions. In 1911, the executioners' identities were kept secret in Nevada's last hanging. However, newspapers named many of those performing ancillary tasks. For example one Nevada newspaper reported that

> Hagerman placed the noose around the murderer's neck, and as he tightened the rope the signal was given to raise the curtain. Captain Muller at the same time completed the adjustment of the straps about Casey's body. He noticed the condemned man start to tremble, and, fearing that he would break down at the last minute, raised his arm as the signal to the three guards concealed behind the partition to the rear. Three knives slashed as many strings and the trap was sprung.[34]

In 1913, Andriza Mircovich became the only inmate in Nevada history to be executed by firing squad.[35] Warden George W. Cowing distributed three rifles, two containing bullets, and one containing a blank cartridge, so the identity of the person who shot the condemned would not be known.[36] But the faces of the shooters were not hidden from the witnesses.

Three years later in Florida, *The Tampa Times* left no doubt about who Bennie Henson's executioner would be: "The hanging of Bennie Henson for the murder of his wife, Ethel Henson, will be the seventh legal execution in Hillsborough country, and the first in which Sheriff Will Spencer has acted as hangman. The unpleasant duty of pulling the cord, releasing the death trap, falls on the sheriff, and will not be shirked by that official."[37] This article also named people who had carried out

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32 *Getting Ready for Death*, The Neb. St. J., Oct. 11, 1910, https://www.newspapers.com/image/42111129.

33 *Jose Lopez was Hanged Today at Florence*, Tucson Citizen, Jan. 5, 1910, https://www.newspapers.com/image/580420091/.

34 *Murderer Casey Makes Short Speech from Gallows Asking Forgiveness for His Crime*, Nev. St. J., Aug. 17, 1911, https://www.newspapers.com/image/78752089/.

35 Espy, M. Watt, and Smykla, John Ortiz. Executions in the United States, 1608-2002: The ESPY File. Inter-university Consortium for Political and Social Research [distributor], 2016-07-20. https://doi.org/10.3886/ICPSR08451.v5.

36 *Death Penalty by Shooting to be Inflicted upon NYE County Murderer at Carson Wednesday*, Tonopah Daily Bonanza, May 12, 1913, https://www.newspapers.com/image/366594871/.

37 *Henson to Hang on February 27*, The Tampa Times, Jan 29, 1914, https://www.newspapers.com/image/325754788.

previous executions.[38]

An Alabama state law, enacted in 1923, designated the warden of Kilby Prison as the state's executioner and also designated alternates if he were unavailable.[39] The law also confirmed the role sheriffs played in past executions: "[The] executioner as provided in this section shall receive for such service the same amount as is now paid by law to Sheriffs for the execution of criminals."[40]An almost identical statute, which also replaced hanging with electrocution as the state's method of execution, was enacted in Georgia in 1924.[41] After declaring that executions must occur within the walls of the State Penitentiary in Milledgeville, Georgia, the statute requires, "That there shall be present at such execution the Warden of the Penitentiary, who shall serve as executioner."[42]

Frank Owens was the last man hanged in Alabama. *The Birmingham News* reported the name of his executioner the day his 1926 execution took place.[43] In 1931, *The Atlanta Constitution* confirmed the executioner's identity for the last hanging in Georgia.[44] But that same year, the identities of the executioners in Oregon's last hanging were concealed: "Elaborate precautions were taken in the mechanical arrangement of the levers which sprung the trap so that nobody can ever name the man who started Kingsley into eternity."[45]

Rainey Bethea was put to death in 1936 in what would turn out to be the last public execution in America and the last hanging in Kentucky. Before the execution,

[38] *Id.*: "The executions in Hillsborough county start with the hanging by Sheriff William Spencer, grandfather of the present sheriff, of William Buckley, a white man, for murder. The second hanging was of Harry Singleton, a negro, also for murder, and Sheriff T. K. Spencer, father of the present sheriff, was the executioner. Sheriff W. T. Lesley was in charge of the next, that of Mercer, the white rapist. Then come three during the terms of Sheriff R. A. Jackson, the first being a negro, Derry Taft, for murder, the second being a negro, Fowers, for rape, and the third being a negro, Anderson, for murder."

[39] Ala. Legislative Act, No. 587, (1923): "The warden of Kilby Prison at Montgomery or in case of his death, disability, or absence, his deputy shall be the executioner. In the event of the death or disability or absence of both the warden and deputy the executioner shall be that person appointed by the Board of Convict Supervisors from the county in which such convict is condemned to death or shall be the Deputy of such sheriff or in the absence or disability of such sheriff or his deputy, shall be such other person as may be appointed by the Board of Convict Supervisors for that purpose…"

[40] *Id.*

[41] Acts and Resolutions of the General Assembly of the St. of Ga., No. 475. Section 1 (1924).

[42] *Id.*

[43] *Negro Hanged in County Jail for Highway Robbery*, The Birmingham News, Sep. 24, 1926, *https://www.newspapers.com/image/573303458/?terms=*: "Frank Owens, negro, arrived at the foot of his gallows on the stroke of 11 Friday morning. The trap was sprung by Sheriff T. J. Shirley at 11:17 and he was pronounced dead by attending physicians 14 minutes later."

[44] *Last Legal Hanging in Georgia Set Today*, The Atlanta Constitution, June 12, 1931, https://www.newspapers.com/image/397928744.: "Sheriff M. Gary Whittle is charged by law to release the rap on the scaffold."

[45] Sidney A. King, *Supreme Penalty Paid by Kingsley Himself*, The Eugene Guard, Oct. 30, 1931, https://www.newspapers.com/image/107685820/.

Sheriff Florence Thompson announced that she planned to hang Bethea.[46] *The New York Times* noted that "Much as she abhors the job, Mrs. Florence Thompson, Daviess County's woman sheriff, is going to spring the trap that sends Rainey Bethea, Negro murderer, to his death. . . . As she explained: 'I could appoint the deputy sheriff or deputize any citizen to spring the trap, but to do that would inflict an unpleasant job — really my own hard task — upon someone else.'"[47]

Although she insisted she would still pull the trap door, the sheriff hired a "consulting expert executioner," Phil Hanna, to assist her.[48]

In the weeks leading up to the execution, Sheriff Thompson received hundreds of letters offering to spring the trapdoor for her.[49] One such letter came from an army veteran and former Louisville policeman:

> Dear Mrs. Thompson,
> I am writing you this letter, offering you my services [for] free . . . for several reasons. . . . First you are a woman and have four children, none of which I am sure would want you to spring the trap that sends Rainey Bethea into eternity. Second, I wouldn't want my mother to be placed in such an unpleasant position. Third, I am an ex-serviceman and served . . . in France in 1918 and 1919, and I know just how you would feel after the execution if you went through with it. You may think it wouldn't bother you, after it is all over, but I know different. . . .Please do not give this letter to anyone for publication. . . . I am not hunting for publicity. I only want to help you.
> Your friend,
> L. Hash[50]

Thompson accepted Hash's offer. As the *Louisville Courier Journal* noted at the time: "[Sheriff Thompson] was reported at Louisville to have decided to deputize a resident of Daviess County not a member of her staff to spring the trap."[51] The Owensboro *Messenger-Inquirer* said that: "Sheriff Thompson contrived to set her public agog by coyly intimidating the she never would shirk her duty… at the last minute, however, she was sitting in a parked car beneath the gallows… The

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[46] *The Last Hanging: There Was a Reason They Outlawed Public Executions.* N.Y. Times, May 6, 2001, https://www.nytimes.com/2001/05/06/weekinreview/the-last-hanging-there-was-a-reason-they-outlawed-public.html.

[47] *Id.:* The fact that a woman was going to conduct the hanging made international news. "I had a law school mate who was in Paris at the time all this was happening, and he sent me clippings from one of the Parisian newspapers dealing with the purported hanging to be done by the Lady Sheriff, and there was a picture of the lady in one of the newspapers."

[48] *Judge Hamilton Grants Writ to Stay Execution*, The Paducah Sun-Democrat, July 30, 1936, https://www.newspapers.com/image/502108652/: "Sheriff Mrs. Florence Thompson took charge of preparations for the execution. She intimated she would spring the trap herself, rather than 'shirk her duty.' G. Phil Hanna, Illinois consulting expert executioner, was engaged to supervise details."

[49] *Execution of Bethea is Set for Sunrise*, The Courier-Journal*,* Aug. 14, 1936, https://www.newspapers.com/image/107744768/.

[50] *The Last Hanging supra* note 46.

[51] *Execution of Bethea is Set for Sunrise*, *supra* note 49.

trap was capably sprung at 4:20 C. S. T. by Hash, resplendent in a spotless white suit, working under the direction of 'Uncle Phil' Hanna, the well-known consultant executioner from White County, Illinois."[52]

An article in The *New York Times* took note of Hash's attire:

> Eyewitnesses say the press was immensely disappointed when Sheriff Thompson did not appear on the scaffold. In her place was the man described afterward by the local press as 'the best-looking cop' in Louisville: Arthur Hash. Despite his stated desire for anonymity, Mr. Hash wore an outfit guaranteed to draw notice and looked tipsy. Hash mounted the steps after the Negro . . . garbed in a white linen suit and white panama hat.[53]

Whether executioners were famous or not, when hanging was America's primary execution method their names were regularly, though not always, made public before or soon after executions took place.

During the first use of the gas chamber in Arizona, the executioner was hidden behind a curtain. A news article in the *Tucson Citizen* captured the scene by using the passive voice: "At 5:09 a cord concealed behind a white curtain was severed. Fifteen poison pellets contained in a mesh bag splashed gently into a container filled with acid and water at the condemned boys' feet, and the death-dealing fumes surged toward them in a grim grey cloud."[54]

However, this same article named other members of the execution team: "The attending physicians–Dr. Hugh F Stanton, state epidemiologist, and Dr. H. B. Steward, prison physician—their eyes [glided] to the quivering countenances through a special observation window, and with elongated stethoscopes leading from the laboring chests to their ears, announced 'it is over.'"[55]

The *Arizona Republic* showed no reticence in speculating about the executioner's identity. "The deadly 15 pellets," it said "were dropped into the acid-water mixture at 5:09 a.m., presumably when Warden A. G. Walker cut a thin string which was suspending them above the mixture."[56]

In 1939, Pennsylvania newspapers published the identity and some personal details of the state's electric chair executioner.[57] In bold lettering one article read, "Frank Lee Wilson, 37 Year Old Pittsburgh Electrical Engineer Receives $450 For First Official Duties."[58] The article goes on say that with "no apparent show of

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52 Hazel Macdonald, *20,000 'Have a Good Time' as Law Hangs a Slayer*, Messenger-Inquirer, Aug. 14, 1936, https://www.newspapers.com/image/376050013/.

53 *The Last Hanging supra* note 46.

54 *Young Slayers Die in Lethal Gas Chamber*, Tucson Citizen, July 6, 1934, http://www.newspapers.com/image/580721182/.

55 *Id.*

56 *Hernandez Brothers Die*, Az. Republic, July 6, 1934, http://www.newspapers.com/image/116818422/.

57 The electric chair was used beginning in the late 1800s and from then on access to the identity of the executioner was often identifiable. We begin after the last public hanging in America to continue the story of access to the executioner's identity in America.

58 *New Executioner Sends Three to Death in 14 Minutes at Rockview*, The Danville

nervousness" 37-year-old Frank Lee Wilson pulled the switch to electrocute three men.[59]

Another newspaper published an article on the same day with the headline, "Executioner Goes Duck Hunting After Grim Job."[60] It included details about Wilson's personal and family life: "Frank Lee Wilson Jr., son of the electrician who early this morning completed his first assignment in the Rockview death chamber said: 'My dad went to Linesville from Bellefonte for the opening of the duck season. He won't be home until Wednesday night.' Young Frank is a student at Perry High School."[61]

When states used the electric chair, the identities of the execution team, not just the executioner, were typically disclosed.[62] For example, one week after Louisiana electrocuted William Alleman, an *Abbeville Meridional* reporter recalled his experience as a witness. He named Grady Jarrett as the "authorized executioner of the State."[63] This article also noted that: "Sixty-one men and a woman have looked in the almost kindly, benign face of Jarrett, and noted the calm blue eyes, as he checked the electrodes, and heard his voice, as their last on earth, bid them good-bye."[64]

Newspapers continued to regularly publish the names of executioners throughout the 1950s, 1960s, and 1970s and state law also disclosed their identities or their official positions. In 1953, Frank Lee Wilson retired as Pennsylvania's executioner, and the *Gettysburg Times* noted that he had presided over 50 executions during his 14-year tenure.[65] In 1956, Georgia state law specified that the warden of the prison that housed its electric chair would serve as its executioner.[66] In Wyoming in 1965, the *Casper Star-Tribune* confirmed that Prison Warden Leonard Mecham

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Morning News, Oct. 23, 1939, http://www.newspapers.com/image/89210688/.

59 *Id.*

60 *Executioner Goes Duck Hunting After Grim Job*, The Times-Tribune, Oct. 23, 1939, https://www.newspapers.com/image/534352754.

61 *Id.*

62 *Electric Chair Used by State for First Time*, The Town Talk, Sep. 11, 1941, https://www.newspapers.com/image/213447620: "The first shock was applied by the official executioner from a portable generator at 12:09 p.m. and a second shock followed immediately, Johnson was declared dead at 12:12 p.m. by two physicians, Coroner Montgomery Williams and Dr. W. A. Sorenson. As Sheriff P. R. Erwin, supervising the execution, strapped the condemned man into the chair, he asked Johnson if he had anything to say and Johnson did not reply… The executioner's identity was closely guarded, and his name was not announced, even after the execution."

63 Mac Crary, *The Execution of William Alleman*, Abbeville Meridional, May 19, 1951, https://www.newspapers.com/image/445771697.

64 *Grady Jarrett Has Killed Sixty Two Men and Women*, Abbeville Meridional, May 19, 1951, https://www.newspapers.com/image/445771697.

65 *Executioner Resigns Post*, The Gettysburg Times, May 23, 1953, https://www.newspapers.com/image/4622819:

"Wilson now will devote his time to a job as superintendent of the Raphael Electric Co. He also will continue to teach night classes in electricity at South High School."

66 Acts and Resolutions of the General Assembly of the St. of Ga., No. 112, (1956): "There shall be present at such execution the warden of the penitentiary, or a deputy warden thereof, who shall serve as executioner."

had pulled the lever which caused "a fish net bag containing cyanide pellets to plunge into a mixture of acid beneath the chair" holding Andrew Pixley.[67]

In 1966, Mike Mayfield conducted Oklahoma's last electrocution. James French was put to death for murdering another inmate while being held for a previous offense. Newspapers reported his executioner's name with little fanfare. For example, the *Ada Weekly News* described the moment when French was executed as follows: "Seconds later, his executioner, prison guard Mike Mayfield, threw the switch and 2200 volts surged through French's body."[68]

Five years later, the Jackson, Mississippi *Clarion Ledger* identified a man named T. B. Berry as the executioner in charge of the state's gas chamber.[69] Also in 1971, an Alabama law mandated that the warden of the William C. Holmes Unit of Atmore Prison serve as its executioner.[70] In 1977, when Charlie Brooks became the first person in the United States to be executed by lethal injection,[71] Texas newspapers identified James Estelle as the state's executioner.[72] The day after the Brooks execution, a local newspaper, the *Victoria Advocate,* reminded its readers that State Prison Director James Estelle had said he felt a "moral responsibility" to act as the executioner instead of delegating the task.[73] However, when reporters asked Estelle if he had kept that commitment he declined to comment.[74]

During the 1980s newspapers also published the names of, or identifying information about, the people responsible for carrying out executions. On March 9, 1981 the Seymour, Indiana *Tribune* reported on the electrocution of Steven Judy.[75] It noted that Indiana state law called for Warden Jack Duckword "to pull the switch that triggers the lethal current."[76]

Other examples of the tradition of disclosure surrounding executions include an Alabama newspaper article confirming that Holman Prison Warden J.D. White

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67 Jack Fairweather & Bill Missett, *Pixley Put to Death Early This Morning*, Casper Star-Tribune, Dec. 10, 1965, https://www.newspapers.com/image/348011522/.

68 *French Dies in Chair*, The Ada Wkly. News, Aug. 11, 1966,https://www.newspapers.com/image/36521105/.

69 Charles M. Hills, *Capitol Observers Trying to Forecast Waller Choice*, Clarion-Ledger, Nov. 27, 1971, https://www.newspapers.com/image/180756109.

70 Ala. Legislative Acts, Act No. 2360 (1971): "The warden of the William C. Holmes Unit of the prison system at Atmore, or in case of his death, disability or absence, his deputy shall be the executioner. In the event of the death or disability or absence of both the warden and deputy the executioner shall be that person appointed by the commissioner of corrections."

71 *The History of the Death Penalty: A Timeline*, Death Penalty Information Center (Mar. 31, 2011), https://deathpenaltyinfo.org/stories/history-of-the-death-penalty-timeline.

72 Amy Kidd, *Prison Head Believes in Death*, The Kilgore News Herald, Nov. 16, 1977, https://www.newspapers.com/image/611742232: "But for [James] Estelle, the decision is an easy one - both on professional and philosophical grounds. His personal feelings don't get in the way of his official job {as} state executioner."

73 George Kuempel, *Murderer's Execution Carried Out*, Victoria Advocate, Dec. 8, 1982, https://www.newspapers.com/image/439217581/.

74 *Id.*

75 *Joking Judy Blames Himself Before Death*, The Tribune, Mar. 9, 1981, https://www.newspapers.com/image/178123545.

76 *Id.*, "However, Department of Corrections spokesperson Tom Hanlon refused to confirm to the paper who pulled the switch."

pulled the switch for the 1983 execution of John Evans III.[77] Four years later, T. Berry Bruce was relieved of his duties as executioner after 30 years in charge of Mississippi's gas chamber.[78] Newspapers throughout the state reported the appointment of Charles Tate Rogers of Parchman as Bruce's replacement.[79] In 1995 an Indiana statute which made lethal injection the official execution method also stated that, "The warden of the state prison, or persons designated by the warden, shall serve as the executioner."[80]

Departures from the tradition of disclosure of the kind seen in the Woods' execution began to appear in the 1990s when laws explicitly mandating secrecy about the identity of the executioner were introduced in several states. For example, in 1992 the Kentucky state legislature passed a statute that read, "The identity of an individual performing the services of executioner shall remain confidential and shall not be considered a public record."[81] But it would be another two decades, propelled by difficulties in securing lethal injection drugs, before laws like Kentucky's became the norm in death penalty states.

### *B. The Manner and Method of Execution*

Like the executioner's identity, traditionally the public has had access to detailed information about the manner and method of execution.[82] In the late 1800s and early 1900s, local newspapers frequently reported details about hangings, including the rope's price, manufacturer, and materials.[83] As the State of Virginia planned to hang the abolitionist John Brown, it conducted a public vetting process to select the particular kind of rope that would be used in Brown's execution. All of the ropes it considered were displayed for the public.[84]

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77 Kathy Beasley, *Three Jolts of Electricity Needed to Kill John Evans*, The Montgomery Advertiser, Apr. 23, 1983, https://www.newspapers.com/image/257686440.

78 Ron Harrist, *New Executioner Appointed by Allain*, Sun Herald, May 17, 1987, https://www.newspapers.com/image/743815852.

79 *Id.*, Strangely enough, a spokesman for the Governor stated that Rogers received his commission and accepted the position of executioner but refused to say whether or not he was a guard at the state penitentiary in Parchman.

80 Ind. Code, §35–38–6–1, Sec 1. (c) (1995).

81 Ky. Laws, Ch. 496, S.B. 310, Section 20 (1990): However, remnants of the disclosure tradition were still present. In 1995 an Indiana statute which made lethal injection the official execution method also stated that, "The warden of the state prison, or persons designated by the warden, shall serve as the executioner." *See also*, 1995 §35–38–6–1 Sec. 1 (c).

82 Jonathan Peters, *The First Amendment Argument against Lethal-Injection Secrecy Laws*, Colum. Journalism Rev. (May 12, 2014), https://www.cjr.org/united_states_project/the_first_amendment_argument_against_death_penalty_secrecy.php: "I'm aware of no practices or policies that shielded rope makers, bullet makers, or blade makers." *See also*, Kelly A. Mennemeier, *A Right to Know How You'll Die: A First Amendment Challenge to State Secrecy Statutes Regarding Lethal Injection Drugs Comments*, 107 J. of Criminal L. & Criminology 443 (2017).

83 Chris Woodyard, *Enough Rope: The Hangman's Rope in the Press*, Haunted Ohio*,* Jan. 19, 2013, https://ppubs.uspto.gov/pubwebapp/ (Cited in Wood v Ryan, *supra* note 1).

84 Jack Shuler, The Thirteenth Turn: A History of the Noose 107 (2014): "South Carolina's rope was made from cotton, of course. Kentucky's offering was sent by Zeb Ward (a former prison director) direct to Virginia Governor Wise. Ward wrote, 'I send

To take another example, newspaper coverage of Ohio's double hanging of Scott Jackson and Alonzo Walling in 1897 included details about the rope and identified the person who made it. As the *Cincinnati Enquirer* noted,

> Each rope is 23 feet in length, and they were made to order in about a week's time from the giving of the order. They were made by Frank Vonderheide, the Main Street cordage dealer, and most of the work was done by Mr. Vonderheide himself. They are made of what is known as silver finish flax sewing twine, there being four strands of 110 threads each, or 440 threads in all.[85]

Rope makers like Vonderheide often openly displayed and marketed their hanging ropes.[86] Additionally, the specifications and construction of the gallows were frequently discussed in the press.[87]

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you . . . this morning a rope made expressly for the use of John Brown & Co. Kentucky will stand pledged for its being an honest rope—I had it made in her behalf and send it to show we are willing and ready to aid our mother state in disposing of those who may attempt to destroy & overthrow her government. . . . The hemp of which it is made was grown in Missouri—a state that Brown had troubled much, and made at Frankfort, Kentucky. I had it made for the express purpose.' After testing, or so the story goes, the cordage from South Carolina and Missouri were deemed too weak, and Kentucky's entry won out. The victorious rope was displayed in the sheriff's office the week before the hanging."

*John Brown Hanged with Kentucky Rope*, Notable Kentucky African Americans Database, https://nkaa.uky.edu/nkaa/items/show/1625 (last modified Dec. 2, 2022): "The rope used to hang abolitionist John Brown (1800-1859) came from Kentucky. Prior to his hanging, rope samples were submitted by South Carolina, Missouri, and Kentucky. The ropes were put on exhibit for the public to view. The ropes from South Carolina and Missouri were not used because it was thought that they were not strong enough, so the rope from Kentucky was selected."

85 Woodyard, *Supra* note 83.

86 Shuler, *Supra* note 84: "Kentucky's offering was sent by Zeb Ward (a former prison director) direct to Virginia Governor Wise. Ward wrote, 'I send you . . . this morning a rope made expressly for the use of John Brown & Co. Kentucky will stand pledged for its being an honest rope—I had it made in her behalf and send it to show we are willing and ready to aid our mother state in disposing of those who may attempt to destroy & overthrow her government. . . . The hemp of which it is made was grown in Missouri—a state that Brown had troubled much, and made at Frankfort, Kentucky. I had it made for the express purpose.' After testing, or so the story goes, the cordage from South Carolina and Missouri were deemed too weak, and Kentucky's entry won out. The victorious rope was displayed in the sheriff's office the week before the hanging."

87 *Id.* at 196: "A local carpenter named David Cockerell constructed the gallows, finishing it by Wednesday. For the rest of the week it stood in the yard of the new Baptist church. One reporter noted that it was a typical gallows, nothing extraordinary, 'uprights, crossbeam, and trap.' The trap door was hinged and held up by a taut rope that, when cut, released the drop and killed the condemned." *Id.* at 248: "A Mankato paper reported that 'the gallows, constructed of heavy, square white oak timbers, is 24 feet square, and in the form of a diamond. It is about 20 feet high. The drop is held by a large rope, attached to a pole in the center of the frame, and the scaffold is supported by heavy ropes centering at this pole, and attached to the one large rope running down to and fastened at the ground.'"

Execution materials were also routinely collected as souvenirs by members of the public. Following hangings, spectators gathered small pieces of the rope or chipped pieces of the gallows as souvenirs.[88] Local museums and shows collected and displayed rope used in hangings,[89] and in some cases it was sold by hangmen following executions.[90]

During the first use of the electric chair in William Kemmler's execution, extensive details were available to the press about the electric chair's construction and the number of volts used in the execution. While the New York State law authorizing use of the electric chair initially restricted media reporting on executions,[91] two years later the legislature "repealed the section of the law that restricted press coverage and acknowledged that the press had a right and responsibility to report on executions." After that, it was routine for wardens to invite the press to send reporters or editors to act as official witnesses to executions.[92] Later uses of the electric chair at the Sing Sing Correctional Facility had the voltmeter displayed,[93] and details about the electric chair's construction were also publicly available.[94]

Edwin Davis, who built the electric chair used in Kemmler's execution, was designated as the "state electrician" for New York. Davis was approved for a patent

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88 Owens Davies, & Francesca Matteoni, Executing Magic in the Modern Era: Criminal Bodies and the Gallows in Popular Medicine 71 (2017): "The St. Louis Republican noted, in 1882, that 'if all the hangman's rope were taken from the pockets of the superstitious St. Louisians, they would form a rope of considerable length.'"; Schuler *supra* note 84, at 265: "The ropes with which they were hung were seized by the bystanders and cut in little pieces as relics. Those who could not secure one of these, cut chips off the gallows."

89 Davis & Matteoni, *supra* note 88, at 72: "A month after the execution, in November 1887, of the four Haymarket 'anarchists', condemned to death after dynamite was thrown at police during a labour demonstration in Chicago, several dime museums around the country exhibited uncut ropes that were purported to be those that hanged the men."

90 *Id.*: "Following the hanging of Richard Mkwayne in York, Pennsylvania, in 1908, 'the rope was hacked into bits for souvenirs. Some of these changed hands at as much as $2 a piece.' There clearly was a trade in obtaining the rope for public display. In 1893, one journalist explained how hangmen often sold off their ropes, or pieces of it, to 'dime museum managers.'"

91 Craig Brandon, The Electric Chair: An Unnatural American History 167 (1999): "Because the electrical execution law outlawed reporting on executions, Durston was careful to point out that Mack and Bain had not been invited as reporters but as citizens of the state."

92 *Id.* at 203.

93 *Id.* at 197: "MacDonald made some recommendations for future executions [...] The voltmeter should be located in the execution room, he said, and a competent person should take readings. The voltage should be between 1,500 and 2,000 volts and should be entered into the official record. Finally, MacDonald suggested that an official report be submitted to the governor after each execution."

94 Scott Christianson, Condemned: Inside the Sing Sing Death House 119 (2000): "J.J. Shanahan, Chief Engineer, April 10, 1942: The Control Equipment such as Voltage Regulators, Auto Transformers, Oil Circuit Breakers, Panel Board, etc., was designed by and supplied by General Electric Company. Prior to the Institution going to Alternating Current, a Consulting Engineer, Mr. G.M. Ogle aided the design of the Electric System. The design for the present system using the Institution supply of Alternating Current was by a Mr. H.M. Jalonack in 1931, an engineer employed by General Electric."

in 1897 for an early design of his "electrocution-chair."[95] This patent contained a detailed drawing explaining all of the components of the electric chair apparatus and their function. Davis pioneered the development of electric chairs across America, and they have remained remarkably similar to his original design.[96]

Not only did Davis construct the machine, but he also presided at 240 executions over the course of his career.[97] According to Stuart Banner, when Davis retired, "His position was taken by John Hulbert, another state prison electrician, who had been trained by Davis himself. Hulbert executed 120 more. Hulbert's successor was Robert Elliott, who also became the official executioner in five other states that used the electric chair—New Jersey, Pennsylvania, Massachusetts, Vermont, and Connecticut."[98]

After the gas chamber was added to America's execution arsenal in 1922, [99] Eaton Metal Products constructed almost all of the gas chambers that were used for capital punishment.[100] Its patent application, a public document, like the patent for Davis' electric chair, also contains detailed drawings of the gas chamber's components.[101] The application also included elaborate descriptions about how each component functions, which gasses will be used and when, and how the chamber operates.

Informal notes on the particularities of other gas chambers were also readily available to the public. Fred Leuchter, who made part of his living repairing capital punishment devices, easily obtained information regarding the operation of gas chambers and electric chairs which he shared with the public any time he

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[95] United States Patent Office, Edwin F. Davis, Electrocution Chair, SPECIFICATION forming part of Letters Patent No. 587,649, dated August 3, 1897.

[96] Anthony Galvin, Old Sparky: The Electric Chair and the History of the Death Penalty 126 (2016): "Despite his oddities, Davis was conscientious about his job and determined to do his best to execute men cleanly and painlessly. He carried his own electrodes, which were always in immaculate condition, and he made several refinements to the chair to improve its efficiency. In fact, to this day he is the only person who has patents registered on the chair. It is very much old technology; it has not changed in over a hundred years."

[97] Stuart Banner, The Death Penalty: An American History 194-5 (2003): "Electrocutions were supervised by a very small number of people. Within a few years after the first electrocution New York turned over all its executions to Edwin F. Davis, the electrician at Auburn and the man who had built the original electric chair in 1890. Davis executed 240 people before he retired in 1914."

[98] *Id.* at 195.

[99] Chris Wilson, *Every Execution in U.S. History in a Single Chart*, Time, July 24, 2014, https://time.com/82375/every-execution-in-u-s-history-in-a-single-chart/.

[100] Stephen Trombley, The Execution Protocol: Inside America's Capital Punishment Industry 15 (1992): "Most gas chambers are octagonal in shape and are made of steel, with glass panels held in place by airtight seals. All except Missouri's, which was constructed by inmates, were manufactured by Eaton Metal Products of Salt Lake City."; Christianson, The Last Gasp: *supra* note 94, 131. "Founded in 1919, Eaton Metal Products was a leading steel plate fabricator that manufactured gasoline tanks, grain bins, and other industrial items. It also had experience in working with cyanide, by virtue of its metal-processing work. Best worked closely with Eaton's Denver plant superintendent, Earl C. Liston, to design a suitable apparatus. The Colorado gas chamber prototype would turn out to be a signature specialty item that would enable Eaton to enjoy worldwide dominance in that line of products for several years."

[101] United States Patent Office, Patent #2,802,462, August 13, 1957.

was interviewed.[102] These details included everything from the engineering of gas chambers to details about his own ideas about electric chair design and how they would improve the electric chair's performance.

As was the case with the identities of executioners, there is a clear pattern of transparency about execution methods. However, there were some notable exceptions. Several states made efforts to limit media reporting on capital punishment in the late 1800s. They passed laws forbidding the press from writing about the details of executions because of the gruesome and sensational stories the press told.[103] But those short lived efforts were more the exception than the rule. [104]

## III. The New Secrecy

Before the full flourishing of execution secrecy laws of the kind seen in the Joseph Wood case, several state protocols contained provisions for some limited degree of secrecy. In 1981, four years after Oklahoma became the first state to adopt lethal injection as its execution method, Jay Chapman, Oklahoma's Chief Medical Examiner and pioneer of the three-drug lethal injection cocktail, wrote to the Oklahoma Department of Corrections with suggested changes its the lethal injection protocol. One of his suggestions read:

> [...] the warden shall choose one (1) person to administer the lethal agents. The first and second alternates shall also be chosen to serve in the event that the designated individual is unable for any reason to participate in the execution. The identities of these individuals shall not be disclosed.[105]

As previously noted, a few death penalty states limited media access, prohibited photography or recording of executions, and even kept secret details about when

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[102] Trombley, *supra* note 100.

[103] Stuart Banner discusses the development of these laws in several states: "New York enacted the first of these laws in 1888. The following year Colorado and Minnesota barred journalists from describing hangings. Similar laws were later enacted in Virginia, Washington, and Arkansas. These bans were widely flouted. In 1891, after a quadruple execution was lavishly recounted in the New York press, the city's district attorney obtained indictments against the editors of several papers, but the resulting criticism of the ban was so strong that the legislature repealed it soon after. Although newspaper editors in the affected states claimed to be confident that such censorship was inconsistent with freedom of the press, the newspapers lost their primary constitutional challenge when the Minnesota Supreme Court upheld the state's statute. (At the turn of the twentieth century the First Amendment and its state constitutional analogues were very rarely invoked and were interpreted more narrowly than they are today.) The statutes nevertheless remained largely unenforced, and the press continued to report the details of executions."

Banner, *supra* note 97.

[104] *Id.*

[105] Letter From Chief Medical Examiner Dr. A. Jay Chapman to Dr. Armond Stuart of the Department of Corrections, with suggested revisions for execution protocol. June 24, 1981, https://drive.google.com/file/d/1CLDC54ZffRHsZSV5kLj_Ve0wgjRJv6l1/view?usp=sharing

and how the inmate was transported to the execution chamber.[106] In addition, a few protocols kept the identity of members of the execution team confidential.[107] The execution team was generally understood to include only individuals present and directly involved with executing the inmate, including the warden, executioner, escort officers, recorders, and supervisors.[108]

Since 2010, fourteen states have enacted laws that extend and intensify secrecy surrounding executions.[109] Those laws have varying degrees of specificity, but all prohibit the disclosure of the identity of the executioner and others directly involved in carrying out executions. They also cover crucial details about the drugs themselves, including in some instances the type of drugs used in executions, details about the drugs' makeup, information about the drug cocktail or combination and how it was developed, and the identities of lethal injection drug suppliers.[110]

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106 Texas Department of Criminal Justice Execution Protocol (Sep., 2005): "No public announcement shall be made concerning the exact time, method, or route of transfer" (6). "No family or media visits allowed at the Huntsville Unit" (7); Tennessee Department of Corrections Execution Protocol (September 2013): "Representatives of the news media are not allowed inside the secure perimeter of the institution during the time of active Death Watch or during an execution for any purpose whatsoever, unless selected as a witness to the execution" (49). Photographic or recording equipment are prohibited at the execution site during the execution (93); Oklahoma Department of Corrections Execution Protocol (October 2010): "No cameras, tape recorders, or other recording devices will be allowed in the viewing area." (13).

107 Oklahoma Department of Corrections Execution Protocol (October 2010): "The Warden of the Oklahoma State Penitentiary or designee will notify the executioners of an execution date in a timely manner. The identities of these individuals will remain confidential." (8); Tennessee Department of Corrections Execution Protocol (Sep. 2013): "The identity of the Execution Team is confidential" (50); Texas Department of Criminal Justice Execution Protocol 4/25/05: "Employee participants in the Execution Process shall not be identified or their names released to the public" (9). The execution team before the proliferation of drug secrecy statutes generally included individuals present and directly involved with executing the inmate, including the warden, executioner, escort officers, recorders, and supervisors.

108 Tennessee Department of Corrections Execution Protocol, September 2013, "The execution team shall consist of: Warden, Deputy Warden, Executioner, Extraction Team, Death Watch Team, IV Team, Lethal Injection Recorder, Facility Maintenance Supervisor, MIS Security Systems Technician(s), and Escort Officer(s)." (7)

109 Robin Konrad, *Behind the Curtain: Secrecy and the Death Penalty in the United States*, Death Penalty Information Center (Nov. 20, 2018), https://documents.deathpenaltyinfo.org/pdf/SecrecyReport-2.f1560295685.pdf. "Since January 1, 2011, legislatures in thirteen states have enacted new secrecy statutes that prevent the public from obtaining important information about executions." The thirteen states that enacted secrecy statutes are Arkansas, Georgia, Indiana, Louisiana, Mississippi, North Carolina, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Virginia, and Wyoming. In addition to the thirteen states the DPIC identifies, we also included Idaho, which passed a secrecy statute in 2022.

110 In Wood v. Ryan, *supra* note 1 and Bray v. Lombardi, 516 S.W.3d 839 (Mo. Ct. App. 2017): Plaintiffs were denied information such as concentration, pH, Osmolarity, expiration date, and lot numbers of drugs.

For example, Georgia's 2013 statute[111] says that

> [...] the identifying information of any person or entity that manufactures, supplies, compounds, or prescribes the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence shall be confidential and shall not be subject to disclosure [...] Such information shall be classified as a confidential state secret.[112]

Idaho's secrecy law, which was passed in February 2022, makes the identities of

> [a]ny person or entity who compounds, synthesizes, tests, sells, supplies, manufactures, stores, transports, procures, dispenses, or prescribes the chemicals or substances for use in an execution or that provides the medical supplies or medical equipment for the execution process" confidential and inadmissible as evidence in court.[113]

Of the death penalty states that have carried out lethal injection executions since 2010, all withheld some information about the execution process. Every state except one withheld information about the source of their execution drugs.[114] The recent history of execution secrecy in the state of Texas exemplifies the changed nature of, and reasons for extending and intensifying, secrecy practices.

In 2015, Senator Joan Huffman authored Texas Senate Bill 1697, which amended Article 43.14 of the Code of Criminal Procedure. This amendment extended the veil of secrecy to include the "name, address, and other identifying information" of "any person or entity that manufactures, transports, tests, procures, compounds, prescribes, dispenses, or provides a substance or supplies used in an execution."[115] One of the amendment's sponsors in the Texas House of Representatives offered the following explanation for this provision, "All we're trying to do is protect individuals from threats of physical violence. And that's really all the bill's about."[116]

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[111] Konrad, *supra* note 109, at 14.

[112] Ga. Code Title, § 42-5-36, (2019).

[113] Act of Idaho Legislature, H.B. 658 (2022). Arkansas is the only death penalty state with an exception in its new secrecy statute that allows disclosure of the identities of lethal injection drug producers and suppliers "in litigation under a protective order." *See* Konrad, *supra* note 109.

[114] *State-by-State Execution Protocols*, Death Penalty Information Center, https://deathpenaltyinfo.org/executions/methods-of-execution/state-by-state-execution-protocols (last visited July 1, 2022).

[115] Act of Texas Legislature, Ch. 209, S.B. 1697, Sec. 1, September 1st, 2015.: "The name, address, and other identifying information of the following is confidential and excepted from disclosure under Section 552.021, Government Code:
any person who participates in an execution procedure described by Subsection (a), including a person who uses, supplies, or administers a substance during the execution; and
any person or entity that manufactures, transports, tests, procures, compounds, prescribes, dispenses, or provides a substance or supplies used in an execution."

[116] 84th Tx. Leg., S.B. 1697 - Statement of Legislative Intent, May 19, 2015.

The sponsors offered no evidence of credible threats to any pharmacy. Nevertheless, they contended that if their identities were not protected "Almost none of the manufacturers or compounders will sell this drug to Texas or any other state right now." References to vague threats of violence and intimidation and acknowledgement of the necessity of secrecy to help ensure the lethal drug supply have been common justifications for what we call "the new secrecy."[117]

Some states have achieved similar enhancements of secrecy through administrative action rather than legislation. For example, the Alabama Department of Corrections treats the state's lethal-injection protocol as confidential and "outside the purview of a public records request."[118] And the Utah Department of Corrections redacted execution protocol states that the "warden shall ensure completion of all arrangements necessary for security of executioners and protection of their identities."[119]

Whether by legislation or administrative action, the last decade has witnessed a dramatic intensification and expansion of the regime of secrecy. It represents a clear departure from traditions of disclosure surrounding the execution process. The new secrecy laws conceal the identities of drug suppliers or expand the definition of the already confidential "execution team" to include them.

When challenged in court, judges have generally sided with the state and resisted calls for disclosure. For example, in 2014 Tennessee death row inmates filed suit seeking the names of officials involved in the lethal injection execution

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[117] Deb. surrounding 2014 La. H.B. 328, (Emily Lane, *Louisiana Lawmaker Removes Electric Chair Execution Option from Bill*, Nola (Apr. 29, 2014), https://www.nola.com/news/politics/article_7a63c503-f5d7-5b0e-8740-38fb59ec7125.html); Deb. around Ind. Code § 36-38-6-1(e) and (f) (Olivia Covington, *Death Penalty 'Secrecy Statute' Now in Hands of Justices*, The Ind. Lawyer (June 10, 2020), https://www.theindianalawyer.com/articles/death-penalty-secrecy-statute-now-in-hands-of-justices; Rhonda Cook, *Lethal Injection Secrecy Bill Wins Approval*, The Atlanta Journal-Constitution (Mar. 26, 2013), https://www.ajc.com/news/state--regional-govt--politics/lethal-injection-secrecy-bill-wins-approval/MxDpXGXmwDhJZH6gmzxc8J/: "DOC and the bill's sponsor, Rep. Kevin Tanner, R-Dawsonville, said the state needed to shield those who participate in executions from being harassed or ostracized in the community. Tanner, a former Department of Corrections board member, said the companies that supply the drugs 'are very reluctant to participate in this process because of harassment and threats.' There has never been any genuine threat of violence toward a lethal injection drug supplier. The state only provides a few crude emails and sporadic complaints, none of which establish a clear and direct threat."

Discussing the foolishness of these threat of violence claims, Judge Jane Stranch writes, "[a]s Sister Helen Prejean pointed out in her testimony for the Plaintiffs, anti-death penalty advocates seek to preserve the lives of even those convicted of serious crimes—hardly a group of activists likely to revert to violence against pharmacy employees." In re: Ohio Execution Protocol Litigation, Case No. 2:11-cv-1016 (Jane Stranch Dissent). Mary Fan's article *The Supply-Side Attack on Lethal Injection and the Rise of Execution Secrecy* is one of the few law review articles defending keeping suppliers' identities secret. Similar to *Owens v. Hill,* 758 S.E.2d 794 (Ga. 2014), Fan claims that, "Suppliers whose identities are revealed have halted sales due to threats, hate mail, constant press inquiries, and lawsuits." Mary D. Fan, *The Supply-Sode Attack on Lethal Injection and the Rise of Execution Secrecy*, 95 Boston U.L. Rev. 427 (2015).

[118] *Supra* note 114.

[119] Utah Department of Corrections Execution Protocol (2010), https://files.deathpenaltyinfo.org/legacy/files/pdf/ExecutionProtocols/UtahProtocol_06.10.10.pdf.

process as well as details about the execution itself.[120] When the case reached the Tennessee Supreme Court, it refused to require such disclosure.

Writing for the majority, Justice Jeffrey Bivens pointed to statements made by Senator Mark Norris, who sponsored the secrecy legislation, as a signal of legislative intent:

> There was a Court of Appeals decision two years ago, the Ray case, which interpreted our current statute more narrowly than we think is appropriate. In fact, so narrowly as only applying to persons that it has become difficult for the Department of Correction sometimes to obtain the materials that are needed because those who would provide the materials are afraid that they will be subject to some kind of exposure or liability. What this bill does is to clarify that persons and entities, persons or entities, have the same protections under the... exemptions from public disclosure.[121]

Justice Bivens also referenced the struggles that Departments of Corrections in Tennessee and elsewhere have had in obtaining drugs and other materials for execution, implicitly recognizing that suppliers would be reluctant to be involved in executions without secrecy.

Reflecting the same kind of argument used by proponents of execution secrecy in Texas and other states, Bivens noted that, "The reasons supporting nondisclosure of the identities of those involved in the execution of a death row inmate 'are obvious, including avoiding the risk of harassment or some other form of retaliation [...]'"[122] Indeed, this "risk of harassment or [...] retaliation" served as a central justification in a series of court decisions that kept the names of entities involved with lethal injection drugs.[123]

## IV. What Difference Does the New Secrecy Make

The existing literature on lethal injection drug secrecy identifies three consequences of the new secrecy.[124] First, drug secrecy laws by definition prevent the public from accessing information necessary to form informed opinions about execution by

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[120] West v. Schofield, 460 S.W.3d 113 (TN S.C. 2015): "We conclude that Tennessee Code Annotated section 10–7–504(h) does not create a privilege that protects the identities of John Doe Defendants from pretrial discovery."

[121] *Id.*

[122] *Id.*

[123] Landrigan v. Brewer, WL 4269559 (Az. D. 2010); In Re: Ohio Execution Protocol, 868 F.Supp.2d 625 (S.D. Ohio, 2012); Schad v. Brewer, 732 F.3d 946 (9th Cir. 2013); Wood v. Ryan, 759 F.3d 1076 (9th Cir. 2014); Owens et al. v. Hill, 295 Ga. 302 (GA S.C. 2014); Waldrip v. Owens, 014 WL 12496989 (Westlaw Citation) (Ga. N.D. 2014); Jordan v. Hall , WL 928871 (E.D. Missouri, 2015); West v. Schofield, 460 S.W.3d 113, (Tn. S.C. 2015); Guardian News and Media LLC, et al. v. Ryan, 225 F.Supp.3d 859, (Az., 2016).

[124] Drug secrecy involves attempts to shield information about the drugs used in lethal injection (identity of drug supplier, identity and aspects of drug themselves, drug protocol, how protocol was determined).

lethal injection.[125] Second, secrecy laws prevent death row inmates from exercising their constitutional rights and bringing legitimate legal challenges to the courts.[126] Third, these laws allow death penalty states to rely on minimally-regulated compounding pharmacies to obtain lethal injection drugs and circumvent federal regulations, pharmaceutical company policies, and international law.[127]

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[125] Mennemeier, *supra* note 82, at 443–92: (Secrecy statutes are unconstitutional because they limit the public's right of access); Adam Lozeau, *Obscuring the Machinery of Death: Assessing the Constitutionality of Georgia's Lethal Injection Secrecy Law*, 32 Minn. J. of L. & Inequality 451 (2014) (Secrecy laws violate the First Amendment, due process right of access to courts, and separation of powers principles);

Nathaniel Crider. *What You Don't Know Will Kill You: A First Amendment Challenge to Lethal Injection Secrecy*, 48 Colum. J. of L. & Soc. Probs. 1 (2014) (Public has qualified right of access to info about lethal injection drugs under 1A); Andrew Shi, *Reviewing Refusal: Lethal Injection, the FDA, and the Courts*, 168 U. Pa. L. Rev. 245 (2019) (Secrecy laws prevent people from evaluating efficacy of compounding pharmacy drugs, which are occasionally diverted to patient market); Clay Calvert et al, *Access to Information About Lethal Injections: A First Amendment Theory Perspective on Creating a New Constitutional Right*, 38 Hastings Comm. & Ent. L. J. 1 (2015) (1A theory demands public and inmate access to details of drugs, procedures, and personnel involved in executions); William W. Berry III, *Individualized Executions*, 52 U.C. Davis L. Rev. 1779 ( 2019) (Courts should assess execution techniques on case-by-case basis to determine constitutionality to allow transparency, give inmates dignity and allow public to have debate/think of legitimate capital punishment); Nadine G. Rodriguez, *Suppressing the Truth: States' Purposeful Violation of the Right of No Cruel or Unreal Punishment in Lethal Injection Executions Comment*, 47 St. Mary's L.J. 673 (2016); Maddy Gates, *Drawing Back the Curtain: Executions and the First Amendment*, Harv. C.R.-C. L. L. Rev. (Oct. 24, 2019), https://harvardcrcl.org/drawing-back-the-curtain-executions-and-the-first-amendment/; Eric Berger, *Courts, Culture, and the Lethal Injection Stalemate*, 62 William & Mary L. Rev. 1 (2020).

[126] Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. Law Review 1367 (2014); Nadine G. Rodriguez, *Suppressing the Truth: States' Purposeful Violation of the Right of No Cruel or Unreal Punishment in Lethal Injection Executions Comment*, 47 St. Mary's L. J. 673 (2016); Gates, *supra* note 125; Jasmine Sharma, *Lethal Attack on Lethal Injection: A Proposal to End the Final Loophole in the Death Penalty Debate* 59 Wash. U. J. L. & Pol'y 301 (2019) (Secrecy laws should be lifted as they hinder constitutional rights of death row inmates); Harrison Blythe, '*Laboratories of Democracy' or 'Machinery of Death'? The Story of Lethal Injection Secrecy and a Call to the Supreme Court for Intervention*, 65 Case W. Rsrv. L. Rev. 1269 (2015) (Circularity problem, plaintiffs can't find alternatives if they don't have access; Unless SC intervenes, states primary interest in executing prisoners however they can will continue); Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 Geo. L. J. 1331 (2014) (Secrecy just hides problems with lethal injection, will be constantly bombarded with lawsuits until actual solutions are figured out instead of a temporary fix of secrecy); Leigh B. Bienen, *Anomalies: Ritual and Language in Lethal Injection Regulations,* 35 Fordham Urb. L. J. 857 (2008) (Secrecy hides carelessness and potential violations of laws, pattern of secrecy with states botching executions and committing more executions); Julia Eaton, *Warning: Use May Result in Cruel and Unusual Punishment: How Administrative Law and Adequate Warning Labels Can Bring about the Demise of Lethal Injection Notes*, 59 B.C. L. Rev. 355 (2018) (Secrecy laws effectively bar civil suits seeking to ban use of drugs and creates significant obstacles for inmates hoping to appeal their death sentence); Berry III, *supra* note 125 (Courts should assess execution techniques on case-by-case basis to determine constitutionality, allow for inmates to bring up extenuating circumstances to argue against the viability of certain methods).

[127] Berger, *supra* note 126.

With respect to the first of these consequences, some scholars argue that the new secrecy laws are incompatible with First Amendment values. Public debate requires access to relevant information. Without that information, speech becomes empty and ritualistic. Informed public consideration of the death penalty in general, and lethal injection in particular, requires public access to details surrounding the lethal injection process.[128] Other scholars contend that because details about executions have historically been open and accessible to the public and because states have not identified a compelling reason for withholding information, such statutes are indefensible.[129] Some even argue that transparency is necessary for the public to evaluate whether states' executions comport with "evolving standards of decency."[130]

The new secrecy also creates a circularity problem for death row inmates. To make a legitimate claim of cruel and unusual punishment, inmates need complete information surrounding the lethal injection process. However, they cannot access this information unless they have a legitimate Eighth Amendment claim.[131] As a result, there are few avenues through which inmates and their lawyers can gather the information necessary to support a successful constitutional challenge to state execution methods.[132]

Many scholars have described the new secrecy laws as a kind of "band-aid," bury-your-head in the sand solution to a serious problem, barring inmates from discovering the causes of botched executions and preventing inmates from ensuring that their own executions are not botched. The more that states keep their execution procedures secret, the more the risk of unnecessary pain grows.[133] By limiting their ability to raise legal challenges to lethal injection, some believe secrecy statutes violate inmates' 14th amendment due process rights.[134] As Eric Berger writes, "By any measure, an inmate's Eighth Amendment right protecting him against an excruciating execution is 'weighty.' And whether one conceives of the inmate's Eighth Amendment right against an excruciating execution as a liberty interest or a 'residual life interest,' that interest is plainly within the Fourteenth Amendment's contemplation."[135]

The new secrecy laws were enacted as a response to difficulties death penalty states encountered in obtaining supplies of lethal injection drugs, shielding[136] their

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[128] Gates, *supra* note 125; Peters, *supra* note 82.

[129] Martin McKown, *Unconstitutional Killing: The Deadly Dilemma Surrounding Oklahoma's Lethal Injection Secrecy Statute*, 53 Duq. L. Rev. 611 (2015).

[130] Peters, *supra* note 128; Mennemeier, supra note 82; Crider, *supra* note 125.

[131] Berger, *supra* note 126; Nadine G. Rodriguez, *Suppressing the Truth: States' Purposeful Violation of the Right of No Cruel or Unreal Punishment in Lethal Injection Executions Comment*, 47 St. Mary's L. J. 673 (2016); McKown, *supra* note 129.

[132] *Civil Procedure — Lethal Injection Secrecy — Eleventh Circuit Denies Mississippi Death Row Prisoners Discovery by Creating a Federal Lethal Injection Secrecy Privilege. — Jordan v. Commissioner, Mississippi Department of Corrections, 908 F.3d 1259 (11th Cir. 2018)*, 133 Harv. Law Review 715 (2019).

[133] Berger, *supra* note 126

[134] *Supra* note 132; Eric Berger, *Private: Botched Executions & the Problem of Lethal Injection Secrecy*, Am. Const. Soc'y (Jan. 29, 2015), https://www.acslaw.org/?post_type=acsblog&p=10685; Berger, *supra* note 126.

[135] Berger, *supra* note 126.

[136] James Gibson & Corinna B. Lain, *Death Penalty Drugs and the International Moral*

efforts to find new suppliers. In 2011 the European Union banned the exportation of execution drugs.[137] With expiring reserves of sodium thiopental and no company to replenish the supply, states either had to find new suppliers or change their protocols if they wanted to continue capital punishment. But domestic pharmaceutical companies soon prohibited the use of their drugs in executions.[138]

In response, death penalty states have turned to compounding pharmacies.[139] Compounding pharmacies mix drugs to meet the needs of individual patients or operate as producers, creating large quantities of drugs that are near-replicas of mainstream products. Compounding pharmacies do not have to register with the FDA or inform the FDA what drugs they are making.[140] They have increasingly come under fire for failing quality tests and causing serious illness and even death due to contamination.[141] Secrecy laws protect these questionable suppliers.

In addition, state officials have violated the law to obtain lethal injection drugs. We know about this only when regulatory agencies intervene or when pharmaceutical companies reveal it. Those drugs have been obtained from unregulated and unreliable sources, posing a great risk to inmates who are executed with them. In 2011, for example, the Drug Enforcement Administration (DEA) started seizing sodium thiopental from several state DOCs.[142] The DEA first confiscated Georgia's supply in March because there were "questions about how the drug was imported to the U.S."[143] On April 1st 2011, the DEA took possession of sodium thiopental from Kentucky and Tennessee.[144] It later seized the imported drug from Alabama and South Carolina as well. States' new lethal injection secrecy statutes began to appear around the same time that state officials began procuring drugs illegally.

In April 2017, America's largest drug distributor accused Arkansas officials of illegally procuring lethal injection drugs. The company, McKesson Pharmaceuticals, said Arkansas fraudulently bought its drug, vecuronium bromide, a paralytic

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*Marketplace*, 103 Geo. L.J. 1215 (2015).

137 Matt Ford, *Can Europe End the Death Penalty in America?* The Atlantic (Feb. 19, 2014), https://www.theatlantic.com/international/archive/2014/02/can-europe-end-the-death-penalty-in-america/283790/.

138 Gibson & Lain, *supra* note 136.

139 *Overview of Lethal Injection Protocols*, Death Penalty Information Center (May 6, 2019), https://deathpenaltyinfo.org/executions/lethal-injection/overview-of-lethal-injection-protocols.

140 "*Compounding Pharmacies and Lethal Injection*," Death Penalty Information Center (Nov. 7, 2018), https://deathpenaltyinfo.org/executions/lethal-injection/compounding-pharmacies.

141 Center for Drug Evaluation and Research, *Compounding and the FDA: Q & A*, U.S. Food and Drug Administration (last modified June 29, 2022), https://www.fda.gov/drugs/human-drug-compounding/compounding-and-fda-questions-and-answers.

142 *New Records Handed Over by DEA Show Prison Officials May Have Broken Law When Importing Lethal Injection Drugs*, A.C.L.U. Northern CA. (May 18, 2011), https://www.aclunc.org/news/new-records-handed-over-dea-show-prison-officials-may-have-broken-law-when-importing-lethal.

143 Jabali-Nash & Naimah. *DEA Seizes Ga.'s Supply of Critical Lethal Injection Drug, All Executions Called Off*, CBS News (Mar. 16, 2011), https://www.cbsnews.com/news/dea-seizes-gas-supply-of-critical-lethal-injection-drug-all-executions-called-off/.

144 *Timeline for California's 'Secret Mission' for Lethal Injection Drugs*, A.C.L.U. Northern Ca. (Aug. 11, 2011), https://www.aclunc.org/blog/timeline-california%E2%80%99s-secret-mission-lethal-injection-drugs.

used in many three drug lethal injection protocols. According to McKesson's lawyer, Arkansas's prison system "never disclosed its intended purpose for these products." In fact, Arkansas officials purchased the drugs using an account opened under the medical license of an Arkansas physician. McKesson's lawyer argued that this deception "implicitly represented that the products would only be used for a legitimate medical purpose."[145] The drugs were also shipped to an address that the state had previously used to receive therapeutic medical supplies such as stethoscopes and surgical gloves. Using McKesson's drugs in executions violated the company's commitment not to allow distribution of products which could be used for lethal injections."[146]

In October of 2020, *The Guardian* found an Arizona DOC order for 1,000 vials of pentobarbital sodium salt, another execution drug, to be shipped in "unmarked jars and boxes."[147] Arizona and federal law make it a felony to dispense pentobarbital without a valid prescription. Licensed practitioners are not allowed to issue pentobarbital prescriptions for executions because they serve no therapeutic or medical purpose.[148] *The Guardian* asked Arizona's Department of Corrections to explain its seemingly illegal purchase of pentobarbital. The department responded that it does not discuss how it obtains execution drugs and stressed that the information is "statutorily confidential."[149] As we saw in the Joseph Wood execution, Arizona's secrecy statute ensures the anonymity of anyone providing an "ancillary function(s) in the execution, including the source of the execution chemicals."[150]

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[145] Alan Blinder, *Arkansas Judge Moves to Block Executions*, N.Y. Times (Apr. 15, 2017), https://www.nytimes.com/2017/04/14/us/arkansas-is-accused-of-deception-in-buying-drug-used-in-executions.html.

[146] *Id.*

[147] Ed Pilkington, *Revealed: Republican-Led States Secretly Spending Huge Sums on Execution Drugs*, The Guardian (Apr. 9, 2021), https://www.theguardian.com/world/2021/apr/09/revealed-republican-led-states-secretly-spending-huge-sums-on-execution-drugs.

[148] *Id.*

[149] *Id.*

[150] Az. Revised Statutes, A.R.S. § 13-757(C) (2009), State officials' hiding behind secrecy to conceal misconduct is an ongoing trend. In a damning report, two newspapers revealed that Idaho officials hid the intended use of lethal injection drugs that they were buying, falsified official documents to hide their tracks, and "acted in bad faith to stonewall public records requests for execution-related information" over the course of the past decade. *Investigative Report: Idaho Records Reveal State's Efforts to Conceal Ghost Purchase of Execution Drugs and Out-of-State Cash Payment to Pharmacy with Dubious Regulatory History*, Death Penalty Information Center (Jan. 21, 2022.), https://deathpenaltyinfo.org/news/investigative-report-idaho-records-reveal-states-efforts-to-conceal-ghost-purchase-of-execution-drugs-and-out-of-state-cash-payment-to-pharmacy-with-dubious-regulatory-history.

In November 2011, the Idaho Department of Corrections (IDOC) employed a pharmacist to travel Salt Lake City and act as a front for the illegal purchase of pentobarbital from a Utah pharmacy. A former IDOC employee testified in a deposition that IDOC had paid "upward of $10,000 in cash" for the out-of-state drug purchase. *Investigative Report: Idaho Records Reveal State's Efforts to Conceal Ghost Purchase of Execution Drugs and Out-of-State Cash Payment to Pharmacy with Dubious Regulatory History*, Death Penalty Information Center (Jan. 21, 2022.), https://deathpenaltyinfo.org/news/investigative-report-idaho-records-reveal-states-efforts-to-conceal-ghost-purchase-of-execution-drugs-and-out-of-state-cash-payment-to-pharmacy-with-

The information such secrecy statutes protect is precisely the information that is necessary to identify state impropriety and deter such action in the future.[151]

## V. Conclusion

This article documents a historically unprecedented intensification and expansion of the regime of execution secrecy. We argue that the new secrecy represents a significant departure from the longstanding tradition of openness about the identity of the executioner and the suppliers of execution methods. This departure is particularly consequential when lethal injection is the method of execution.

Kelly Mennemeier  explains why this is the case. She argues that knowing the details about lethal injection drugs is more important than knowing details about past execution materials.  As she notes, "The type of rope or gun or supplier of electricity or gas" does not "intimately impact" the result of executions. However, with lethal injection, "[I]mproper drug dosages or concentrations, expired drugs, and contaminated drugs risk [causing] the condemned prisoner excruciating pain."

No one can properly evaluate those risks without knowing the identity of lethal injection drug suppliers and details about the drugs.[152] And we know that, like the Joseph Wood execution, lethal injection executions are more frequently botched than other kinds of executions.[153] Instead of departing from the longstanding history of openness about executions, states carrying out lethal injection executions should reverse the recent intensification and expansion of secrecy. If the United States continues to execute, it should bring executions out of the shadows and provide more transparency, not less.

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dubious-regulatory-history.

[151] Some scholars provide solutions that could remedy problems associated with secrecy without repealing the secrecy statutes outright. *See* Berger, *supra* note 134.; Peters *supra* note 82.

[152] Mennemeier, *supra* note 82: "However, the drugs and drug combinations used in lethal injections affect the condemned prisoner's experience of dying to a much greater extent than other means of execution, where the type of rope or gun or supplier of electricity or gas does not intimately impact the resultant experience of dying and death. Insufficient sedatives, for instance, may leave a prisoner still conscious when the more painful, death-inflicting drugs enter the body. [...] With other forms of execution, knowing the method of execution was akin to understanding the method of execution. With lethal injection, however, additional information is required to understand the method of execution. [...] Improper drug dosages or concentrations, expired drugs, and contaminated drugs risk [can cause] the condemned prisoner excruciating pain."

[153] *Botched Executions*, Death Penalty Information Center (Nov. 17, 2011), https://deathpenaltyinfo.org/executions/botched-executions: Lethal Injection has a botched execution rate of 7.12%. Other common execution methods such as electrocution and hanging have botched execution rates of 1.92% and 3.12% respectively.

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# An Overview of Environmental Justice in Brazil

Ricardo Perlingeiro[1], Luísa Silva Schmidt[2]

## ABSTRACT

*This article discusses environmental conflict resolution in Brazil in both the administrative and judicial spheres, with the aim of analyzing the configuration of the bodies in charge of such adjudication, the procedural instruments at their disposal, and the main types, grounds and effects of environmental claims. An overview of the Brazilian system is evaluated based on the criteria of judicial and extrajudicial due process in order to point out certain dysfunctions of environmental adjudication that compromise its effectiveness, such as the inadequacy of the procedural legislation and the poor quality of the resulting decisions; ways of strengthening the rights and guarantees provided to litigants by the administrative and judicial authorities are also proposed as a means of improving the performance of environmental adjudication.*

## KEYWORDS

*Administrative justice, Environmental claims, Due process, Administrative authorities. Safeguards*

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## I. Introduction

The increasing importance[3] attached to environmental issues on the international scene since the creation of the United Nations Environment Programme (UNEP) in 1972 and the successive conferences on the subject has tended to spread to the other UN member states and has influenced the creation of laws and regulations intended to regulate the protection of natural spaces and the use of resources, and to minimize harmful interference with the environment.

Since UNCED 1992 (the United Nations Conference on the Environment and Development, held in Rio de Janeiro in 1992) called up on nations to enact environmental protection legislation, more than 80 countries have amended their constitutions to include the right to a healthy environment, and more than 300 environmental treaties and multilateral agreements have been signed. As a result, environmental law has become more complex and many entities have become specialized in environmental affairs to ensure improved implementation. By 2010, there were around 360 judicial and non-judicial bodies (generally integrated into the Legislative or Executive structures, with the power to resolve disputes) specialized in environmental matters, spread over 42 countries.[4]

In Brazil, the incorporation of legislation into the discussions initiated in the international sphere coincided with the nation's creation of its own environmental law as a discipline, which dates back to 1981, with the enactment of the National Environmental Policy Law (Law 6.938/1981). This Law broke with the previous legal approach, which addressed the environment only sporadically, when instrumental to achieving other purposes, such as economic growth and public health protection, and began dealing with the environment as a legal asset worthy of autonomous protection.[5]

This process, which culminated in the enactment of the 1988 Federal Constitution, a pioneer in the constitutionalizing of environmental issues in Brazil, triggered the production of more and more sophisticated ordinances, creating a complex framework of environmental law. To illustrate this point, concerning environmental licenses alone, there are an estimated 30,000 ordinances issued at the federal, state, district and municipal levels that directly or indirectly regulate such licensing issues.[6]

The profusion of laws, however, has not been accompanied by the corresponding structuring of administrative agencies in charge of implementation and supervision, which is an obstacle to rendering the normative provisions fully effective. For instance, Ibama, the agency in charge of implementing the National Environmental

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[3] The present article is derived from the lecture *Outline of Environmental Adjudication in Brazil* given by the author Ricardo Perlingeiro in the seminary *The Judiciary and Environmental Regulation*, which was held by the *Centre for American Legal Studies*, Birmingham City University, in partnership with the *United Kingdom Environmental Law Association*, on 17 November 2017, in London, the United Kingdom.

[4] George Pring & Catherine Pring, *Increase in Environmental Courts and Tribunals Prompts New Global Institute*, 3 J. Court Innovation 11, 11-21 (2010).

[5] Ingo Wolfgang Sarlet & Tiago Fensterseifer, Direito ambiental: introdução, fundamentos e teoria geral 178-183 (2014) (Braz.).

[6] Rose Mirian Hofmann, Gargalos do licenciamento ambiental federal no Brasil 53 (2015) (Braz.).

Policy at the federal level, has held only four public competitions for the admission of civil servants since its creation in 1989.[7] After the completion of the selection process initiated in 2012,[8] the agency did not publish an announcement for a new competition for the hiring of civil servants until the end of 2021.[9] According to the agency's own estimates, it was understaffed by more than 50% during that period. This decreased the number of environmental license applications examined, delayed the collection of environmental fines, and increased deforestation due to the shortage of civil servants to monitor compliance with the relevant norms.[10]

The excessive workload assigned to an insufficient number of civil servants, who often lack the material infrastructure they need to perform their assignments, has an adverse impact on the timeliness and quality of procedures,[11] making it difficult to produce decisions worthy of deference in the eyes of the reviewing bodies and society. As a result, such disputes end up being transferred to other entities, put in charge of giving them a final solution.

However, the majority of the entities with authority to review such decisions are generalist courts without specific technical training in environmental matters.

The lack of specialization also affects the procedural legislation that regulates such conflicts in the judicial sphere: such laws do not provide for proceedings capable of responding to the class actions with the necessary legal certainty, which results in contradictory rulings being issued on claims originating from a given factual configuration.

Moreover, the resolution of structural problems depends on budget issues that are generally beyond the decision-makers' control. It is therefore necessary to find ways of optimizing the proceedings of the adjudicators, whether in administrative or judicial bodies, in order to increase the efficiency of environmental adjudication.

Thus, we initially need to identify the features underlying due process in both the judicial and extrajudicial spheres and to give an overview of the current situation of Brazilian environmental adjudication in order to find potential opportunities for improvement.

This Article begins with an analysis of what the Inter-American Court of Human Rights (IACHR) means by right to a fair hearing in or out of court apt to produce decisions worthy of deference.

We shall then examine the configuration of administrative justice in Brazil, with a special focus on its impact on environmental justice and on the basic principles, types and effects of environmental claims.

Finally, we shall address certain dysfunctions that compromise the effectiveness of environmental adjudication before judicial and administrative decision-making bodies.

The response to the questions raised will take into account the Brazilian and foreign legislation and doctrine relating to environmental law and administrative justice, in addition to the rulings of the IACHR and of the Brazilians higher courts

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[7] Aline Borges do Carmo & Alessandro Soares da Silva, *Licenciamento Ambiental Federal no Brasil: Perspectiva Histórica, Poder e Tomada de Decisão em um Campo em Tensão,* Confins (19/2013) at 9 (Braz./Fr.).

[8] IBAMA, Edital 1, de 25 de outubro de 2012 (Braz.).

[9] IBAMA, Edital 1, de 29 de novembro de 2021 (Braz.).

[10] Nota Técnica do IBAMA nº 16/2020/CODEP/CGGP/DIPLAN, item 4.11 (Braz.).

[11] Nota Técnica do IBAMA nº 16/2020/CODEP/CGGP/DIPLAN, itens 8.20 and 8.21 (Braz.).

with subject-matter jurisdiction over environmental matters (the Superior Court of Justice and the Federal Supreme Court).

The analysis needs to cover Brazilian federal administrative procedure because it forms a system applicable throughout the national territory and generally replicated– although with certain adaptations– within each Federal State.

By doing, so, we hope to demonstrate the potential for increasing the effectiveness of environmental justice by implementing and strengthening the rights and guarantees established in national and international law in the proceedings of administrative and judicial authorities.

## II. Administrative Due Process (Judicial and Extrajudicial) According to the Inter-American Court of Human Rights

The IACHR considers it a fundamental human right to have access to an administrative justice system that is endowed with a competent, independent and impartial tribunal. Although "*Garantias Judiciais*" (Judicial Guarantees) is the official Portuguese title of Article 8 of the American Convention on Human Rights (ACHR), the Court finds that the guarantees of due process constitute a human right applicable not only to judicial but to any proceedings whose rulings have an impact on rights, including in administrative matters.[12]

According to IACHR precedents, the State's duty to resolve administrative disputes and protect rights should be comprehensive and effective and involve a review of the content of administrative decisions,[13] i.e., a review of questions of fact, questions of law, extrajudicial technical questions, as well as a review of the exercise of discretionary administrative powers.

In this context, the Brazilian Federal Supreme Court has allowed the review of a discretionary administrative decision to ensure that it complies with the constitutional principles that govern administrative proceedings, especially the principle of legality.[14] Gustavo Binenbojm affirms that "the possibility of judicial review of discretionary administrative decisions is now beyond dispute; the only remaining debates concern the limits (intensity) and parameters (criteria) that should govern such review". He further argues that the dichotomy between discretionary administrative powers and law-bound administrative powers has been refined by recognizing "different degrees by which administrative decisions are bound by the constitutional interpretation of the principle of legality", so that "the administrative merits – the core of the administrative action– which were previously untouchable, have begun to be directly influenced by constitutional principles".[15]

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[12] Case of Baena Ricardo et al. v. Panama. Merits, Reparations and Costs, Judgment, Inter-Am. Ct H. R. (Series C) No. 72, § 127 (Feb. 2, 2001).

[13] Case of Barbani Duarte et al. v. Uruguay. Merits, Reparations and Costs, Judgment Inter-Am. Ct H. R. (Series C) No. 234, § 204 (Oct. 13, 2011).

[14] STF, RE 131661, Relator: Min. Marco Aurélio, 2ª T., j. 26 set. 1995; RMS 24699, Relator: Min. Eros Grau, 1ª T., j. 30 nov. 2004; ARE 740670 AgR, Relator: Min. Gilmar Mendes, 2ª T., j. 07 out. 2014 (Braz.).

[15] Gustavo Binenbojm, Uma teoria do direito administrativo: direitos fundamentais, democracia e constitucionalização 213, 220, 221 (3 ed. 2014) (Braz.).

Within the meaning of the ACHR, an "adjudicator" may mean an authority, a judge, a court or tribunal or an administrative body.[16] What matters is not the particular branch of government (i.e. the Executive Branch via its administrative agencies or the Judiciary via the courts) which is assigned the duty to resolve administrative conflicts and to protect rights; what matters is that the chosen adjudicator must be competent, independent, impartial and has full powers to review administrative decisions. Thus, the more the adjudication of administrative conflicts characterized by due process is concentrated in administrative agencies, the less such administrative decisions will have to be submitted to judicial review and the greater the deference that will be shown by the Judiciary to such agencies. And vice-versa, the less aptitude is demonstrated by the administrative agencies to resolve a conflict effectively, the greater will be the required judicial "activism" and the less deference will be shown by the courts to the administrative agencies.

The IACHR holds that the principles inherent in a fair hearing are also applicable to front-line decisions (i.e., the implementing functions of administrative agencies) but only to the extent necessary to avoid an arbitrary decision. Front-line decisions are not subject to typical preliminary due process, since the decisions triggering the administrative process are necessarily followed by a phase of defense prior to the final solution. In that respect, the IACHR has already decided that the guarantees of due process of law are not applicable to rights-restricting administrative decisions, such as front-line decisions, with the same intensity with which such guarantees are required by judicial bodies, but rather only to the extent necessary to ensure that the administrative decision is not arbitrary.[17]

However, the more likely the front-line decisions are to comply with fundamental rights, the less the probability of conflicts, and the less judicial or extrajudicial adjudicators will be needed; thus, the more the citizens and adjudicators will display deference and confidence in such front-line decisions.

### *A. Front-line Decisions as Implementing Decisions*

In this regard, Michael Asimow conceives of front-line decisions as the initial stage of administrative adjudication, defined as "the entire system for resolving individualized disputes between private parties and government administrative agencies". The *front-line decision* is the initial decision, "the first agency proceeding that allows the private party a formal opportunity to present its case and challenge the "front-line" determination of the agency staff", apt to become firm and final unless challenged at a higher hierarchical level.[18] The term "implementation" as it is commonly used by Peter Cane and Peter Strauss, for example, refers to the elaboration of the initial decisions in the administrative sphere, as distinct from "administrative adjudication", which designates the review procedure for such decisions.[19]

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[16] Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations, and Costs, Judgment Inter-Am. Ct H. R. (Series C) No. 218, § 108 (Nov. 23, 2010).

[17] Case of Claude Reyes et al. v. Chile. Merits, Reparations and Costs, Judgment Inter-Am. Ct H. R. (Series C) No. 151, §§ 118 and 119 (Sept. 19, 2006).

[18] Michael R. Asimow, *Five Models of Administrative Adjudication*. 63, Am. J. Comp. Law 3, 4-6 (2015).

[19] Peter Cane, Administrative Tribunals and Adjudication (2009) [ebook].

### *B. Judicial Deference and Activism*

"Judicial deference" has to do with the intensity of the judicial review of the administrative decision. According to Eduardo Jordão, it refers to "the courts adopting an attitude of self-restraint when reviewing administrative decisions".[20] The 1984 U.S. Supreme Court Judgement in the *Chevron* case serves as a paradigm when analyzing judicial deference to administrative interpretation.[21] Jordão points out that said case:

> has established an important two-step test that has become a guide to determining the appropriate intensity of [judicial] review of the agency's interpretation of the law. According to the *Chevron* test, the courts should, in the first step, identify whether the law offered a clear solution to the specific question that was submitted for decision and formed the subject matter of the administrative interpretation. If the law provided such a clear solution, the case is settled: it suffices for the courts to apply that solution, because it is the only conceivable solution to the particular case. […] The second step of the *Chevron* test is performed precisely in cases in which the legislators failed to clearly settle the specific question brought before the court. In other words: the judge of the specific case should proceed to the second step of the *Chevron* test in the event that the legislation was ambiguous about the question at hand. If so, it is not incumbent on the courts to directly interpret the legislative ambiguity by adopting the solution they find most suitable. On the contrary, they should merely judge whether the solution adopted by the administrative authority is permissible (reasonable).[22]

U.S. Supreme Court case law evolved with the *Mead* case of 2001,[23] which added a preliminary verification step (*step zero*), by stipulating that:

> the *Chevron* system and its two-step test should only be applied in cases in which it is possible to identify a delegation by the legislators to the administrative authorities of powers to make norms with the force of law.[24]

According to the *Chevron* doctrine, judicial deference is based on the idea of separation of powers, which enables various possibilities of institutional arrangements. With the rise of the administrative state, the arrangement now includes a delegation of authority by the Legislative to the Executive branch to

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20 Eduardo Jordão, Controle judicial de uma administração pública complexa: a experiência estrangeira na adaptação da intensidade do controle 50 (2016) (Braz.).

21 Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

22 Jordão, *supra* note 20, at 202-03.

23 United States v. Mead Corporation, 533 US. 218 (2001).

24 Jordão, *supra* note 20, at 206.

interpret norms that it is responsible for enforcing, whether the delegation is express or implied. In this context, it is incumbent on the Judiciary to act in such a way as to foster the balance among the political powers.[25]

Another point that should be noted about the U.S. definition of judicial deference is that it finds its justification in the agency's technical capabilities. If the agency were not specialized in the subject matter of the interpreted norm or did not display technical expertise, there would be no reason to defer to the agency's interpretation.[26] Judicial deference therefore functions as a measure of the capacity of the administrative agency to resolve conflicts with the required technical expertise and guarantees of due process.[27]

In Brazil, Gustavo Binenbojm tried to systematize the parameters guiding the proper degree of judicial deference to administrative decisions as follows:

> I) the greater the degree of objectivity that can be derived from the administrative rules pertaining to the hypothesis under examination, the more intensive the degree of judicial review should be. […] II) the greater the degree of technicality of the subject matter decided upon by the experienced expert agencies, the less intensive the judicial review has to be. […] III) the greater the political nature of the subject matter decided upon by the duly elected agents (Chief of the Executive branch and Congressmen, for example), the less intensive the judicial review should be. […] IV) the greater the degree of effective social participation (whether direct or indirect) in the deliberation process that gave rise to the decision, the less intensive the judicial review should be. […] V) the more restrictions are imposed on fundamental rights […], the more intensive the degree of judicial review should be.[28]

Judicial activism may be thought of as the "exercise of the adjudicative function beyond the limits imposed by the legal system itself", by invading the areas of authority of another Branch. That characterization of judicial activism is directly related to the institutional role assigned to the Judiciary in every legal system. Generally speaking, in *civil law* systems, where case law is not considered to be a formal source of the law and adjudicative activity should be kept within the existing statutory framework, it is easier to identify judicial activism than in *common law* systems, where case law and precedents function as a creative source of the law.[29]

Judicial activism should not be confused with the judicialization of policy-making, which is a trend that:

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25 Anne Oakes, *Judicial Deference & the Administration: Are UK/US Parallels Feasible?,* 22 Revista Juris Poiesis 307, 307-311 (2019) (Braz.).

26 Ilaria Di-Gioia, *Administrative Deference in the United States: Kisor and the Consolidation of* Auer *Jurisprudence,* 22 Revista Juris Poiesis 328, 328-32 (2019) (Braz.).

27 Peter Cane, Controlling Administrative Power: An Historical Comparison 268 (2016).

28 Binenbojm, *supra* note 15, at 253-254.

29 Elival da Silva Ramos, Ativismo Judicial: Parâmetros Dogmáticos Capítulo I, Seção III (2 ed. 2015) (Braz.).

> [...] far from weakening the party system, [...] tends to strengthen it, insofar as it helps to create a bond (albeit mainly in the field of law and legal procedures) between representative democracy and participatory democracy, which is contributed to by "ações populares" (*actio popularis)* in which the citizenry has legal standing to sue authorities.[30]

Thus, the judicialization of policy-making would exercise a counter-majoritarian function in which the Judiciary would be responsible for revealing "the general will of the people implicit in positive law".[31] According to that line of thought, judicial activism may be considered to be a degeneration of the judicialization of politics.

## III. Administrative Justice: Organization and Impacts on Environmental Justice

Peter Cane defines "administrative justice" as the system that "[...] encompasses substantive rules and norms, decision-making procedures, and institutions", referring to matters of an administrative or executive nature. The author also points out that the word "justice" has a descriptive function in the term "administrative justice".[32] What is meant by administrative justice in the United Kingdom is equivalent in Brazil to a set of administrative and judicial decisions, in the following sequence:

- *Front-line administrative decisions*, meaning decisions that grant or deny an environmental license application and decisions that initiate an environmental sanctioning process or an environmental license revocation process. Examples of front-line administrative decisions found in Brazilian environmental legislation are Article 70, §3º, of Law 9.605/1998, on the initiation of administrative proceedings to ascertain environmental violations; Article 10, Clause VIII, of CONAMA[33] Resolution No. 237/1997, on the granting or rejection of environmental license applications; the introductory paragraph of Article 50 of Law 9.433/1997, which authorizes administrative agencies to impose penalties for the violation of any statutory or regulatory provision regarding the use of water resources; and Article 22 of Law 9.985/2000, on the creation of nature conservation areas by decision of the public authorities.
- *Administrative adjudication*, such as decisions that resolve an

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[30] Luiz Werneck Vianna et al., A Judicialização da Política e das Relações Sociais no Brasil 43 (2 ed. 2014) (Braz.).

[31] *Id.* at 38.

[32] Cane, *supra* note 19, at Chapter 6, item 6.1.

[33] CONAMA stands for *Conselho Nacional do Meio Ambiente* (National Environmental Council), consultative and deliberative body created by the National Environmental Policy Law (Law 6.938/1981) with the objective of proposing guidelines for government policies for the environment and natural resources and deliberating, within its attributions, on norms and standards compatible with an ecologically balanced environment.

administrative appeal or that conclude a sanctioning procedure or an environmental license revocation procedure. Examples of decisions that resolve administrative disputes under Brazilian environmental law are provided by articles 70, §4º, and 71, II, both of Law 9.605/1998, regarding decisions that conclude an administrative procedure to ascertain an environmental infraction, ruling on the notice of infraction issued at the start of the procedure; Article 19 of CONAMA Resolution 237/1997, which provides for the suspension, cancellation or modification of the requirements for an environmental license by the appropriate environmental agency; and Article 50, § 3º, of Law 9.433/1997, which provides for an appeal against an administrative agency's decision that imposes a penalty for an infraction of any statutory or regulatory provision regarding the use of water resources.

- Finally, judicial review, meaning a judicial proceeding for the review of administrative decisions intended to resolve environmental disputes or to take the place of such decisions in case of omission. In addition to judicial review, strictly speaking, there is a possibility of a judicial action, such as a judicial proceeding on a question of private law (but one that is relevant to the public administrative authorities) that does not necessarily have a preliminary extrajudicial administrative phase, such as questions of the civil liability of the State. In numerous precedents, the Brazilian Superior Court of Justice has recognized the civil liability of the State in environmental matters, whether by reason of an administrative act causing damage to a third party – or to a community represented in court by the Public Prosecutor's Office (*Ministério Público*) in accordance with Article 127 of the Federal Constitution – which did not take part in producing the administrative decision[34], or else as a result of an administrative omission, in which case the government agency is considered an indirect originator of the damage that is jointly and severally liable with the direct polluter.[35]

To summarize, "administrative justice" in Brazil is organized as follows: on the one hand, the civil servants and administrative agencies responsible for the initial decision (*front-line decision*) and for the review of that decision (*administrative adjudication*), although endowed with specialized technical expertise, impartiality and full powers of review of the challenged decisions, may lack the necessary prerogatives for taking independent (quasi-judicial) action. On the other hand, the trial and appellate judges and courts act independently and impartially, and with full powers of review of the challenged decision, despite their generalist

[34] STJ, AgInt no REsp 1326903/DF, Relator: Min. Og Fernandes, 2ª T., j. 24 abr. 2018); REsp 1245149/MS, Relator: Min. Herman Benjamin, 2ª T., j. 09 Out. 2012 (Braz.).

[35] STJ, REsp 1666027/SP, Relator: Min. Herman Benjamin, 2ª T., j. 19 out. 2017; AgRg no REsp 1417023/PR, Relator: Min. Humberto Martins, 2ª T., j. 18 ago. 2015; REsp 1376199/SP, Relator: Min. Herman Benjamin, 2ª T., j. 19 ago. 2014; REsp 1071741/SP, Relator: Min. Herman Benjamin, 2ª T., j. 24 Mar. 2009 (Braz.).

jurisdiction (non-specialized in administrative law and lacking environmental technical expertise). It should also be noted that the decision-making bodies in the administrative sphere are subject to the rules of administrative procedure and the courts are subject to the general rules of civil procedure.

In Brazil, the Judiciary has a monopoly on independent and impartial exercise of the adjudicative function.[36] According to the 1988 Constitution of the Federative Republic of Brazil, there are branches of justice specialized in trying cases of labor law (articles 111 to 116), electoral law (articles 118 to 121) and military law (articles 122 to 124). Any subject areas not mentioned above, such as environmental law, are referred to the common state courts (articles 125 and 126) and federal courts, whose jurisdiction generally depends on the presence of the federal agency or the involvement of the federal interest in the dispute (articles 106 to 110). There may be specialized bodies within the common state or federal justice systems, if so determined by laws or judicial norms. For example, the Federal Regional Court of the 4th Circuit created specialized trial courts in Curitiba, Porto Alegre and Florianopolis, by Resolutions 39, 54 and 55, respectively, of the President's Office of the Federal Regional Court of the 4th Circuit, all of them adopted in 2005, to try and judge all cases related to environmental and agricultural law, both in civil and criminal matters. Nevertheless, delimitation of jurisdiction is ad hoc rather than permanent, which is intended to minimize the problem of the lack of specialization of the adjudicators.

In this context, independent and impartial adjudication in Brazil is a function performed exclusively by the courts, which are almost always generalist courts having full powers of review of the agencies' decisions, both those that implement the laws (*front-line decisions*) and those that adjudicate disputes (*administrative adjudication*). In Brazil courts are subject to the principles of civil procedural law. Thus, it is not hard to see how much the courts and tribunals play the leading role in Brazilian environmental law.

## IV. Legal Grounds of Environmental Claims

### *A. Environment and Development*

According to the systematic analysis proposed by the authors, most of the conflicts that give rise to environmental claims before the courts are based on one of the grounds discussed below.

This primarily concerns issues that are inherent in the collision of fundamental rights and involve an agency's exercise of its discretionary powers in making difficult choices between favoring the environment, on the one hand, or economic development, on the other.

The Federal Supreme Court has already been called upon to settle various situations of conflict, where the Court gave priority to one principle or the other depending on the circumstances of the specific case. In the case ADI 3540 MC/

[36] In the case of *Piersack v. Belgium*, the European Court of Human Rights distinguished the subjective approach from the objective approach of impartiality. The former relates to the person of the judge, while the latter concerns the trust that the court inspires in the public (Piersack v. Belgium. Eur. Ct. H.R. (Oct. 1, 1982)).

DF,[37] considered the leading precedent on the subject, the Court upheld the constitutionality of a provision that granted the environmental agency the authority, via an administrative proceeding, to authorize the partial removal of vegetation in a permanent nature conservation area in order to facilitate economic activity in such areas. The reporting Justice stated as follows in his opinion:

> the principle of sustainable development [...] is one factor contributing to a fair balance between economic and ecological demands; nevertheless, invoking that principle in a situation of conflict between relevant constitutional values is conditional on one indispensable requirement, compliance with which neither compromises nor nullifies the essential content of one of the most significant fundamental rights: the right to preservation of the environment, which is an asset to be used in common by the general population and to be safeguarded on behalf of the present and future generations.

In another emblematic case, the Supreme Court recognized the constitutionality of decisions prohibiting the importation of used tires, giving priority to environmental protection to the detriment of the free exercise of such economic activity, which is considered harmful to health and to the environment due to the toxicity of the raw material and increase in the accumulation of solid waste.[38] The Supreme Court once again adopted an interpretation that favors the environment by recognizing that the statutory provision permitting commercial exploitation of chrysotile asbestos, a substance that is agreed to be toxic by the majority of medical researchers, fails to provide sufficient protection to health and environmental values.[39] More recently, when analyzing the constitutionality of various provisions of the Forestry Code (Law 12.651/2012), the Supreme Court acknowledged that mankind is an integral part of the environment, so that it is unacceptable to make economic progress at the cost of human survival. On the other hand, it is not feasible to achieve a total absence of environmental impact, since the Constitution also protects values such as social development, protection of the labor market and the satisfaction of the population's basic consumer needs, since democratically formulated public policies are the ideal *locus* in which to weigh such conflicting interests.[40]

The Supreme Court case law noticeably oscillates back and forth when it comes to determining the sustainability model that is supposed to reconcile environmental protection with economic development. Although such an assessment involves assigning different weights to each of the conflicting interests according to the circumstances of the specific case, the decision-making process underlying the solution adopted is often insufficiently explained. This prevents assessing the weights assigned to each of the conflicting interests which, in turn, makes it

[37] Relator: Min. Celso de Mello, Tribunal Pleno, j. 01 Set. 2005 (Braz.).

[38] STF, ADPF 101/DF, Relatora: Min. Cármen Lúcia, Tribunal Pleno, j. 24 Jun. 2009 (Braz.).

[39] STF, ADI 4066/DF, Relatora: Min. Rosa Weber, Tribunal Pleno, j. 24 Ago. 2017 (Braz.).

[40] STF, ADC 42, ADI's 4901, 4902, 4903 and 4937, Relator: Min. Luiz Fux, Tribunal Pleno, j. 28 Fev. 2018 (Braz.).

difficult to elaborate objective parameters applicable in subsequent decisions, to the detriment of legal certainty.[41]

### *B. Environment and Legitimate Expectations*

The other category of conflicts involves a collision of fundamental rights: environmental protection versus legitimate expectations.

Legitimate expectations can generally be defined as the subjective aspect of legal certainty, which is intended to protect the confidence placed by individuals in the continuation of a certain type of behavior by the State, as defined by Almiro do Couto e Silva in his article "O Princípio da Segurança Jurídica" (The Principle of Legal Certainty).[42]

In practice, situations commonly occur in which the government, through municipal and non-specialized agencies, allows individuals to occupy areas that are protected by reason of their environmental characteristics, promoting the collection of taxes and providing essential services such as supplying water, electrical power and garbage collection. This raises expectations in the individual occupants that they will be allowed to continue occupying such areas on a regular basis, which conflicts with the actions, generally assigned to specialized federal and state environmental agencies, to enforce the regulations that prohibit such occupancy.

Although the case law of the Brazilian higher courts contains no precedents specifically involving the conflict between legitimate expectations and environmental protection, the latter (environmental protection) is generally given priority when it conflicts with other principles related to legitimate expectations. For example, according to Statement 613 of the Summary of Case Law of the Superior Court of Justice, "the theory of *fait accompli* cannot be applied to matters of Environmental Law". The same Court has also held that no right can be acquired to the continuation of a situation that causes damage to the environment.[43] The Federal Supreme Court, for its part, when analyzing the tension between the legal certainty that justifies setting statutes of limitation, on the one hand, and the constitutional principles of environmental protection, on the other, ruled in favor of environmental protection by holding that no claims limitation period is applicable to environmental damage claims under civil law, considering 1) the inalienability of the fundamental right to an ecologically balanced environment and 2) the difficulty of assessing and measuring environmental damage in the short and medium term.[44]

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[41] Luísa Silva Schmidt, A Aplicabilidade da Economia Ecológica na Definição Jurídica do Desenvolvimento Sustentável especially items 2.1.1 & 2.2 (2020) (Braz.).

[42] Almiro do Couto e Silva, *O Princípio da Segurança Jurídica (Proteção à Confiança) no Direito Público Brasileiro e o Direito da Administração Pública de Anular seus Próprios Atos Administrativos: O Prazo Decadencial do Art. 54 da Lei do Processo Administrativo da União (Lei 9.784/99),* 237 Revista de Direito Administrativo 271, 272-274 (2004) (Braz.).

[43] STJ, AgInt no REsp 1545177/PR, Relator: Min. Og Fernandes, 2ª T., j. 13 nov. 2018; REsp 1755077/PA, Relator: Min. Herman Benjamin, 2ª T., j. 17 out. 2018; AgInt no AgInt no AgInt no AREsp 747515/SC, Relatora: Min. Regina Helena Costa, 1ª T., j. 09 out. 2018 (Braz.).

[44] STF, RE 654833/AC, Relator: Min. Alexandre de Moraes, Tribunal Pleno, j. 20 Abr. 2020 (Braz.).

### *C. Environment and Technical Evidence*

Disagreements about the scientific-technical evidence, on which the authorities base the exercise of their discretionary powers, also occur very frequently in environmental claims.

In a situation in which there was no scientific consensus on toxicity, the Supreme Court gave greater weight to free economic initiative by holding that it was not feasible to force electrical utilities to reduce the electromagnetic field of transmission lines below the minimum height required by law.[45]

## V. Types of Environmental Claims

We may therefore observe that environmental claims always gravitate around by administrative acts or omissions; this is especially noticeable in the cases related to the powers of agencies to grant licenses or impose penalties. The types of claims vary in this context, but they are usually of the types discussed below.

### *A. Claims Challenging the Granting of Licenses*

These are claims that challenge the granting or the refusal to grant an environmental license, or the absence of monitoring of licensing necessary to carry out a project or activity.

The environmental license is the administrative instrument that results from the licensing procedure and establishes the terms and conditions and compensatory measures that should be adopted to set up, operate and expand potentially polluting undertakings and activities (Art. 1º, I and II, of CONAMA Resolution 237/1997).

The licensing procedure generally encompasses three stages, namely, obtaining the preliminary license, the installation license, and the operating license. The preliminary license certifies approval of the project site and environmental feasibility; changes and measures may be required in subsequent stages. The installation license authorizes the entrepreneur to set up the undertaking or activity in accordance with the approved plan and the proposed changes, where applicable. Finally, the operating license authorizes the undertaking to go into operation once compliance with the conditions imposed in the previous stages has been verified (Art. 19, Decree 99.724/1990).

However, the environmental agencies often lack the operational capacity to complete the licensing procedure within a reasonable time and to monitor compliance with the conditions imposed. This situation ends up compromising their efficiency as a mechanism of environmental protection,[46] which may give rise to judicial review.

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[45] STF, RE 627.189/SP, Relator: Min. Dias Toffoli, Tribunal Pleno, j. 08 Jun. 2016 (Braz.).

[46] World Bank, Baseline Assessment of Proposals to Revise Federal Environmental Licensing in Brazil 9 (2016).

### *B. Claims Challenging Disciplinary Proceedings*

These claims challenge decisions to take disciplinary action against private individuals or civil servants for failure to comply with environmental legislation.

Disciplinary prosecution of a civil servant may be implemented either extrajudicially (when the administrative agency initiates disciplinary proceedings for dismissal and the civil servant in question challenges the decision to commence the proceedings) or judicially (when the administrative agency initiates a judicial improbity action (*ação de improbidade)*, requesting removal from office, and the civil servant's challenge takes on the form of his defense).

An improbity action is a judicial instrument for protection against administrative misconduct. According to the express provision of §4º of Article 37 of the Federal Constitution, it is a non-criminal action aimed at imposing political penalties (suspension of political rights) and civil penalties (freezing of assets, compensation for damages and removal from public office) on those responsible for performing an act of misconduct. Law 8.429/1992 provides for three basic types of acts of misconduct, depending on whether the misconduct entails unjust enrichment (Art. 9º), causes losses to the public treasury (Art. 10) or violates the principles of public administration (Art. 11).

### *C. Claims Challenging the Revocation of Licenses*

These are claims challenging a decision to revoke a license granted previously. According to Maurer, there are exceptions to the rule of the stability of administrative decisions because, unlike judicial bodies, which adjudicate disputes of third parties as a neutral forum, administrative agencies act as parties involved in their own cases, which means that administrative decisions do not provide the same guarantees of due process as judicial decisions. Besides that, the administrative decisions cannot offer the same resistance to change as judicial decisions because they have to adjust to the changing circumstances that gave rise to their enactment. The possibility granted to the administrative body to review its own decisions, and to revise them *ex officio* (when they were originally unlawful) or by reversing them (when, despite being originally lawful, changes in factual and/or legal circumstances would make it inappropriate to uphold its decision if certain circumstances provided for by law are ascertained), forms part of its administrative autonomy.[47]

In Brazil, the possibility of the agency annulling its own unlawful decisions *ex officio* was initially dealt with in Statement 473 of the Supreme Court Case Law Summary, published in 1969, according to which:

> the administrative agencies may annul their own decisions if vitiated by defects that make them unlawful, because no rights can be derived from them; or else revoke them, for reasons of convenience or expediency, providing that any acquired rights are respected, and subject to judicial review in any case.

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[47] Hartmut Maurer & Christian Waldhoff, Allgemeines Verwaltungsrecht (20 ed. 2020) (Ger.).

Articles 53 and 54 of Law 9.784/1999 adopted the jurisprudential orientation and set a 5-year limitation period in which to annul administrative decisions favorable to the addressees; the right of the administrative agencies to review such decisions lapses upon expiration of that period. The limitation period does not apply to administrative decisions that are unfavorable or restrictive vis-à-vis the interested parties, nor does it apply to favorable administrative decisions if the beneficiaries acted in bad faith, in which case the decisions may be annulled at any time, in principle.

### *D. Claims to Recover Damages*

Finally, there are civil liability claims for environmental negligence and failure to meet the requirements of an environmental license.

The compensation for environmental damage is characterized by various particularities in relation to the general theory of civil liability, by reason of the specific nature of the environmental asset for which compensation is payable. Such specificities include the absence of a limitation period on civil claims for compensation for environmental damage,[48] the reversal of the burden of proof in actions related to environmental pollution[49] and adoption of the "integral risk theory", which allows the agent to be held liable on a no-fault basis regardless of any factors that may generally exclude civil liability;[50] in other words, in order to establish an obligation to pay damages, it suffices to demonstrate the existence of a causal nexus capable of linking the harmful outcome ascertained (the pollution) with the act or omission attributable to the presumed causal agent (the polluter).[51]

Such particularities provide for a broader range of options to demonstrate civil liability in environmental matters than in other subject areas. Thanks to the adoption of the integral risk theory, it is even possible to sue the contractor for civil liability for damage arising from an activity carried out in accordance with the terms of an environmental license, even if the license was granted by mistake.[52]

### *E. Individual and General Effects of the Environmental Claims*

All these claims essentially have general effect, in view of the widespread nature of the right to a healthy environment. The intensity of the external effects produced by the decision generally has a scope conditional on the type of claim. Therefore, in terms of the effects, environmental claims are generally classified into claims of indirect general effect and claims of direct general effect.

An environmental administrative decision may be challenged because the license applicant disagrees with the version of the facts or evidence that the environmental agency associates with his license application. In such cases,

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48 Ver *supra* note 43.

49 Statement 618 of the Superior Court of Justice Case Law Summary.

50 STJ, REsp 1374284/MG (Tema Repetitivo 707), Relator: Min. Luis Felipe Salmão, 2ª Seção, j. 27 Ago. 2014 (Braz.).

51 STJ, REsp 1602106/PR (Tema Repetitivo 957), Relator: Min. Ricardo Villas Bôas Cueva, 2ª Seção, j. 25 Out. 2017 (Braz.).

52 STJ, REsp 1612887/PR, Relatora: Min. Nancy Andrighi, 3ª T., j. 28 Abr. 2020 (Braz.).

the claim is limited to the applicant and the trend is for only the applicant to be interested in the question, which is therefore considered to be a claim of indirect general effect.

In contrast, a claim may be based on grounds related to the legality of an environmental regulation or with the constitutionality of an environmental law. In such cases, the individual claim naturally takes on broader contours, extrapolates the usual limits of a conflict that is typically individual, and also tends to be of direct interest to the whole community.

## VI. Certain Dysfunctions of Environmental Justice

Having analyzed judicial and extrajudicial due process of law in the view of the Inter-American Court of Human Rights, the configuration of administrative justice in Brazil and the fundamental principles, types and effects of environmental claims, we shall now take a look at dysfunctions that impair the effectiveness of environmental justice before the courts.

### *A. Inadequacy of Procedural Laws*

The first dysfunction is related to the failure of the drafters of the laws of civil procedure to consider the specificities of environmental claims. Environmental claims are collective administrative actions, which becomes especially obvious in connection with claims of direct general effect based on environmental norms (administrative regulations or laws) rather than on facts that only have to do with the applicant.

In Brazil, there is no general law on judicial review proceedings in matters of administrative law or on collective proceedings. In an effort to systematize the subject matter, the Ibero-American Institute of Procedural Law, coordinated by professors Roberto Berizonce (Argentina), Ada Pellegrini Grinover (Brazil) and Angel Landoni Sosa (Uruguay), published the "Model Code of Collective Proceedings for Ibero-America" in 2004.[53]

In the field of administrative proceedings, the same Ibero-American Institute of Procedural Law, via a special committee coordinated by Brazilian professors Ada Pellegrini Grinover, as Chairwoman, and Ricardo Perlingeiro, as Secretary-General, prepared the "Model Code of Judicial and Extrajudicial Administrative Procedures for Ibero-America"[54] in 2012. In order to consider the justice systems of Continental Europe, too, the "Euro-American Model Code of Administrative Justice" was prepared.[55]

A procedural instrument is therefore needed allowing courts to issue decisions effective *erga omnes,* providing that, in a given claim, its grounds include

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[53] Ada Pellegrini Grinover et. al., Código Modelo de Processos Coletivos para Ibero-América (2004) (Braz.).

[54] Ada Pellegrini Grinover et. al., Código Modelo de Processos Administrativos: Judicial e Extrajudicial – para Ibero-América. Instituto Ibero-Americano de Direito Processual (2012) (Braz.).

[55] Euro-American Model Code of Administrative Jurisdiction (Ricardo Perlingeiro & Karl-Peter Sommermann org., 2014).

administrative decisions of direct general effect. On a previous occasion, it was observed that:

> [...] allowing diffuse and abstract review of a legal norm, granting several different courts the power of constitutional review of a law, would be something that could generate intolerable legal uncertainty, with decisions that are binding *erga omnes*, producing judgments that are *res judicata* and often inconsistent. With the same degree of legal uncertainty, the diffuse and abstract review of general and impersonal administrative acts, by allowing distinct and contradictory judicial decisions with respect to that category of administrative acts, would be capable of producing even more serious consequences, such as rendering unfeasible or contributing to the collapse of administrative activities and of the provision of public services that are essential to the community.[56]

In fact, one solution capable of reconciling legal certainty with the guarantees of due process of law in the resolution of collective disputes would consist in:

> [...] granting standing to sue and be sued to effectively independent public agencies and concentrating jurisdiction in a single court, thereby avoiding a multiplicity of lawsuits and conflicting decisions.[57]

Such a measure would prevent the atomization of individual lawsuits concerning issues that could be resolved collectively in the administrative sphere.

One example of the pernicious effects of the lack of a competent judicial body to centralize the resolution of environmental actions may be seen in the environmental disaster of Mariana, caused by the collapse of the mining tailings dam of Fundão in Minas Gerais, managed by the Samarco mining company, on November 5, 2015, causing 19 deaths, and dumping 62 million cubic meters of mining tailings into the environment, thereby damaging the Doce River ecosystem. This environmental disaster gave rise to several class actions, brought at both the state and federal level, by the State, Federal and Labor Public Prosecution Offices, representatives of the states concerned and the Federal Government, and civil society associations. The issues in dispute included compensation for damage to the natural and artificial environment (reconstruction of communities destroyed by the dam tailings), compensation for affected workers and fishermen whose livelihoods were impaired by water pollution, and the execution of preventive measures. In addition to the class actions, several individual actions have been proposed. The Court of Justice of Minas Gerais estimated that it has received approximately 50,000 individual actions questioning the water quality of Rio Doce.[58] The lack of

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56 Ricardo Perlingeiro, *A Impugnação Judicial de Atos Administrativos na Defesa de Interesses Difuso, Coletivo e Individuais Homogêneos*, 7 Revista de Direito do Estado 255, 263 (2007) (Braz.).

57 *Id*. at 270.

58 Cíntia Paes, *Processos e Acordos Marcam 30 Meses do Desastre da Barragem de Mariana",* G1 MG (05 Maio 2018) (Braz.).

uniformity in handling the question gave rise to procedural incidents due to conflicts of jurisdiction and contradictory decisions, so that, the case remained unresolved years afterwards, and the disaster ended up repeating itself on 25 January 2019, with the collapse of the Mina Feijão dam in Brumadinho, Minas-Gerais, which left 259 dead and 11 missing[59], in addition to the environmental damage still unmeasured.

In fact, in Brazil, "*ações populares*" ("*actio popularis*" or class actions in which standing to sue is universal) and actions concerning the standing to sue of the Public Prosecutor's Office are likely to result in court judgments that are effective *erga omnes*; nevertheless, such lawsuits are regulated by special procedural laws and based solely upon an issue of general interest, and neither prevent nor suppress the initiatives of individuals having a direct interest in the environmental issue. The absence of a stay of proceedings (*lis pendens*) between individual actions and collective actions may give rise to contradictory decisions and can lead to legal uncertainty.

The "*ação popular*" (*actio popularis)*, whose origins date back to Roman law, is characterized by the citizens being granted standing to sue in their own name to defend interests that belong to them not individually but collectively, as members of the community. It is recognized by the constitutions of various countries, such as Portugal (Art. 52), Spain (Art. 125) and Italy (Art. 113).[60] In Brazil, it is contemplated in Article 5º, LXXIII, of the 1988 Constitution, as a constitutional action intended to protect the historical and cultural public heritage, and administrative and environmental integrity, by annulling decisions that have proven harmful to them. Any citizen has standing to file a popular action subject to proving his eligibility by attaching a voter's card or equivalent document to his initial petition (Art. 1º, §3º, of Law 4.717/1965). The respondents (or parties with standing to be sued) should be composed of the legal entity responsible for issuing the allegedly harmful decision, the civil servants who contributed to the occurrence of the damage, and the direct beneficiaries of the harmful decision. It should be noted that the legal entity has the right not to challenge the claim or to act on the side of the claimant if doing so serves the public interest (Art. 6, introductory para. and §3 of Law 4.717/1965). The resulting judgment is effective *erga omnes*, except in cases dismissed for lack of evidence, in which case the judgement is only effective against the parties (Art. 18 of Law 4.717/1965). The problem is that jurisdiction to try the case is assigned to the court of first instance since no forum is provided for the administrative agent-respondent based on its privileges of office (Art. 5º, Law 4.717/1965). Consequently, the limitation of the effects of the decision to the territorial jurisdiction of the body that issued it may lead to contradictory decisions by different bodies.

Among the actions in which standing as a party is granted to the Public Prosecutor's Office, which is the body constitutionally responsible for defending the public and social heritage, the environment, and other diffuse and collective interests (Art. 129, III, of the 1988 Federal Constitution), the "*ação civil pública*" (civil public action) stands out as a procedural instrument for collective protection regulated in

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[59] Luiza Franco, *"'Estamos Presos Naquele Dia': 1 Ano após Rompimento de Barragem de Brumadinho, os impactos duradouros da tragédia",* BBC News Brazil (25 Jan. 2020) (Braz.).

[60] Paulo Hamilton Siqueira Jr., Direito Processual Constitucional 359-360 (6 ed. 2012) (Braz.).

Law 7.347/1985 and in Title III of Law 8.078/1990 (Consumer Defense Code). The subject matter of the civil public action is broad and includes any mass interest (diffuse, collective or homogeneous individual claims), even if not included within the scope illustrated by examples in Article 1º of Law 7.347/1985,[61] as well as the standing to file such an action, which is granted not only to the Public Prosecutor's Office but also to other entities representing collective interests in the broad sense of the term, such as the Public Defender's Office, the political entities, associations of civil society, political parties and labor unions (Art. 5º of Law 7.347/1985 and Art. 82 of Law 8.078/1990). Jurisdiction is assigned to the forum of the place where the damage occurred or is expected to occur.[62] In cases of nationwide or regional damage, jurisdiction is assigned to the forum of the State Capital or of the Federal District, respectively (Art. 2º of Law 7.347/1985 and Art. 93 of Law 8.078/1990); the forum by privilege of office is not applicable otherwise.[63] The effects produced by the decision depend on the outcome and the nature of the protected interest, in the manner regulated by Article 103 of Law 8.078/1990, and the filing of the collective action will not result in *lis pendens* (a stay of proceedings) with respect to individual actions (Art. 104 of Law 8.078/1990), which may generate a multiplicity of contradictory decisions.

### *B. Quality of Environmental Judicial Decisions*

The above-mentioned inadequacy of the civil procedural law for implementation of environmental justice also leads to another dysfunction that compromises the quality of judicial decisions. In this respect, it should be recalled that judges who are members of the courts are not specialists in administrative law or environmental law, and that the courts have broad powers of review of environmental administrative decisions. The combination of generalist courts and the lack of specialized legislation exacerbates the poor quality of such judicial decisions.

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61 Art. 1st. The provisions of this Law shall govern, without prejudice to the "ações populares" (*actio popularis)*, liability actions for moral and material damages caused:
I – to the environment;
II – to the consumer;
III – to rights and assets pertaining to artistic, esthetic, historical, tourism or landscaping matters;
IV – any other diffuse or collective interests;
V – through the violation of economic laws and regulations;
VI – to the urban planning system;
VII – to the honor and dignity of racial, ethnic or religious groups.
VIII – to social welfare and public assets.
Single paragraph. The scope shall not include civil actions under public law to assert claims involving taxes, pension contributions, the Employee Severance Indemnity Fund (FGTS) or other institutional funds whose beneficiaries may be determined individually.

62 Brazilian law allows the filing of preventive actions, before environmental damage occurs, pursuant to Article 4 of Law 7.347/1985: "Precautionary actions may be filed for the purposes of this Law, including with the objective of preventing damage to public and social assets, to the environment, to the consumer, to the honor and dignity of racial, ethnic or religious groups, to the urban planning system or to rights and assets of artistic, aesthetic, historical, tourism and landscaping value".

63 The Brazilian Federal Supreme Court adopted this decision, among others, in the following cases: ARE 874283 AgR, Relator: Min. Gilmar Mendes, 2ª T., j. 04 Fev. 2019; Pet 3240 AgR, Relator: p/ Acórdão Min. Roberto Barroso, Tribunal Pleno, j. 10 Maio 2018 (Braz.).

According to the IACHR, the guarantees of due process instituted by the ACHR are closely related to the concept of justice, so that due process of law should be addressed not only from a purely formal perspective but also from a substantive point view that includes the quality of the judicial decision. Thus, the guarantees of due process should ensure that fair trial will be obtained, in which the decision adopted to resolve the dispute ensures the highest possible level of legal correctness.[64]

The "quality of a decision" is a vague concept that is difficult to measure. Nevertheless, the minimum required contents can be identified, including legality, effectiveness, efficiency and legitimacy. Legality refers to the jurisdiction of the decision-making authority, to an accurate evaluation of the relevant facts and to the convergence of the decision with the legal norms in force on the subject matter. Effectiveness means the extent to which the decision contributed to achieve the proposed purpose, whereas efficiency requires that purpose to be achieved at the least possible expense. Finally, legitimacy has to do with the subjective perception of the public affected by the decision and is influenced, for example, by the level of participation that is ensured to the public concerned, and by the quality of the arguments used to justify the decision. Moreover, legitimacy influences the acceptance and observance of the decision by the addressees.[65]

In this context, the judges put in charge of judicial review in environmental matters are often unaware of the specific environmental laws and regulations. Instead, they tend to apply principles of private law, focusing on the two-party nature of the dispute to the detriment of the underlying public interest.[66] Consequently, they fail to give due consideration to the conflict between the fundamental rights involved in the specific case, such as the rights to environmental protection versus economic development, or a healthy environment versus legitimate expectations.

### *C. Quality of Environmental Administrative Decisions*

The third dysfunction of the environmental justice system is likewise related to quality, but the quality not just of judicial decisions but of administrative decisions, as well.

In Brazil, the administrative decisions subject to judicial review are based on technical reports prepared by the same individuals who are interested in obtaining a license, and the civil servants in charge of decision-making are not always properly qualified to check the validity of such technical evidence.

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[64] Rights and guarantees of children in the context of migration and/or in need of international protection. Advisory Opinion OC-21/14, Inter-Am. Ct H. R. (Series A) No.21, § 109 (Aug. 19, 2014); Case of Ruano Torres et al. v. El Salvador. Merits, Reparations and Costs, Judgment Inter-Am. Ct H. R. (Series C) No. 303, § 151 (Oct. 5, 2015).

[65] M. Herweijer, *Inquiries into the Quality of Administrative Decision-Making, in:* Quality of Decision-Making in Public Law 11, 11-27 (K. J. De Graaf; J. H. Jans; A. T. Marseille & J. De Ridder eds., 2007).

[66] Ricardo Perlingeiro, *Administrative Functions of Implementation, Control of Administrative Decisions and Rights Protection*, 10 Br. J. Am. Leg. Studies 1, 5-6 (2021).

The Federal Constitution (Art. 225, §1º, IV) requires performing a preliminary environmental impact assessment during the licensing procedure whenever the planned activity is capable of causing what is considered to be a significant amount of environmental damage.

Before that, Law 6.938/1981 already listed the environmental impact assessment as one of the instruments of the National Environmental Policy (Art. 9, III), and it was up to CONAMA (the National Environmental Council), as an advisory and decision-making body attached to the Ministry of the Environment, to order, as necessary, studies of possible alternatives and the environmental consequences of public and private projects, as well as the respective reports (Art. 8, II).

To establish the general guidelines for the Environmental Impact Assessments, CONAMA issued Resolution 1/1986, in which it stipulated that the minimum required content of the Environmental Impact Assessments (EIA) must include the environmental diagnosis of the area impacted by the project and an analysis of the project's environmental impacts and the alternatives; the specification of measures to mitigate the negative impacts, and the preparation of a follow-up and monitoring program (Art. 6). The Environmental Impact Report (EIR) must state the conclusions of the EIA's and contain at least the objectives and justifications of the project, as well as description of it and of alternative technologies and sites; the summary of the results of the environmental diagnosis studies of the project's area of influence; the description of the probable environmental impacts resulting from the performance and operation of the planned activity; a characterization of the future environmental quality of the area of influence; the description of the expected effects of the mitigating measures on the negative impacts, including those that are unavoidable; the program for the following up and monitoring of the results; and recommendations as to the most favorable alternative (Art. 9º).

Article 3 of CONAMA Resolution 237/1997 has already established that the Environmental Impact Assessment (EIA) and the corresponding Environmental Impact Report (EIR) must be conducted by legally qualified professionals, at the entrepreneur's expense. According to Article 11, the entrepreneur and the professionals who sign the assessment are liable for the information provided. Thus, a professional hired and paid by the license applicant prepares the EIA/EIR.

On the other hand, the agency employees in charge of assessing the accuracy of the EIA/EIR do not necessarily have to be a trained expert in environmental engineering. According to Law 10.410/2002 on the careers of Environment Analysts, the position of Environmental Analyst is associated with environmental licensing and auditing activities, among others (Article 4º), and such analysts are required to hold a university degree or legally equivalent qualifications. If specialized training is required, that fact will be mentioned in the announcement of the entrance exam (Art. 11, §§2, I, and 3). In any case, the latest announcement of the public competition for Environmental Analyst positions at IBAMA stated that candidates need only be university graduates, without requiring any specific training.[67] Environmental Technicians who are in charge of providing specialized technical support and assistance to the Environmental Analysts (Art. 66 of Law 10.40/2002) are only required to have a high school diploma or the equivalent

[67] IBAMA, Edital 1, de 29 de Novembro de 2021, item 2.1 (Braz.).

(Art. 11, §2, III). As a result, the environmental agencies are forced to rely on individual training of their employees, since no policies have been planned to attract employees with the level of training required to perform some of the tasks involved in the licensing procedure.[68]

Thus, in such cases, administrative decisions lack legitimacy and objective impartiality, and undermine the credibility of the front-line decision-makers in the eyes of the administrative adjudication authorities, the courts and society, even at the international level, which is problematic in light of the need to structure the administrative agencies in such a way as to honor Brazil's environmental commitments.[69] Naturally, that increases the number of disputes.

Moreover, the courts are noticeably ill at ease when ruling on environmental cases involving highly technical issues, because the judges and administrative adjudicative bodies rarely have qualifications that are equal to or greater than those of the front-line decision-makers in environmental matters. In general, the courts and such adjudicative bodies lack specialized technical support and the specific training required to review the technical evidence. This is a widespread problem in procedural law, but it is intensified in environmental law, since a large part of such disputes can only be resolved by means of technical evidence.

By the way, in England and Wales, degrees in engineering, architecture or planning are generally held by the members of *Planning Inspectorates*, which perform a function similar to that of an administrative environmental *tribunal*, hearing appeals against the rejection of applications for environmental licenses or permits or appeals against additional requirements added to such licenses or permits.[70]

In this context, in Brazil, inadequate technical evidence (in administrative and judicial proceedings) may create a considerable lacuna in environmental adjudication, since there are no authorities authorized to make up for the absence of such evidence.

## VII. Final Considerations

Increasingly, agencies have a duty to be guided by fundamental rights, not just for administrative adjudicative decisions but primarily for initial administrative decisions (*front-line decisions)*. Contemporary administrative law and environmental law require making decisions that are effective transnationally, which means, in turn, that the environmental authorities must be capable of gaining trust internationally.

In recent years, the Judiciary has been creating specialized environmental courts, which has now become a global trend, as we saw in the introduction. By the start of early 2010, 42 countries had already instituted around 360 judicial and

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68 Hofmann, *supra* note 6, at 69.

69 For example, one may mention here the obligations arising from the ratification of the Paris Agreement under the United Nations Framework Convention on Climate Change (implemented nationally in Brazil by Decree 9.073/2017), requiring the signatories, among other things, to develop objectives for the reduction of greenhouse gas emissions.

70 Richard Macrory, *Environmental Courts and Tribunals in England and Wales – A Tentative New Dawn*, 3 J. Court Innovation 61, 63 (2010).

non-judicial adjudicative bodies specialized in environmental disputes. In Brazil, as pointed out in item 3, three adjudicative units specialized in environmental matters were created by the Federal Regional Court of the 4th Circuit.

However, assigning a specialization of environmental law to the courts of a Judiciary that has a tradition of generalist jurisdiction and is subject to a Code of Civil Procedure is only a palliative measure so long as there is no effective (or partially effective) adjudication in the administrative sphere.

These findings, as well as the conclusions derived from them, are not new to the authors[71], nor are they limited to environmental issues. Nevertheless, such issues offer a striking example of the relevance of the debate due to the increasing importance that is being attached to environmental questions.

In reality, the only way that environmental justice can be transformed is through a reform of the environmental agencies, in compliance with the following:

1. setting up quasi-independent administrative agencies with an environmental adjudication function, as a way to guarantee a high level of specialization and to promote judicial deference in favor of such agencies; and
2. setting up prerogatives of independence and impartiality for the environmental agencies in charge of *front-line decisions*, so as to prevent conflicts, with a view to increasing the credibility of such agencies in the eyes of society, vis-à-vis the agencies' own environmental adjudication bodies, and vis-à-vis the Judiciary.

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[71] Ricardo Perlingeiro, *Judicial Deference & Right to a Fair Trial: A Feasible Conciliation in Latin America?* 22 Revista Juris Poiesis 333, 333-337 (2019). ISSN 2448-0517 (Braz.); Perlingeiro, *supra* note 66.

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# Keeping It Complex With Philip Hunton, John Locke, and the United States Federal Judiciary: On the Merit of Murkiness in Separation of Powers Jurisprudence

Michelle M. Kundmueller*

## ABSTRACT

*This article draws on the resources of a little-known political theorist, Philip Hunton, to explain the function of "murky" jurisprudence in the maintenance of separation of powers over time. In the era immediately before the drafting of the United States Constitution, separation of powers was a touted remedy to tyranny. But if government is thus moderated, a critical question arises: who will judge the precise contours of each institution's powers? This article addresses this longstanding question by comparing the solutions offered by Philip Hunton, John Locke, and the United States judiciary. I conclude that the judiciary's decried inability to clarify the limits of its own power is justified by Hunton's obscure explanation that separation of powers can only function so long as murkiness shrouds questions of ultimate institutional authority.*

## KEYWORDS

*Separation of powers, tryanny, John Locke, case or controversy, political question doctrine*

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## Introduction

This article contributes to our understanding of separation-of-powers theory by analyzing the role of the United States judiciary in maintaining that separation under the United States Constitution. The United States Supreme Court's role in defining the limits of its own constitutional authority has been a source of perennial debate and critique. The Supreme Court's articulation and implementation of the limits of judicial authority have elicited critique both for their substance and their doctrinal ambiguity. This article juxtaposes the doctrinal ambiguity of the United States judiciary's role in the national government with the mixed-government theory of the seventeenth-century political theorist Phillip Hunton. Hunton's little-known analysis provides the logic necessary to explain the function of the decried murkiness in the United States Supreme Court's jurisprudence.

As Locke warned and the drafters of the Constitution attempted to prevent, separated governments—often called complex—have a tendency towards consolidation of power into one part of the government. The great danger for a separated government is thus "simplification," which effectively ends its existence as a separated government. Hunton's argument suggests that a kind of "murkiness" is necessary for a separated government to avoid this evil and retain the necessary dynamism within its structure. If Hunton is right, imprecision in articulating and enforcing limits of judicial authority may be the key ingredient in whatever success separation of powers can boast within the American system.

All concede that no branch of the United States government is without some authority, and thus no branch has total authority. Accordingly, most scholarship focuses on determining the limit of each branch's authority in relation to the others and to other salient features of United States politics that might shift the relative power limits. Hunton's insight draws attention to an overlooked possibility: *where* precisely the boundaries of branch power lies may be less important than *how* and *how predictably* these boundaries are found. Counterintuitively, Hunton argues that unpredictability of branch boundaries is essential to the stability and quality of government over time. He argues that the inability to identify the supreme power within a complex government supports the continuation of the dynamic struggle necessary for such a government to remain complex and thus to serve its own end—the prevention of tyranny.

Hunton's theory was expounded in the context of a mixed government with hereditary elements and not to address the needs of government in the wholly republican United States. Nonetheless, his argument suggests a benefit of the Supreme Court's inability to articulate a consistent, clear doctrine explaining its own "case or controversy" limitations under Article III. Mapping Hunton's understanding of the power relations within a mixed government onto the respective branches created by the Constitution reveals that clarity and predictability are not ends to be sought. To the contrary, murkiness is the mechanism that prevents separation of powers from becoming a mere parchment barrier against tyranny.

Murkiness is not a known or even—to my knowledge—previously used term in jurisprudence or legal scholarship. The term is employed here to denote the particularly problematic quality of the precise boundaries of institutional authority among the United States legislature, executive, and judiciary and particularly to describe the federal common law delineating which branch shall determine the precise limitations of each branch's authority under the Constitution. The term "murkiness" is employed to underscore a feature of this portion of the United

States jurisprudence that is distinct *in function* from the baseline unpredictability, ambiguity, inconsistency, or downright irrationality that can (at times) be observed in the common law more generally. In addition to all these qualities (which are normal and inherent, if regrettable, in common law), in this particular instance the common law produces a murkiness that—according to the dynamic observed by Hunton—actually strengthens rather than weakens the government as a whole.

Given prevailing rule-of-law norms such as the desirability of predictability, stability, and clarity,[1] the finding that a certain type of judicially-created murkiness enhances the government's aggregate structural integrity is particularly surprising, unconventional, and—I believe—unprecedented. Admittedly, if the murkiness were too thick (so to speak), the government could not function at all. Moreover, as mentioned below, the murkiness may produce unjust outcomes in some cases. So, while Hunton's theory would lead one to believe that murkiness renders important or even critical benefits, there are countervailing interests indicating that the benefits come at a high price and that therefore the desirable degree of murkiness is itself murky.

To be clear, this article attempts to demonstrate neither Hunton's historical influence nor his success in foretelling a potential role for courts. Rather, my argument is that—in grappling with the dynamics inherent in mixed government, the dynamics of limiting the potential tyranny of a king or of Parliament—Hunton proposed a solution that the Supreme Court has reproduced, albeit unwittingly and contrary to its best efforts at predictability, stability, and clarity. Hunton's insight did not cause or predict the development of the United States judiciary or the function that it performs in maintaining separations of powers within the United States government; rather, Hunton's insight about the uncertainty necessary to maintain the power dynamics of a mixed regime—when applied to the power dynamics of the separation of powers established within the United States—reframes what has been seen as a deficiency in the constitutional structure of the United States. The Supreme Court's unintended lack of clarity in expounding just when it has the authority to resolve a conflict and when it must defer to the coordinate branches is a saving grace—not a stumbling block.

## I. The Case or Controversy Limitations of Article III

The federal judiciary's role in resolving conflicts among the branches of the national government has been the subject of extensive study by political scientists,

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[1] However it may be best formulated or to whomever it may be most accurately attributed, the rule of law—which requires at a minimum that the law be knowable—exists in tension with murkiness in the law. The idea of the rule of law is notoriously difficult to pin down within the Anglo-American legal tradition, but whether it is best attributed to ancient Greek Aristotle or British attorney A.V. Dicey, the practice, idea, or ideal of the rule of law requires that law be known in advance and then applied in some rational, predictable, and pre-announced fashion. *See* Richard H. Fallon, Jr., *"The Rule of Law" As A Concept in Constitutional Discourse*, 97 Colum. L. Rev. 1, 1–7 (1997); Eric J. Segall, *Justice Scalia, Critical Legal Studies, and the Rule of Law*, 62 Geo. Wash. L. Rev. 991, 991–95 (1994); Kem Thompson Frost, *Predictability in the Law, Prized Yet Not Promoted: A Study in Judicial Priorities*, 67 Baylor L. Rev. 48, 67 (2015).

legal scholars, and judges. Political scientists have posited a variety of models that account for case selection and outcome when the branches are pitted against one another in a legal battle.[2] Offering a complex set of partial explanations for the Supreme Court's resolution of these conflicts, this research suggests various factors—perhaps most recently and notably the degree of judicial control over ruling implementation[3] and the degree of policy preference divergence among the Court,[4] the branches, and public opinion.[5] A large body of work is devoted to predicting which branch is likely to prevail once a legal confrontation has started among the branches. Yet the discipline is still at odds with itself, and no conclusive set of factors predicting judicial outcomes is in sight. For example, while Moe and Howell conclude that the Court is largely deferential to the executive, they call the Court's potential to resist executive action a "wild card."[6] More recently Owens, in challenging the separation of powers model favored by many, concluded that the studied factors in judicial decision making may simply be "so limited or difficult to measure that existing methodologies are blind" to them.[7]

As this overview is intended to establish, the brunt of the focus of political science has fallen on how federal courts generally and the Supreme Court in particular resolve conflicts that all observers concede are properly conflicts for the judiciary to resolve. The judiciary's role in determining which branch shall resolve which issue has, by contrast, attracted relatively little attention from political

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[2] For an overview of the competing theories of the two dominant approaches, the attitudinal and the separation of powers models, see Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 Am. Pol. Sci. Rev. 28 (1997).

[3] Matthew E.K. Hall, *The Semiconstrained Court: Public Opinion, the Separation of Powers, and the U.S. Supreme Court's Fear of Nonimplementation*, 58 Am. J. Pol. Sci. 352 (2014).

[4] Employing the convention of United States judges and attorneys, I refer to the United States Supreme Court as the "Court" and any other court (including a lower federal court) as a "court."

[5] Bethany Blackstone & Greg Goelzhauser, *Congressional Responses to the Supreme Court's Constitutional and Statutory Decisions*, 40 Just. Sys. J. 91 (2019); Alyx Mark & Michael A. Zilis, *The Conditional Effectiveness of Legislative Threats: How Court Curbing Alters the Behavior of (Some) Supreme Court Justices*, 72 Pol. Rsch. Q. 570 (2019); Jeffrey A. Segal, Chad Westerland & Stefanie A. Lindquist, *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 Am. J. Pol. Sci. 89 (2011); Clifford J. Carrubba & Christopher Zorn, *Executive Discretion, Judicial Decision Making, and Separation of Powers in the United States*, 72 J. Pol. 812 (2010); Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 Am. J. Pol. Sci. 971 (2009).

[6] Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 Presidential Studs. Q. 850, 866 (1999).

[7] Ryan J. Owens, *The Separation of Powers and Supreme Court Agenda Setting*, 54 Am. J. Pol. Sci. 412, 425 (2010). *See also* Jeffrey A. Segal & Chad Westerland, *The Supreme Court, Congress, and Judicial Review*, 83 N.C. L. Rev. 1323 (2005). Likewise, political scientists are divided over the desirability of separation of powers and the principles that justify its continuation. For new and classic examples, see, e.g., Tara Ginnane, *Separation of Powers: Legitimacy, Not Liberty*, 53 Polity 132 (2021); Gleason Judd & Lawrence S. Rothenberg, *Flexibility or Stability? Analyzing Proposals to Reform the Separation of Powers*, 64 Am. J. Pol. Sci. 309 (2020); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. Pub. L. 279 (1957).

scientists. Because this issue is central to understanding the operation of separation of powers under the United States Constitution, it is to this preliminary and often overlooked question—the question of whether a conflict may be resolved by a federal court—that I wish to direct attention.

To be clear, all branches—and even individual citizens—play a role in this traffic direction of conflict to and through the branches of government. Thus, presidents decide whether to attempt to work under existing laws or to solicit new statutes from Congress.[8] Congress determines when to create judicial remedies, when to empower executive action, and when to employ both judicial and executive solutions.[9] And citizens—whether consciously or not—decide too: sometimes they sue, sometimes they campaign to change public opinion and hence—eventually—the relevant politicians and the law, and sometimes they attempt to elicit a change from the relevant federal, state, or local executive official (be it president, mayor, or cop on the beat).

But the judiciary plays what is most often the most definitive role—which is not to say a universally final role[10]—in determining how the social conflict traffic

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8 *See* Bruce Ackerman, *The New Separation of Powers*, 113 Harv. L. Rev. 633, 712 (2000).

9 In some cases, Congress even elects to bring suit, effectively harnessing the judicial branch to meet its own goals. Ben Miller-Gootnick, *How the House Sues*, 2021 U. Ill. L. Rev. 607 (2021). Congress may write laws that either expand or contract the federal judiciary's jurisdiction. The extent of this power is unclear and the topic of much debate. Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. Rev. 1778 (2020); Reid Coleman, *Separation of Powers Faux Pas: The McGahn Litigation and Congress's Efforts to Utilize the Courts to Resolve Interbranch Information Disputes*, 87 U. Chi. L. Rev. Online 1 (2020); *see also* David R. Dow & Sanat Mehta, *Does Eliminating Life Tenure for Article III Judges Require a Constitutional Amendment?*, 16 Duke J. Const. L. & Pub. Pol'y 89 (2021) (arguing that Congress may be able eliminate life tenure for federal judges without recourse to constitutional amendment).

10 Various constitutional provisions and power dynamics permit resistance to final resolution of an issue by the federal judiciary. The most obvious is constitutional amendment, provided for in Article V. Together, constitutional amendment and the Civil War reversed the Court's finding that it held the authority to resolve the constitutional status of slavery. *Scott v. Sandford,* probably not coincidentally, is also the Court's most infamous case of ruling without jurisdiction under Article III. 60 U.S. 393, 427–431 (1856). Section II of Article III empowers Congress to remove issues from federal jurisdiction, giving Congress direct control over the federal judiciary's jurisdiction. Creative legislation can also substantially alter the dynamic between branches. For example, the federal Religious Freedom Restoration Act effectively raised the floor for federal deference to religious freedom, thereby curtailing the relevance of the judiciary's role in determining the contours of religious freedom protection under the First Amendment. Ben Ojerkis, Comment, *Protecting Religion or Privileging Religion: An Analysis of the Genesis and Unintended Consequences of the Indiana Religion Freedom Restoration Act*, 21 Rutgers J.L. & Religion 260, 261–71 (2020) (providing an overview of why and how the Religious Freedom Restoration Act changed the protection of religious practice from federal law); *see Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682 (2014), 693–696. Finally, overwhelming popular pressure and longstanding executive resistance can dampen, delay, or foreclose enforcement of judicial rulings. The prolonged end of school segregation, although a state example, is probably the most overt and famous example of this dynamic. *See* Jim Hilbert, *Restoring the Promise of Brown: Using State*

will be directed among the three branches of the federal government. Every time a federal court rules on a point of First or Fourteenth Amendment law (for example), the judiciary first determines that it is the branch that will make this determination. More to the point, sometimes a judicial ruling never comes because the court determines as a preliminary matter—in a very real sense before the legal controversy has even started—that the case before it is not a case at all. This limitation of judicial authority is grounded in Article III of the Constitution, which vests the "judicial power" of the United States to resolve "cases" and "controversies." As recently articulated by the Court, "no principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."[11]

As interpreted by the Court over the years, the case-or-controversy limitation means that the federal judiciary is limited to resolving legal conflicts—and only those legal conflicts that do not require resolving a question committed by the Constitution's text to either the executive or the legislature.[12] The doctrines that have grown from this limitation prevent the courts from "usurp[ing] the powers of the political branches."[13] When a conflict lies outside these parameters, it is not—to put the issue in Article III terms—a "case" or "controversy." Therefore, the issue lies outside the judicial power, or—to put the matter in the terms most often employed by the courts—it is "nonjusticiable," and accordingly the court has no jurisdiction and may not rule.[14] As Justice Warren explained, the case-or-controversy formulation limits the "federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process" and ensures "that the federal courts will not intrude into areas committed to the other branches of government."[15]

Through the common law process, the Court has developed a number of doctrines that articulate how the case-or-controversy limitation circumscribes the federal judiciary's authority in different scenarios.[16] Perhaps best known is

*Constitutional Law to Challenge School Segregation*, 46 J.L. & Educ. 1, 4–8 (2017); Josh Blackman, *The Irrepressible Myth of Cooper v. Aaron*, 107 Geo. L.J. 1135, 1140–51 (2019).

11 *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016). *Spokeo*, like all the cases relied on to illustrate the Article III limitations of the federal judiciary's jurisdiction, adjudicated a separation of powers question. In each of these opinions the Court ruled on the scope of its own authority, thereby delineating the scope of judiciary's authority within the United States separation of powers scheme. Both diminishment and expansion of the judiciary's authority will normally have at least an indirect and corresponding impact on the power of one or both of the coordinate branches (because the coordinate branches will thereby have either more or less capacity to act without judicial oversight).

12 *Id.* at 336–37; *Rucho v. Common Cause*, 139 S. Ct. 2484, 2493–94 (2019); *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 101–04 (1998).

13 *Spokeo*, 578 U.S. at 338. In *Spokeo*, the Court was specifically referring to the doctrine of standing, but the same logic applies to all the doctrines based on the case-or-controversy limitation.

14 Fundamental to the federal court's limitations under Article III is their inability to rule without jurisdiction. *See Steel Co*., 523 U.S. at 89–104 (for further elaboration on this issue).

15 *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

16 Andrew Hessick, *Standing and Contracts*, 89 Geo. Wash. L. Rev. 298, 304–05 (2021). The *Spokeo* court described this aspect of standing in terms that apply to all the case-or-

the doctrine of standing, which requires that the plaintiff have suffered an injury that is "both concrete and particularized."[17] The legal issue at the heart of the case must also be "ripe—not dependent on contingent future events that may not occur as anticipated, or indeed may not occur at all."[18] On the flip side, the issue may be "moot" if—at some point before judgment—circumstances change so that the court can no longer provide effectual relief.[19] Once a case becomes moot, it is no longer a "case" within the meaning of Article III, and accordingly it is outside the jurisdiction of the federal judiciary.[20] Taken together, these case-or-controversy–derived doctrines ensure that "the dispute must be real and substantial and admit of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."[21] In other words, these doctrines ensure that the judiciary does not exercise "general authority to conduct oversight of decisions of the elected branches of government."[22] Hence the case-or-controversy doctrines guide the courts as they translate this constitutional imperative into reality.

Exploration of the concept of advisory opinion is particularly helpful to the process of understanding the common foundation of these doctrines, all of which limit courts to ruling on legal questions in the context of legal battles.[23] Viewed in the broadest of perspectives, standing, mootness, and ripeness are all analytical tools that ensure that—even when the conflict looks a bit "lawlike"—a court will not render what would effectively be an advisory opinion. Since the Court refused to give George Washington advisory opinions "under circumstances which do not give cognizance to them to the tribunals of the country," it has been axiomatic

controversy doctrines: it "is a doctrine rooted in the traditional understanding of a case or controversy. The doctrine developed in our case law to ensure that federal courts do not exceed their authority as it has been traditionally understood." *Spokeo*, 587 U.S. at 338.

[17] *Spokeo*, 578 U.S. at 334. To demonstrate standing, the plaintiff must also show that the injury is fairly traceable to the defendant and that it is likely to be redressed by a favorable judicial decision. *Id.* at 338.

[18] *Trump v. New York*, 141 S. Ct. 530, 535 (2020).

[19] *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021).

[20] *United States v. Sanchez-Gomez,* 138 S. Ct. 1532, 1537 (2018).

[21] *California v. Texas,* 141 S. Ct. 2104, 2115–16 (2020).

[22] *Id.* at 2117.

[23] A related yet distinct doctrine of judicial self-limitation is the "party presentation rule." Under this rule, which is derived from the fundamentally passive nature of judicial power, the judiciary generally limits itself to resolving issues properly raised by the parties. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). As the Court has explained, "In our adversarial system of adjudication, we follow the principle of party presentation. . . . in both civil and criminal cases, in the first instance and on appeal . . . , we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.* (internal citations omitted). Because this doctrine is "supple, not ironclad" (*id.)* it adds another layer of complexity to a federal court's analysis of which issues will be resolved when by federal courts. Amanda Frost, *The Limits of Advocacy*, 59 Duke L.J. 447, 449–55 (2009). The party presentation rule is distinct from the doctrines discussed in the body of this paper, however, because it is not generally understood as a jurisdictional issue and because it is triggered by the party's determination of how to plead a case: pleaded differently, there would be no bar to adjudication of whatever issue the party presentation rule precludes.

that federal courts will not provide advisory opinions.[24] Taken together, standing, mootness, and ripeness help the courts apply this limitation to the varied and real-world scenarios that come before them—many of which are less obvious than Washington's request for advice because they often have more in common with an actual case or controversy. Unless an issue can meet these requirements, it is not a case or controversy, and the courts will leave the issue to be dealt with by the other branches (if at all). The conflict cannot proceed within the judicial system because any judicial pronouncement would be essentially indistinguishable from an advisory opinion—the court pronouncing on an issue even though that issue has not come before it as a case or controversy.

A closely related doctrine—the political-question doctrine—dictates the same result but follows a slightly different logic. Under the political-question doctrine, a court will make a similar finding of nonjusticiability and dismiss the conflict for lack of jurisdiction if it decides that resolving the conflict would require the court to determine an issue exclusively allocated to a coordinate branch or an issue for which there is no legal resolution.[25] In such cases, the "claim is said to present a political question and to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction."[26] The contours of the political-question doctrine were first suggested by the Supreme Court in *Marbury v. Madison*, when the Court declared that "questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made by this court."[27] Like the other case-or-controversy limitations, the political-question doctrine reflects both the explicit limits on the power granted the judiciary under Article III and the separation of powers inherent in the structure of the Constitution. But where the other case-or-controversy limitations are most clearly indicated by the "case" and "controversy" wording of Article III, the foundation of the political-question doctrine is found equally in the judiciary's duty to respect the power grants of Article I and Article II.[28]

Thus, for example, the text of the United States Constitution provides that military decisions are within the discretion of the executive and legislative branches. In addition to the power to declare war, Article I vests Congress with the power to "provide and maintain a Navy" and to "make the Rules and Regulations of the land and naval Forces."[29] Article II states that, among the president's duties, the "President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia."[30] By contrast, Article III is silent about the role of the judiciary in relation to military matters. Based on this textually demonstrable commitment of the military to the political branches (the branches that are most accountable to the people through the political process), the Supreme Court has repeatedly held that many military issues are beyond the scope of judicial determination. In

24 *Vieth v. Jubelirer*, 541 U.S. 267, 302–03 (2004) (quoting correspondence between then Supreme Court Chief Justice John Jay and then Secretary of State Thomas Jefferson, writing on behalf of George Washington in 1793).

25 *See Rucho v. Common Cause,* 139 S. Ct. 2484, 2493–94 (2019).

26 *Id.* at 2494.

27 *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 170 (1803).

28 *See Rucho,* 139 S. Ct. at 2493–94; *Vieth,* 541 U.S. at 276–78.

29 U.S. Const. art. I, § 8, cl. 11–14.

30 U.S. Const. art. II, § 2, cl. 1.

*Gilligan v. Morgan*, the Court discussed the constitutional allocation of military powers to Congress and the president, concluding that it "would be difficult to think of a clearer example of the type of government action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process."[31]

Over the course of the second half of the twentieth century, the most-cited delineation of the political-question doctrine was found in *Baker v. Carr*. *Baker* consolidated the narrative of the history of the political-question doctrine and clarified—if one may use that word—the factors that the Court would look to when determining the existence of a political question:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[32]

Although the amorphous *Baker* factors remain the best-known judicial test for a political question, in recent years the Court has apparently collapsed or streamlined this into a two-factor test: "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it."[33] If one considers that the "judicial power" is granted in Article III to the judiciary and that—by the logic of the terms used—this means that the institution created by Article III is intended to act as a legal court resolving legal cases and controversies, then these two factors really collapse into one. Under the political-question doctrine, the Court refuses to exercise jurisdiction over conflicts that do not fall within the meaning of "judicial power"—which may be discovered by considering whether there are traditional judicial means for resolving the conflict or by searching the Constitution to see whether the issue was allocated to either of the other branches.

Under all the doctrines discussed above, the question of the appropriateness of an issue for judicial resolution is a preliminary or threshold issue whenever issues come before a federal court.[34] However, it is not only a threshold question: it

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31 *Gilligan v. Morgan*, 413 U.S. 1, 8 (1973).

32 *Baker v. Carr*, 369 U.S. 186, 217 (1962) (brackets in original).

33 *Zivotofsky v. Clinton,* 566 U.S. 189, 195 (2012) (brackets in original).

34 Of course, there are reasons unrelated to the Article III origin of the federal judiciary's power that may lead a federal court to determine that it ought not or cannot rule. Those related to the relationship between state governments and the federal judiciary are beyond the scope of this article because they relate to neither separation of powers nor the limits of Article III. The Eleventh Amendment, which prohibits federal jurisdiction over suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of any Foreign State" is an obvious example. In such instances, federal

remains a live question until a final judgment. If at any point the conflict changes so that it is no longer a case or controversy, a court will—without a motion from the parties—note its new lack of jurisdiction, vacate any rulings, and dismiss the case. This necessity has been at the heart of American jurisprudence since *Marbury v. Madison*, when Justice Marshall determined that the Court would not provide relief if jurisdiction could not be claimed consistently with the Article III charter of the judiciary's authority.

Counter-examples that come to mind often relate to one of two potential routes of confusion—either the conflation of the political question doctrine with an issue of political importance or conflation of judicial supremacy (to whatever extent it may exist) with an end to the requirement of jurisdiction. Turning first to the confusion over the meaning of the political question doctrine, the Court's resolution of high-profile political issues might seem at first blush a counter-example to the doctrines of judicially-enforced judicial limitation that have been sketched. This is due to an unfortunate ambiguity in the name of the "political question doctrine." The doctrine's name is derived from the fact that a political question exists when an issue has been constitutionally allocated to one of the two "political branches" of the United States government. The political branches are those branches held accountable to the people via the political process—the executive and the legislature. The doctrine has nothing to do with whether a case relates to a "political" issue in the sense of a substantive issue with a bearing on electoral or policy-oriented politics. The high-profile political impact of the outcome of cases like *Bush v. Gore*, *Clinton v. Jones*, and even *Scott v. Sandford* has no relationship to the question of whether or not the political question doctrine (which relates to the question of whether determination of an issue has been allocated exclusively to a political branch) barred a judicial ruling.[35] Accordingly, the political question doctrine by no means bars federal courts from resolving issues of decisive political importance; it does bar courts from resolving issues allocated to the political branches of the federal government. The verbal ambiguity introduced by the word "political" is

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courts have no jurisdiction, but it is neither because the case falls outside the meaning of "judicial power" nor because it is not a case or controversy. Similarly, federal courts sometimes employ abstention (one variety of which arises when there are independent state grounds to resolve the issue before the court) to defer resolving a constitutional question when a state proceeding is ongoing. Robert J. Pushaw, Jr., *Dual Enforcement of Constitutional Norms: Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court's Theory that Self-Restraint Promotes Federalism*, 46 Wm. & Mary L. Rev. 1289, 1300–05 (2005). Abstention—which is a federalism rather than a separation of powers issue—should not be confused with justiciability: indeed, courts reach an abstention analysis only after a case has been found justiciable (although this distinction is so definitional that it is commonly left implicit). Joseph A. Carroll, Howard C. Schwab Memorial Essays, *Family Law is Not 'Civil': The Faulty Foundation of the Domestic Relations Exception to Federal Jurisdiction*, 52 Fam. L.Q. 125, 140–41 (2018). A precise number of case or controversy doctrines cannot be named without courting controversy. Not only has the total set of doctrines altered over time and been the subject of various scholarly framings, but some of the doctrines are arguably a subset of the others (see the discussion of advisory opinions above) and sometimes courts simply state that there is no case or controversy, leaving scholars to debate which specific doctrine applies.

[35] *Bush v. Gore*, 531 U.S. 98 (2000); *Clinton v. Jones*, 520 U.S. 681 (1997); *Scott v. Sandford,* 60 U.S. 393 (1856).

increased by the fact that sometimes a political question may bar ruling in high-profile political cases: in other words, although most high-impact political issues that come to the courts do not require a resolution of a political question, some do.[36]

A second set of potential counter-examples arises from the Court's most emphatic statements of its own prerogative to determine the contours of constitutional law—those statements that have come to be known as claims of "judicial supremacy." Take this example from *Cooper v. Aaron*, one of the cases in which the Court insisted on the federal judiciary's capacity to direct and control enforcement of *Brown v. Board of Education*[37] over state resistance:

> Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison* that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. [38]

Granted, this language—like the language of *Marbury* before it—is emphatic. But this is a case in which the Court is asserting supremacy over state action and state law.[39] Moreover, in *Cooper*, there was no question of whether or not a case or controversy, within the bounds of Article III, existed. Even in *Cooper*, perhaps the most famous assertion of judicial supremacy, the Court relies on an example—*Marbury*—that underscores the limits of judicial power. Lest we forget, in *Marbury*, the Court refused to rule on the substantive issue before it (after making perfectly clear what such a ruling should be) because it found that it lacked jurisdiction.[40] At the end of the day, *Cooper's* claim to power carries within it a reminder that—however supreme the judiciary may be in its declarations of the meaning of the Constitution—its supremacy is always contingent upon its jurisdiction under Article III.

And yet, this fundamental limitation of the judiciary is consistently ignored by scholars who blithely conclude that "the fact is that the Supreme Court has the right

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36 *See Clinton*, 520 U.S. at 698–705.

37 *Brown v. Board of Education*, 347 U.S. 43 (1954).

38 *Cooper v. Aaron*, 358 U.S. 1 (1958), 18 (internal citations omitted).

39 *Cooper* is known as one of the strongest statements of the doctrine of judicial supremacy, the doctrine that once the federal judiciary has addressed an issue it is resolved—not only for the parties before the court—but for all individuals, all political actors (state and federal), and all time. The pedigree of this doctrine and its acceptance among judges and legal scholars is questionable at best. The doctrine's most famous detractor is Abraham Lincoln, who explicitly rejected it in his response to *Scott v. Sandford*. President Abraham Lincoln, Speech on the Dred Scott Decision (June 26, 1857). For an overview of the doctrine of judicial supremacy and the closely related doctrine of judicial universality and an analysis of their legitimacy, see Blackmun, *supra* note 10, at 1135–1204, 1154–1159, 1192–1202.

40 *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 173–180 (1803).

to say what the Constitution means—and thus to resolve any and all ambiguities. . . . It can issue rulings that spell out in explicit, all-encompassing terms what the boundaries of presidential power are, and it can set these boundaries as narrowly as it likes."[41] Indeed, no. As the Supreme Court has explained repeatedly and continues to explain today, the Court may not, consistently with its own basis of power (Article III), do any such thing.

> No one can accuse this Court of having a crabbed view of the reach of its competence. But we have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of such authority. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison* . . . . In this rare circumstance, that means that our duty is to say "this [issue brought before the court] is not law."[42]

Perhaps this limitation is yet more clearly explained when the Court makes explicit the connection between this doctrinal limitation and the function of the judiciary.

> The judicial Power created by Article III . . . is not whatever judges choose to do . . . or even whatever Congress chooses to assign to them . . . . It is the power to act in the manner traditional for English and American courts. One of the most obvious limitations imposed by that requirement is that judicial action must be governed by standard, by rule. Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.[43]

Thus, Supreme Court history shows that—as theory and Constitution have translated into political reality—the judiciary's power is great but also curtailed in relation to policing the precise limits of the other branches of government.

As political scientists have paid little heed to these limitations on the federal judiciary's authority, it is not surprising that they have failed to note the difficulty of applying these doctrines to the various scenarios that emerge over time. Whether the cause is the inherent intellectual challenge posed by the doctrines themselves, the wide range of factual circumstances to which they must be applied, or the differences among the justices crafting and applying the definitive version of these concepts, it is remarkable how little consistency has emerged. While there is much agreement about the general contours of case-or-controversy limitations on the judiciary, there is also widespread agreement that separation-of-powers law is hard to pin down precisely, unpredictable, and always morphing.[44] The further one

41 Moe & Howell, *supra* note 6, at 865–866.

42 *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019) (internal citation omitted).

43 *Vieth v. Jubelirer*, 541 U.S. 267, 276–78 (2004).

44 Aziz Z. Huq, *Separation of Powers Metatheory*, 118 Colum. L. Rev. 1517, 1517–19 (2018); Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 Yale L.J. 346, 352 (2016); Edward Hirsch Levi, *Some Aspects of Separation of Powers*, 76 Colum. L. Rev. 371, 386–88 (1976).

gets from theoretical explanations (like the one above) and the closer one gets to workaday judicial application of the doctrines, the more this is true.

For example, because of ongoing adjustments in the doctrine of standing, potential plaintiffs may come to the courts only to find that—regardless of a clear statute providing for liability—their claims cannot be redressed by the courts.[45] In *Spokeo, Inc. v. Robins*, the Court adjusted—or at least newly articulated—the "injury" prong of the standing test. Under the challenged law, the Fair Credit Reporting Act, Congress had created a cause of action and damages for individuals whose credit information had been mishandled—even where the individual involved could otherwise show no damages as the result of the handing of their credit information.[46] Robins filed suit, and indeed conventional wisdom before the Supreme Court's ruling would have predicted that he had standing because he individually had had his information mishandled and because Congress's law stated that the mishandler of the information could be held liable.[47] The Court commenced by restating its own limitations under Article III, and then explained—much as Justice Marshall had done with regard to original jurisdiction in *Marbury*—that Congress could not create standing where Article III does not provide for it. In particular, the Court emphasized that because Congress cannot extend the judiciary's fundamental boundaries there could be no standing without a concrete injury.

> This case primarily concerns injury in fact, the "[f]irst and foremost" of standing's three elements. . . . Injury in fact is a constitutional requirement, and "[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."[48]
>
> Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.[49]

Based on this reasoning, the Court indicated that unless an alternate basis for jurisdiction could be found by the lower courts, Robins had no standing and ultimately the judiciary had no jurisdiction.

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[45] Hessick, *supra* note 16, at 300–303.
[46] *Spokeo, Inc. v. Robins*, 578 U.S. 330, 334–37 (2016).
[47] *Id*. As the Court paraphrased the statute, it "provided that '[a]ny person who willfully fails to comply with any requirement [of the Act] with respect to any [individual] is liable to that [individual]' for, among other things, either 'actual damages' or statutory damages of $100 to $1,000 per violation, costs of the action and attorney's fees, and possibly punitive damages." *Id*. (internal citations omitted).
[48] *Id.* at 338–39 (internal citations omitted).
[49] *Id.* at 341 (internal citations omitted).

The point of this example is not to hail *Spokeo* as a radical change in the Court's articulation of standing, to dramatize the travails of the would-be plaintiff, or to detail the work of federal district and circuit courts as they reconsider various statutory and contract-based claims and commence rejecting them for lack of standing.[50] The point of this example is to illustrate how this one decision and the changes that ripple outward from it are simultaneously profound—when considered in their own right—and yet relatively common in proportion to baseline level of instability, ambiguity, and opaqueness within the common law as it defines the judiciary's authority.

The effect of *Spokeo* is profound (if subtle) in its own right. It affects the enforcement of yet-unidentified laws and alters Congress's toolkit for addressing social ills moving forward. And yet this one change is small or at least normal: it is one small component in an ever-changing landscape of murkiness. Indeed, *Spokeo* is only one of several reasons why some scholars believe that standing is so confusing that even the federal courts are having trouble keeping it straight. Birney and Edmonson accuse the federal courts of consistently confusing statutory standing (which Congress may change) with constitutional standing (which Congress obviously cannot alter).[51] Similarly, Coon accuses the courts of conflating standing and ripeness,[52] and similar allegations and debates surround the other Article III limitations on judicial authority.

Legal scholars have engaged in a rigorous debate over whether the political-question doctrine (the subject of analysis in many a federal and Supreme Court opinion) remains viable.[53] A vast body of literature, fueled in part by recent case law, debates the nature and precise limits of the political-question doctrine: one scholar quips, "[T]he doctrine (if it can even be called that) is little more than an amalgam of tangentially related concepts and cases—a repository of loose odds and ends."[54] Others have critiqued the vague doctrine for excessive "malleability,"[55] and indeed scholarship has repeatedly demonstrated that this is true—whether considering alterations in the doctrine over time or across the judiciary at one moment in time.[56] As some have noted, this type and amount of confusion is not necessarily the fault of either doctrinal inconsistency by the courts or a lack of perception on the part of scholars.[57] The task of identifying the genuine cases and controversies among the

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[50] Hessick, *supra* note 16, at 301; Jason R. Smith, Comment, *Statutes and Spokeo*, 87 U. Chi. L. Rev. 1695, 1697 (2020).

[51] Patrick M. Birney & Jamie L. Edmonson, *Understanding Standing: Statutory Authority Made Simple*, 39 Am. Bankr. Inst. J. 18 (2020).

[52] Nora Coon, Chapter, *Ripening Green Litigation: The Case for Deconstitutionalizing Ripeness in Environmental Law*, 45 Env'tl. L. 811, 812–13 (2015).

[53] Gwynne Skinner, *Misunderstood, Misconstrued, and Now Clearly Dead: The "Political Question Doctrine" as a Justiciability Doctrine*, 29 J.L. & Pol. 427 (2014).

[54] G. Michael Parsons, *Gerrymandering & Justiciability: The Political Question Doctrine After Rucho v. Common Cause*, 95 Ind. L.J. 1295, 1297 (2020).

[55] Michael Gentithes, *Gobbledygook: Political Questions, Manageability, and Partisan Gerrymandering*, 105 Iowa L. Rev. 1081, 1083–84 (2020).

[56] John Harrison, *The Political Question Doctrines*, 67 Am. U. L. Rev. 457, 509–12 (2017).

[57] Vicki C. Jackson, *Standing and the Role of Federal Courts: Triple Error Decisions in Clapper v. Amnesty International USA* and *City of Los Angeles v. Lyons*, 23 Wm. & Mary Bill Rts. J. 127, 127–28 (2014).

indescribably wide range of issues brought into the federal courts ought not to be underestimated.[58]

However important the judiciary's interpretation of the law and the Constitution's substance may be, the traffic director role entailed in the Court's interpretation of its own legitimate authority is arguably the most important and interesting function that the Court fulfills. As its own authority expands and contracts through the application of this doctrine, the power of the other branches adjusts accordingly. Not only is the United States judiciary the first judiciary to serve as an independent and coequal branch of government, but in this role it orchestrates the whole institutional framework in an entirely novel fashion.

Delving into the opinions and practices of the Supreme Court itself, one finds an ambiguous set of opinions that explain the Court's policing of the roles of the respective branches in relationship to one another. The overview provided here of this case law and related scholarship is not intended to demonstrate that the judiciary dominates or fails to dominate—or should or should not dominate—the other branches. Rather, this overview is intended, first, to illustrate the most fundamental doctrine under which the Court directs traffic among the three branches and, second, to reveal how this case-or-controversy limitation puts the federal courts at the pivot point within the separation of powers. Determining which issues the courts will resolve and which issues will be left without their otherwise ostensibly final resolution, the Court effectively shifts power among all three branches in the very act of limiting its own. This is the elusive—the "murky"—mechanism at the heart of separation of powers. Despite its pivotal role in conflict resolution, the mechanism

[58] This uncertainty is closely related to concerns about the justice of leaving potential litigants outside the protection of the courts. Litigants, judges, and scholars have legitimate concerns about claims for justice that the courts cannot—in some cases ever—resolve because of the judiciary's lack of authority. The federal judiciary's refusal to claim jurisdiction leaves certain questions about the lawfulness—and sometimes the constitutionality—of executive and legislative action effectively irresolvable through recourse to the judiciary. In the last decade alone, pleas to resolve international, national-security, corporate responsibility, and environmental claims have been found to be nonjusticiable by federal courts. Nino Guruli, *Pro-constitutional Engagement: Judicial Review, Legislative Avoidance, and Institutional Interdependence in National Security*, 12 Harv. Nat'l Sec. J. 1 (2021); Albert C. Lin, *Dodging Public Nuisance*, 11 UC Irvine L. Rev. 489 (2020); Jeff Todd, *A Fighting Stance in Environmental Justice Litigation*, 50 Envtl. L. 557 (2020); Philip G. Cohen, *The Political Question Doctrine—An Inappropriate Roadblock to the Limitations on Benefits Safety Valve*, 21 Hous. Bus. & Tax L.J. 48 (2020). Moreover, under these doctrines, branch inaction is often unchallengeable by recourse to the courts, and this can make righting presidential wrongs particularly difficult. Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 Mich. L. Rev. 1195, 1227–28 (2014). In these instances, it is not merely individual litigants who happen to be turned away by the courts; rather, systemic injustices—or so the potential litigants argue—cannot be addressed by the courts because there is no set of facts where the alleged wrong is justiciable. Environmental and corporate responsibility wrongs, for example, may fail to produce an individual plaintiff with standing. Executive decisions impacting military contractors, international affairs, and military decisions may cross constitutional, tort, or contract lines yet remain outside the scope of adjudication because of the political questions—in other words, executive military or international affairs decisions—that the courts would have to rule on in order to address the claims of litigants.

ensures ongoing unpredictability through shifts in dominant doctrine, doctrinal complexity, and the contingency inherent in the application of this doctrine to the variety of circumstances that may or may not materialize before a federal court.

## II. How Separation of Powers Fails and Why It Matters

Although Alexander Hamilton admitted that the judiciary is "incontestably" the "weakest of the three departments of power," he likewise made it clear that the judiciary was incontestably one of the three departments of power and not a mere subsidiary of the legislative or executive powers.[59] Madison, famously paraphrasing Locke, wrote that separation of powers was imperative because "accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[60] Taking together these two axiomatic claims about the role of the judiciary, it seems that the judiciary is the weakest of three branches integral for tyranny prevention under the Constitution. Moreover, in practice the judiciary—this weakest branch—plays the most decisive role in allocating issues to the respective branches. This is particularly extraordinary when one takes into account how crucial the separation among the branches was thought to be to the moderation of the tendency toward tyranny.

Even as the tyrant, by classical definition, lacks the capacity to rule himself as an individual and is in need of moderation, so too any government—which is but comprised of individuals—needs a moderating mechanism to check its tyrannous tendencies. As Madison famously paraphrased, "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[61] A dependence on the will of the people is the first tool to this end, but—because of the potential for a tyrannous majority to emerge—separation of powers must also be employed to prevent all power from consolidating into one set of hands.[62]

The United States Constitution does not duplicate any earlier institutional structure or replicate the designs of any single theorist.[63] Nonetheless, there are

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59 The Federalist No. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

60 The Federalist No. 47, *supra* note 59, at 249 (James Madison).

61 The Federalist No. 51, *supra* note 59, at 269 (James Madison).

62 This truth about the institutional structure of the United States has been recognized in many formulations. Ackerman, *supra* note 8, at 689 (noting that if the power to make laws is not separated from the power to implement them, "the result will be tyranny"); Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 Mich. L. Rev. 592, 611 (1986) ("Indeed there are times when it seems that there is nothing between the political tyranny of the political branches and the liberty of the people but a vigilant judicial branch").

63 Alan Gibson, *Madisonian "Paths of Innovation": Michael Zuckert on the Political Science of James Madison*, 8 Am. Pol. Thought 243, 243–45 (2019); Laurence Claus, *Montesquieu's Mistakes and the True Meaning of Separation*, 25 Oxford J. Legal Stud. 419, 440 (2005); Michael Zuckert, *Natural Rights and Modern Constitutionalism*, 2 Nw. J. Hum. Rts. 1, 51, 54 (2004); Kurland, *supra* note 62, at 595.

several dynamics touted by eighteenth-century political theorists that provide the logic behind the creation of separated government institutions. Perhaps most importantly, Locke and Montesquieu both taught that liberty was best protected by the moderation that could be introduced via the separation of powers.[64] Locke recommended dividing government power between two institutions, the legislative and executive, but he never suggested elevating the judiciary to the position it takes under the United States Constitution.[65] Montesquieu, on the other hand, suggested the judiciary's institutional potential as a distinct branch of government, but his institutional framework was dependent on the continued use of hereditary social institutions unpalatable to the fully republican Madison and the lion's share of his peers.[66]

Indeed, we can learn much about separation of powers and the political goods that it may provide via reference to Locke and Montesquieu.[67] Taken together, they clearly affirm at least two aspects of the separation of powers that are pertinent here. First, government institutions are to be separated in order to prevent the usurpation of power by any one institution within government, and accordingly their ultimate end is the protection of the citizen's liberty from encroachment by government.[68] Second, in order to achieve this end, each of the institutions must maintain some capacity and will to check the other institutions: without this capacity and will, the separation may continue formally but it is no longer a working reality contributing to the protection of liberty.[69]

As admired and emulated as this institutional arrangement may have been, advocates of the separation of powers were aware of at least one potentially fatal flaw—the difficulty of keeping each of the institutions within its own proper sphere of action.[70] This proper sphere includes checking the other branches when they step beyond their just authority, but it can never include dominating the system as a whole. How is such a complex system to be maintained when one branch overreaches, and who shall hold the power to declare when a branch is beyond its authority? These difficult questions reveal the weakest point in a separated system. Locke's explanation of just how fundamental this problem is underscores

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64 Levi, *supra* note 44, at 373–374.

65 The discussion in the following pages supports this paragraph's claims about Locke with references to *Two Treatises of Government*.

66 Gibson, *supra* note 63, at 252; Claus, *supra* note 63, at 421; Zuckert, *supra* note 63, at para. 29–31, 34; Sharon Krause, *The Spirit of Separate Powers in Montesquieu*, 62 Rev. Pol. 231, 259–60 (2000). For a discussion of the extent to which Montesquieu's suggestion of the judiciary may have been premised on a civil law (rather than common law) understanding of the function of courts, see Claus, *supra* note 63, at 426, 431.

67 Arguably, taken together they were the most influential on the Constitution's drafters. Kurland, *supra* note 62, at 595.

68 Giacomo Gambino, *Our End Was in Our Beginning: Judith Shklar and the American Founding*, 8 Am. Pol. Thought 202, 207 (2019); Krause, *supra* note 66, at 231, 238–239.

69 Zuckert, *supra* note 63, at para. 27, 35–37; Claus, *supra* note 63, at 419.

70 *The Federalist* grapples with this difficulty: Number 51 provides the famous solution that ambition shall be made to check ambition, but Number 37 concedes that even clearly delineating the roles of the respective branches poses a fundamental challenge such that a "faultless plan was not to be expected." The Federalist No. 51, *supra* note 59, at 269 (James Madison); The Federalist No. 37, *supra* note 59, at 180 (James Madison).

the difficulty of the problem and thereby brings the gravity of the Supreme Court's position at the pivot point of the separation of powers more fully into focus.

Locke's awareness of this difficulty is forecast in his description of the state of nature: the challenge, indeed, is found in the natural human condition. He lists the need for "a known and indifferent Judge, with Authority to determine all differences" as fundamental to the human need to join into political societies to preserve their property.[71] The lack of an impartial judge draws humanity into political association because without it humans are but a short path from war with one another. As he explains in his chapter on the state of nature, "[T]he *Execution* of the Law of Nature is in that State, put into every Mans hand, whereby every one has a right to punish the transgressors of that Law to such a Degree, as may hinder its Violation."[72] The universal authority to execute the law of nature leads to a serious problem because "it is unreasonable for Men to be Judges in their own Cases."[73] As he illustrates, "'[T]is easily to be imagined, that he was so unjust as to do to his Brother an Injury, will scarce be so just as to condemn himself for it."[74] Men cannot be judges in their own cases because "Self-love will make men partial to themselves and their Friends."[75]

Without any judge who is not a party to a dispute, the state of nature results in "Confusion and Disorder."[76] To this problem Locke "easily grant[s] that *Civil Government* is the proper remedy."[77] But the introduction of government only introduces a judge between one citizen and another.[78] It leaves the citizen judgeless in relation to government itself. In other words, one of the fundamental problems that motivated the departure from the state of nature is only partially solved by the introduction of government.[79] To solve the problem introduced by government, Locke calls for dividing the authority of government, delineating the legislative and the executive as the two primary government powers and suggesting that they may be allocated in various arrangements.[80]

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71 John Locke, Two Treatises of Government Bk II, §§124–125 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

72 *Id.* at Bk II, §7.4–7.

73 *Id.* at Bk II, §13.3–4.

74 *Id.* at Bk II, §13.12–14.

75 *Id.* at Bk II, §13.4–5.

76 *Id.* at Bk II, §13.7–8.

77 *Id.* at Bk II, §13.9–10.

78 *Id.* at Bk II, §19.

79 This poses a particularly onerous threat in the case of absolute monarchs: because the monarch "has the Liberty to be Judge in his own Case, and may do to all his Subjects whatever he pleases, without the least liberty to any one to question or controle those who Execute his Pleasure. . . . Much better it is in the State of Nature wherein Men are not bound to submit to the unjust will of another." *Id.* at Bk II, §13.16–29. Indeed, Locke concludes that an absolute monarchy "can be no Form of Civil Government at all." *Id.* at Bk II, §90.3–4.

80 Locke also briefly discusses the "federative" power, the power "of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth." *Id.* at Bk II, §146.1–3. But this power, he explains, is "always almost united" with the executive power, and need not complicate this discussion further. *Id.* at Bk II, §147.6. Locke dismisses all other political powers in a single sentence: "Of other *Ministerial* and *subordinate Powers* in a Commonwealth, we need not speak." *Id.* at Bk

Locke introduces the potential to mix the traditional estates, noting the potential for democracy, oligarchy, monarchy, and "compounded" (also called "mixed") forms of government.[81] Observations about the potential for the legislature to be in being intermittently and the executive's need for constant vigilance lead Locke to conclude that the powers can and should be held separately: "Legislative and Executive Power are in distinct hands . . . in all moderated Monarchies, and well-framed Governments."[82] Although there are two main government powers for Locke, there can be only one supreme power—the legislative.[83] But Locke returns to another possible configuration—a configuration of particular importance for a nation in which the executive has a role to play in lawmaking and the courts have a role in effectively erasing law. According to Locke, if the executive has a "share in the Legislative" then—despite the supremacy of the legislative power vis-à-vis the executive power—that person who has a role in both "in a very tolerable sense may also be called *Suprem*."[84]

Locke explains the danger in this separation between executive and legislative function by discussing potential strife over the executive's use of the prerogative. The prerogative is a power to take action unsupported by—sometimes even contrary to—legislation for the good of society.[85] When the executive's use of the prerogative is challenged, ultimately the question of breach of executive authority must be decided with reference to the good of the people.[86] But the practical question still remains: *who* determines when this limit has been breached? The answer, Locke explains, is simple: "Between an Executive Power in being, with such a Prerogative, and a Legislative that depends upon his will for their convening, there can be no *Judge on Earth*."[87] An appeal to heaven, he proposes, is the only

II, §152.10–11. Such powers are inferior because "they have no manner of Authority any of them, beyond what is, by positive Grant, and Commission, delegated to them and are all of them accountable to some other Power in the Commonwealth." *Id.* at Bk II, §152.16–19.

[81] *Id.* at Bk II, §107.13–20, §132.13–14. Having once established the legislature as the supreme authority (*id.* at Bk II, §132.19–23, §134.4–14), Locke explores the relationship of the lawmaking function to the function of executing the law. The legislative function rules by "*promulgated standing Laws*" to be applied by "*known Authoriz'd Judges*." *Id.* at Bk II, §136.4. The legislature "need not always be in being, not having always business to do." *Id.* at Bk II, §143.6–7. In contrast, the laws enacted by the legislature "are constantly to be Executed" and their "force is always to continue." *Id.* at Bk II, §143.4–6. Locke thus concludes that the executive, unlike the legislature, is "*always in being*." *Id.* at Bk II, §144.4.

[82] *Id.* at Bk II, §159.1–3; *see also id.* at Bk II, §143.7–23, §144.6.

[83] *Id.* at Bk II, §149.3–4.

[84] *Id.* at Bk II, §151.3–4. On the other hand, where executive power rests with a person who has no share in the legislative power, then the executive "is visibly subordinate and accountable to it." *Id.* at Bk II, §152.2–3.

[85] *Id.* at Bk II, §159.5–17.

[86] *Id.* at Bk II, §161.7–10 ("But if there comes to be a *question* between the Executive Power and the People, *about* a thing claimed as a *Prerogative*; the tendency of the exercise of such *Prerogative* to the good or hurt of the People, will easily decide the Question").

[87] *Id.* at Bk II, §168.3–5.

recourse when a direct conflict arises between executive and legislature or, as he goes on to elaborate, between the legislature and the people.[88]

Locke does not place the right to resolve conflict over the limits of the executive and legislative power vis-a-vis one another in *any* part of the government. If a conflict between the legislature and executive is resolved by either of them, then the victorious power—by the act of deciding who defines their respective roles—has ended the separation of powers and thus simplified the government so that no division of power remains. If the people (or a majority of the people) assert themselves to reform the powers of government back into their proper spheres, then the function of government as impartial arbiter of disputes has also broken down. In either case, the political structures have failed to perform their function. If one government power (or institution) has emerged supreme in the sense of exceeding its proper boundaries, it has become a tyrant holding all power. Or, in the more apparent scenario of total breakdown, political authority reverts to the people as supreme.[89]

Of course, a dissolution reduces the government—or whatever one should call this society of the people to which the legislature has reverted—once again to a simple, undivided form in which majority rule controls without any moderating forces. The benefits of dividing political power are lost. This reversion of authority to the community is clearly good in the sense that it avoids the abuse of power in the hands of government, but it is also in itself a loss of the moderating role of separation of power that a properly structured government provided. Thus, for Locke, disagreement among the repositories of political power has the potential to end the division of their power.[90] The separations of power collapse to the victor, who then emerges as an unmoderated ruler—be it the executive, legislature, or an unmitigated democracy.

## III. Hunton's Insight

From this perspective, the advantages of the United States' institutional structure are evident. Instead of appealing to heaven, at least initially one appeals to the courts. As the first section of this essay illustrates, this leads to a complex and unpredictable resolution process in which a court—arguably the weakest of three power contenders—limits the power of not only the other branches but also of itself. Juxtaposition of this process to Locke's description of the breakdown of

88 *Id.* at Bk II, §168.16. Locke asserts that when the matter is of sufficient weight action may be taken. *Id.* at Bk II, §168.32–34. What exactly this appeal entails is a matter of debate: is it limited to the appeal to heaven or does it include the right to change one's government, as would seem implied by Locke's claim that "God and Nature never [allow] a Man to so abandon himself, as to neglect his own preservation." *Id.* at Bk II, §168.28–29. It is enough for present purposes to note that conflict may ensue.

89 Political authority may be "forfeited" by "the Miscarriages of those in Authority." *Id.* at Bk II, §243.14–15. Authority then "*reverts to the Society*, and the People have a Right to act as Supreme, and continue the Legislative in the themselves, or erect a new Form, or under the old form place it in new hands, as they think good." *Id.* at Bk II, §243.17–20.

90 John T. Scott, *The Sovereignless State and Locke's Language of Obligation*, 94 Am. Pol. Sci. Rev. 547, 554 (2000) ("The state of nature endures as a necessary possibility, and the state of war looms as a constant threat for the Lockean commonwealth.").

the separation of powers between an executive and a legislature reveals how the American process delays and obscures the results when the legitimacy of a branch's use of its power is challenged, and this alone may provide some moderation—if only time for heads to cool and negotiations to play out—with explanatory power. But, on the logic of Locke's analysis alone, we cannot quite explain how this nation has—more often than not—avoided the appeal to heaven of which he warned. Why, by and large, has the Court (and the system as a whole) been able to avoid the emergence of either an all-dominant branch, civil war, or both? Hunton's theory provides a novel answer to this question.

Countryman and contemporary of Thomas Hobbes and John Locke, Hunton is most frequently mentioned in scholarship on the English Civil War and the theories of mixed government then being debated.[91] Despite his current obscurity, Hunton's works enjoyed a renown of their own in the seventeenth century.[92] Writing and publishing *A Treatise of Monarchy*[93] during the English Civil War, Hunton was a moderate Parliamentarian who theorized about the rights and functioning of England's mixed regime and its monarchic, aristocratic, and popular elements.[94]

Despite his having been relegated primarily to historical debate, incidental scholarly references to Hunton indicate that his work sheds light on Locke and more generally on the republican government theorists who would inherit Locke at the time of the American founding.[95] Hunton, like Montesquieu, thought, wrote,

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[91] Glenn Burgess, *Was the English Civil War a War of Religion? The Evidence of Political Propaganda*, 61 Huntington Libr. Q. 173, 180 (1998); Eunice Ostrensky, *The Levellers' Conception of Legitimate Authority*, 20 Araucaria 157, 164 (2018); Corinne Comstock Weston, *English Constitutional Doctrines from the Fifteenth Century to the Seventeenth: II. The Theory of Mixed Monarchy under Charles I and After*, 75 Eng. Hist. Rev. 426, 435 (1960). While political theorists and historians have paid Hunton little attention, legal scholars have rarely even mentioned his work. The LexisNexis "law reviews and journals" database contains only nine articles mentioning Philip Hunton. None of these articles devotes more than a paragraph and a handful of footnotes to Hunton, and most relegate him entirely to the footnotes to provide context, further support, or contrast to other, better known mixed-government theorists of his century. Kinch Hoekstra, *Constitutionalism, Ancient and Modern: Early Modern Absolutism and Constitutionalism*, 34 Cardozo L. Rev. 1079, 1092–93 (2013) (containing the most substantive discussion of Hunton's theory of mixed government in a law review or journal article).

[92] As Peter Laslett notes in his introduction to Locke's *Two Treatises of Government*, Hunton's works were among those burned at the University of Oxford in 1683 (alongside the better-known *Leviathan*). Peter Laslett, *Introduction* to Locke, *supra* note 71.

[93] Phillip Hunton, A Treatise of Monarchy: Containing Two Parts. I. Concerning Monarchy in General. II. Concerning this Particular Monarchy, Also a Vindication (London, 1643). To my knowledge, there is no modern edition of *A Treatise of Monarchy* in standardized or modern spelling. The 1643 text is difficult to read, containing archaic spelling and punctuation. In quotations I have replaced the *f*, which appeared to stand for the modern *s*, as this is critical for comprehension. Otherwise, I have left cited text unchanged.

[94] Michael P. Zuckert, Natural Rights and the New Republicanism 67 (1994); John Sanderson, *Philip Hunton's Appeasement: Moderation and Extremism in the English Civil War*, 3 Hist. Pol. Thought 447, 449 (1982).

[95] Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 Colum. L. Rev. 1169, 1197, 1216, 1232, 1235, 1240 (2019); Scott, *supra* note 90, at 552. Robert Filmer—certainly contrary to his own wishes—best predicted the

and argued from within a mixed-government framework.[96] Like Locke, he was concerned with the potential for abuse of government power, particularly the abuses likely when a ruler judges between himself and his people.[97] Like Locke, Hunton outlined methods of moderating the potential for such abuses by dividing political power. Like Locke, he preferred complex or compound institutional arrangements over simple or consolidated government power.

Hunton describes the problem inherent in an institution judging the limits of its own power in the context of both absolute and limited monarchies. In so doing, he illustrates why—although the people may sometimes have the ultimate right to resist their monarch—this breakdown of government undermines the benefits for which governments are instituted. In his discussion of the right to resist an absolute monarch, Hunton observes that an ultimate judge is required between the governed and those governing. Thus, he claims that, while a monarchy may be unlimited as to means, it must still be understood as aiming at the "conservation of the whole Publike."[98] Even under an absolute monarch, therefore, when the conservation of the public is "invaded; the intent of the constitution is overthrowne; and an act is done which can be supposed to be within the compasse of no politicall power."[99] And while Hunton concludes that this justifies some forms of resistance to an absolute monarch, this does not solve the problem. One of the defining features of absolute rule is that when a "plea of reason and equity" is made by the people, the will of the monarch judges the plea.[100] This cannot be escaped because "some power must judge" and the "constitution of absolute Monarchy resolves all judgments into the will of the Monarch."[101]

When Hunton turns from his discussion of absolute monarchy to limited monarchy, the location of the authority to judge between the subjects and the government again comes to the fore. Hunton asks, "Who shall be the Judge of the Excesses of the Soveraigne Lord in Monarchies of this composure?"[102] This question, he claims, exposes the one defect from which absolute monarchy is free that limited monarchy suffers from: "the impossibility of constituting a Judge to determine this last controversie, *vis*. the Soveraigne's transgressing his fundamentall

eventual relevance of Hunton's advocacy for mixed government to government of the then colonies. Ridiculing Hunton, Filmer concluded: "I am somewhat confident that his doctrine of limited and mixed monarchy is an opinion but of yesterday, and of no antiquity, a mere innovation in policy, not so old as New England, though calculated properly for that meridian." Robert Filmer, Patriarcha and Other Writings 134 (Johann P. Sommerville ed., Cambridge Univ. Press 1991) (1680).

96 Many scholars have connected mixed-government theory to the fully republican separation-of-powers structure of the United States Constitution and recognized the potential utility of applying insights about the earlier government structure to our own. Gibson, *supra* note 63, at 252; Huq, *supra* note 44; Krause, *supra* note 66, at 264.

97 Sanderson notes that there was no impartial, ultimate judge to mediate dispute between Charles I and Parliament. Without such an arbitrator, violence erupted. Sanderson, *supra* note 94, at 450.

98 Hunton, *supra* note 93, at 10.

99 *Id.*

100 *Id.* at 11.

101 *Id.*

102 *Id.* at 16.

limits."[103] Placing the power to judge the monarch in the government destroys the limited nature of the government, and therefore Hunton concludes, "I conceive in a limited legall Monarchy there can be no stated internall Judge of the Monachs actions, if there grow a fundamentall Variance betwixt him and the Community."[104]

Thus, Hunton continues, "it is a transcendent case beyond the provision of the Government, and must have an extraordinary Judge and way of decision."[105] While counseling subjects to peacefully bear with a government which has transcended its limitations in small matters, Hunton concludes that when the matter is "mortall and such as suffered, [it] dissolves the frame and life of the Government and publique liberty."[106] In such a case, if petition does not result in a better resolution, citizens are to judge for themselves according to their own conscience.[107] Such judgments are not legal, but moral: for once the government acts beyond its own limitations it is as if the people had no government.

> People are unbound, and in state as if they had no Government; and the superior Law of Reason and Conscience must be Judge: wherein every one must proceed with the utmost advice and impartiality: For if hee erre in judgement hee either resists Gods Ordinance, or puts his hand to the subversion of the State and Policy he lives in.[108]

Thus, in the case of limited monarchy, when the government must ultimately be judged by the people, it is as though there were no government and citizens are called upon to use their own discretion. But this, as Hunton makes clear, is not a legal or a political judgment: it is a moral power of each individual—the use of one's own reason—and not a provision of the government for such extreme moments. Ultimately, in Hunton's eyes, there is no political or legal means to resolve grave questions of constitutional compliance between governed and governor.

Hunton focuses on how the lack of a judge between a government and its people may drive the people outside of political bounds, and ultimately he concludes that the people have a right to resist under some circumstances. But he seeks to contrive political structures likely to avoid such a breakdown of government. Where Locke delineates the separation of executive and legislative function to solve this problem, Hunton proposes a mixture of the various types of government (monarchy, aristocracy, and democracy). This structure, he argues, will avoid insofar as possible all their weaknesses while capturing insofar as possible their respective strengths.[109] The key feature of the mixed government

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[103] *Id.* at 17.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.* at 17-18.

[108] *Id.* at 18.

[109] In Hunton's lexicon, in contrast to a "mixture" or a "mixed government," a "simple" government, whether limited or absolute, places authority in "one Person," or "one associate body, chosen either from the Nobility, . . . or out of the Community, without respect of birth or state." *Id.* at 24. According to Hunton, each simple form has a particular weakness and a particular strength. Monarchy is prone to tyranny. *Id.* Aristocracy tends to factions. *Id.* Democracy suffers from "Confusion and Tumult." *Id.* But each of these simple forms of government likewise has "some good which the

is that one estate "must not hold his power from the other, but all equally from the fundamentall Constitution."[110] A mixed government is framed so that estates "might confine each other from exorbitance, which cannot be done by a derivate power."[111] Thus, in a genuinely mixed government each estate holds its power from the fundamental law, and the government is thus limited by its own foundational structure.[112]

In the latter half of his treatise, Hunton illustrates both the moderating effect of mixing government and the necessity that each estate's power be independent of the others in his discussion of the then-current monarchy. He praises the "never enough to be admired wisedome of the Architects and Contrivers of the frame of Government in this Realme" for establishing a system which makes "an excellent provision for the Peoples freedome, by constituting two Estates of men, who are for their condition Subjects, and yet have that interest in the Government, that they can both moderate and redresse the excesses and illegalities of the Royall power."[113] Such a structure, with all its benefits, cannot be achieved without "putting into the hands" of the estates "a power to meddle in the acts of the highest function of Government; a power not depending on his will, but radically their owne, and so suficient to moderate the Soveraignes power."[114]

Hunton warned that this measure brings with it a problem that would look all too familiar to Locke or even—one suspects—to a modern federal judge. As soon as political power is divided, it will become necessary to judge whose judgment controls when the different parts of the government are at odds with one another. As he concedes, Hunton cannot prescribe a fully satisfactory solution to this problem, but he does set forth a solution that looks surprisingly similar to that of the working United States solution. After outlining various methods for minimizing the potential for conflict,[115] Hunton comes to the heart of the matter, admitting the "one inconvenience" that "must necessarily be in all mixed Governments."[116] This "inconvenience" is that "there can be no Constituted, Legall, Authoritative Judge of the fundamentall Controversies arising betwixt the three Estates."[117] The problem, as he most aptly explains, is that insofar as a final judge were to be determined,

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others want": "Unity and Strength in Monarchy; Counsell and Wisdome in Aristocracy; Liberty and respect of Common good in a Democracy." *Id.* Thus, Hunton recommends a mixture of all three "so the good of all might be enjoyed, and the evill of them avoided." *Id.* at 25. Sanderson notes this feature, explaining that Hunton "expects the Estates to act in a mutually restraining way, taking it as their function to preserve the integrity of the regime." Sanderson, *supra* note 94, p. 453.

[110] Hunton, *supra* note 93, at 25.

[111] *Id.*

[112] *Id.* at 27; *see also id.* at 41.

[113] *Id.* at 41.

[114] *Id.* In the mixed government described in most detail by Hunton, the two powers which are allocated amongst the three estates are the "Legislative" and the "Gubernative." *Id.* The legislative is the superior of these two and has the power "of making new Lawes, if any new be needfull to be added to the foundation: and the Authentick power of interpreting the old." *Id.* Hence, the legislative power must be held jointly by the three estates—people, aristocrats, and monarch.

[115] *See id.* at 27–28.

[116] *Id.* at 28.

[117] *Id.*

the government would cease to be mixed and the final judge would become the absolute ruler.[118]

Despite the seriousness of this problem, Hunton does not shy away from his conclusion that the problem is inevitable: "[O]f this question there is no legall Judge, it is a case beyond the possible provision of such a Government."[119] The only solution—such as it is—is not a governmental one. Rather, Hunton recommends an appeal to the people's consciences and ultimately to the force of arms for the sake of preserving the government understood according to its original frame.[120]

> The Accusing side must make it evident to every mans Conscience. In this case, which is beyond the Government, the Appeal must be the Community, as if there were no Government; and as by Evidence mens Consciences are convinced, they are bound to give their utmost assistance. For the intention of the Frame in such States, justifies the exercise of any power, conducing to the safety of the Universality and Government established.[121]

Hunton further illustrates this point by explaining its application to the government of his own country. He explains that each estate in "case the Fundamental Rights of either of the three Estates bee invaded by one or both the rest, the wronged may lawfully assume force for its own defense."[122] Each estate may thus employ force because "else it were not free but dependent upon the pleasure of the other."[123] Moreover, the "suppression" or "diminishing" of the rights of any estate "carries with it the dissolution of government" and thereby triggers the right and duty to use force in defense of the government.[124] In order to truly exist as a mixed government, each estate must wield the right and carry the potentially burdensome duty of defending its own rights and thereby the very form of the government.

But—and here we return to the question of final authority to decide the contours of the rights of each estate—the unanswerable question remains: who will judge whether the rights of an estate have been violated and whether the right to use force has been triggered? Sometimes the violation of an estate's rights may be blatant—clear for all to see and possibly even without a claim to legality and thus also clearly calling the other estates to moderate the estate that has moved beyond its proper sphere. But, as Hunton frames the question, when a "plea of subversion is more obscure and questionable, which of three Estates hath the power of ultime and

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118 *Id.* at 28–29. *See also* Ostrensky, *supra* note 91, at 163. ("Hunton even denies that any of the three estates can prevail over the others, lest the excess of power of one estate should unbalance the government").

119 Hunton, *supra* note 93, at 29.

120 *See* Ostrensky, *supra* note 91, at 164. ("In that extreme situation, the appeal to the community outside the frame of government seems to Hunton the only solution to the deadlock; only the individual, after a careful examination of his conscience, can decide whom he shall obey and assist").

121 Hunton, *supra* note 93, at 29.

122 *Id.* at 67.

123 *Id.*

124 *Id.*

supreme judicature by Vote or sentence to determine it against the other?"[125] Who, as Hunton further elaborates, has the power to declare "so that the People are bound to rest in that determination, and accordingly to give their assistance, . . . because it is by such a Power so noted and declared?"[126]

This is the question that Hunton will not answer. He believes that even answering this question destroys the mixed—and therefore moderated—government and renders it simple in favor of whichever estate has the right to declare the extents of the rights of each. As he argues, "To demand which Estate may challenge this power of finall determination of Fundamentall controversies arising between them is to demand which of them shall be absolute."[127] If a king resolves the question, the government is a monarchy. And the same follows for the aristocratic and democratic estates, their authority to resolve inter-estate disputes, and the resulting simple—and therefore unmoderated—form of government. Thus the placement of this "finall Judgment" must be withheld if a government is to remain mixed.[128]

Without writing a word on courts or judiciaries in his analysis, Hunton thus explains the great benefit of "murkiness" in separation of powers. Withholding an answer to the question of who shall decide power struggles among the branches is essential to the maintenance of a complex government.

## Conclusion

Three observations common to Hunton and Locke bring into focus the function that the judiciary plays in the separation of powers under the United States Constitution. First, Hunton and Locke both insist on the importance of a judge or umpire between individuals in politics. Second, they both praise the division of political power as a means for moderating its possible abuses. Third (and flowing from the first and second similarities), they demonstrate that the inherent problem with dividing political power is that eventually the divided parts will come into conflict with one another and this conflict will not be resolved peaceably or in favor of the moderate use of political power without an authority established to umpire the question. Locke concludes that the people are the ultimate umpire, and he shows how this could result in the collapse of the division of authority. Hunton concludes that no such umpire can be established and declares this to be the great defect of the separated political power for which he advocates.

Taken together, Hunton and Locke thus implicitly explain why political institutions based on a division of power needed an innovation—or, as history would reveal, an institution—such as the judiciary as established in the United States Constitution. Although neither of them identifies any form of judiciary as a solution, both men frame the problem. Of the two, Hunton gives the closer hint to the innovation needed. Somehow, power needs to be divided, and yet the division needs to be both clear enough for workaday implementation and vague enough to prevent a clear or sustained answer to the question of the location of the ultimate arbiter of disputes within the government. In the end, the United States

[125] *Id.* at 68.
[126] *Id.*
[127] *Id.* at 69.
[128] *Id.*

Constitution supplies a potential answer by elevating the judiciary to the role of a coequal power of government, an institution capable of resisting the other two and thus of moderating the government. And the Supreme Court has completed the answer (however unintentionally) through case law that gives life to the perpetual non-answer that Hunton thought necessary. And, lest we forget, Locke's answer—appeal to the people and to heaven—remains a living possibility either through the overriding and longstanding preferences of the people or through civil war.

Hunton and Locke teach us why the use of the separation of powers as a moderating force in government has created the need for judges like those established by the Constitution. They explain why separated powers need a body that can judge among them, and hence they explain the forces keeping the modern judiciary at the center of our polity. But through their caution against placing the powers wielded by the Supreme Court into any government hands, Hunton and Locke warn of the dangers inherent in this structure. Apprehension—if not complete comprehension—of the danger lurking in the placement of this power into any hands can be discerned in the doctrines developed by the Court; powerful as it is, under the case-or-controversy and political-question doctrines, the Court refuses to unambiguously claim a clearly defined role as final arbiter of all constitutional questions. If Hunton is correct, this is one case where the murkiness of the law—however unappealing to those who love to find coherence in the common law—ultimately serves to maintain institutional arrangements necessary to subvert humanity's tyrannical tendencies.

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# The Great Synthesizer: Natural Rights, the Law of Nations, and the Moral Sense in the Philosophical and Constitutional Thought of James Wilson

Derek A. Webb*

## ABSTRACT

*This article argues that the key to understanding James Wilson, one of the leading architects of the Constitution and the first Supreme Court Justice to be sworn in, and yet arguably the most neglected and misunderstood figure from the founding generation, is as a "great synthesizer" of seemingly disparate philosophical and constitutional commitments. Drawing upon the natural rights tradition of early classical liberalism as envisioned by John Locke, Wilson insisted that the new federal government be as democratic and broadly reflective of "We the People" as possible. Drawing upon the law of nations tradition as articulated particularly by Cicero, he became one of the nation's leading proponents of a strong, centralized federal government in order to form "a more perfect union." And inspired by the concept of the moral sense and the innate sociality of the human person as discussed in the Scottish Enlightenment by Thomas Reid and Francis Hutcheson, he made clear that the "blessings of liberty" were contingent upon an active and engaged citizenry on the national level. By understanding this overlooked, synthetic quality of Wilson's thought, we may better understand, in all its richness and complexity, the unique role Wilson played in America's creation story, gain a new perspective on the original Constitution itself, its achievements and flaws, and reconstruct a compelling constitutional theory that cut across the political alignment of the day but perhaps better anticipated subsequent constitutional development than any of the prevailing positions in 1787.*

## KEYWORDS

*U.S. Constitution, natural rights, law of nations, moral sense, James Wilson*

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## I. Introduction

George Washington has his Monument, Thomas Jefferson has his Memorial, and Benjamin Franklin has his Institute, but James Wilson of Pennsylvania, one of the leading intellectual lights of America's founding generation, remains a relatively overshadowed and neglected figure in American constitutional history. [1] Until recently, even the Supreme Court of the United States did not pay him much attention. When visitors enter the Court, they are first greeted by a regal portrait of John Jay, the Court's first Chief Justice. Strolling down the hallway, they come upon a larger-than-life statue of John Marshall, with select quotes from his opinions etched in marble above and behind him. And in perhaps a fitting tribute to Wilson's historical obscurity, only the most intrepid (or lost) visitors who keep going to the very back of the Court, behind the Marshall statue, around a wall, past a tribute to Justice O'Connor, and veer off to the left in a dimly-lit corner can find a recently hung, oft-maligned portrait of the man who served as one of the first six Supreme Court Justices and played a key role in the creation and defense of the new U.S. Constitution.

For almost as long as constitutional historians have been writing about Wilson, they have recognized and lamented his neglect. As far back as 1897, Andrew McLaughlin observed that "The work of James Wilson as a framer of the Constitution seems not to have received its just recognition."[2] Seventy years later in 1967, Robert G. McCloskey's observed that "Wilson is well known only to a few constitutional historians, … he is not much more than a name to most other American historians, and… to educated Americans in general he is not even a name."[3] And nearly fifty years after that, Gordon Wood, in a 2006 book review of Akhil Amar's *America's Constitution: A Biography*, described Wilson as "an intellectually important framer who Amar correctly believes has been much neglected."[4] William Ewald remarked in 2008 that Wilson "has a good claim to be the most neglected of the major American founders."[5] And the evidence seems to supports this claim that Wilson is best known for being forgotten: in a recent survey of historians and political scientists, James Wilson was voted by a significant margin the number one most neglected figure of the American founding period.[6] One cannot help but wonder whether constitutional historians in another fifty or so years, say in 2070, will be making similar comments about Wilson's neglect.

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1 The inspiration for the opening phrase of this sentence comes from Michael P. Zuckert, *The Political Science of James Madison*, in The History of American Political Thought 149 (Bryan-Paul Frost & Jeffrey Sikkenga, eds., 2003).

2 *See* Andrew C. McLaughlin, *James Wilson in the Philadelphia Convention*, 12 Pol. Sci. Q. 1 (1897).

3 James Wilson, The Works of James Wilson (Robert G. McCloskey ed., 1967).

4 Gordon Wood, *How Democratic Is the Constitution*? 53 N.Y. Rev. Books 3 (Feb. 3, 2006).

5 *See* William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. Penn. J. Const. L., 902 (2008). For a helpful discussion of how historians and American popular culture have treated Wilson over the years, often unkindly, *see* Nicholas Pederson, *The Lost Founder: James Wilson in American Memory*, 22 Yale J, L. & Hum. 257 (2010).

6 America's Forgotten Founders xiv (Gary L. Gregg II & Mark David Hall, eds., 2011).

The reasons for Wilson's obscurity itself remain somewhat obscure. But some explanations are at least possible. Unlike some of the lions of the founding generation, Wilson never held nationwide elected office or served as a high ranking cabinet member under the new Constitution.[7] And unlike some of the great legal giants of his day, whose judicial opinions numbered into the hundreds and effectively transformed the American legal landscape, his tenure on the Supreme Court came at a time of relative inactivity for the Court,[8] giving him the opportunity to pen only eight signed opinions[9] of varying quality[10] over the course of seven terms. And unlike several of the most well regarded founding figures, whose lives ended in either a blaze of glory like Hamilton or, as with Jefferson and Adams, after a long life in a nearly poetic death on the 50th anniversary of the signing of the Declaration of Independence, Wilson came to a difficult, ignoble end, twice

[7] In 1907, the secretary of the James Wilson Memorial Committee, Burton Alva Konkle, who conceived and executed a plan to remove Wilson's remains from North Carolina and return them to a cemetery in Philadelphia near Independence Hall, accompanied by a small memorial service, speculated that Wilson's absence from the more glamorous positions in the new government may partly explain why so few Americans knew of James Wilson. "Had he gone into the picturesque office of President of the United States, or been a dashing Secretary of the Treasury… instead of being buried in the sober and unpicturesque halls of the Supreme Court, he might have been in the popular thought as fully as he has always been in that of the student of constitutional history." Burton Alva Konkle, *The James Wilson Memorial*, 55 Am. L. Reg. 1, 2 (1907).

[8] As Robert McCloskey, both a revered historian of the Supreme Court and a publisher of Wilson's works, observed, "The Court of the 1790's was not yet ready for the great work of its future, nor was the country prepared to accept the judicial leadership of later years. The status of the fledgling Court in the fledgling Republic was ambiguous and, for the moment, comparatively minor… Those years from February 1, 1790, when he first took his seat, and August 21, 1798, when he died, were simply not years of great opportunity for a justice of the Supreme Court, even one with Wilson's intellect and drive." Wilson, *supra* note 3, at 30.

[9] The opinions were State of Ga. v. Brailsford, 2 U.S. 402, 407 (1792), Chisholm v. Georgia, 2 U.S. 419, 453 (1793), United States v. Hamilton, 3 U.S. 17, 18 (1795), Bingham v. Cabot, 3 U.S. 19, 33 (1795), Hylton v. United States, 3 U.S. 171, 183 (1796), Ware v. Hylton, 3 U.S. 199, 281 (1796), Wiscart v. D'Auchy, 3 U.S. 321, 324 (1796), and Brown v. Van Bramm, 3 U.S. 344, 356 (1797).

[10] Comparing the quality of Wilson's judicial opinions with John Marshall's, McCloskey observed a considerable difference in style that limited Wilson's influence. "Though far more erudite and a deeper thinker than Marshall, he was unable to match the lucidity, simplicity, and persuasiveness of Marshall's prose style. When we lay a page of his *Chisholm* opinion beside a page from *McCulloch* or *Cohens* the contrast is arresting. Wilson's argumentative talent was by no means slight. But he could seldom resist adorning the essential point of his contention with scholarly references and grandiloquent asides, and his sentences sometimes develop a labyrinthine complexity. At its worst his prose seems the result of a cross-fertilization between a pedant and a Fourth of July orator, and the intervening passages of clear and even memorable English cannot quite save it." Wilson, *supra note* 3, at 36. Regarding the mixed quality of his overall judicial output, Hampton L. Carson, in attempting to explain why "Judge Wilson on the Bench did not equal Mr. Wilson at the Bar," observed that Wilson's personal difficulties while he served on the Court "deprived him of the equanimity of mind so necessary to the proper performance of the duties of a judge." Hampton L. Carson, *The Works of James Wilson* 35 Am. L. Reg. & Rev. 633, 635, (1896).

arrested in the last year of his life while sitting as a Supreme Court Justice[11] for failing to pay his staggeringly high debts incurred from failed land speculation, and dying from malaria in 1798, financially ruined, forced off the Court, and in hiding from his creditors who, as he put it, "hunted him like a wild beast."[12]

But another reason why Wilson may remain overlooked is that, as a thinker, where he perhaps did most of his living and enjoyed his greatest successes,[13] he does not clearly stand in the collective public imagination or the scholarly consensus for any single particular big idea. If one is in search of an articulate and uncompromising early American exponent of individual rights, personal autonomy, and democracy, one turns naturally to Jefferson, while if one is interested in an American defender of the importance of tradition, forms, and the rule of law, one may look to Adams.[14] If one is looking for a taste of the spirit of the American enlightenment seasoned with wit, one turns to Benjamin Franklin. If one is looking for a balanced, encyclopedic understanding of the architecture of the new federal government under the Constitution, one consults James Madison, while if one is interested in an early champion of a powerful and well financed national government, Alexander Hamilton is likely your preferred Broadway star. James Wilson, by contrast, seems to pale in comparison, lacking a clear, satisfyingly archetypical idea to help distinguish him as a constitutional thinker.

Wilson's overlooked genius, however, resided not so much in staking claim to one single, overriding philosophical position or interpretive approach to the Constitution, but rather in a rich, surprising, and compelling synthesis of disparate philosophical and constitutional principles ordinarily kept apart at the time but that have since been mostly blended today. In the course of analyzing a passage from William Blackstone in his lecture on Municipal Law, Wilson noted in an offhand way that "I search not for contradictions. I wish to reconcile what is seemingly contradictory."[15] This statement, though in this context perhaps little more than a rhetorical flourish, captures nicely the dynamic of his mind which was more inclined to embrace "both… and" formulations than choices between "either… or."

As a political philosopher, Wilson embraced three ideas that had distinctive, potentially rivalrous origins. He defended the view traditionally associated with early modern liberalism that individuals are naturally free, endowed with various natural rights, and that political authority is created to secure those rights and

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11 Giving Wilson the dubious distinction of being the only sitting Justice of the Supreme Court to ever spend time in prison. Ewald, *supra* note 5, at 914-15.

12 Wilson's biographer Charles Page Smith aptly summarized Wilson's final days when he titled the final chapter of his biography "The Morass." Charles P. Smith, James Wilson: Founding Father, 1742-1798, at 376-88 (1956).

13 Andrew C. McLaughlin put this point most delicately when he observed that "he was not one of those statesmen who master details, who work with promptness and decision for the accomplishment of palpable objects. Nor was he one of those statesmen who know men with unerring judgment… Nor was he one of those who feel acutely the life of the state… his greatest talent was of a different nature. He was above all a political scientist." McLaughlin, *supra* note 2, at 2.

14 Their character as natural opposites led Benjamin Rush to quip that Jefferson and Adams collectively represented the "North and South Poles of the American Revolution."

15 James Wilson, Collected Works of James Wilson 570 (Kermit L. Hall & Mark D. Hall eds., 2007) [hereinafter, Wilson].

derives its authority from the consent of the governed. He endorsed the view typically associated with pre-modern, classical political thought that order and natural law pervades the universe and imposes duties upon individuals and states alike. And he championed the Scottish Enlightenment view that all individuals are born with an innate moral sense that renders them invariably social creatures whose survival and happiness depends upon active participation in both domestic and civil society. Wilson as a thinker thus drew upon Locke, Cicero, and Reid in building his comprehensive philosophical outlook.

As a constitutional thinker, Wilson endorsed views on the Constitution that blurred boundaries between opposing camps.[16] He sided with Jefferson and the Anti-Federalist critics of the Constitution in speaking out in favor of a much more thoroughly democratic and representative federal government than was ultimately produced. He sided with Hamilton and the Federalists, however, in defending an even stronger national government than the convention in Philadelphia ultimately endorsed. And, in a sense, he split the difference between both these camps on the topic of citizenship, arguing for a robust concept of engaged, vigilant, and dutiful citizenship that Jefferson and the Anti-Federalists endorsed while, in good Hamiltonian and Federalist style, defending an "expanded patriotism" that drew citizens' primary attachment away from the more factional state and local interests and towards the federal government. Wilson as a constitutional thinker thus staked out views that at different times sounded like Thomas Jefferson, Alexander Hamilton, James Madison, and Melancton Smith.

All this surprising and unorthodox pairing, matching and blending among Wilson's philosophical and constitutional views has led scholars down one of two equally unsatisfactory avenues. Some have been tempted to conclude that Wilson's philosophical and constitutional views were a hopeless bricolage of contending and rival approaches, at times a throwback to a classical philosophical orientation, at other times distinctively modern, at times Jeffersonian, at other times Hamiltonian, yet always ultimately confused.[17] Robert McCloskey, for example, observed the

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[16] As Arnaud B. Leavelle put it, Wilson's "governmental doctrines cut across the existing political alignment of his day." Arnaud B. Leavelle, *James Wilson and the Relation of the Scottish Metaphysics to American Political Thought*, 57 Pol. Sci. Q. 394, 396 (1942). And as Richard Bernstein expressed it, "Wilson does not fit well with the prevailing bright-line boundaries that some modern historians and legal scholars discern in the era of the American Revolution and the making of the Constitution." R. B. Bernstein, *Bernstein on Hall, 'The Political and Legal Philosophy of James Wilson, 1742-1798*, H-Law, H-Net Reviews (1998) (reviewing Mark David, The Political and Legal Philosophy of James Wilson (1997)).

[17] Richard Gummere captured the sense of many scholars when he observed that "It is hard to classify Wilson." Richard M. Gummere, *Classical Precedents in the Writings of James Wilson* 32 Colonial Soc'y Mass: Transactions 525, 527 (1937). Alfons Beitzinger observed that Wilson's philosophy of law was mostly a "muddle" of disparate, unreconcilable sources, concluding that "if one attempts to integrate on an equal basis the natural law approach of a Hooker with the consensual theory of a Locke one is on an impossible course." Alfons Beitzinger, *The Philosophy of Law of Four American Founding Fathers* 21 Am. J. Juris. 1, 15-6 (1976). Thomas and Lorraine Pangle gently suggested that "One may accuse him… of moving too superficially and in too harmonizing a spirit through the complex quarrels that divide and animate the history of political philosophy." Lorraine Smith Pangle & Thomas Pangle, The Learning of Liberty: The Educational Ideas of the American Founders 175 (1993).

synthetic quality of Wilson's political theory, but concluded that it was ultimately a hopeless collection of highly disparate sources that did not cohere well together.

> Perhaps the most noteworthy thing about the theory is its synthetic quality: the refusal to dispense with either the old or the new, the tendency to claim the best of both worlds – or of any of the several worlds that Wilson cherished. The virtue of this quality is that it reflects the eclectic, ambivalent disposition of the American mind itself. America was attached to both the ancient idea of an immutable moral law and the new idea of popular sovereignty, to the concept of order and the concept of liberty, to the need for continuity and the need for progressive change. Wilson's theory embraced all these New World prepossessions and asserted, in spite of logical difficulties, their compatibility… Like his theory, he was conglomerate of values and impulses drawn from widely variant worlds, of incompatibilities brought together only by his own attachment to them, and reconciled only by his own incurable optimism that they *could* be reconciled in some apocalyptic day that never quite arrived.[18]

Others, perhaps themselves aware of the complexity of his thinking but personally predisposed to favor just one or two elements of it, or just eager to simplify for their readers, have tended to portray (and either valorize or criticize) just one dimension of his thought to the exclusion of all else. Early Wilson scholarship tended to focus exclusively on the presence and significance of natural law as classically conceived in his philosophical and constitutional thought.[19] Other scholars have focused principally on the ways in which the philosophical developments within the Scottish Enlightenment influenced Wilson's moral and political views.[20] Finally, there are a number of scholars who have emphasized Wilson's seemingly singular devotion to consent, popular sovereignty, and democracy as the organizing touchstone for understanding all of his thought.[21] Not

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[18] Wilson, *supra note 3*, at 41.

[19] Examples of this include May G. O'Donnell, James Wilson and the Natural Law Basis of Positive Law (1937), William Obering, The Philosophy of Law of James Wilson: A Study in Comparative Jurisprudence (1938), and Mary T. Delahanty, The Integralist Philosophy of James Wilson (1969). Likewise, Mark David Hall, though considerably better than most in acknowledging the multiple traditions upon which Wilson drew, ultimately concluded that "Of primary importance for Wilson was the Christian natural law tradition." Mark D. Hall, The Political and Legal Philosophy of James Wilson (1997).

[20] Foremost among these scholars is Stephen A. Conrad, who has written three thoughtful articles exploring these connections and illustrating Wilson's focus upon the moral sense and the qualities of good citizenship, including Stephen A. Conrad, *Polite Foundation: Citizenship and Common Sense in James Wilson's Republican Theory*, 1984 Sup. Ct. Rev., 359 (1984), Stephen A. Conrad, *Metaphor and Imagination in James Wilson's Theory of Federal Union*, 13 L. & Soc. Inquiry 1 (1988), and Stephen A. Conrad, *James Wilson's 'Assimilation of the Common-Law Mind,'* 84 Nw. L. Rev. 186 (1989). Samuel Beer similarly focused upon these connections in a chapter devoted to Wilson in his book, Samuel Beer, To Make a Nation: The Rediscovery of American Federalism (1993).

[21] Early forerunners of this approach included John Jezierski, *Parliament or People: James Wilson and Blackstone on the Nature and Location of Sovereignty*, 32 J. of

unlike the proverbial blind men each touching a different part of an elephant and concluding that it was, variously, a water spout, a pillar, and a fan, many different Wilson scholars have tended to see in Wilson what they themselves most admire in his thinking, leaving him stand in for that singular idea and little else besides.

Unlike these previous scholars who have either thrown up their hands at the contradictions within Wilson's thought, or have just focused on one element of it to the exclusion of all else, this article dwells at equal length on each of the three critical nodes of his philosophical and constitutional thought, on the trunk, the leg, and the ear, if you will, and thereby both brings out the complexity and richness of his thought, while at the same time illustrating a striking underlying order connecting at several levels his seemingly disparate views. Wilson's disparate philosophical positions, however themselves potentially rivalrous in their origins, led consistently to an approach to the formation and interpretation of the new Constitution that emphasized the power and democratic legitimacy of the federal government independent of the state governments and the significance of a robustly participatory national political culture. His argument that consent was the only means by which political authority could be created led to his view that all the ruling elements under the U.S. Constitution needed to find their touchstone as directly as possible in the approval of "We the people" themselves, and emphatically not the states. His argument that both individuals and states had natural duties to themselves and others led to his view that the new federal government needed to have at least as much power as it was given in Philadelphia to bring forward a "more perfect union," to carry out the various national and international responsibilities which the states on their own could not perform, and to serve as a check upon the potential injustices of state legislatures, particularly with regard to slavery. And his view that people were innately social and possessed of a moral sense led him to the view that to truly secure "the blessings of liberty," Americans would need to gradually develop and actively participate in a distinctly national American civic

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the Hist. of Ideas 95 (1971) and George M. Dennison, *The 'Revolution Principle': Ideology and Constitutionalism in the Thought of James Wilson*, 39 The Rev. Pol., 157 (1977). More recent scholars who have chosen to single out this dimension in Wilson's thought in an attempt, at least in part, to disprove Charles Beard's thesis that the Constitution was a largely anti-democratic charter, and to champion him for more contemporary audiences, include Akhil Amar, America's Constitution: A Biography (2006), Nicholas Pedersen, *The Lost Founder: James Wilson in American Memory*, 22 Yale J. L. & Human., 257 (2010), and Aaron T. Knapp, *Law's Revolutionary: James Wilson and the Birth of American Jurisprudence*, 29 J. L. & Pol. 189 (2013) (who notes, contra Amar, that Wilson was more exceptional and unique in his devotion to democracy than he was actually representative of common Federalist thinking at the time. But in his representation of Wilson's thought as bottomed on exclusively democratic principles, he is actually much closer to Amar than he lets on.) And there have been other scholars who have similarly identified Wilson with this devotion to democracy and popular sovereignty, but have then faulted him for what they consider to be his excessively singular devotion to democratic rule, thereby jeopardizing minority rights. Examples of this perspective include Ralph Rossum, *James Wilson and the 'Pyramid of Government:' The Federal Republic,* 6 Pol, Sci. Reviewer 113 (1976), Jennifer Nedelsky, *The Democratic Federalist Alternative: James Wilson and the Potential of Participation, in* Private Property and the Limits of American Constitutionalism, 96-140 (1990), and James Read, *Wilson and the Idea of Popular Sovereignty, in* Power Versus Liberty: Madison, Hamilton, Wilson, and Jefferson (2000).

culture that in some ways transcended their potentially more parochial local and state attachments. Drawing upon divergent philosophical traditions inherited from different European thinkers of different eras, he sketched a nonetheless coherent constitutional vision of America as democratic as Jefferson might have wished, powerful as Hamilton could have hoped for, and rooted in a robustly participatory civic culture that the Anti-Federalists would have welcomed, but keyed to the national level, and not just the local. In a uniquely Scottish way, Wilson blended rivalrous philosophical traditions in articulating a unique and coherent vision of a new, powerful federal government that stood on its own bottom independent of the states, and was capable of checking those states against their worst tendencies, under America's new constitutional order.

Thus unlike prior scholarship that has either tended to focus on the contradictions within Wilson's thought or just upon one narrow dimension of it, this article provides an account of why Wilson emerged as the unique political figure of his day, whose democratic and civic nationalism scrambled many of the political categories of his time and placed him almost in a category unto his own. It presents him as the "great synthesizer" by showing how his disparate philosophical views, articulated in theoretical terms at various points throughout his career, from his first pamphlet in 1774 to his Lectures on Law in 1790-1792,[22] explained and undergirded the concrete proposals he made to the Constitution in the summer of 1787 and his explanation of those proposals throughout the ratification contest in 1787-1788.[23] Wilson himself never took the time to explicitly show his readers all the connections between his theoretical statements and his more practical work as a builder of the Constitution. But the connections are there to see for attentive readers of his entire corpus. This article lays out that underlying web of connections. Clarifying Wilson's synthesis of disparate philosophical views and divergent politics helps us better understand an individual who, though curiously overlooked by history, fused together various constitutional values and strands of thought that, though kept apart at the time of the American founding, have over the course of American political and constitutional development in some ways come together. While history has mostly overlooked James Wilson, Wilson, more than really any other single American founder, argued for, and in a sense, anticipated the spirit in which much of American constitutional history would eventually unfold. Understanding Wilson and his unique synthesis thus helps us to not only better understand a fascinating and overlooked figure, but also helps us to better understand America itself, its founding to be sure, but perhaps even more so its current constitutional design.

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[22] Though Wilson refined and elaborated his philosophical statements over time, his basic commitments to classical, modern, and Scottish insights did not appear to shift much over time.

[23] Though at first glance there may appear to be some chronological awkwardness in using later-in-time philosophical statements to explain earlier constitutional proposals, Wilson's proposals were often nested at the time within briefer, philosophical statements that he unpacked at greater length just a couple years later during his Lectures on Law.

## II. Natural Rights, the Revolution Principle, and "We the People"

### *A. The Source of the Nile: Consent, the Origins of States, and the Rights of Individuals*

At the outset of his first lecture on law, Wilson introduced his subject with an epigrammatic discussion of the relationship between liberty and law. Liberty and law, he said, could not exist without the other. "Without liberty, law loses its nature and its name and becomes oppression. Without law, liberty also loses its nature and its name, and becomes licentiousness."[24] Moreover, the American character could, in his view, best be summarized in the following few words: "That character has been eminently distinguished by the love of liberty, and the love of law."[25]

In his first lecture, Wilson focused on the first prong of that statement and drew his audience's attention to a stunning historical fact. For thousands of years, the source of the mighty Nile river, which flowed through Egypt and alternately brought plenty and fertility or devastation and famine, was unknown to scientists, philosophers, and kings. All were curious, but all ultimately failed to discover its source. Because it remained a mystery, poets started making the literary suggestion that its origin was in a "superior orb" which they then worshipped as divinity. Recently, however, scientists had finally and truthfully discovered its source in a collection of springs "small, indeed, but pure."[26]

Wilson drew an analogy between the mystery surrounding the source of the Nile River and the mystery surrounding the source of sovereignty. Sovereignty, like the Nile River, had been with us for a thousand years and presented a magnificent spectacle. It too had alternately been a blessing and a curse for people. And its origin had similarly been sought after by politicians and philosophers for ages. Finally, perplexed by the seemingly unfathomable nature of sovereignty, the politicians and philosophers took on the role of poets and taught that its origins must be divine. And only recently, when investigated by thinkers of a more scientific cast of mind, had something useful and true finally been discovered about the source of sovereignty: that the "ultimate and genuine" source of the "dread and redoubtable sovereign" could be found in "the free and independent man."[27] As he would put it as a Supreme Court Justice two years later in *Chisholm v. Georgia*, "The sovereign, when traced to his source, must be found in the man."[28]

This discovery amounted to a revolution in the science of government. Heretofore, that science had simply floundered from one infeasible system to another, all improperly conceptualizing the source of sovereignty. "Sovereignty has sometimes been viewed as a star, which eluded our investigation by its immeasurable height; sometimes it has been considered as a sun, which could not be distinctly seen by reason of its insufferable splendor."[29] Now, finally, it was seen in its true, not mystifying or obfuscating light – the simple and natural fact that all

24 Wilson, *supra* note 15, at 435.
25 *Id.* at 432.
26 *Id.* at 445.
27 *Id.*
28 Chisholm v. Georgia, 2 U.S. 419, 458 (1793).
29 Wilson, *supra note* 15, at 444-45.

political authority begins with free and independent man. This fact was for Wilson the "point of departure" for all thinking about politics. He refers to it variously as the "first and fundamental principle in the science of government," the "broad and deep foundation of human happiness," and "the *vital* principle… which diffuses animation and vigour through all the others."[30] The discovery of this obvious but true point of departure now provided the science of government with a helpful foundation which it had been lacking and upon which it could build itself from its infancy into a genuine science.

Spelled out in greater detail, the principle was what he called "the revolution principle."[31] According to this principle, all legitimate political authority flows ultimately from the consent of individuals and the people at large. Consent, he said, was "the true origin of the obligation of human laws."[32] As he put it in *Chisholm v. Georgia*, "The only reason, I believe, why a free man is bound by human laws, is that he binds himself… If one free man, an original sovereign, may do all this; why may not an aggregate of free men, a collection of original sovereigns, do this likewise?"[33] And that original power to consent to political authority remained even after the initial formation of the Constitution. As he put it in his *Lectures on Law*, "The supreme or sovereign power of the society resides in the citizens at large; and that, therefore, they always retain the right of abolishing, altering, or amending their constitution, at whatever time, and in whatever manner, they shall deem it expedient."[34] This principle, according to which all political authority depended upon popular consent for both its original inception and its ongoing legitimacy, was for Wilson what had sparked the American Revolution.[35]

And having drafted an important and widely read pamphlet in 1774 urging revolution on precisely these grounds, "Considerations on the Nature and Extent of the Legislative Authority of the British Parliament," Wilson was well positioned to make this claim.[36] In that pamphlet, he formulated the "revolution principle" in these terms.

> All men are, by nature, equal and free: no one has a right to any authority over another without his consent: all lawful government is founded on the consent of those who are subject to it: such consent was given with a view

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[30] *Id.* at 446.

[31] George M. Dennison observed the modern provenance of Wilson's "revolution principle" when he wrote that it was bottomed on "English theory drawn from the seventeenth century concerning the relationship between ruler and ruled." And later in that article, he identified Locke as the principal philosophical influence: "Wilson's explanation of the people's right of peaceable revolution deserves careful analysis. This conception of revolution certainly had its roots in the seventeenth century and specifically in the ideas associated with the political theory of John Locke." George M. Dennison, *The 'Revolution Principle': Ideology and Constitutionalism in the Thought of James Wilson*, 39 Rev. Pol. 157, 165, 175 (1977).

[32] Wilson at 494.

[33] Chisholm v. Georgia, 2 U.S. 419, 456 (1793).

[34] Wilson, *supra note* 15, at 441.

[35] *Id.* at 442.

[36] As James Oscar Pierce put it, Wilson in his 1774 pamphlet "was writing, at the age of less than thirty years, a thesis which became the basis of revolution." James Oscar Pierce, *James Wilson as a Jurist*, 38 Am. L. Rev. 44, 47 (1904).

> to ensure and to increase the happiness of the governed, above what they could enjoy in an independent and unconnected state of nature.[37]

Scholars have since suggested that this passage had an influence on Jefferson's own formulation of the philosophical preamble of the Declaration of Independence, a document which Wilson himself signed as a member of the Continental Congress.[38] But regardless of whether Wilson's formulation of the "revolution principle" exerted some influence on Jefferson's draftsmanship, the point here is that for Wilson, the "revolution principle" was a new discovery of modern political science which he attributed to the thought of John Locke.[39] As he put it in the Pennsylvania State Ratifying Convention on December 4, 1787,

> "[T]he truth is, that the supreme, absolute, and uncontrollable authority *remains* with the people. I mentioned, also, that the practical recognition of this truth was reserved for the honor of this country. I recollect no constitution founded on this principle; but we have witnessed the improvement, and enjoy the happiness of seeing it carried into practice. The great and penetrating mind of *Locke* seems to be the only one that pointed towards even the theory of this great truth."[40]

This "great truth" for Wilson amounted to what he called the "first and fundamental principle in the science of government" and would, in his judgment, need to serve as the ultimate legitimating touchstone for the new United States Constitution.[41]

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[37] Wilson at 4.

[38] James De Witt Andrews made this claim in 1901, noting the similarities and observing that it "outlines the Declaration of Independence." James De Witt Andrews, *James Wilson and his Relation to Jurisprudence and Constitutional Law*, 40 Am. L. Reg. 708, 720 (1901). James Oscar Pierce said that "The spirit of Wilson breathes throughout the great Declaration." Pierce, *supra* note 36, at 49. and Carl Becker noted the similarities as well, remarking that "This reminds us of the Declaration of Independence, and sounds as if Wilson were making a summary of Locke." Carl L. Becker, The Declaration of Independence: A Study in the History of Ideas (1922).

[39] There exists some scholarly controversy over precisely which modern thinkers Wilson drew upon in formulating his views on the "revolution principle" and the sovereignty of the people. Garry Wills has variously suggested that it was not John Locke, as the majority of scholars have supposed, but rather Burlamqui or even Jean Jacques Rousseau. Garry Wills, Inventing America: Jefferson's Declaration of Independence 250 (2018); Garry Wills, James Wilson's New Meaning for Sovereignty, *in* Conceptual Change and the Constitution, (Terrence Ball & J.G.A. Pocock eds., 1988). But Burlamqui himself was influenced by Locke, so the intervening influence of Burlamqui on Wilson would not eliminate Locke as an ultimate influence. Ewald, *supra* note 5, at 905. And though Rousseau was a theorist whom Wilson read and occasionally cited, Rousseau's claim that individuals lose all their natural liberty upon entering the social contract, and enjoy only those rights which society affirmatively grants, was one which Wilson sharply criticized throughout his career.

[40] Wilson, *supra* note 15, at 213 (emphasis in the original).

[41] *Id.* at 443.

### *B. Laying the "Cornerstone": Wilson's Democratic Faith*

Wilson's commitment to the "revolution principle" of 1776, and to rooting all government directly in the "true source of the Nile," the people, led him to embrace a highly democratic view of the new federal government. While on one Wilsonian metaphor, the people were the "rock" upon which the new Constitution was built,[42] a static image that might imply that just so long as the new federal government rested ultimately upon the people, all would be well, on another one of his favorite metaphors, the people were a "fountain," suggesting that their status as the source of all political authority would be a more direct, active, and ongoing one.[43]

Throughout the Federal Convention, Wilson labored to connect as directly as possible the new institutions of the federal government with the streams coming from the people and to simultaneously disconnect them from the streams of traditional state power. As he put it early on in the deliberations on June 7, "If we are to establish a national government, that government ought to flow from the people at large,"[44] and most decidedly not the states. And if the new federal government were to be a bona fide government of "We the People," and not a mere confederation of "We the States," both the legislature and the executive of the new federal government would have to be drawn as much as possible from the people, and not the states.

Beginning first with the House of Representatives, Wilson contended that it should be as democratic an institution as was practicable and as little indebted to the state governments as possible. In his first substantive comments at the convention on May 31, Wilson said that because he wanted to raise the "federal pyramid" as high as possible, the delegates to the Federal Convention needed to give that pyramid "as broad a basis as possible."[45] As Madison recorded Wilson's very first statement, "Mr. Wilson contended strenuously for drawing the most numerous branch of the legislature immediately from the people."[46] Giving this power to the people, Wilson made clear, also meant taking it away from the states. As Madison proceeded to record Wilson's next set of comments:

> He also thought it wrong to increase the weight of the State Legislatures by making them the electors of the national Legislature. All interference between the general and local Governmts (sic) should be obviated as much as possible. On examination it would be found that the opposition

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42 *Id.* at 202. "I have no idea that a safe system of power in the government, sufficient to manage the general interest of the United States, could be drawn from any other source, or vested in any other authority, than that of the people at large. I consider this authority as the rock on which this structure will stand."

43 *Id.* at 193. "If we take an extended and accurate view of it, we shall find the streams of power running in different directions, in different dimensions, and at different heights, watering, adorning, and fertilizing the fields and meadows, through which their courses are led; but if we trace them, we shall discover that they all originally flow from one abundant fountain. In this constitution, all authority is derived from the people."

44 *Id.* at 92.

45 *Id.* at 82-3. For an intriguing discussion of the "pyramid" metaphor in Wilson's thought, *see* John F. Witt, *The Pyramid and the Machine: Founding Visions in the Life of James Wilson in* Patriots and Cosmopolitans: Hidden Histories of American Law 15-82 (2007).

46 *Id.* at 82.

> of States to federal measures had proceeded much more from the officers of the States, than from the people at large.[47]

One week later, on June 6, Wilson again showed how his commitment to the revolution principle led him to prefer that the House of Representatives be elected directly by the people and not the state legislatures. In response to a proposal by Charles Pinckney of South Carolina that the House of Representatives be elected by the state legislatures, Wilson countered with a highly democratic counter-proposal in the name of his beloved revolution principle.

> He wished for vigor in the Govt, but he wished that vigorous authority to flow immediately from the legitimate source of all political authority. The Govt ought to possess not only 1st the *force*, but 2dly the *mind or sense* of the people at large. The Legislature ought to be the most exact transcript of the whole Society.[48]

Wilson sought with even greater vigor at the Federal Convention, but less success, to directly connect the Senate to the electoral preferences of the people and to simultaneously disconnect it from what he considered to be the parochial interests of the state governments. In the name of the revolution principle, Wilson argued for direct election of Senators by the people rather than the state legislatures, and for proportional representation in the Senate according to each State's population. On both issues, Wilson advanced a uniquely democratic vision for the Senate that at every turn sought to break up state control and place the reins of the new Senate instead in the hands of the people.

Wilson felt so strongly that Senators should be elected by the people rather than by the state legislators that he was willing to take his stand for this in the face of a contrary motion by his former mentor in the law, John Dickinson, under whom Wilson had apprenticed throughout the 1770's. Dickinson had moved on June 7 "that the members of the 2d branch ought to be chosen by the individual Legislatures."[49] And he did so, he said, to ensure that the Senators would "consist of the most distinguished characters," becoming the American equivalent of the British House of Lords.[50] According to Madison's notes, Wilson was the first at the convention to rise to challenge Dickinson's motion. And he did so squarely on the basis of the revolution principle. "If we are to establish a national Government," he said, "that Government ought to flow from the people at large."[51] The indirect election of Senators by state legislatures violated the basic principle that individuals, and not states, were represented in the federal government. Because the federal government derived its authority from the people, just as the state governments did, so also should its Senators be drawn directly from the people, just as they were at the state level. Invoking a theory of "dual citizenship," Wilson explained, that because U.S. citizens would be citizens of both the federal government and their particular state governments, the same principles of democratic representation

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[47] *Id.* at 83.
[48] *Id.* at 90.
[49] *Id.* at 92.
[50] Madison's Notes at the Federal Convention, June 7, 1787.
[51] Wilson, *supra* note 15, at 92.

ought to govern in both contexts. "Both Govts were derived from the people – both meant for the people – both therefore ought to be regulated on the same principles."[52] And just as one would not interpose an intermediary electoral body in between the people and their state governments, so also one would not put such a body in between the people and their federal government.

Wilson also strongly objected to the allotment of equal numbers of Senators for each state. This arrangement, by which small states like Delaware and Georgia would receive the same number of Senators as large states like Virginia and Massachusetts, flatly violated one of "the essential principles of justice," namely (once again) that because "all authority was derived from the people, equal numbers of people ought to have an equal number of representatives and different numbers of people different numbers of representatives."[53] As opposed to this natural principle of justice, the defenders of equal votes for states in the Senate rested their system upon "metaphysical distinctions" between the "imaginary beings" known as states. But states, Wilson insisted, were nothing other than "artificial" collections of real, living individuals for whom the federal government was really being formed.

> Can we forget for whom we are forming a government? Is it for *men*, or for the imaginary beings called *states*? Will our constituents be satisfied with metaphysical distinctions?... The rule of suffrage ought, on every principle, to be the same in the second as in the first branch. If the government be not laid on this foundation it can be neither solid nor lasting."[54]

Consequently, it was the numbers of these individuals alone, "the natural and precise measure of representation," and no other metric, that should determine the number of Senators.[55]

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52 *Id.* at 104.

53 *Id.* at 116, 93.

54 *Id.* at 107-8. Wilson would return to this theme of the greater importance of the "majesty of the people" in comparison with the states in his opinion in *Chisholm v. Georgia* when he would argue that the purported sovereignty of the state of Georgia did not prevent it from being sued in federal court by a private citizen of another state. As he put it there, "In the United States, and in the several States, which compose the Union, we go not so far [as to entirely eliminate the legal significance of the people, as happens in England]: but still we go one step farther than we ought to go in this unnatural and inverted order of things. The states, rather than the People, for whose sakes the States exist, are frequently the objects which attract and arrest our principal attention. This, I believe, has produced much of the confusion and perplexity, which have appeared in several proceedings and several publications on state-politics, and on the politics, too, of the United States. Sentiments and expressions of this inaccurate kind prevail in our common, even in our convivial, language. Is a toast asked? 'The United States,' instead of the 'People of the United States,' is the toast given. This is not politically correct. The toast is meant to present to view the first great object in the Union. It presents only the second: It presents only the artificial person, instead of the natural persons, who spoke it into existence. A State I cheerfully admit, is the noblest work of Man: But Man himself, free and honest, is, I speak as to this world, the noblest work of God… With the strictest propriety, therefore, classical and political, our national scene opens with the most magnificent object, which the nation could present. 'The PEOPLE of the United States." Chisholm v. Georgia, 2 U.S. 419, 462-63 (1793).

55 *Id.* at 107-08.

Turning to the President, Wilson campaigned on behalf of similar instincts in arguing for a nationwide, democratic election of the President that sought to avoid vesting the decision in the hands of state operatives. At the pinnacle of Wilson's imagined "federal pyramid" would stand the President, whose democratic credentials would be the most substantial of any officer in the new system and whose vision would be the least clouded by the "local, confined, and temporary" perspectives of any particular state or region. What Wilson fought for, mostly on his own at the Convention, was a singular executive who could justly be called "the man of the people."[56] If the people were the ultimate source of all political authority, the new President would be the ultimate repository of that authority and its ultimate guardian.

At the Federal Convention, the Pennsylvania Ratifying Convention, and again in his Lectures on Law in 1791, Wilson repeatedly, and singularly, characterized the President as "the man of the people." That locution, so characteristic of the contours of Wilson's thought, conveyed yet again the twofold dynamic of the revolution principle, which at once drew the national government closer to the people at large and simultaneously distinguished it from the perspective of the particular state governments. This dynamic came through with particular clarity during the Pennsylvania Ratifying Convention, when Wilson explained why the President could veto acts of Congress. As Wilson put it, "The President, sir, will not be a stranger to our country, to our laws, or to our wishes. He will, under this Constitution, be placed in office as the President of the whole Union, and will be chosen in such a manner that he may be justly styled THE MAN OF THE PEOPLE; being elected by the different parts of the United States, he will consider himself as not particularly interested for any one of them, but will watch over the whole with paternal care and affection."[57]

Thus on June 1 at the Federal Convention, the same day that he proposed that the President be unitary, Wilson proposed that the President be elected directly by the people at large in one single, nationwide election. Even though he knew his proposal would be greeted as "chimerical" by many, which made him "almost unwilling" to make this proposal, the experience of statewide elections of the governors of New York and Massachusetts had convinced him that "an election of the first magistrate by the people at large, was both a convenient & successful mode."[58] And once again, the logic of the revolution principle, which amplified the necessity of consent by the people at large, and simultaneously diminished the intervening influence of the states, seemed to be at work. "He wished to derive not only both branches of the Legislature from the people, without the intervention of State Legislatures but the Executive also; in order to make them as independent as possible of each other, as well as of the States."[59]

Confronted, however, by the fact that his colleagues at the Federal Convention deemed direct election by the people "impractical," but challenged by George Mason to take some time to propose an alternative, Wilson the next day counter-

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[56] *See generally* Christopher S. Yoo, *James Wilson as the Architect of the American Presidency*, 16 Geo. J. L. & Pub. Pol'y. 51 (2019).

[57] *Id.* at 205.

[58] *Id.* at 84-5.

[59] *Id.* at 85.

offered with what turned out to be the first blueprint for the Electoral College.[60] But Wilson's proposed Electoral College, unlike the Constitution's final product, was to be a direct reflection of his revolution principles. Namely, the number of electors would be *directly proportional* to population. Each state would be divided into districts of equal populations. And within those districts, those citizens qualified to vote for members of the House of Representatives would choose a single elector. Electors from all the districts would then meet and cast ballots for the national executive. And in the course of laying out his case for this special body of electors, chosen directly by the people and directly proportional to the numbers of people, he reiterated his earlier concern about detaching the states from the electoral process. As Madison recorded it, "Mr. Wilson repeated his arguments in favor of an election without the intervention of the states."[61]

And three months later in early September, when the delegates were concluding their work on the details of the Electoral College, Wilson added an additional democratic safeguard to the selection mechanism. If no single candidate obtained a majority of the votes in the Electoral College, the "eventual appointment," he said, should be made by the House of Representatives rather than the Senate. Having the House rather than the Senate make the final decision enhanced the President's democratic credentials while at the same time detaching the Presidency from the direct involvement of the states, which at this point during the Convention had, to Wilson's regret, obtained an electoral preeminence in the Senate. If the Senate were to make the final appointment, Wilson worried that "the President will not be the man of the people as he ought to be, but the Minion of the Senate."[62] And as the "Minion of the Senate," he would be captured by the states, thereby both diminishing the President's democratic bona fides and obstructing his uniquely national vantage point at the same time.

Thus, in Wilson's rendering, from the very bottom of the "federal pyramid" to its very top, bills could only become laws if they enjoyed the assent of both democratically elected representatives who mirrored the sentiments of their constituents, and a democratically elected "man of the people" positioned to "watch out for the whole."[63]

Wilson's "democratic faith"[64] put him considerably out in front of most of his fellow Federalist colleagues in attempting to root the branches of government in the most democratic foundations possible. Federalists mostly shared Wilson's

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60 Madison's Notes at the Federal Convention, June 2, 1787.

61 *Id.*

62 Wilson, *supra* note 15, at 164.

63 *Id.* at 205.

64 For others who have described Wilson's attitude in terms of "democratic faith," *see* McLaughlin, *supra* note 2, at 15, "Wilson, on the contrary, was given over to the democratic faith;" Leavelle, *supra* note 16, at 405, "Wilson's defense of the widespread use of the franchise was the practical expression of his faith that men are capable of free and meaningful choices;" and Conrad (quoting McLaughlin), who observed that Wilson was "given over, at least by the late 1780's, to a 'democratic faith.'" Stephen A. Conrad, *Metaphor and Imagination in James Wilson's Theory of Federal Union*, 13 Law & Soc. Inquiry 1, 14 (1988). As President, Theodore Roosevelt also put Wilson's commitment to democracy in terms of "faith." "He [Wilson] believed in the people with the faith of Abraham Lincoln." Theodore Roosevelt, At the Dedication Ceremonies of the New State Capitol Building at Harrisburg, PA. Quoted in Pederson, *supra* note 5, at 304.

philosophical starting point that government's authority derived from the consent of the people. They were, however, considerably less punctilious in recognizing that this principle therefore required that all its branches be derived directly from the election of the people.[65] James Madison, for example, famously broadened the definition of a republic to include those governments in which "the persons administering it be appointed, either directly or indirectly, by the people," and then found all elements of the proposed government to meet this flexible criteria.[66] Indeed, Madison would go on in *Federalist* 63 to happily describe the American system as one in which there was "the total exclusion of the people, in their collective capacity, from any share" in direct governance.[67] Wilson, by contrast, insisted that "the difference between a mediate and immediate election was immense"[68] and added that the "chain of connection" between the people and their government might "consist of one link, or of more links than one; but it should always be sufficiently strong and discernible."[69]

Wilson's commitment to the revolution principle of 1776, and to rooting all government directly in the "true source of the Nile," the people, thus led him to embrace a surprisingly Anti-Federalist stance with regard to the democratic elements of the Constitution. He shared the Anti-Federalists view of representation as "mirroring" the people themselves.[70] And he supported the direct election of a proportionally representative Senate, like many Anti-Federalists as well.

It was for this reason that when Pennsylvania revised its state constitution in 1790, Wilson broke ranks with his fellow Pennsylvania Federalists like William Lewis, Thomas McKean, and Timothy Pickering in favor of a considerably more democratic charter. As a fellow delegate to the 1790 state constitutional convention Alexander Graydon reported, Wilson, "hitherto deemed an aristocrat, a monarchist and a despot, as all the federalists were, found his adherents on this occasion, with few exceptions, on the democratic or antifederal side of the house."[71]

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[65] Robert McCloskey observed that Wilson's differences with his Federalist colleagues on this point could be seen even at the level of vocabulary. Wilson often used the word "democracy" with a positive valence, even though "it was not in high favor at the time, especially among Federalists." Wilson, *supra* note 3, at 26. As Akhil Amar noted, "in both his opening and concluding speeches before the Pennsylvania ratifying convention, Wilson pronounced the Constitution "purely democratical," and in yet another speech he boasted that "the DEMOCRATIC principle is carried into every part of the government." Akhil Amar, America's Constitution: A Biography 16-7 (2006).

[66] The Federalist No. 39 (James Madison) (George W. Carey & James McClellan eds., 2001).

[67] *Id.* The Federalist No. 63 (James Madison). For a helpful survey of the ways in which Wilson stood apart from his fellow Federalists by insisting upon the importance of democracy, *see generally* Aaron T. Knapp, *Law's Revolutionary: James Wilson and the Birth of American Jurisprudence*, 29 J. L. & Pol. 189 (2013).

[68] Wilson, *supra* note 15, at 101.

[69] *Id.* at 183.

[70] It may have been for this reason that Herbert Storing occasionally quoted from Wilson when he wanted to convey the Anti-Federalist understanding of representation as a mirror reflecting within the halls of federal power the interests and concerns of the people. Hebert Storing, What the Anti-Federalists Were For: The Political Thought of the Opponents of the Constitution 16, 17, n.13, 62 (1981).

[71] Morton Rosenberg, In Search of James Wilson, 117, n. 28. Quoted in Smith, James Wilson, supra note 12, at 302-303.

And yet, Wilson's application of the revolution principle to the Constitution's selection mechanisms had a twofold dynamic, anchoring the nation's new institutions directly in the people while at the same time severing it as much as possible from state control. In this way, Wilson's application of the revolution principle had a nationalizing tendency, breaking down state prerogative in the name of "We the people." The application of the same principle by critics of the Constitution like the author of "Brutus" or "Federal Farmer," or later by Thomas Jefferson, was mostly in the opposite direction, seeking to enhance the democratic credentials of the new government in order to protect the states and resist consolidation of power in the hands of a small and imperial federal aristocracy. In this respect, as in others, Wilson ironically stood apart from many of his contemporaries by bringing together positions often held miles apart.

## III. Natural Law, the Law of Nations, and a "More Perfect Union"

### *A. The "Compass" and "Pole Star": Natural Law, the Law of Nations, and the Duties of States*

Citizens are only bound by laws to which they have given their consent. This was the central thesis of Wilson's opening lectures and the wellspring of his strenuous commitment to the "revolution principle." But laws made by legislatures were not the only kinds of law to which people were bound. For if positively enacted municipal laws were the only laws that could bind, what guidance did the people have before any laws were made at all? And for that matter, what sorts of norms should guide their decision making when they proposed to enact laws in the first place? The revolution principle helped identify which laws were in fact legally binding. But it did not help answer the even more fundamental question of which laws *should* be enacted in the first place.

To answer this question, Wilson turned in his third and fourth lectures to a study of natural law. Wilson variously described natural law as the "compass," "chart," and "pole star" by which we regulate our course.[72] At times he described natural law in decidedly theological terms, placing it within a larger Thomistic rubric that included eternal, celestial, divine, and human law, and calling natural law the communication of God to man through the faculties of reason and the moral sense.[73] At other times he sounded a more classical philosophical note, emphasizing natural law's transcendent permanence and universality, quoting

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[72] Wilson, *supra* note 15, at 500.

[73] For accounts that highlight the influence of theological or scholastic sources on Wilson's philosophy of law, *see* May G. O'Donnell, James Wilson and the Natural Law Basis of Positive Law (1937); William F. Obering, The Philosophy of Law of James Wilson (1938), Alfons Beitzinger, *The Philosophy of Law of Four American Founding Fathers*, 21 Am. J. Juris. 1, 12-17 (1976). For a more recent version of this argument, *see also* Mark D. Hall, The Political and Legal Philosophy of James Wilson, 35-67 (1997), who argued that "Of primary importance for Wilson was the Christian natural law tradition" at 194.

Cicero "it is, indeed, a true law, conformable to nature, diffused among all men, unchangeable, eternal… It is not one law at Rome, another at Athens; one law now, another hereafter: it is the same eternal and immutable law, given at all times and to all nations."[74] And at still other times, he described it in more immanent terms, saying that the natural law was best perceived through our instincts and faculty of moral sense by which good and bad immediately registered for us as pain and pleasure.[75] And occasionally he knit together the theological, transcendent, and immanent qualities of the natural law, when he observed that "Order, proportion, and fitness pervade the universe. Around us, we see; within us, we feel; above us we admire a rule, from which a deviation cannot, or should not, or will not be made."[76] However philosophically construed, natural law served for Wilson as the ultimate touchstone for moral guidance.

It also served as the touchstone for the laws passed by legislatures as well. For the same body of principles that applied to individuals applied equally to political societies. As addressed to individuals, they were commonly known as "natural law." As addressed to political societies, they could be known as the "law of nations."[77] Either way, they specified a body of principles that, though not legally

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[74] Wilson, *supra* note 15, at 523. For an account that highlights the influence of classical political thought in general, and Cicero in particular, *see* Richard Gummere, *Classical Precedents in the Writings of James Wilson*, 32 Colonial Soc'y Mass: Transactions 525 (1937). For an account that highlights the Aristotelian dimensions of Wilson's thought, *see* Mary T. Delahanty, The Integralist Philosophy of James Wilson (1969) (arguing that Wilson was "carrying forward and making applicable the traditional political concepts, concepts which have their origin in the writings of Aristotle. For to know the philosophy of Aristotle is to understand the thought of James Wilson.") *See also* George Carey, who concluded that Wilson's belief in a "higher law from which rights are derived – a higher law and rights which are not the product of convention or 'created' through agreements or contract" suggested that his "basic premises, positions, and concerns... are essentially those which characterize classical political thought." George Carey, *James Wilson's Political Thought and the Constitutional Convention*, 17 Pol. Sci. Reviewer 49, 58 (1987).

[75] Wilson, *supra* note 15, at 520. For an account that highlights the influence of decidedly modern intellectual influences on Wilson's theory of natural law, *see* Thomas Pangle, who observed that "despite his repeated invocations of 'the judicious Hooker,' as well as other spokesmen for the Thomistic or Stoic traditions, Wilson's conception of the natural law proves to differ fundamentally from that of ancient and medieval rationalists." Thomas L. Pangle, The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke, 122 (1988). *See also* James R. Zink, who observed that "In contrast to the natural law tradition, Wilson's view of political life is grounded in an account of the origins of politics, much like those of Hobbes and Locke before him… he consistently presents a largely modern political teaching in which the security of individual natural rights provides the operative political standard." James R. Zink, *The Language of Liberty and Law: James Wilson on America's Written Constitution*, 103 Am. Pol. Sci. Rev. 442, 443 (2009).

[76] *Id.* at 464. Daniel Robinson's suggestion that Wilson's understanding of natural law was a "Christianized version of Cicero's presuppositions" seems promising. Daniel N. Robinson, *Do the People of the United States form a nation? James Wilson's Theory of Rights*, 8 Int'l J. Const. L. 287, 288 (2010).

[77] For the classical provenance of this argument, *see* Gummere, *supra* note 74, at 532-33, who observed that "The Law of Nature, with its consequent development into the Law of Nations… harks back to Aristotle, the Stoics, Cicero, Seneca, and Ulpian.

binding, were morally binding on individuals and states alike. As morally binding, they identified in general terms what people and states should do. "The laws of morality are equally strict with regard to societies, as to the individuals of whom the society are composed."[78] Or as he also put it, "the law of nations, properly so called, is the law of nature applied to states and sovereigns, obligatory upon them in the same manner, and for the same reasons, as the law of nature is obligatory upon individuals. Universal, indispensable, and unchangeable is the obligation of both."[79]

The law of nations imposes duties upon states of two kinds. The first kind included "duties which a nation owes itself" while the second included "duties which it owes to others."[80] Ordinarily, when scholars and politicians considered the laws of nations, they were inclined to think only of the second category and ignore the first. States might have duties towards one another, especially in light of treaties, this thinking went, but no such obligations to themselves. But just as the natural law imposed upon individuals important duties towards themselves, so also did it impose upon states responsibilities to themselves.

Wilson then enumerated a stunning list of duties that states owed themselves.[81] The first duty a state had was, in its ongoing existential struggle for survival, to preserve itself against dissolution and to protect its members from external attack. Next, it had the duty to ensure its freedom, by forming a strong and viable political and legal structure that was capable of self-correction and self-improvement through an amendment process. Connected with the duty to ensure its freedom was the duty of self-knowledge and the duty to guide itself according to the "genius and manner of the people." States also had the duty to burnish their reputations through the pursuit of honest fame, encouragement of true patriotism, and the observation of strict justice with neighbors and, of particular relevance for the Americans, former inhabitants of the land. States were also charged with the all-around duty of "self-improvement," and "perfection," by which Wilson meant the increase of its numbers through immigration and marriage and the improvement of the minds and character of citizens. Finally, the state had the duty to promote the happiness of its

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78 *Id.* at 532. For a discussion of how Wilson's understanding of the law of nations departed from Grotius's view that the law of nations obliged only those who consented to it, *see* Eduardo Velasquez, *Rethinking America's Modernity: Natural Law, Natural Rights and the Character of James Wilson's Liberal Republicanism,* 29 Polity 193, 205-06 (1996).

79 Wilson, *supra* note 15, at 529.

80 *Id.* at 533, 540.

81 Ralph Rossum seems to have curiously overlooked this critical dimension of Wilson's thought, leading him to conclude that Wilson evaluated governments only on the basis of whether they were sufficiently democratic, and not on the basis of whether they created good policies. As he put it, "The direct political question, 'Is this law or government decent, good, or useful?' is obscured or forgotten in Wilson's preoccupation with the question, 'Is this law or government truly representative, that is, has it in some sense received the consent of the people?' Wilson thus replaced the question of goodness with the question of legitimacy… He subordinated the quality of the policy to the quantity and immediacy of consent it received." Ralph Rossum, *James Wilson and the 'Pyramid of Government:' The Federal Republic*, 6 Pol. Sci. Reviewer 113, 125 (1976). As his list of duties that states owed to their citizens illustrates though, Wilson was at least as concerned with the substance of government policy as he was with the democratic procedures by which it acted.

citizens, which above all required the promotion of education of the young and the promotion of "the arts, sciences, philosophy, virtue, and religion."[82]

While Wilson's list of duties that states owed to themselves was extensive, his list of duties that states owed each other was at least as impressive. First, states were obligated to keep their promises and "preserve inviolably their treaties and engagements" (*pacta sunt servanda*)[83] They were also obligated to draft treaties that were clear and crafted and interpreted in good faith (*bona fides*). Beyond the observation of voluntary contracts, states also had broader obligations to one another. Nations were forbidden to do injustice to one another. In other words, they were forbidden to do anything that would diminish the happiness and perfection of another state, such as exciting disturbances within it, depriving it of natural advantages, dishonoring its reputation, or fomenting the hatred of its enemies. It was this requirement of the law of nations that Wilson invoked in his jury instructions in *Henfield's Case*, a case in which a U.S. citizen had seized a French ship in violation of the Neutrality Proclamation, when he said that U.S. citizens were bound to keep the peace between nations with whom the United States was at peace.[84] Beyond this, nations were under an obligation to do positive good to one another. They were obliged, for instance, to give one another (when asked and when it was appropriate in light of other more pressing responsibilities) what was necessary for their preservation and even their perfection. They were even under an obligation to love one another. By the device of "moral abstraction," nations could (and should) promote the enlarged and elevated virtue of extending benevolence beyond the sphere of one's own small circle to include, for instance, "the commonwealth of Pennsylvania, the empire of the United States, the civilized and commercial part of the world, the inhabitants of the whole earth."[85] Thus, if states would listen to the laws of nations, too often drowned out in commotion, they would heed the fact that "mankind are all brothers"[86] and would act accordingly on the world stage.

### *B. Supplying the "Keystone": Wilson's Defense of a Strong Federal Government*

If states were obligated to preserve themselves, ensure the just treatment of all its citizens while promoting their happiness and welfare, avoid disintegration, overcome weakness and inconvenience, burnish its reputation among other states, honor its obligations and treaties with nations, and even occasionally act benevolently towards foreign nations, then the behavior of the United States under the Articles of Confederation amounted to a violation of the laws of nature. For as a freestanding nation since it declared its independence in 1776, America was under the obligations of the law of nations. As he put it as a Justice of the Supreme Court

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82 Wilson, *supra* note 15, at 539.
83 *Id.* at 547.
84 Henfield's Case, 11 F. Cas. 1099 (C.C.D. Pa. 1793), in Wilson, *supra* note 15, at 368.
85 *Id.* at 544.
86 *Id.* at 545. "At last, however, the voice of nature, intelligible and persuasive, has been heard by nations that are civilized; at last it is acknowledged that mankind are all brothers: the happy time is, we hope, approaching, when the acknowledgement will be substantiated by a uniform corresponding conduct."

in 1796, "When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."[87] Wilson, unsurprisingly, was dismayed by the failure of state legislatures to meet their responsibilities and frustrated by the Confederation government's inability to raise funds and coerce the states into honoring their obligations.[88] Thus at several stages in his role as a delegate to the Constitutional Convention, Wilson proposed that the federal government enjoy numerous constitutional advantages over its predecessor, including particularly, 1) the necessary and proper clause, 2) a veto power held by the national legislature over state legislation, 3) the power to ban the importation and spread of slavery, and 4) a strong, unitary executive. Wilson's conviction that the laws of nations and principles of justice imposed extensive obligations upon states led him to become one of the more outspoken nationalists at the convention.

At the Federal Convention, Wilson played a key role in inserting, or in some cases at least attempting to insert, into the Constitution's text, sufficiently broad grants of power so that the new federal government under its new and improved Constitution could better carry out all the tasks that he believed the law of nations imposed on the young country. And those tasks were indeed considerable. "War, commerce, and revenue were the great objects of the Gen Government," he said at the Federal Convention.[89] But to accomplish what he called the "great national objects," the federal government needed considerable powers at home and abroad.[90] "If this government does not possess internal as well as external power, and that power for internal as well as external purposes, I apprehend that all that has hitherto been done must go for nothing. I apprehend a government that cannot answer for the purposes for which it was intended is not a government for this country."[91] The law of nations, in other words, prescribed to all nation's governments various tasks which it was of the very definitional essence of a nation to carry out. A fundamental inability to perform those tasks meant that the nation itself did not exist. At the Pennsylvania Ratifying Convention, Wilson put his finger on the existential dimensions of the thirteen states' dilemma in 1787.

> I stated, on a former occasion, one important advantage; by adopting this system, we become a *nation*; at present we are not one. Can we perform a single national act? Can we do any thing to procure us dignity,

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87 Ware v. Hylton., 3 U.S. 199, 281 (1796).

88 With respect to the state legislatures, he said that "We have seen the Legislatures in our own Country deprive the Citizen of Life, of Liberty & of Property. We have seen Laws of Attainder, Punishment and Confiscation." Cited in Akhil Amar, America's Constitution: A Biography, 109 (2006). And with respect to the failure of the Confederation Congress, he observed that "The great fault of the existing confederacy is its inactivity. It has never been a complaint ag^st^Cong^s^ that they governed overmuch. The complaint has been that they have governed too little. To remedy this defect we were sent here." Wilson, *supra* note 15, at 117. Six years later in Chisholm v. Georgia, Wilson observed, "To the purposes of public strength and felicity, that confederacy was totally inadequate. A requisition on the several States terminated its Legislative authority: Executive or Judicial authority it had none." Chisholm v. Georgia, 2 U.S. 419, 463 (1793). *See also*, Richard R. Beeman, Plain Honest Men, 51 (2009).

89 Wilson, *supra* note 15, at 146.

90 *Id.* at 281.

91 *Id.* at 256.

> or to preserve peace and tranquility? Can we relieve the distress of our citizens? Can we provide for their welfare or happiness? The powers of our government are mere sound. If we offer to treat with a nation, we receive this humiliating answer: 'You cannot, in propriety of language, make a treaty, because you have no power to execute it.'… Can we borrow money?... Can we raise an army? This system, sir, will make us a nation, and put it in the power of the Union to act as such. We shall be considered as such by every nation in the world. We shall regain the confidence of our citizens, and command the respect of others.[92]

As a delegate to the Federal Convention, one of Wilson's most notable efforts to give the federal government the power "to become a nation" was through the necessary and proper clause. Wilson was one of five members of the Committee of Detail that produced the first rough draft of the Constitution.[93] After it produced several drafts that only included specifically enumerated powers, such as the power to regulate commerce, coin money, etc., their final draft included the clause, "And to make all laws that shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested, by this constitution, in the government of the United States, or in any department or officer thereof."[94] Though no smoking gun proof exists for this attribution, historians have concluded that Wilson was "most likely" responsible for its inclusion.[95] And while it received hardly any commentary during the remainder of the Convention, Anti-Federalists would eventually focus upon it as one of the elastic clauses by which they feared Congress would expand its power.

Beyond empowering the federal government to carry out its various "great national objects," Wilson treated with equal importance the task of enabling the government to check the states from carrying out injustice and obstructing the more general, public welfare. Along with his Virginia colleague James Madison, he would propose that Congress be given the power to "negative" any law passed by the states that interfered with the federal system. Before any state law could take effect, it would need to survive the scrutiny of the federal Congress. While Congress could not directly pass any legislation for the states, it could prevent legislation that encroached upon the federal government or harmed the rights of individuals. Wilson was nearly as passionate in defense of this proposal as was Madison, who would later report to Jefferson that its absence from the Constitution was its principal defect. According to Wilson,

> We are now one nation of brethren. We must bury all local interests and distinctions… No sooner were the State Govts formed than their jealousy and ambition began to display themselves. Each endeavored to cut a

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92 *Id.* at 280-81.

93 *Id.* at 264. The other four were Nathaniel Gorham, Oliver Ellsworth, Edmund Randolph, and John Rutledge.

94 Wilson, *supra* note 15, at 131.

95 Beeman, *supra* note 88, at 274. For an extended discussion of the role Wilson played on the Convention's all-important Committee of Detail, and the role he may have played as a member in inserting other textual provisions such as "We the People," the Supremacy Clause, and the enumeration of activities forbidden to the states, *see* Ewald, *supra* note 5, at 983-93.

> slice from the common loaf, to add to its own morsel, till at length the confederation became frittered down to the impotent condition in which it now stands. Review the progress of the articles of Confederation thro' Congress & compare the first & last draught of it. To correct its vices is the business of this convention. One of its vices is the want of an effectual controul in the whole over its parts.[96]

This power was, for Wilson, essential to guarantee that the state governments would not exceed their powers and encroach upon the prerogatives of the federal government.

Madison would add that a second, equally compelling reason for the legislative veto was to prevent the states from encroaching upon the rights of their own citizens.[97] While Wilson himself did not mention this second reason at the Convention, he appeared to share this concern. Some scholars, however, have suggested that Wilson cared less than Madison about the dangers of "majority tyranny." Jennifer Nedelsky and James Read, for example, have independently made the suggestion that Wilson, unlike Madison, was not as concerned with the protection of individual liberties against majority tyranny, arguing that "one looks in vain in Wilson's writings for any recognition of the problem of reconciling civil liberties with the principle of popular sovereignty… he seems not to have believed that majority rule would pose a serious threat to individual rights."[98] But while it is true that Wilson did not write as thematically on this issue as Madison, his various utterances on the topic should at least mitigate Nedelsky and Read's concern. For starters, Wilson frequently observed that the protection of individual rights was a leading purpose of all government which required constant vigilance. In his 1774 pamphlet, Wilson called the protection of individual rights the "primary end" of government.[99] And in his Lectures on Law, he wrote that "Government, in my humble opinion, should be formed to secure and enlarge the exercise of the natural rights of its members; and every government, which has not this in view, as its principal object, is not a government of the legitimate kind."[100] And when government, acting on behalf of the majority, acted in ways that directly violated the rights of even a single individual, "it is tyranny; it is not government…This,

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[96] Wilson, *supra* note 15, at 92-93.

[97] James Madison to Thomas Jefferson, October 24, 1787. "A constitutional negative on the laws of the States seems equally necessary to secure individuals agst. encroachments on their rights. The mutability of the laws of the States is found to be a serious evil. The injustice of them has been so frequent and so flagrant as to alarm the most stedfast friends of Republicanism. I am persuaded I do not err in saying that the evils issuing from these sources contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects. A reform therefore which does not make provision for private rights, must be materially defective."

[98] James Read, *Wilson and the Idea of Popular Sovereignty, in* James Read, Power Versus Liberty: Madison, Hamilton, Wilson, and Jefferson, 113-114 (2000). *See also* Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism, 96-140 (1990).

[99] Wilson, *supra* note 15, at 15.

[100] *Id.* at 1061.

I repeat it, is tyranny: and tyranny, though it may be more formidable and more oppressive, is neither less odious nor less unjust—is neither less dishonourable to the character of one party, nor less hostile to the rights of the other, because it is proudly prefaced by the epithet—legislative."[101] The brute fact of majority will was not enough to make policy rightful. In such cases when the majority of society oppressed even a single individual, he pointed out, "The citizen has rights as well as duties… On one side, indeed, there stands a single individual: on the other side, perhaps, there stand millions: but right is weighed by principle; it is not estimated by numbers."[102] Wilson hoped (perhaps beyond measure) that in the ordinary course, popular will would not often conflict with individual right.[103] But as a legal theorist, he acknowledged that when it did, the claims of individual right outweighed the mere interests of even millions of members of the community, and to sacrifice the former to the latter constituted what he called "tyranny."

The legislative veto was thus in Wilson's mind so essential to preserve the strength of the new federal government that he called it "the key-stone wanted to compleat the wide arch of Government we are raising."[104] He explained: "the firmness of judges is not of itself sufficient. Something further is requisite. It will be better to prevent the passage of an improper law, than to declare it void when passed."[105] Thus while federal judges had the power to invalidate unconstitutional state laws in the course of resolving a particular case or controversy, this alone was an insufficient guarantee of the supremacy of the federal government and the individual rights of citizens within the states. What was above all required, in Wilson's mind, was to take the radical step of giving the federal government a preemptive veto on all proposed state legislation, thereby supplying the "keystone" for a strong and truly national political system.

To Wilson and Madison's disappointment, they could not persuade their colleagues of the appropriateness of a legislative veto. But in lieu of it, Wilson fought hard for the inclusion of specific prohibitions on state power, often in the name of securing elementary principles of justice prescribed by the law of nations. He likely helped add the phrase "anything in the Constitution or laws of any State to the contrary notwithstanding" to the Supremacy Clause. Along with Madison he helped ensure that Congress would have the power to create inferior tribunals below the Supreme Court, since the courts of the federal government, he said, were more likely than those of the states to decide with justice and impartiality, especially in cases dealing with citizens from different states or foreign countries.[106] As a delegate to the Federal Convention he helped to include the various prohibitions on the state governments in Article I, Section 9. And as a delegate to the Pennsylvania Ratifying Convention, he sang their praises more highly than perhaps any other participant in the ratifying debates, saying that "If only the following lines were inserted in this Constitution, I think it would be worth our adoption: 'No state shall

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[101] *Id.* at 1044.

[102] *Id.* at 1043. Quoted in Hall, 146.

[103] *Id.* "Fortunate, however, it is, that in a government formed wisely and administered impartially, this unavoidable competition can seldom take place, at least in any very great degree."

[104] *Id.* at 154.

[105] *Id.*

[106] *Id.* at 248.

hereafter emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts."[107]

And perhaps most poignantly, he observed that on the issue of slavery, the most glaring and serious instance of a violation of individual rights and what he called "the great principles of humanity" by the state governments at the time, the federal Congress was better situated to handle the matter justly than the individual state governments. Giving Congress the power to ban the importation of slavery after 1808 and tax any imported slaves up until then to control the presence of slavery in any new states would help by "laying the foundation for banishing slavery out of this country."[108] While he said that he wished that the ban could start sooner, the ban on the importation of slavery, "notwithstanding the disposition of any state to the contrary," "presents us with the pleasing prospect, that the rights of mankind will be acknowledged and established throughout the union."[109] "If there was no other lovely feature in the constitution but this one, it would diffuse a beauty over its whole countenance. Yet the lapse of a few years, and congress will have a power to exterminate slavery from within our borders."[110] Such an outcome would be a "delightful prospect" and "expand the breast of a benevolent and philanthropic European" like Jacques Necker, a French writer whose explanation of the contradiction between slavery and the respect for human rights Wilson quoted at the Pennsylvania Convention:

> In short, we pride ourselves on the superiority of man, and it is with reason that we discover this superiority, in the wonderful and mysterious unfolding of the intellectual faculties; and yet the trifling difference in the hair of the head, or in the color of the epidermis, is sufficient to change our respect into contempt, and to engage us to place beings like ourselves, in the rank of those animals devoid of reason, whom we subject to the yoke; that we may make use of their strength, and of their instinct at command.[111]

The institutional remedy for this practice, Wilson hoped, was a Congress empowered to slowly cut off both the supply of slavery via importation and the spread of slavery into the territories. By giving Congress final say over slavery in the territories and the admission of new states, precisely because it would be "under *the control* of Congress," and not the states, the new Constitution ensured, in his judgment, that "slaves will never be introduced amongst them."[112] And by giving Congress the power to tax and prohibit the importation of slaves, Wilson hoped the new Constitution would help put this practice on the course of ultimate extinction.

The final way in which Wilson advanced the cause of a strong national government was through his proposal that there be one, single, and powerful executive. Wilson, as we have seen, stood out for his proposal that the president should be elected directly by the people. He also was the first at the convention to

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[107] *Id.* at 242.
[108] *Id.* at 210.
[109] *Id.* at 241.
[110] *Id.*
[111] *Id.*
[112] *Id.* at 210.

propose that the president in fact be just a single individual, making this motion on the first day of the convention's deliberations on the executive, and actively pushing forward the argument on the grounds that this would give "most energy, dispatch, and responsibility to the office."[113] While a bicameral legislature rooted as directly as possible in the people would produce the laws for society, all of this would be "nugatory and abortive" unless "the laws are vigorously and steadily executed."[114] Indeed it was not the absence of laws but the "weak and irregular execution" of laws that had prompted the calling of a general convention to remedy the Articles of Confederation.[115] And since their *execution* was what brought the democratically enacted laws "home to the fortunes, and farms, and houses, and business of the people," it was best to vest the executive branch in a single individual who could act with "promptitude, activity, firmness, consistency, and energy."[116] Indeed, Wilson went so far as to propose that the president have an unqualified veto of legislation that could not be overridden by Congress[117] and, once he accepted the Convention's decision that the president's veto could be overridden by a 2/3 vote of Congress, he observed in the Pennsylvania ratifying convention that Presidential veto messages could still have a long term effect, noting that "even if his objections do not prevent its passing into a law, they will not be useless; they will be kept, together with the law, and, in the archives of Congress, will be valuable and practical materials, to form the minds of posterity for legislation."[118] Wilson also proposed that the president enjoy the exclusive power to appoint judges and ambassadors without the further requirement of Senate approval.[119] With regard to the power of appointment, he observed that "A principal reason for unity in the Executive was that officers might be appointed by a single responsible person"[120] and then later added that "Good laws are of no effect without a good Executive; and there can be no good executive without a responsible appointment of officers to execute. Responsibility is in a manner destroyed by such an agency of the Senate."[121] Elsewhere in his *Lectures on Law*, he expanded upon the importance of a powerful executive, noting that all governments needed to have equal mixtures of goodness, wisdom, and power.[122] The democratic elements of government, which supply "publick virtue and purity of intention," laid the foundation or cornerstone of government. But the monarchical elements of government, which supply "energy and vigour," were needed to prevent the improvidence and weak execution too often associated with democracies. By being the directly elected "man of the people," while also being singular and strong, Wilson's proposal for an executive who would "hold the helm,"

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[113] *Id.* at 83. *See also* Robert E. DiClerico, *James Wilson's Presidency*, 17 Presidential Stud. Q. 301, 303 (1987).

[114] Wilson, *supra* note 15, at 698.

[115] *Id.*

[116] *Id.*

[117] Wilson, *supra* note 15, at 88.

[118] Wilson, *supra note* 15, at 206. Quoted in Daniel J. McCarthy, *James Wilson and the Creation of the Presidency*, 17 Presidential. Stud. Q. 689, 692 (1987).

[119] *Id.* at 89. For a fuller discussion of Wilson's thoughts on the veto and appointment powers of the President, *see* DiClerico, *supra* note 113, at 311-14 and Daniel J. McCarthy, *James Wilson and the Creation of the Presidency*, 17 Presidential. Stud. Q. 689 (1987).

[120] *Id.*

[121] *Id.* at 164.

[122] *Id.* at 696.

attempted to bring together both democratic and monarchic elements. And in so doing, "on the basis of goodness, we erect the pillars of wisdom and strength."[123]

Through his advocacy on behalf of a federal government that could carry out great national objects, his proposal of the necessary and proper clause, legislative veto over state laws, various specific checks upon state power, his embrace of Congress's power to stop the importation and spread of slavery, and a powerful, unitary executive, Wilson advanced a vision of the federal government that would be powerful, vigorous, and supreme. While grounded upon the "cornerstone" of democracy, it possessed aristocratic and monarchical elements that were anathema to many Anti-Federalists and, at least in the case of the legislative veto, the supposed "keystone" of his system, went beyond what even many Federalists were prepared to accept.

And just as his radicalism on behalf of democratic values could best be seen as an extension of his philosophic views on consent, so also can his strong nationalism be understood as a function of his philosophic views on the natural law and the laws of nations. To the degree that the law of nations obligated states to preserve themselves from dissolution and maintain the freedom of its citizens, the legislative veto and the specific checks upon state power were crafted with precisely these aims in mind. Since "general principles of humanity" revealed the wickedness of slavery, Congress' power to ban its importation and spread into the territories was a key institutional advantage over states that might wish to maintain the practice. To the degree that the law of nations obligated states to promote the good faith observation of all its treaties and maintain friendly and even benevolent relations with other governments, a strong and responsible executive authority was particularly required. Finally, to the extent that the law of nations imposed extensive obligations upon states, it also gave states the power necessary to fulfill those obligations. "The law of nature prescribes not impossibilities: it imposes not an obligation, without giving a right to the necessary means of fulfilling it."[124] The necessary and proper clause, in Wilson's mind at least, was the constitutional response to this philosophical requirement. In sum, just as his application of the revolution principle led Wilson to advocate a direct connection between the new federal government and the people themselves, that enhanced the federal government's democratic quotient while circumventing the states and enhancing the independence and prestige of the federal government, his recourse to the laws of nations led him to advocate a government strong enough to carry out the extensive obligations all nations bore and powerful enough to check the state governments and defend the prerogatives of what he often termed the whole over its parts.

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[123] *Id.* at 712. Gordon Wood nicely summarized Wilson's understanding of the new American system as a "mixed or balanced democracy," based upon a "purely democratical" foundation while still enjoying the advantages offered by the other kinds of government. Gordon S. Wood, The Creation of the American Republic, 603-04 (1969).

[124] Wilson, *supra* note 15 at 536.

# IV. The Moral Sense, Civic Duties, and the "The Blessings of Liberty"

## *A. The French Prisoner and the Spider: Moral Sense and Sociability*

In his seventh lecture on law, Wilson told a story. There once was a French nobleman who, on account of some crime, had been imprisoned alone in an apartment. He had been kept there for some time, not allowed to interact with others, until he discovered the presence of a spider in his cell. Having longed for some kind of companionship, he was delighted by this discovery and took up an imaginary conversation with it for some time. The spider's very presence lifted his spirits. But eventually this interspecies friendship was discovered by the nobleman's keeper. The keeper then killed the spider, reducing the nobleman once again to absolute solitude. Years later once he had been released from his confinement, the nobleman would characterize this event, the killing of a little insect, as one of the greatest moments of distress in his life.[125]

For Wilson, human nature at its core was social and interpersonal. The moral sense, characterized by the luminaries of the Scottish Enlightenment like Thomas Reid and Frances Hutcheson and defended by Wilson, was that core faculty in individuals that made them invariably relational creatures connected as if by a chain to others. The moral sense provided the very intuitive starting points for our understandings of both our rights and our duties to others. The natural liberty intuited by Locke and the natural law articulated by Cicero were known, ultimately, only by virtue of this inborn and God-given capacity to sense and feel moral right and moral wrong. The modern insight of the revolution principle and the classical understanding of an immutable set of moral obligations both hinged ultimately upon this inborn, intuitive moral sense. "In short, if we had not the faculty of perceiving certain things in conduct to be right, and others to be wrong; and of perceiving our obligation to do what is right, and not to do what is wrong; we should not be moral and accountable beings."[126] The moral sense not only teaches right from wrong in some abstract sense, but does so by making individuals capable of taking in and viscerally feeling the very same things others feel. The very expressions on another's face, for instance, flies like an "electric shock" from one to another. Infants before they can reason can quickly intuit the meaning of facial gestures and can make them themselves, communicating invariably and precisely the feelings which they themselves experience. Humans are, in other words, internally constituted for, and radically in need of, society.

The academic label for this philosophical position when Wilson wrote was the "social system," defended particularly by the members of the Scottish Enlightenment, and formulated in part in response to other philosophers in England and on the continent who articulated what was called the "selfish system." Defenders of the selfish system, like Mandeville, rejected the claim that there was some sort of secret chain uniting individuals to one another and advanced instead the view that human social behavior was based purely on self-interest.[127]

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[125] *Id.* at 622.

[126] *Id.* at 512.

[127] Arnauld B. Leavelle, *James Wilson and the Relation of the Scottish Metaphysics to American Political Thought*, 57 Pol. Sci. Q. 394, 396 (1942).

Wilson, it should be said, did not so much refute the selfish system in his lecture on law as he did prove its basic point that humans were considerably better off as active and engaged members of society than they were apart.[128] In one particularly evocative passage, Wilson says

> In all our pictures of happiness, which at certain gay and disengaged moments, appear in soft and alluring colours, to our fancy, does not a partner of our bliss always occupy a conspicuous place? When, on the other hand, phantoms of misery haunt our disturbed imaginations, do not solitary wanderings frequently form a principal part of the gloomy scene?[129]

Our necessities were better attained through social collaboration than solitary efforts. Even the fully grown and healthy would have extreme difficulty producing all the many "arts of life" that contribute to comfortable existence. Moreover, even if our necessities could somehow be produced by a lone Robinson Crusoe, a solitary existence would lack affection, social joy, and the intellectual pursuits. Although perhaps comfortable, the solitary figure cut off from society would be inclined to "sour discontentment, sullen melancholy, listless languor."[130] Quoting Cicero, Wilson observed that "human nature is so constituted, as to be incapable of solitary satisfactions. Man, like those plants which are formed to embrace others, is led, by an instinctive impulse, to recline on those of his own kind."[131] Society, in other words, provided not only our necessities but our very happiness.

Continuing the horticultural theme in Cicero's meditation, Wilson then quoted Alexander Pope,

> Man, like the gen'rous vine, supported lives;
> The strength he gains is from th' embrace he gives.[132]

Though initially counterintuitive, Wilson stressed that society did not simply and directly give us our necessities and happiness, but made this possible by providing opportunities for service to others. In the domestic sphere, "We see those persons possess the greatest share of happiness, who have about them many objects of love and endearment."[133] In the marketplace, acts of beneficence such as giving favors, offering professional advice, or pouring into others our knowledge refresh the spirit and bring greater satisfaction than the mere hording of money and wisdom. In short, "he who acts on such principles, and is governed by such affections, as sever him from the common good and publick interest, works, in reality, towards his own misery: while he, on the other hand, who operates for the good of the whole, as is by

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[128] For the intriguing suggestion that Wilson's attempt to reconcile self-interest with sympathy for others owed more to Adam Smith than Thomas Reid, *see* Roderick M. Hills, Jr. *The Reconciliation of Law and Liberty in James Wilson*, 12 Harv. J. L. & Pub. Pol. 889, 916-220 (1989).

[129] Wilson, *supra* note 15, at 622.

[130] *Id.* at 631.

[131] *Id.* at 632. Quoting Cicero from *De Amicitia*, 23.

[132] *Id.* Quoting Pope's Essays on Man, Ep. 3 v. 3II.

[133] *Id.*

nature and by nature's God appointed him, pursues, in truth, and at the same time, his own felicity. Regulated by this standard, extensive, unerring, and sublime, self-love and social are the same."[134]

But while humans were better off when integrated in a thick web of community life, Wilson did not believe that they would consistently seek that out, or that even if they did, the results would necessarily always be positive. Some scholars have faulted Wilson for overconfidence in the unfailing goodness of human nature and the moral sense. Rossum, for example, argued that Wilson rather naively subscribed to the view that all people were "naturally social, veracious, liberal, and benevolent," and that therefore "[s]uch men would never tyrannize each other," leading Wilson, unlike the more sensible Madison, to be inadequately concerned about checking factional impulses through wise institutional design.[135] But Wilson was much less sanguine about human nature than Rossum makes out. As Wilson put it in his 1774 pamphlet, "A very little share of experience in the world – a very little degree of knowledge in the history of men, will sufficiently convince us, that a regard for justice is by no means the ruling principle in human nature."[136] In his State House Yard Speech on October 6, 1787, he put it even more plainly, observing that "It is the nature of man to pursue his own interest, in preference to the public good."[137] But he did believe that humans *ought* to seek out rich community life to correct and overcome temptations to overriding and self-destructive self-love. "Self-love and social are the same," for Wilson, but only when conduct is "regulated by this standard" of generosity towards and regard for others.

### *B. Forging America's "National Character": "What are Laws without Manners?"*

The impressive new federal government that Wilson hoped to establish, grounded in the cornerstone of democratic consent, and rising up to the keystone of a powerful new union, itself ultimately rested upon the manners and mores of its citizens. The liberty of the citizens to choose their representatives and make their laws guaranteed a free republic that would not descend into oppression. The obligations imposed by the natural law and the vigor of a strong national government guaranteed that freedom would not devolve into license and anarchy. But without the love of liberty and law by the new republic's citizens, neither the cornerstone (democratic consent) nor the keystone (a strong, national government) would be fully secure. Early in the contest over ratification of the Constitution in Pennsylvania, Wilson stressed how contingent the seemingly impressive edifice of the new Constitution was upon the character of the people. For all its philosophical legitimacy, the "revolution principle" alone would not guarantee that the "blessings of liberty" would be secured to ourselves and our posterity, as the Constitution's Preamble promised. Indeed, it was precisely because the Constitution attempted to institutionalize the "revolution principle" that the character of the people was the indispensable prerequisite for political well-being. As Wilson put it,

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[134] *Id.* at 634.
[135] Rossum, *supra* note 81, at 124-25. *See also* Witt, at 59-70.
[136] Wilson, *supra* note 15, at 17-8.
[137] *Id.* at 176.

> Oft have I viewed with silent pleasure and admiration the force and prevalence, through the United States, of this principle—that the supreme power resides in the people; and that they never part with it. It may be called the *panacea* in politicks. There can be no disorder in the community but may here receive a radical cure. If the errour be in the legislature, it may be corrected by the constitution; if in the constitution, it may be corrected by the people. There is a remedy, therefore, for every distemper in government, if the people are not wanting to themselves. For a people wanting to themselves, there is no remedy: from their power, as we have seen, there is no appeal: to their errour, there is no superiour principle of correction.[138]

Just two weeks after the Constitution was officially ratified, Wilson gave a Fourth of July Oration on the Adoption of the Constitution, in which he observed that all the exciting opportunities created by the new federal government would be for naught if the citizens would not be actively engaged in its governance.

> But while we cherish the delightful emotion, let us remember those things, which are requisite to give it permanence and stability. Shall we lie supine, and look in listless languor, for those blessings and enjoyments, to which exertion is inseparably attached? If we would be happy, we must be active. The constitution and our manners must mutually support and be supported.[139]

Thus over forty-five years before Tocqueville would observe the ways in which the American political system depended on a set of peculiar civic mores and character traits for its well-being, Wilson would make this same observation just weeks after the Constitution's ratification.

And that civic character, in turn, depended greatly upon civic knowledge. Before liberty and law could be loved, Wilson said, they needed to be understood.[140] "What are laws without manners?" Wilson asked. Answering his own question with another question, he asked, "How can manners be formed, but by a proper education?"[141] Consequently, in his *Lectures on Law*, Wilson said that while in the 1780's he had spent his energy "forming a system of government," he now planned in the 1790's to spend his energy "forming a system of education" that would undergird the new government.[142]

Wilson's educational program was designed to shape citizens who would play an active and informed role in government. For while securing the rights of

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[138] *Id.* at 191-92.

[139] *Id.* at 290.

[140] *Id.* at 435.

[141] *Id.* at 451.

[142] The connection between self-interest and service to others in Wilson's mind is perhaps nowhere better illustrated than in his full description of his own motivations. "I have been zealous - I hope I have not been altogether unsuccessful - in contributing the best of my endeavours towards forming a system of government; I shall rise in importance, if I can be equally successful - I will not be less zealous - in contributing the best of my endeavours towards forming a system of education likewise, in the United States. I shall rise in importance, because I shall rise in usefulness." *Id.* at 450.

citizens had been an understandable and essential preoccupation among American politicians from the time of the Revolution to the formation of the new Constitution, Wilson insisted more clearly than any other figure from the founding generation that with every right came a corresponding civic duty.

> I express it now, as I have always expressed it heretofore, with a far other and higher aim - with an aim to excite the people to acquire, by vigorous and manly exercise, a degree of strength sufficient to support the weighty burthen which is laid upon them - with an aim to convince them, that *their duties rise in strict proportion to their rights*; and that few are able to trace or to estimate the great danger, in a free government, when the rights of the people are unexercised, and the still greater danger, when the rights of the people are ill exercised.[143] (emphasis added)

American citizens had their rights, and they knew them by heart. The key was to teach them how to best use them as knowledgeable and engaged citizens, whether as voters, jurors, or even elected officials, so that their liberties would truly be the "blessings" referred to in the Constitution.

Citizens were thus expected to be engaged in the "business of the commonwealth." Wilson' vision was not of a society in which merely passive spectators claimed their rights and freedoms to be left alone. Rather, he expected citizens to devote as much of their time and energy as they could spare to active, informed, and public citizenship. "The publick duties and the publick rights of every citizen of the United States loudly demand from him all the time, which he can prudently spare, and all the means which he can prudently employ, in order to learn that part, which it is incumbent on him to act."[144] As he had said in his Fourth of July oration, the commonwealth would be better off from such engaged participation. "For believe me, no government, even the best, can be happily administered by ignorant or vicious men."[145] And as he had laid out in his chapter "Of Man, as a Member of Society," citizens themselves would be better off by throwing their hats into the civic ring, for as Pope had said, "the strength he gains is from the embrace he gives."

This view of citizenship was far more redolent of the Jeffersonian and Anti-Federalist vision, which emphasized the importance of civic virtue and the subordination of individual interests to the common good.[146] It contrasted, for the most part, with the Federalist vision, which tended to deemphasize the importance of civic virtue, took men as they were, and relied instead upon the corrective devices of wisely designed institutions that would channel self-interest and check ambition with ambition.[147] Wilson thus sounded less like his Federalist colleague James

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[143] *Id.* at 436.
[144] *Id.* at 436.
[145] *Id.* at 292.
[146] *See generally* Jean Yarbrough, American Virtues: Thomas Jefferson and the Character of a Free People (1998) and Hebert Storing, What the Anti-Federalists Were For 19 (1981).
[147] The *locus classicus* of this position may be found in Federalist 51. *See also* Martin Diamond, *Ethics and Politics: The American Way, in* The Moral Foundations of the American Republic (Robert H. Horwitz ed., 1986). In a similar vein, Samuel Beer

Madison, who argued that the "policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public,"[148] and more like the Anti-Federalist Melancton Smith, who said that "Government operates upon the spirit of the people, as well as the spirit of the people operates upon it – and if they are not conformable to each other, the one or the other will prevail… Our duty is to frame a government friendly to liberty and the rights of mankind, which will tend to cherish and cultivate a love of liberty among our citizens."[149] While the Anti-Federalists, like Wilson, wanted the motives of civic engagement to predominate among citizens, the Federalists were more content to see rational self-interest prevail.

Wilson's concern for civic engagement, however, is in one key respect decidedly different from the kind of engagement envisioned by Jefferson and the Anti-Federalists. The Anti-Federalists believed that civic virtue was best realized in small, economically and culturally homogenous republics on the scale of local townships and states and not on the level of the nation.[150] Anti-Federalists promoted robust programs of education, but kept these "seminaries of useful learning" at the local level.[151] Jefferson too proposed that civic education would thrive primarily on the smaller scale of "ward republics."[152] Citizens were thus to love their liberty and participate in politics, but the focus of their attention would ideally be on the local and state levels.

Wilson, by contrast, promoted civic education on the national level. Wilson's preference for civic nationalism, it seems, was a function of his views on moral psychology.[153] While Wilson celebrated the moral sense and the capacity humans had for reaching out beyond themselves and becoming parts of larger wholes, he also observed that this capacity was a double-edged sword. On the one hand, it could lead individuals out of the cold, lonely, solipsistic world of self-concern. But on the other hand, it could lead individuals into over-identification with relatively small, cliquish, factional, dogmatic, and self-righteous groups that held themselves out, for all intents and purposes, as the whole world for their individual members.

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observed that Wilson differed from the authors of the *Federalist Papers* by arguing that citizens would become bonded to the national government not just because the federal government would provide more efficient administration, as Madison and Hamilton suggested, but because through their participation in the national government, they would develop an ennobling affective connection with the new extended republic. "As a theory of public affections, Wilson's view differed from that of *The Federalist* primarily by holding that the social bond in a republic came not so much from the benefits of government as from the process of self-government. The national republic would therefore have a stronger hold on the emotions of its citizens than would state governments not only because of the results of 'better administration' but also and chiefly because of the wider focus of participation." Samuel Beer, To Make a Nation: The Rediscovery of American Federalism 363 (1993).

148 The Federalist No. 51 (James Madison).

149 Herbert Storing, What the Anti-Federalists Were For 19 (1981).

150 *Id.* at 20.

151 *Id.* at 21.

152 *See* Thomas Jefferson to Samuel Kercheval, July 12, 1816.

153 Although as James Bryce pointed out, the fact that Wilson was himself an immigrant from Scotland, and had not developed deep, personal ties with any particular state, likely also contributed to his tendency to prefer the national to a state-based view. James Bryce, *James Wilson: An Appreciation*, 60 Pa. Mag. Hist & Biography. 358, 360 (1936).

"With regard to the sentiments of the people," it is "difficult to know precisely what they are. Those of the particular circle in which one moved, were commonly mistaken for the general voice."[154] Like Madison on this score, Wilson worried about the natural propensity to faction at the local level, observing that "Faction itself is nothing else than a warm but inconsiderate ebullition of our social propensities."[155] Just as a republic could not long thrive if all citizens tucked themselves away into their private domestic spheres, it could also not thrive if citizens associated themselves exclusively with various small, tribal teams that rarely overlapped and viewed each other with mutual hostility and suspicion.

Consequently, Wilson argued that the faculty of the moral sense needed to be gently corrected on this score through an education that promoted primary identification with the nation as a whole, and not the states. "This spirit [of esprit du corps] should not be extinguished: but in all governments, it is of vast moment – in confederated governments, it is of indispensable necessity – that it should be regulated, guided, and controlled."[156] In particular, it should be regulated and guided in such a way as to encourage an "expanded patriotism" that prevented an "excess of concentricity" by channeling the social passions beyond the "narrow and contracted sphere" of localities and states towards a devotion to the larger good of the whole country.[157] This expanded patriotism, Wilson said, "will preserve inviolate the connection of interest between the whole and all its parts, and the connection of affection as well as interest between all the several parts."[158] And eventually it would form what he called at the Pennsylvania ratifying convention, America's "national character," using that phrase in a way not to be found anywhere in the *Federalist Papers* or the writings of prominent Anti-Federalists.

> As we shall become a nation, I trust that we shall also form a national character, and that this character will be adapted to the principles and genius of our system of government: as yet we possess none; our language, manners, customs, habits, and dress, depend too much upon those of other countries. Every nation, in these respects, should possess originality; there are not, on any part of the globe, finer qualities for forming a national character, than those possessed by the children of America. Activity, perseverance, industry, laudable emulation, docility in acquiring information, firmness in adversity, and patience and magnanimity under the greatest hardships;—from these materials, what a respectable national character may be raised![159]

Thus while Jefferson and Anti-Federalists like Melancton Smith argued for a smaller republic of civic virtue and Federalists like Hamilton and Madison argued for an extended sphere of enlightened self-interest, Wilson split the difference

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154 Wilson, *supra* note 15, at 96.
155 *Id.* at 668.
156 *Id.* at 669.
157 *Id.* at 668-71. For the ways in which Wilson's defense of an "expanded patriotism" reflected concerns about the dangers of parochialism similar to those of the Scottish moral sense thinkers upon whom he drew, *see* McCarthy, *supra* note 119, at 694.
158 *Id.* at 671.
159 *Id.* at 281.

between these positions, arguing for the self-conscious formation of a "national character" and an extended sphere of republican engagement and civic activity.[160]

## V. Conclusion: James Wilson: The Great Synthesizer

James Wilson was, in more ways than one, a man of contradictions. He was an immigrant who campaigned to forge an organic American national culture alongside a generation of American revolutionaries almost entirely born on American soil. He was educated in the Roman civil law, and breathed in its philosophical, literary, and scholastic dimensions, and yet became one of the earliest exponents and celebrators of America's common law tradition. He had a reputation as a high-minded aristocrat, who adorned himself in opulent attire, wore his spectacles in regal fashion, and crisscrossed the streets of Philadelphia in a posh carriage drawn by four horses, while holding himself out as a fervent advocate of democracy and the common man. And he nursed a seemingly unquenchable thirst for lands far beyond his ability to pay for them, while saying "How miserable, and how contemptible is that man, who inverts the order of nature, and makes his property, not a means, but an end!"[161] It was this last contradiction which would lead to his ultimate undoing, prompting Justice Wilson to leave the Supreme Court in an effort to avoid his creditors who hunted him down and to evade the long arm of the law.

Perhaps because of these personal contradictions, he was particularly inclined to attempt reconciliation in the theoretical arena whenever possible. "I search not for contradictions. I wish to reconcile what is seemingly contradictory," he said in his *Lectures on Law*. And as we have seen, Wilson attempted to take in a wide variety of philosophical and constitutional sources, influences, traditions, and principles, and make them work as a coherent, overall system. Some of the greatest Wilson scholars have since concluded that just as the contradictions in his personal life did not work out, so also his intellectual commitments amounted to a hodgepodge of intriguing yet ultimately irreconcilable commitments. Other scholars who have studied Wilson have often been drawn to him because of one particular idea in his system, whether it was his commitment to democracy and popular sovereignty, a strong federal government, the law of nations, natural law theory, or the moral sense, which they have tended to focus on to the exclusion of all else, typically casting him as either the heroic champion of that singular idea or its excessively single-minded acolyte.

All this mixing and matching rendered him a unique figure at the time. Aligned politically with the Federalists, he nonetheless departed from them by insisting as strenuously as anyone from his era that all legitimate political authority needed to have as close a connection with "We the People" as possible, "mirroring" the people themselves rather than "refining and enlarging" the popular perspective. Aligned

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[160] For an account that similarly points out how Wilson navigated between the Federalists and Anti-Federalists on the question of civic engagement, but lays greater stress on the concept of a "written constitution" as the critical mediating channel through which citizens learn both their rights and duties, *see* James R. Zink, *The Language of Liberty and Law: James Wilson on America's Written Constitution,* 103 Am. Pol. Sci. Rev. 442 (2009).

[161] *Id.* at 449.

in some ways intellectually with the Anti-Federalists and Jefferson, he nonetheless proposed the formation of a powerful federal government with broadly stated purposes, expansive grants of power, extensive checks on the state governments, particularly with the power to restrict the spread of slavery, and a popularly elected, energetic executive figure that could enable the federal government to efficiently carry out all its many responsibilities under the laws of nations. And taken as he was with the importance of manners for a healthy democracy, he encouraged the cultivation of an active and engaged citizenry, but practically alone among all the founding figures, directed those energies towards the extended sphere of the nation as a whole.

And Wilson forged this unique constitutional synthesis via an amalgam of several disparate philosophical principles. As an immigrant to America at the age of twenty-three from Scotland, where he had received a philosophical and legal education at both the College of St. Andrew and the University of Glasgow at the height of the Scottish Enlightenment,[162] Wilson had been exposed to several rich philosophical traditions from which he developed his worldview. He took from Locke his "revolution principle," Cicero and other classical and medieval sources the "pole star" of natural law and the law of nations, and Reid and Hutcheson the insight into the moral sense and the inherent sociality of human nature. It was in the light of these three philosophical sources that Wilson stitched together his unique synthesis about the American Constitution that transcended the categories of his day.

But while Wilson was for the most part *sui generis* during the American founding, blending together constitutional commitments that were ordinarily kept apart, what the American founding kept apart, subsequent history has since mostly brought together. Robust democratic norms bottomed on Wilson's revolution principle have gradually, though not completely, won the day, via political developments, Supreme Court decisions, and a parade of twentieth century amendments to the text of the Constitution, such as the Seventeenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, in which suffrage has been expanded and the Senate made directly elected by the people rather than the state legislatures. A strong federal government with expansive powers has emerged, made possible in part due to checks placed upon state governments via the Reconstruction Amendments and led in many ways by a plebiscitary president who has functioned as the agenda setting "man of the people." And a national civic culture has decidedly emerged, in which citizens identify with, care more about, and involve themselves more regularly with the ups and downs of national political affairs than they do with local or state government.

As such, Wilson's status as the American founding's "great synthesizer" of diverse philosophical and constitutional commitments, kept apart in his own time, but mostly knitted together since then, should prompt contemporary legal scholars, political theorists, historians, and citizens alike to pay increased attention to this figure, in all his manifold and fascinating complexity, perhaps neglected in his own time due to his idiosyncratic views, but now the founder in whom we can best make out the shape of our own constitutional design.

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[162] William Ewald, *James Wilson and the Scottish Enlightenment*, 12 U. of Pa. J. of Const. L., 1053, 1113-14 (2010); Martin Claggett, *James Wilson - His Scottish Background: Corrections and Additions*, 79 Pa. Hist.: J. of Mid-Atl. Stud. 154 (2012).

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# Constructing Race

Thomas Halper*

## ABSTRACT

*The legal construction of race has assumed considerable importance for affirmative action and other purposes. But buffeted by racist tropes from an earlier day and simple self interest, the construct has become a nest of irrationalities and inconsistencies.*

## KEYWORDS

*race, white supremacy, affirmative action*

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> A Jewish man is sitting at a bar having a drink. After a while, a Chinese man comes and sits at the bar and orders a drink. The Jewish man punches the Chinese man in the face.
> "What was that for?" demands the Chinese man.
> "That was for Pearl Harbor!" answers the Jewish man.
> "You idiot! I am Chinese, not Japanese," says the Chinese man.
> "Chinese, Japanese, what's the difference?" replies the Jewish man.
> The Chinese man punches the Jewish man in the face.
> "What was that for?" demands the Jewish man.
> "That was for the Titanic," answers the Chinese man.
> "An iceberg caused the Titanic to sink, not me," says the Jewish man.
> "Iceberg, Goldberg, what's the difference?" replies the Chinese man.[1]

## I. Race as Social Construct

Like a hole that threatens to swallow a doughnut, the matter of constructing the concept of race renders much of racial jurisprudence problematical. Most people, like Justice Potter Stewart opining on obscenity,[2] are confident that they know a person's race when they see it, and consequently feel no need to pursue the question further. Many whites, it seems, do not routinely think of themselves in racial terms, and "are not familiar with or connected to their origins."[3] But race, that most toxic of concepts, is not always simple.

As always in America, race is not merely a topic of abstract curiosity. As a benign category, it may be useful in medical, scientific, and social scientific research, and may even prove indispensable in policy making and implementation. The federal government gathers data on race for a variety of purposes, including monitoring and enforcing the Civil Rights Act,[4] Voting Rights Act,[5] Fair Housing Act,[6] Home Mortgage Disclosure Act,[7] Equal Employment Opportunity Act,[8] and Equal Credit Opportunity Act;[9] state and local governments use the data to create and evaluate health, education, and social service policies;[10] private businesses rely on the data for planning, marketing, and other aspects of their operations. In responding to the covid pandemic, federal, state, and business decision makers felt compelled to address the special situation of minorities, who were both more prone to contract the disease and for a while more hesitant to become vaccinated against it.

It is also true that denying one's racial identity by passing as a member of another race may be socially productive: Walter White of the NAACP, for instance,

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1. The Foundation for Critical Thinking, https://www.criticalthinking.org .
2. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).
3. Vera Cohen et al., *Black and Hispanic Americans See Their Origins as Central to Who They Are, Less So for Whites*, Pew Research Center, May 14, 2021.
4. Pub. L. 88-352, 78 Stat. 241 (1964).
5. Pub. L. 89-110, 79 Stat. 437 (1965).
6. 42 U.S.C. 3601-19 (1968).
7. 12 U.S.C. 281-10 (1975).
8. Pub. L. 92-261, 86 Stat. 103 (1972).
9. 15 U.S.C. 1691 *f* (1974).
10. *E.g.*, Minn. Stat. 363A.01-.15 (1991); Mo. Rev. Stat. 213.01-.137 (1996).

passed for white in the Jim Crow South to gather information on lynchings,[11] and John Howard Griffin [12] and Grace Halsell[13] passed for Black to investigate racism for a white audience.

But, of course, in America race and its cousin, ethnicity, are not always benign categories. In this country as well as Europe, the concepts were long polluted by bogus science that purported to assign personality, intelligence, and other traits to various subcategories, ranking them in the process. So lacking in intellectual rigor was the enterprise that even the fundamental distinction between race and ethnicity was often ignored or conflated.[14]

Given the long and poisonous history of white supremacy, race is also especially fraught with pain, suffering, and loss. In this regard, it is essential to stress the unique hardships experienced by Black people that far exceed those confronting whites or other nonwhite groups, who faced discrimination but not brazen denials of their humanity.[15] For centuries, Blackness has routinely carried with it huge social disadvantages, in the form of rigorously enforced segregation and discrimination in the South and not only the South. For the past half century or so, however, no longer are the advantages all with whiteness. Today, with affirmative action practiced in varying degrees in education,[16] employment,[17] government contracts,[18] and elsewhere, it is sometimes advantageous to be a person of color.

Beginning in the 1960s, racial and ethnic data became important in the creation, implementation, monitoring, and evaluation of a myriad of federal programs. In an effort to bring consistency and intelligibility to the process, the Office of Management and Budget in 1977 issued the Statistical Policy Directive No. 15 as government's *de facto* racial identification instrument.[19] Its purpose was "to provide a standard classification for record keeping, collection, and presentation of data on race and ethnicity," and it bound "all federal agencies and programs."[20]

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[11] Walter F. White, A Man Called White 3 (1948). "I am a Negro. My skin is white, my eyes are blue, my hair is blond," he wrote. "There is magic in a white skin." White was one sixty-fourth black. James F. Davis, Who Is Black? One Nation's Definition 125 (1991).

[12] John H. Griffin, Black Like Me (1961).

[13] Grace Halsell, Soul Sister (1969). In the course of passing, Griffin and Halsell also learned about the nature of whiteness.

[14] Among the public, too, there remains considerable confusion as to race and ethnicity. Eleanor Gerber & Manuel de la Puente, *The Development and Cognitive Testing of Race and Ethnic Origin Questions for the Year 2000 Decennial Census*, Proc. of the Bureau of the Census' 1996 Annual Research Conference (1996).

[15] When Aristotle observed that "the use made of slaves and of tame animals is not very different," he was pointing to a convention of conceiving of slaves as animals. Aristotle, Politics 9 (Benjamin Jowett trans., H.W.C Davies eds., 1885). One prominent scholar maintains that it was the domestication of animals that provided a model for slavery. Karl Jacoby, *Slaves by Nature? Domestic Animals and Human Slaves*, 15 Slavery & Abolition 89 (1994). American slaves were often marketed as livestock, sometimes even branded like cattle.

[16] 34 CFR, sec. 100.3 (6)(ii) (1980).

[17] Exec. Order 10925 (1961).

[18] Exec. Order 11246 (1965).

[19] Office of Management and Budget, *Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting*, 43 Fed. Reg. 19 (May 12, 1977).

[20] Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity (1997).

In its two pages, the directive classified people into four racial groups: American Indian or Alaskan Native (persons having origins in any of the original peoples of North America, who also maintain cultural identification through tribal affiliation or community recognition), Asian or Pacific Islander (persons having origins in the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands), Black (persons having origins of the Black racial groups of Africa), and white (persons having origins of the original peoples of Europe, North Africa, or the Middle East), and one ethnicity, Hispanic (persons having origins in Latin America or other Spanish culture or origin, regardless of race). Mixed race persons were to be categorized according to the race "which most closely reflects the individual's recognition in his community."[21]

In response to criticism that these categories failed to reflect the consequences of such major changes as increases in immigration and interracial marriages, OMB conducted a four year review, which culminated in a 1997 revision that divided Asian and Pacific Islander into separate categories, and changed Hispanic to Latino. Respondents were also given the option of choosing more than one racial classification. More recently, on June 15, 2022, the nation's chief statistician announced a further review of Directive No. 15, with the completion date no later than summer, 2024, perhaps including a separate category for the Middle East and North Africa that would omit Israelis as not originating from the original peoples of the area.

All this has taken place in a context of an increasingly high profile focus on diversity, equity, and inclusion, in which "person of color" has assumed a center stage position. The term appears on its face to be a catch-all for all nonwhite races. In fact, this is not exactly the case, for it also encompasses certain ethnic groupings. Latinos, a linguistic/geographical group[22] and the nation's largest minority at over sixty million,[23] are officially an ethnic group[24] and mostly self identify as white,[25] but courts blurring the line between race and ethnicity frequently speak of them as racial,[26] as do two-thirds of Latinos themselves.[27] "Asian" refers geographically to

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[21] OMB, s*upra* note 19.

[22] Sharon R. Ennis, Merarys Rios-Vargas & Nora C. Gilbert, *Census: The Hispanic Population: 2010* 1 (May, 2011). Though the Census was willing to count them as Hispanic, few immigrants from Brazil (four percent), Portugal (one percent) or the Philippines (one percent) sought the designation. Jeffrey Passel & Paul Taylor, *Who's Hispanic?* Pew Hispanic Center, May 28, 2009. Connecticut and Rhode Island include Portuguese in their minority business enterprise programs. CT. Gen. Stat. secs. 32-9n (2010); R.I. Dep't Admin., *Rules, Regulations, Procedures, and Criteria Governing Certification and Decertification of MBE Enterprises* (Aug., 2016).

[23] Census Bureau, *65 and Older Population Grows Rapidly as Baby Boomers Age* (July 25, 2020).

[24] OMB, *supra* note 19; Census Bureau, *About Hispanic Origins* (Oct. 16, 2020).

[25] Luis Noe-Bustamante *et al. Measuring the Racial Identity of Latinos*, Pew Research Center, Nov. 4, 2021. Only fifteen percent self-identify as dark skinned and fifty-nine percent report that lighter skin is advantageous. Bustamante *et al*., *Majority of Latinos Say Skin Color Impacts Opportunity in America and Shapes Daily Life*, Pew Research Center, Nov. 4. 2021.

[26] *E.g*., Freeport v. Barrella, 814 F. 3d 594, 598 (2016). More generally, *see* Luis A. Toro, *"Race" and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15*, 26 Tex. Tech. L. Rev. 1219, 1248 (1995).

[27] Kim Parker *et al*., *The Many Dimensions of Hispanic Racial Identity,* Pew Research Center*,* June 11, 2015. That Hispanics should be considered a racial category is advanced

a vast array of groups, but not to Turks, Russians, Afghans, Iranians, or Israelis. Arabs, who are officially white,[28] qualify;[29] Jews do not,[30] despite the claims of anti-Semites who deny that Jews are white.[31] On the other hand, Filipinos, though coming from a Pacific archipelago, are categorized as Asians, not Pacific Islanders. Sharing origins with the original peoples is required for all categories, except Blacks and Latinos; Native Americans and Latinos alone must show some cultural connection. In short, if Directive No. 15 aimed to eliminate inconsistencies in classification, it has not been a huge success. "Person of color" is not only about race, hinting at the murkiness that often penetrates racial rhetoric. Some of its peculiarities are difficult to comprehend. Others may turn on whether the group is considered to be subject to current or past oppression by the white majority, however whiteness is understood.

All this points to the fact that race is socially constructed, for race is a "product of human perception and classification. . . . We give them meaning, and in the process we create race."[32] In other words, what is important are not the genetically identifiable markers, but the inferences we draw from them. And because race is socially constructed, it may not always be fixed at birth, immutable and unchanging.[33] Indeed, the chief constant may well be the evolution in the way race is understood.[34] For years, Eastern and Southern Europeans were widely considered less white than Northern Europeans, though certainly more worthy than Blacks;[35] Italian Americans thought of their color as white, but their race as Italian;[36] and Jews felt not white in relation to the dominant culture, but white in relation to Blacks.[37] All of this has changed, reflecting substantial assimilation. Yet a 2015 Pew Research Center survey found that sixty-one percent of multiracial adults refused the label.[38] Indeed, as a distinguished Black scholar noted, "most native born United States Negroes, far from being non-white, are in fact part white. They

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by Steven Hitlin, J. Scott Brown, & Glen H. Elder, Jr., *Measuring Latinos: Racial and Ethnic Classification and Self- Understandings*, 86 SOC. FORCES 587 (2007).

28 Census Bureau, *About Race*, Oct. 16, 2020

29 Shaari Tefila Congregation v. Cobb, 481 U.S. 615, 617 (1987).

30 Harold Orlans, *The Politics of Minority Statistics*, 26 Society 24 (May, 1989).

31 *E.g*., Chris Rosetti, *Jews Identity: Non-White, Anti-White*, NATIONAL GUARDIAN, Jan. 21, 2017.

32 STEPHEN CORNELL & DOUGLAS HARTMANN, ETHNICITY AND RACE: MAKING IDENTITIES IN A CHANGING WORLD 23-24 (1998).

33 *White during Day…[Black] at Home*, EBONY, Apr. 1952, at 31.

34 MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 60-61 (2d ed. 1994).

35 MATTHEW FRYE JACOBSON, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE (1998).

36 THOMAS GUGLIELMO, WHITE ON ARRIVAL: ITALIANS, RACE, COLOR, AND POWER IN CHICAGO, 1890-1945 (2003). In Rollins v. Alabama, a county court reversed the conviction of a Black man for having sex with a white woman, explaining that "the mere fact that . . . this woman came from Sicily can in no sense be taken as conclusive that she was therefore a white woman or that she was not a negro or descended from a negro." Rollins v. Alabama, 18 Ala. 354, 356 (App. 1922).

37 KAREN BRODKIN, HOW JEWS BECAME WHITE FOLKS AND WHAT THIS SAYS ABOUT RACE IN AMERICA (1998).

38 Kim Parker *et al*., *The Multiracial Identification Gap*, Pew Research Center, June 11, 2015.

are also by any meaningful definition of culture part Anglo-Saxon, and they are overwhelmingly Protestant."[39]

Further evidence of the social construction of race is the variation from society to society; the United States tends to conceive race literally as a matter of black and white, while Brazil recognizes 136 racial categories[40] and in the Dominican Republic skin color predicts only fifty percent of racial identifications.[41] Races also "are constructed relationally, against one another, rather than in isolation."[42] As the concept of light has meaning only because there is darkness, so the concept of race has meaning only because we accept that there are multiple races. No wonder one observer concluded that "among the words that can be all things to all men, the word race has a fair claim to being the most common, the most ambiguous, and the most explosive."[43]

The *Yale Law Journal*, writing during a crescendo of anti-Black violence and subjugation, thought that the "question [of racial identification] is purely academic."[44] But such stunningly blind complacency utterly ignores the role of law in prescribing and enforcing racial distinctions. By putting the full force of governmental power behind racial definitions and the discriminatory practices they entailed, it has not only made them effective; their effectiveness has also helped in establishing their legitimacy, at least with the white population, educating them in the virtues and necessity of racism. Nor, obviously, has the end of Jim Crow meant the end of racial significance. In determining racial discrimination in employment, for example, courts inquire into whether existing practices give rise to a disparate negative impact on minorities.[45] In order to compile the necessary statistics, presumably the compilers must know how to categorize people racially. Given the obvious legal importance of race, the question becomes: how does the law construct race?

But of course, the law not only affects society; society affects the law. It was white attitudes toward Black people that shaped the laws constructing race. In the most fundamental sense, these attitudes were clear in affirming a consensus that Blacks were an inferior Other. In another sense, however, as analysis will demonstrate, there was disagreement, uncertainty, even confusion as to particulars. None of this imperiled the underlying assumption, but it did generate problems in implementing the racist vision.

Over the years, courts have been asked to police racial boundaries, often being denied the legislative guidance that would have facilitated their efforts. Partly, this may be due to unexamined and crude notions of race as biologically fixed, with the central presumption being the contaminant of black blood, as a means of

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[39] Albert Murray, The Omni Americans: New Perspectives on Black Experiences and American Culture 79-80 (1970).

[40] Lilia M. Schwarcz, *Not Black, Not White, Just the Opposite: Race and National Identity in Brazil*, Ctr. for Brazilian Stud. 5 (2003), https://www.lac.ox.ac.uk/sites/default/files/lac/documents/media/schwarcz47.pdf.

[41] Edward Telles & Tianna Paschel, *Who Is Black, White, or Mixed Race? How Skin Color. Status, and Nation Shape Racial Classification in Latin America*, 120 Am. J. Socio. 864, 866 (2014).

[42] Ian F. Haney Lopez, *The Social Construction of Race: Some Observations, Illusions, Fabrications, and Choice*, 29 Harv. C.R.C.L. L. Rev. 1, 28 (1994).

[43] Jacques Barzun, Race: A Study in Modern Superstition 3 (1937).

[44] *The Negro Defined*, 20 Yale L. J. 224 (1911).

[45] Griggs v. Duke Power, 401 U.S. 424, 432 (1971).

quantifying ancestry. The term appears rooted in the English common law, which used it in making distinctions for purposes of inheritance,[46] but more generally it resonates powerfully as a primal metaphor for life itself.[47]

White lawmakers and judges seem to have taken the blood contaminant presumption for granted, but its application was often confused and inconsistent. In general, there have been two tests courts have utilized: biological (for example, is the person's appearance Black or can his or her genealogy be reliably traced, especially to the mother?) and behavioral (for example, does he or she have Black friends?). These tests will be grouped under the "objective" heading because that is how they have typically been understood. In reality, of course, the objective facts have been perceived through an unexamined racist lens that distorted the objectivity. Occasionally, pseudoscience has been employed to support or apply these standards, buttressing the illusion of objectivity, but mostly courts have relied on what they took to be good faith judgments by witnesses and trial judges. The witnesses and judges for many years were usually white and usually male.

## II. Who Defines Race: The Objective Answer

Who defines an individual's race? Common sense tells us that race is a set of genetically determined traits that we can easily identify. Thus, for example, Congress has decreed that "the term 'racial group' means a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent."[48] Who doubts that Louis Armstrong was black and Grace Kelly was white? If the assumption was that such bright line distinctions between racial groups are always possible and that identifying races is a neutral act, it was naïve enough to be refuted by daily observation.

Given the race based slavery of the antebellum South, the question of defining race took on great practical importance, in affecting daily life and setting down precedents for the future.[49] Of course, the law was created by slaveowners for their benefit; slaves as the ultimate outsiders were powerless to effectively denounce it, in terms of natural rights, democracy or accountability. Yet America's War for Independence had popularized a rhetoric of liberty and rights that could not entirely be ignored. Adding to the tension was an unresolvable conundrum: how could slaves be both people and property? From this intellectual tangle, stumbles and bumbles could not be avoided.

The most prominent legal racial issue was whether Black slaves were persons,[50] and it was widely assumed that this could be objectively determined.

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46 Frederick Pollock & Frederic Maitland, I The History of English Law before the Time of Edward I 301-5 (1959).

47 Melissa L. Meyer, Thicker than Water: The Origins of Blood as Symbol and Ritual ch. 1 (2005).

48 Genocide Convention Implementation Act of 1987, 18 U.S.C. §1093 (1988).

49 Court cases were also sometimes useful in racial designations for specific persons, as official record keeping was often spotty or nonexistent.

50 A careful study concluded that slaveowners were never entirely able to equate Blacks with slaves, though plainly a presumption to that effect was powerfully in force. Alejandro de la Fuente & Ariela Gross, Becoming Black, Becoming Free: Race,

In general, courts applied blanket rules: Blacks were slaves; whites and Native Americans were free. As early as the mid-seventeenth century, the general principle was *partus sequitur ventrem,* literally, that which is brought forth follows the belly, which meant that the status of the mother determined the status of the child.[51] In the vast majority of mixed race persons, the mother was an enslaved Black and the father, the master or overseer, was white. The *ventrem* principle reversed the normal English common law presumption, but had a pair of significant practical advantages for slaveowners: it increased the number of slaves and it absolved the fathers of any responsibility for their offspring.

Often, however, the status of the mother was contested. For example, *Jenkins v. Tom* (1792)[52] involved a Virginia slave, who produced evidence to show that he was descended from Indians, not Blacks. The slaveowner countered that a 1753 law made all non-Christians brought to this country slaves, including Indians, but the Virginia Court of Appeals held that as the law had been repealed, he had misstated the law. Since Indians could not be slaves, the court reasoned, he could not be a slave, and so he was freed. In *Thomas v. Pile* (1794),[53] a biracial slave in Maryland won his freedom when a white woman testified that he was descended from a free white woman. The slaveowner had tried to impeach the witness with testimony that she "kept company with negroes,"[54] but the trial judge refused to admit it, and the Maryland General Court agreed, freeing the slave.

In *Higgins v. Allen* (1796),[55] the Maryland General Court of Appeals traced the matrilineal line of Nathaniel Allen back to his great grandmother, who was white. She married a slave, as did her mixed race daughter and mixed race granddaughter. Relying on statutes, the Court declared, "If there is no positive law for making all the descendants of white women by negroes slaves, they are, consequently, free."[56] Thus, because Allen was descended from a free white woman, he was freed, even though from a "fourth descent from a white woman."[57]

*Gobu v. Gobu* (1802)[58] involved a twelve year old North Carolina girl, who claimed to have found an abandoned newborn, whom she made her slave. The boy (with straight hair and "olive color" skin) sued for his freedom, maintaining that there was no evidence of his slave status. The girl said that he was Black, and that was sufficient evidence. The North Carolina Superior Court agreed to the "presumption of every black person being a slave. It is so, because the negroes originally brought to this country were slaves, and their descendants must continue as slaves unless manumitted by proper authorities. If therefore a person of that description claims his freedom, he must establish his right to it by such evidence as will destroy the force of presumption arising from his color."[59] On the other hand,

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Freedom, and Law in Colonial Cuba, Virginia, and Louisiana 220 (2020).

51 Jennifer L. Morgan, Partus Sequitur Ventrem: Law, Race, and Reproduction in Colonial Slavery 22 (2018).

52 Jenkins v. Tom, 1 Va. 123 (1792).

53 Thomas v. Pile, 3 Md. 241 (1852).

54 *Id.*

55 Higgins v. Allen, 3 H. & McH 504.

56 *Id.* at 505.

57 *Id.*

58 Gobu v. Gobu,1 N.C. 188 (1802).

59 *Id.*

the court maintained that mixed blood persons should not be presumed slaves, as the parents might have been free and it was usually possible to prove slave status. For this reason, the boy was freed. This case established the principle, not always followed, that appearance of Black or white creates a rebuttable presumption, but that appearance of mixed race does not; the boy's mixed race appearance, with no slavery connection, meant that he could be freed.

A few years later*, Hudgins v. Wrights* (1806)[60] concerned a similar appeal of slaves for their freedom, this time provoked by an intention by the slaveowner to sell them and break up the family. The Wrights, slaves, alleged that their mother and grandmother were Indians, and as Indians were free, they should be free. They lacked documentary proof, but pointed to their physical appearance and testimony from witnesses; the slaveowner, Hudgins, countered that the Wrights were actually descended from Black people. The trial court found that the Wrights appeared to be Indians, held that the Virginia Declaration of Rights meant slaveowners always carried the burden of proof, and concluded that the slaveowner had not carried it. Hudgins appealed to the Virginia Supreme Court of Appeals, which ruled that appearance created a rebuttable presumption. Thus, the Wrights' resemblance to Indians placed the burden of proof on Hudgins, which he failed to carry, such as through genealogical testimony. It also stated that the Declaration of Rights applied only to whites, rejecting the assumption that in questions of freedom, the burden of proof always rests on the slaveowner. The higher court's ruling became the "most influential Southern precedent in setting the presumptions for slave/free status on the basis of race."[61]

As to the reliability of physical appearance, however, the court was split. Judge Tucker believed that "So pointed is this distinction between the natives of Africa and the aborigines of America that a man might as easily mistake the glossy, jetty clothing of an American bear for the wool of a black sheep."[62] On the other hand, Judge Roane thought that "When. . . these races become intermingled, it is difficult, if not impossible, to say from inspection only, which race predominates in the offspring, and certainly impossible to determine whether the descent from a given race has been through the paternal or maternal line."[63] In short, though "slave or free status was . . . read on the bodies of the litigants,"[64] different judges might read it differently.

*Hudgins* posed a problem for the rule of lenity,[65] a common law principle borrowed from England,[66] to the effect that courts should resolve ambiguities in

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60 Hudgins v. Wrights, 11 Va. 134 (1806).

61 Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South*, 108 Yale L. J. 109, 128 (1998).

62 Hudgins, *supra* note 60, at 140. Judge Tucker, who first published Blackstone's *Commentaries* in America and wrote advocating the gradual abolition of slavery, was "one of the best examples Virginia had to offer of an enlightened member of the revolutionary generation." Paul Finkelman, *The Crime of Color*, 67 Tul. L. Rev. 2063, 2108 (1993).

63 Hudgins, *supra* note 60, at 141.

64 Deborah A. Rosen, American Indians and State Law: Sovereignty, Race, and Citizenship*,* 1790-1880, 88 (2007).

65 *E.g.*, Harry v. Decker, 1 Walk. 36, 42 (Miss. 1818); Isaac v. West, 6 Rand. 652, 657 (Va. 1828).

66 William Blackstone, Commentaries on the Laws of England 88-89 (1753).

favor of liberty. Southern courts generally accepted the rule, but in a slave society, such a principle clearly raised serious problems: it would tend to undermine the legitimacy of slavery, generate legal disputes, and increase the number of free persons of color. As a Kentucky court put it, "Color. . . affords a presumption of slavery."[67] By mid-century when a growing sectional crisis left the white South increasingly threatened, its courts had renounced lenity.

In *Hook v. Pagee* (1811),[68] barely five years after *Hudgins*, the Virginia Supreme Court of Appeals spoke only of physical observation. Nanny Pagee and her children were held in slavery, but maintained that they were white, and therefore, free. The court observed that the jury "have the highest evidence, the evidence of their own senses, and upon that they find a verdict."[69] Observation told the jurors she was white, and so the jury decided, and the court agreed.

Physical observation, however, was not always unambiguous. "The constant tendency of this class to assimilate to the white, and the desire of elevation," wrote a South Carolina court, "present frequent cases of embarrassment and difficulty."[70] Yet the same court a few years earlier considered that "It would be dangerous and cruel to subject to this disqualification persons bearing all the features of a white on account of some remote admixture of blood."[71]

*Butt v. Rachel* (1814)[72] involved fourteen slaves, who challenged Butt's right to hold them, on the ground that they were descended from an Indian woman brought to Virginia from Jamaica. Butts responded that she had been a slave in Jamaica and so could be treated as a slave in Virginia, rendering her children slaves. But the Virginia Supreme Court of Appeals concluded that as she was an Indian, her children were Indians, and therefore free. Her status in Jamaica was irrelevant.

*State v. Cantey* (1835)[73] concerned a white criminal defendant, who complained that the prosecution had called Black witnesses against him, in violation of law. The witnesses were one-sixteenth Black. The jury, however, considered them white and convicted him. Judge Harper speaking for the South Carolina Court of Appeals was openly dubious about the blood standard. "We cannot say what admixture of blood will make a colored person [for the] status of the individual [must also take into account his] reputation, . . . his reception into society, and his having commonly exercised the privileges of a white man. . . [i]t may be well and proper that a man of worth, honesty, industry, and respectability, should have the rank of a white man, while a vagabond of the same degree of blood should be confined to the inferior caste."[74]

When in the end Harper announced that "a slave cannot be a white man,"[75] was he saying that an upright person of mixed blood could not be a slave because regarding "a person of color on account of any mixture of blood, however slight or remote" would be "very cruel and mischievous"?[76] Or was he merely giving

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67 Davis v. Curry, 5 Ky. 238 (1818).
68 Hook v. Pagee, 16 Va. 379 (1811).
69 *Id.* at 385.
70 White v. Tax Collector of Kershaw Distr., 31 S.C.L. 136, 139 (1846).
71 State v. Davis, 18 S.C.L. 558, 559 (1831).
72 18 Va. 209.
73 State v. Cantey, 20 S.C.L. 614 (S.C. Ct. App.).
74 *Id.* at 615.
75 *Id.* at 616.
76 *Id.* at 615.

voice to conventional wisdom? Harper disregarded the fractional blood arguments, agreed that the witnesses could testify, and upheld the conviction. The reason he gave was that it would be very unlikely to mistake "a person of unmixed European blood [for] a colored person,"[77] and thus it made perfect sense to announce that "a slave cannot be a white man." The court is plainly straining toward its view of meritocracy, but the result is a muddle that appears to equate whiteness with virtue in ways juries and judges would find challenging to apply consistently.

*Thurman v. Alabama* (1850)[78] involved a free mixed race man, who was convicted of raping a white woman. As the penalty for a Black man, death, was worse than for a white man, he claimed that as one-quarter Black, he qualified as a white man. In deciding for him, the Alabama Supreme Court said, "If the statute against mulattoes is by construction to include quadroons, where are we to stop? . . . [A]re we not bound to pursue the line of descendants, so long as there is a drop of blood remaining?"[79] The one-drop rule seemed to the Court a *reductio ad absurdum*.

*State v. Chavers* (1857)[80] involved a North Carolina prosecution of William Chavers, allegedly a free Black man, for carrying a gun. He denied he was Black, but as he purchased a ticket at the Black discount price and was one-sixteenth Black, the court considered him Black.

Meanwhile, certain Northern states, while outlawing slavery, shared the white Southern attitude toward Black people. In *Van Camp v. Board of Education of Logan, Ohio* (1859), for instance, the Ohio Supreme Court denied the admission of mixed race children to public schools. Judge Peck relied on a dictionary definition: "Our standard philologist, Webster, defines 'colored people' to be 'black people – African or their descendants, mixed or unmixed. . . . A person who has any perceptible admixture of African blood is generally called a colored person. . . . we do not ordinarily stop to estimate the precise shade, whether light or dark."[81] These cases that centered on ancestry, however, often confronted insurmountable record keeping problems that made it practically impossible to establish the necessary lineage.

The Civil War and the Thirteenth, Fourteenth, and Fifteenth Amendments that followed in its wake radically changed the law. Slavery was no more, and many invidious racial distinctions were also banned. By the late 1880s, however, whatever progress had been achieved under Reconstruction began to be seriously eroded, and in an environment of racial terrorism and the celebration of white supremacy, Southern Blacks were systematically deprived of political rights, as legally mandated racial segregation spread across the region. Ironically, "racism, although the child of slavery, not only outlived its parent but grew stronger and more independent after slavery's demise."[82] As a Black Mississippian observed, "They had to have a license to kill anything but a negro. We was always in season."[83]

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[77] *Id.* 616.

[78] Thurman v. Alabama, 18 Ala. 276 (1850).

[79] *Id.* at 279.

[80] State v. Chavers, 50 N.C. 11 (1857).

[81] Van Camp v. Board of Education of Incorporated Village of Logan, 9 Ohio St. 406, 411 (1859).

[82] George M. Fredrickson, The Arrogance of Race: Historical Perspectives on Slavery, Racism, and Social Inequality *3* (1988).

[83] Qtd. in Neil R. McMillan, Dark Journey: Black Mississippians in the Age of Jim Crow 224 (1989).

Sometimes, Asians would be caught in the web. For instance, a 1923 case concerned a "high caste Hindu," who wished to be counted as white, so that he could become a naturalized citizen, only whites at that time being eligible for citizenship. In *United States v. Bhagat Sing Thind*,[84] Justice Sutherland acknowledged that "'Caucasian is a conventional word of much flexibility,"[85] but decided on the popular rather than the scientific usage. "Race," he announced, "must be applied to a group of living persons now possessing in common requisite characteristics, not to groups of persons who are supposed to be or really are descended from some remote common ancestor."[86] Thus, Thind might have white features, but he was obviously too dark for most people to take him as white, and so his plea was denied. Of course, Sutherland, concluded, "It is very far from our thought to suggest the slightest question of racial superiority or inferiority."[87]

Highlighting the role of minor bureaucrats in racial designation, most of the judicial controversies over racial identification that subsequently arose concerned marriage or birth certificates, and, again, an objective approach was the rule. At one point, thirty-eight states banned interracial marriage.[88] After marital dissolution, it was not uncommon for one of the spouses to claim that the other spouse had hidden his or her Black racial identity, which would have voided the marriage and deprived the offending spouse of any benefits. In many of these cases, the traditional reliance on the race of the mother as determinative was simply abandoned, perhaps because it could not be settled. *Hopkins v. Bowers* (1892),[89] for example, concerned a family dispute over the ownership of a tract of land that pivoted on the validity of a marriage. The mother was alleged to be of mixed blood, voiding the marriage, and the North Carolina Supreme Court accepted testimony that she was reputed to be Black, "usually associated with colored people,"[90] and in appearance looked Black. On this basis, it concluded that she was, indeed, Black, and following the matrilineal rule, voided the marriage.

In *Ferrell v. Ferrell* (1910), a North Carolina husband seeking to avoid alimony and child support sued to have his marriage annulled, claiming that his wife's great grandfather was Black, making her Black. She replied that he was probably of Indian or Portuguese blood. In order to meet the matrilineal state standard of at least one-eighth Black, the husband had to show that her great grandfather was a "real negro," that is, entirely Black. He could not do this, and so lost the case.[91]

*Sunseri v. Cassagne* (1938)[92] involved a couple who married and soon separated; the wife sought alimony, and the husband asked that the marriage be annulled on the ground that she was Black. Her birth certificate stated that she was Black and the trial judge found her one thirty-second Black. But the community had long accepted her as white: she attended white schools, rode in white sections on

[84] United States v. Thind, 261 U.S. 204 (1923).
[85] *Id.* at 208.
[86] *Id.* at 208, 209.
[87] *Id.* at 215.
[88] Nancy Leong, *Judicial Erasure of Mixed-Race Discrimination*, 59 Am. U. L. Rev. 469, 487 (2010).
[89] Hopkins v. Bowers, 111 N.C. 175 (1892).
[90] *Id.* at 179.
[91] Ferrall v. Ferrall, 153 N.C. 174 (1910).
[92] Sunseri v. Cassagne, 191 La. 209 (1938).

busses and trains, was treated as white in theatres, hotels, and restaurants, and all her friends were white. Weighing the certificate and her ancestry against community acceptance, the Louisiana Supreme Court found the evidence inconclusive, and remanded it for further consideration.

Two years later, the court revisited the case, again finding inconsistent evidence. [93] On the basis that it could justify changing the racial designation only if "the evidence adduced leaves no room for doubt,"[94] the court "with regret"[95] ruled in favor of the wife, upholding the designation on the marriage certificate.

More recently, racial designation issues arose in the context of disputed birth certificates. The certificates, whose original rationale was chiefly as public health measures,[96] became a way to establish and fix individual identity, and thus assumed considerable importance. Many of these cases arose in New Orleans, ironically, a city well known for recognizing varied racial distinctions.[97]

*State ex rel. Treadway v. Louisiana State Board of Health* (1951*)*[98] concerned a family's effort to change their late mother's birth certificate from colored to white. After reviewing the conflicting evidence, the court decided that the requisite legal certainty was not established, and refused to change the designation. Judge Moise wrote, "The registration of a birth certificate must be given as much sanctity in the law as the registration of a property right."[99]

*Green v. New Orleans* (1956)[100] involved a Black man, Robert Green, who wanted to adopt a four year old girl, Jacqueline Anne Henley. The problem was that according to her birth certificate, she was white, legally barring the adoption,[101] and the Louisiana Bureau of Vital Statistics refused to change her racial designation. Her mother, deceased, was white, but her father was unknown. Green believed that Jacqueline was actually Black, and the trial judge relaxed the rules of evidence to give him every opportunity to prove his case, admitting hearsay, inferences, and presumptions of fact. The mother's sister, who cared for the girl, complained that "she didn't fit in my family, she was too dark [and] was getting darker day by day."[102] An anthropology professor examined her, and on the basis of three physical characteristics concluded that it was "extremely probable" that she was Black.[103] And the official who filled out her birth certificate admitted that she had not asked the mother the race of the father; "if she is a white mother we do not ask if her husband is white, we take it for granted that he is white."[104] The trial judge, bound by a precedent that if persons were widely accepted as white, this could not be legally reversed unless he could "prove his case with legal certainty,"[105] found that

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93 Sunseri v. Cassagne, 195 La. 19 (1940).

94 *Id.* at 22.

95 *Id.* at 27.

96 H L Brumberg, *History of the Birth Certificate: From Inception to the Future of Electronic Data*, 32 J. Perinatology 407, 407-8, 411 (2012).

97 Eugene D. Genovese, Roll, Jordan, Roll 431 (1974).

98 State ex rel. Treadway v. La. State Bd. of Health, 218 La. 752 (1951).

99 *Id.*, at 739.

100 Green v. City of New Orleans, 88 So.2d 76 (1956).

101 La. Rev. Stat. Ann. § 9.422 (1951).

102 Green*, supra* note 100. at 78.

103 *Id.* at 79.

104 *Id.* at 78.

105 *Id.* at 79.

Green failed to meet this standard. Instead, he offered to revisit the issue in a few years, when, as the anthropologist suggested, matters might be clearer. In the end, as the dissent pointed out, the refusal rested on "a presumption and not because of a stated fact,"[106] a presumption that in a city known for its sizable mixed race population was hardly plausible.

Had the traditional reliance on the race of the mother been followed, the case would have had a different result. Ordinary citizens, as exemplified by Jacqueline's aunt in *Green,* believed she was Black, but this was not sufficient. Was the court, then, defending whiteness by establishing a high bar of proof? Or was it undermining it by reinforcing a principle that would reject worthy white candidates? How, in any event, could race in these pre-DNA days have been established with certainty? And why the certainty test? Ordinarily, lawsuits are resolved in favor of the preponderance of evidence; here, courts were insisting on a higher standard of proof than even criminal cases, which mandate proof beyond a reasonable doubt. All this indicates how seriously white Louisianians took perceived threats to racial purity.

*State ex rel. Rodi v. New Orleans* (1957)[107] also drew attention to the power of petty bureaucrats. Steve Rodi died, and the undertaker and cemetery that buried him dealt only with whites, and his death certificate designated him as white. However, the 1949-1965 head of the New Orleans office of the Louisiana Bureau of Vital Statistics, Naomi Drake, kept a list of names she believed had been improperly classified as white, and visited Rodi's place of birth, "spending several days making a thorough investigation."[108] She concluded that he was Black, and without informing the family changed his death certificate accordingly. His daughter, Estelle, sued to have the original designation reapplied. This was not simply a matter of racial pride. If her father were declared Black, his marriage to her mother would have been invalidated, as well as her own because the state banned interracial marriage. As her husband had recently died, this would exclude her from inheriting his estate.

At trial, Estelle alleged that the state law delegating racial designations to the Bureau of Vital Statistics violated the Fourteenth Amendment's due process clause because it failed to provide officials adequate guidelines and because Drake had changed the racial designation without informing interested parties. The Louisiana Supreme Court reviewed the evidence, noting that each side could point to documents and witnesses, but it was impressed that there was "no reasonable doubt in the minds of officials."[109] This shifted the burden to Estelle, requiring her to "leave practically no doubt at all"[110] about her contention, which she could not do. As to the constitutional argument, the court found that "when a statute merely

106 *Id.* at 81.

107 State ex rel. Rodi v. New Orleans, 94 So. 2d 108 (1957).

108 *Id.* at 116. For many years Drake engaged in a crusade to redesignate persons she believed had been improperly designated as white, refusing to issue birth certificates (numbering about 4,700) and death certificates (numbering about 1,200), when she considered the race in doubt. James O'Byrne, *Many Feared Naomi Drake and Powerful Racial Whim*, New Orleans Times-Picayune (Aug. 16, 1993), https://www.nola.com/news/politics/article_5f54a83c-6981-518e-8396-5ba24a07fc60.html. The *Green* and *Dupas* cases, *supra* note 100 and *infra* note 113*,* arose as a result of her efforts.

109 Rodi, *supra* note 107, at 114.

110 *Id.*

authorizes a registrar or board to reach a conclusion of facts,"[111] this does not constitute an unlawful delegation. Nor was the court troubled by Drake's failure to notify Estelle, for officials often make factual decisions without notice, she retained the right to appeal, and there would be "complete impracticality" in requiring notice in such cases.[112]

*State ex rel. Dupas v. New Orleans* (1960)[113] concerned a prize fighter, a fan favorite in New Orleans, who found his career in jeopardy. He believed himself white and had fought as white, but Drake's Bureau of Vital Statistics believed he was Black and changed his birth certificate to Black. As Louisiana barred interracial boxing, this designation would seriously damage his career. The state permitted him to fight in a bout that had already been scheduled, but declared that he must prove that he was white for future fights. The Louisiana Supreme Court, however, after a lengthy review of the evidence determined that Dupas was, indeed, Black.

A few years later, another Louisiana case, *Anderson v. Martin* (1964),[114] raised the issue of racial identification. A Louisiana law required the race of candidates to appear on ballots. The Supreme Court unanimously struck down the law as discriminatory, and thus never addressed the issue of how race was to be determined.

Four other birth certificate cases arose after the civil rights movement, which presumably had changed racial attitudes or at least the willingness openly to express them. *State ex rel. Pritchard v. Louisiana Board of Health* (1967)[115] saw a woman's effort to have her birth certificate changed from Black to white fail, on the ground that as she sought the change, she carried the burden of proof and was unable to sustain the burden. *State ex rel. Schlumbrecht v. Louisiana State Board of Health* (1970)[116] concerned a father who wanted his daughter's birth certificate to remain white in the face of the registrar's doubts that this was accurate. The registrar pointed to the census of the maternal line, which contained references to white, person of color, mulatto, and colored, and urged a judicial proceeding to resolve the matter. But the court treated the history as so confused as to be useless; some children of the same parents were designated with different races. The original designation had to be shown clearly wrong, the court held, and as the state could not demonstrate this, the original designation was upheld.

*Thomas v. Louisiana State Board of Health* (1973)[117] concerned a man and the birth certificates of his wife and two sons. Originally, the three were listed as white; later, they changed the designation to Black; he wanted to return the designation to white. After reviewing the very extensive record, the Louisiana Court of Appeals ruled that a change could be ordered only if there were "no room for doubt."[118] But with unreliable records and no way to determine the proportion of Black blood, it could not order the change.

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111 *Id.* at 111.
112 *Id.* at 112-13.
113 State ex rel. Dupas v. New Orleans, 125 So.2d 375 (1960).
114 Anderson v. Martin, 375 U.S. 399 (1964).
115 State ex rel. Pritchard v. La. State Bd. of Health, 198 So. 2d 490 (La. Ct. App. 1967).
116 State ex rel. Schlumbrecht v. La. State Bd. of Health, 231 So. 2d 730, 730-31 (La. Ct. App. 1970).
117 Thomas v. La. State Bd. of Health, 278 So.2d 915 (La. Ct. App. 1973).
118 *Id.* at 917.

*State ex rel. Plaia v. Louisiana State Board of Health* (1973)[119] involved a parent who designated her daughter as white, but found that a registrar had designated her as Black on her birth certificate. The registrar had relied on a 1970 statute that defined Black as one thirty-second or more Black, but did not instruct as to how this would be calculated. The registrar, assuming that every mixed race ancestor was half Black, produced a number greater than one thirty-second. "[I]t would follow," the Louisiana Supreme Court concluded, "that anyone who was less than half Negro would have been placed on the census record as white, a conclusion which hardly seems realistic."[120] The court, finding the registrar's assumption implausible and disputing the calculation, concluded that there was sufficient cause to overrule the designation.

*Doe v State* (1985)[121] concerned several members of a Louisiana family, who maintained that their parents' birth certificates had erroneously designated them as Black. The Louisiana Supreme Court ruled that one party cannot sue to change the racial designation of another party. But though its ruling could have ended at this point, it then turned to the merits and held that the family had failed to establish that the preponderance of the evidence supported their position. It conceded that "racial designations are purely social and cultural perceptions,"[122] but thought that the "evidence conclusively proves those subjective perceptions were correctly recorded" on the certificates; it added that there was "no evidence that during their lifetimes they objected to the racial classifications."[123] In following a preponderance of evidence rule,[124] the court departed from the traditional no room for doubt rule, but offered no explanation for the departure.

What was never addressed in the racial designation cases was a clear equal protection issue. Laws that define Blackness according to some fraction openly treat Blacks and whites differently. If you are one-eighth Black, you are Black, but if you are one-eighth white, you are not white. It would not be necessary even to allege that the purpose is obviously racist to show that without justification, the races are treated radically differently under the law.

How, then, to define race? Two points are immediately obvious. First, a community is constituted by what it excludes as much as by what it includes. The community of white people thus was partially constituted by excluding Black people. Second, in the words of Merleau-Ponty, "To see is to see from somewhere."[125] That is, the racial distinctions proceed from the white perspective, with the consequence that the exclusion necessarily was accompanied by pejoratives, with laws of nature sometimes invoked to legitimate the judgment. The courts, therefore, adhered to a single objective model, in which Black blood contaminated pure white blood.

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[119] State ex rel. Plaia v. La. State Bd. of Health, 275 So.2d 201 (La. Ct. App. 1973).
[120] *Id.* at 204.
[121] Doe v. State, 479 So.2d 369 (La. Ct. App. 1985).
[122] *Id.* at 372.
[123] *Id.*
[124] *Id.*
[125] Maurice Merleau-Ponty, Phenomenology of Perception 69 (Donald Landes trans., Routledge & Kegan Paul 2d ed. 2014)(1945).

# III. Contamination

What is contamination? William James famously defined dirt as "matter out of place;"[126] it is fine in the backyard, but not on the crème brulee. Blacks would be fine in the field as subordinates, but out of place as social equals. But as Douglas observed in a somewhat different context, ideas of purity and pollution may seem timeless and unchanging and safeguarded by rules of avoidance and punishment, but they *do* change, resulting in inconsistencies of application.[127] Thus, on the precise level of assumed Black toxicity, the unanimity broke down, some favoring a fourth, others an eighth, a sixteenth or a thirty-second, with marginal cases to be decided on the basis of appearance or performativity.

Complicating matters further, all races have not been treated the same. For example, the federal government, which did not utilize blood quantums for Native Americans until early in the twentieth century,[128] has generated nearly three dozen definitions of "Indian,"[129] and the 574 federally recognized tribes[130] have created even more.[131] There are also many tribes that are not recognized and many Native Americans who do not expressly belong to tribes. The Bureau of Indian Affairs generally follows the one-quarter rule, perhaps because this results in fewer persons entitled to race based government entitlements than the one-drop rule. In any case, Native Americans are intermarrying at such a high rate that applying the rule will mean that "eventually Indians will be defined out of existence. When this happens the federal government will be freed of its persistent 'Indian problem.'"[132]

An enduring problem has been that all the criteria are seriously defective. Ancestry faces the problem of conflicting, incomplete or absent records. It is obviously easier to tie a child's race to the mother than the father, but it is not always clear what the mother's race is. A 2015 Pew Research Center survey found that 6.9% of adults identified as multiracial, about twenty million people.[133] In a

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[126] William James, Varieties of Religious Experience 129 (1901).

[127] Mary Douglas, Purity and Danger: An Analysis of Concepts of Pollution and Taboo 8 (1966).

[128] Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S. Dak. L. Rev. 1, 4 (2006).

[129] Sharon O'Brien, *Tribes and Indians: With Whom Does the United States Maintain a Relationship*? 66 Notre Dame L. Rev. 1461, 1481 (1991).

[130] 25 U.S.C. 488 (2003); *Tribal Nations and the United States*, Nat'l Cong. Of Am. Indians (Feb., 2020), https://www.ncai.org/tribalnations/introduction/Indian_Country_101_Updated_February_2019.pdf.

[131] For example, the White Mountain Apaches require half blood for membership, the Tunica-Biloxi only one-sixty-fourth, and the Oklahoma Cherokee none at all. Margo S. Brownwell, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. Mich. J. L. Reform 275 (2000); Fergus M. Bordewich, Killing the White Man's Indian 72-73 (1996); Circe Sturm, Blood Politics: Race, Culture, and Identity in the Cherokee Nation of Oklahoma 52 (2002).

[132] Patricia N. Limerick, The Legacy of Conquest: The Unbroken Past of the American West 338 (1987).

[133] Juliana M. Horowitz & Abby Budiman, *Key Findings about Multiracial Identity in the U.S. as Harris Becomes Vice Presidential Nominee*, Pew Research Center, (Aug. 18, 2020), https://www.pewresearch.org/fact-tank/2020/08/18/key-findings-about-multiracial-identity-in-the-u-s-as-harris-becomes-vice-presidential-nominee/.

time of increasing rates of multiracial people, do we resurrect the quadroon and octoroon terminology from the old Jim Crow days?

The appearance criterion faces the problem of subjectivity – different people might evaluate a person's appearance differently – plus the problem of invisible Blackness – a person might pass the appearance test but fail the ancestry test. When Latinos were given stereotypical Black haircuts and Blacks stereotypical Latino haircuts, their racial identifications changed accordingly.[134] Finally, the performativity criterion faces the problem of socialization – persons living in a given culture may absorb the mores and behaviors of that culture, even if objectively they do not seem to belong there.

There is also, famously, the one drop rule, according to which literally a single drop of Black blood renders an individual Black.[135] In the early colonial period, most mixed race persons resulted from unions between enslaved Black women and male white indentured servants,[136] with the result that "certain people of blended ancestry often enjoyed space in between slavery and freedom."[137] With the development of plantation agriculture, however, this pattern was replaced by enslaved Black women having children by white masters or overseers, mostly coercively. As the nineteenth century progressed, according to Williamson's pioneering study, the one-drop rule first took root in the upper South, where mixed race people were more numerous, and then later in the lower South, where mixed race people were less common. Here, the perceived need to enforce the color line was weaker, and mixed race people tended to be recognized as a separate intermediate category accorded greater respect and security. By the 1850s, though, as a defensive reaction against abolitionists at a time of growing sectional crisis, the one-drop rule had become universal[138] and communities of free Black people were regarded as hotbeds of abolitionism and incubators of rebellion.[139]

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[134] Otto H. MacLin & Roy S. Malpass, *Racial Categorization of Faces – The Ambiguous Race Face Affect*, 7 Psychol. Pub. Pol'y & L. 98 (2001).

[135] In the United States, the one-drop rule has applied only to white and Black mixed race persons. Winthrop D. Jordan, *Historical Origins of the One-Drop Rule in the United States*, 1 J. Crit. Mixed Race Stud. 98, 101 (2014). Elsewhere, the one-drop rule has taken different forms. For example, in the late fifteenth century, following the expulsion of Jews and Muslims, Spain and Portugal adopted *limpieza de sangre* (purity of blood) laws that declared "any strain of an impure lineage was ineffaceable and perpetual." Marc Shell, *Marranos (Pigs), or from Coexistence to Toleration*, 17 Crit. Inq. 306, 309 (1991).

[136] Ranier Spencer, New Racial Identities, Old Arguments: Continuing Biological Reification, in Mixed Messages: Multiracial Identities in the "Color-Blind" Era 83, 89-90 (2006).

[137] Aaron B. Wilkinson, *Blurring the Line of Race and Freedom: Mulattoes in English Colonial North America and the Early United States Republic*, Univ. Cal. Berkeley. Hist. Ph.D. diss.169 (2013).

[138] Joel Williamson, New People: Miscegenation and Mullatoes in the United States (1980). His generalizations from New Orleans and Charleston to the entire lower South, however, may be open to question. *See also* Daniel J. Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600-1860,* 91 Minn. L. Rev. 592, 629-54 (2007). On the other hand, Washington finds the one-drop rule becoming dominant only in the post-Reconstruction period. Scott L. Washington, Hypodescent: A History of the Crystallization of the One-Drop Rule in the United States, 1880-1940, Princeton Univ. Socio, Ph.D. diss. ch. 2 (2011) (Pro Quest).

[139] Meyer, s*upra* note 47, at 83.

By 1904, a prominent statistician could brag that "there is no country in which statistical investigation of race questions is so highly developed . . . as the United States."[140] In a few years, the one drop rule was enshrined in law in Tennessee (1910), Arkansas and Texas (1911), Mississippi (1917), North Carolina (1923), Alabama and Georgia (1927), Virginia (1930), and Oklahoma (1931). Typical was a 1911 Arkansas statute, which defined "Negro" as anyone "who has . . . any Negro blood whatever."[141] In addition, a rule of one-sixteenth or one thirty-second Black blood, which was practically indistinguishable from the one drop rule, was adopted in Florida, Indiana, Kentucky, Maryland, Nebraska, North Dakota, and Utah. The 1920 Census formally accepted the one-drop rule.[142]

Intellectually, the one-drop rule provided a work-around for the troublesome Sorites Paradox. Imagine that you wish to build a pile of rice. You select one grain; it is not a pile. You add a second grain; it is also not a pile. Each additional grain is too small to make a difference. Thus, adding a thousandth grain would not make a pile – and yet collectively a thousand grains *are* a pile. So it is with race. If one accepts the racist contaminant premise, how to determine where to draw the line? One sixty-fourth may seem too tiny to notice. One thirty-second is also very small. So is one sixteenth. And one-eighth. The one-drop rule renders all these calculations irrelevant. Instead of seeking vainly for the precise point at which individual grains constitute a pile, it offers a very different metaphor. In the words of the notorious Klan apologist, Thomas Dixon, "A pint of ink can make black gallons of water."[143]

Though there is "very little evidence for sharp racially defined heterogeneities,"[144] some believe in the utility of DNA testing.[145] However, genetic testing recalls the infamous anti-Semitic Nazi Nuremberg laws to "protect German blood and honor" and the apartheid system of South Africa. Adding uncertainty, future advances in gene editing may eventually enable us to choose or alter our race, undermining the fixity assumption. More broadly, some scholars caution against genetic racial determination on the ground that it omits considerations of social, cultural, relational, and experiential norms that are essential in shaping racial identity.[146]

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[140] Walter Willcox, *Census Statistic of the Negro*, 13 Yale Rev. 274 (1904). On Willcox, *see* Mark Aldrich, *Progressive Economists: Walter Wilcox and Black Americans*, 1895-1910, 40 Phylon 1 (1979).

[141] 1911 Ark. Act. 320. One sociologist maintains that the one-drop rule has shaped Southern black racial self identification through a process of reflected appraisal. Nikki Khanna, *"If You're Half Black, You're Just Black": Reflected Appraisals and the Persistence of the One-Drop Rule*, 51 Socio. Q. 96 (2015).

[142] U.S. Census Bureau, Fourteenth Census of the United States: 1920 (1923).

[143] Thomas Dixon, Jr.,The Sins of the Father: A Romance of the South 276 (1912).

[144] Seymour Garte, *The Racial Genetics Paradox in Biomedical Research and Public Health*, 217 Pub. Health Rep. 421 (2002).

[145] Estaban G. Burchard *et al, The Importance of Race and Ethnic Background in Biomedical Research and Clinical Practice*, 348 New Eng. J. Med. 1170 (2003); Neil Risch, *Categorization of Humans in Biomedical Research: Genes, Race, and Disease*, 3 Genome Bio. 1 (2002).

[146] *E.g.*, Trina Jones & Jessica L. Roberts, *Genetic Race: DNA Ancestry Tests, Racial Identity, and the Law*, 120 Colum. L. Rev. 1929 (2020).

## IV. Who Defines Race: The Subjective Answer

The alternative to having someone else determine one's race, is to do it oneself. This bow to individual agency carries great emotional appeal in America, where so many of us, engaged in the pursuit of happiness that is always just out of reach, gorge ourselves on self help books that instruct us to take control of our lives.[147] Can I decide, then, on an aggressive make-over? Not merely Botox to plump up my lips or a hair transplant to give me a pompadour, but something truly radical? May I, a white person, choose to be Black? Worded this way, the proposal sounds silly. Yet choosing one's race is very far from a frivolous decision, and inasmuch as a white person can never really know what it is to be Black, he or she may base a momentous choice on second hand information of dubious validity. (It may be easier for a Black person successfully to choose to be white, as whites probably feel less need to hide their thoughts.)

In any case, racial self-identification is hardly uncommon. The Pew Research Center analyzed 168 million 2010 census returns and found that more than ten million changed their race from 2000.[148] More notoriously, Rachel Dolezal (aka Nkechi Amare Diallo), [149] Margaret Seltzer (aka Margaret B. Jones),[150] Jennifer Benton (aka Satchuel Cole),[151] and Jessica A. Krug (aka Jess La Bombera)[152] identified as Black; Jackie Marks (aka Jamake Highwater)[153] and Andrea Smith identified as Cherokee;[154]

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[147] *E.g.*, Jen Sincero, You Are a Badass: How to Stop Doubting Your Greatness and Start Living an Awesome Life (2013).

[148] D'Vera Cohn, *Millions of Americans Changed Their Race or Ethnicity Identification from One Census to the Next*, Pew Research Center, (May. 4, 2014), https://www.pewresearch.org/social-trends/2014/05/05/do-americans-change-their-race-from-one-census-to-the-next-millions-do/.

[149] Allison Samuels, *Rachel Dolezal's True Lies*, Vanity Fair (July 19, 2015), https://www.vanityfair.com/news/2015/07/rachel-dolezal-new-interview-pictures-exclusive.

[150] Motoko Rich, *Gang Memoir, Turning Page, Is Pure Fiction*, N.Y Times (Mar. 4, 2008), https://www.nytimes.com/2008/03/04/books/04fake.html.

[151] Tim Evans & Natalie E. Contreras, *Satchuel Cole, Leader in Fight for Racial Equality in Indianapolis, Lied about Own Race*, Indianapolis Star (Sept. 18, 2020), https://eu.indystar.com/story/news/investigations/2020/09/18/indianapolis-activist-satchuel-cole-lied-being-black/3486542001/.

[152] Colleen Flaherty, *White Lies*, Inside Higher Education (Sept. 4, 2020), https://www.insidehighered.com/news/2020/09/04/prominent-scholar-outs-herself-white-just-she-faced-exposure-claiming-be-black.

[153] Alex Jacobs, *Fool's Gold: The Story of Jamake Highwater, the Fake Indian Who Won't Die*, Indian Country Today (June. 19, 2015), https://indiancountrytoday.com/archive/fools-gold-the-story-of-jamake-highwater-the-fake-indian-who-wont-die.

[154] Cherokee Women Scholars' and Activists' Statement on Andrea Smith, Indian Country Today (July 17, 2015), https://indiancountrytoday.com/archive/cherokee-women-scholars-and-activists-statement-on-andrea-smith. The most famous case of Native American self-identification involved Senator Elizabeth Warren, who for a variety of purposes and over nearly twenty years claimed to be Native American. A DNA test disclosed that she "likely had a Native American ancestor six to ten generations ago." Kristina Peterson & Rebecca Ballhaus, *Warren Releases DNA Analysis Showing String Evidence of Native American Heritage*, Wall St. J. (Oct. 15, 2018), https://www.wsj.com/articles/warren-releases-dna-analysis-showing-evidence-of-native-american-heritage-1539619976.

and Michael Derrick (aka Yi-Fen Chou)[155] identified as Chinese. All were white and can be classed as identity entrepreneurs, in that they "leverage[d] . . . identity as a means of deriving social or economic value."[156] Self-identification, in short, frequently will present a conflict of interest: I may choose to identify with a race because it is to my advantage to do so.[157] You may choose to accept my self-identification for the same reason.[158] Or you may reject it as somehow inauthentic.[159] The utility of self-identification is a staple of fiction depicting non-white characters passing as white.[160] As Booker T. Washington observed, "how difficult it sometimes is to know where the black begins and the white ends."[161]

Can I, then, with the aid of cosmetic science take control of my life and remake myself in this fashion? Indeed, do I have a dignity or liberty interest in self-identification?[162] Or does it constitute racial fraud?[163] Even if it is fraud, is this an acceptable price to pay for the agency self-identification confers?[164] One might imagine that Black people would feel that only those who have suffered on account of race should claim its benefits.[165] However, the verdict is mixed, and the results are somewhat unexpected. On Dolezal, sixty-eight percent of whites thought she was deceitful and only twenty percent believed she should retain her position as president of the Washington chapter of the NAACP; on the other hand, only forty-six percent of Black people considered her deceitful and fifty-two percent

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155 Hua Hsu, *When White Poets Pretend to Be Asian*, New Yorker (Sept. 9, 2015), https://www.newyorker.com/books/page-turner/when-white-poets-pretend-to-be-asian.

156 Nancy Leong, *Identity Entrepreneurs*, 104 Cal. L. Rev. 1333, 1336 (2016).

157 An interesting case is Johnny Otis, an influential rhythm and blues impresario, who did not hide the fact that he was white, but, as he put it, "As a kid I decided that if our society dictated that we had to be either black or white, I would be black." Johnny Otis, Listen to the Lambs 12 (2009).

158 Under the apartheid system, Japan was a major trading partner of South Africa. Hence, as of 1961 Japanese were designated honorary whites and entitled to enjoy most of the privileges of whites. Robert J. Payne, *Japan's South Africa Policy: Political Rhetoric and Economic Realities*, 86 Afr. Affs. 167, 168 (1987).

159 A study of American Indians found very high rates of misclassification by observers, often with serious psychological consequences. Mary E. Campbell & Lisa Troyer, *The Implications of Racial Misclassification by Observers*, 72 Am. Socio. Rev. 750 (2007). Indeed, thirty-seven percent of infants who died before age one were classified differently on their birth and death certificates. Robert A. Hahn, J. Mulinare & S.M. Teutsch, *Inconsistencies in Coding of Race and Ethnicity between Birth and Death in U.S. Infants: A New Look at Infant Mortality, 1983 through 1985,* 267 JAMA 259, 260-61 (1992).

160 *E.g.*, Mark Twain, The Tragedy of Pudd'nhead Wilson (1894); Charles Waddell Chesnutt, The House beyond the Cedars (1900); James Weldon Johnson, The Autobiography of an Ex-Colored Man (1912); Edna Ferber, Show Boat (1926); Jessie Fauset, Plum Bun (1928); Nella Larsen, Passing (1929); George Schuyler, Black No More; Philip Roth, The Human Stain (2000).

161 Booker T. Washington, Up from Slavery: An Autobiography 66 (1901).

162 Camille G. Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 Geo. L. J. 1501, 1506-7 (2014).

163 Luvell Anderson, *Whiteness Is the Greatest Racial Fraud*, Boston Rev. (Jan. 13, 2021), https://bostonreview.net/articles/luvell-anderson-whiteness-itself-greatest-racial-fraud/.

164 Randell Kennedy, Interracial Intimacies: Sex, Marriage, Identity, and Adoption 337 (2003).

165 Adrian Piper, *Passing for White, Passing for Black*, 58 Transition 4, 7 (1992).

thought she should keep her NAACP position.[166] An easy prediction that Black people would be more critical of her falsely assuming their status for her benefit turns out to be false. Which may suggest that it is unwise to take how people feel about constructing race for granted.

The revelations about persons of one race assuming another race suggest that observation may not always be a reliable guide for racial identification. Thus, we may see someone and perhaps not be certain which race he or she is, and then look or listen at other things – maybe his or her hairstyle or slang – and make up our mind accordingly, adding behavior to the mix. Which is not necessarily to say that culture is determinative.[167] Is the rapper Eminem Black or the opera singer Leontyne Price white? "If 'white' can be 'black,' what is white?"[168] And what is Black?

Of course, relying on behaviors leaves us open to charges of stereotyping, which was exactly how Dolezal and the rest successfully passed. However, stereotyping is normal behavior, for "the human mind must think with the aid of categories. . . We cannot possibly avoid this process. Orderly living depends on it."[169] It is essential in cutting our information processing costs, even though it may yield very imperfect results. Racial stereotyping, in particular, is notoriously insidious, as it may be activated involuntarily and unintentionally as a result of cultural conditioning at a very young age.[170]

If common sense tells us that race is easily determined objectively, it is also common sense that tells us the earth is flat. Common sense does not always make sense. Consider the plight of Homer Plessy in the well known case that bears his name.[171] In the Louisiana of the 1890s, "There existed no consistent, thorough, and effective system of social control, legal or extralegal, governing relations between the races. The place of the Negro and his relationship to the white man had yet to be carefully defined." Accordingly, the "treatment accorded Negroes on the railroads varied greatly."[172] Yet though Louisiana was late in embracing legally required racial segregation, it was also perhaps the most aggressive Southern state in this regard.[173]

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[166] *More Black Voters Don't Think Rachel Dolezal Should Have Resigned from the NAACP*, Rasmussen Rep. (June. 22, 2015), https://www.rasmussenreports.com/public_content/politics/general_politics/june_2015/most_black_voters_don_t_think_rachel_dolezal_should_have_resigned_from_naacp. In support of Dolezal, *see* Rebecca Tuvel, *In Defense of Transracialism*, 32 Hypatia 263 (2017). Of course, whites passing as Black always retain the option of returning to white.

[167] Tanya Katari Hernandez*, "Multiracial" Discourse: Racial Classifications in an Era of Color-blind Jurisprudence*, 53 Md. L. Rev. 97, 111-12 (1998).

[168] Elaine K. Ginsberg, Passing and the Fictions of Identity 8 (1996).

[169] Gordon W. Alport, The Nature of Prejudice 21 (1954).

[170] P.G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. Personality & Soc. Psychol. 548 (1989).

[171] Plessy v. Ferguson, 165 U.S. 537 (1896).

[172] Henry C. Dethloff & Robert P. Jones, *Race Relations in Louisiana, 1877-1898*, 9 La. Hist. 301, 305, 312 (1968). Light skinned Blacks often sat in white sections of street cars in New Orleans. Hilary McLaughlin-Stonham, From Slavery to Civil Rights: On the Streetcars of New Orleans, 1830-Present 123 (2020).

[173] Franklin Johnson, The Development of State Legislation Concerning the Free Negro 111-16 (1919).

One-eighth Black, Plessy could pass for white ("his blood was not discernible"[174]). Yet a train conductor, in the words of his lawyer, Albion Tourgee, "in the absence of statutory definition and without evidence"[175] directed him to cars reserved only for Blacks, as required by Louisiana law. Plessy refused to categorize himself racially and noted that in his hometown, New Orleans, there were several racial gradations that were widely recognized, with lighter skins being privileged. As Tourgee, argued, "In any mixed community, the reputation of belonging to the dominant race... is property, in the same sense that a right of action or an inheritance is property. . . . Indeed, is not whiteness the most valuable sort of property, being the master-key that unlocks the golden door of opportunity? . . . Probably most white persons if given a choice, would prefer death to life in the United States as colored persons. Under these conditions, is it possible to conclude that the reputation of being white is not property?"[176]

Louisiana empowered the conductor "at his own discretion to require a man to ride in a 'Jim Crow' car,"[177] thereby depriving Plessy of his property (that is, his reputation) without due process in violation of the Fourteenth Amendment.[178] Compounding the problem, because the law denied the conductor and the railroad any liability for damages, it removed a key incentive to challenge the conductor's authority through a suit for damages. Thus, as Tourgee put it, the "gist of our case is the unconstitutionality of the assortment, not the question of equal accommodation."[179]

The United States Supreme Court in deciding against Plessy, however, paid little attention to his argument. At one point, Justice Brown asserted that racial differences exist as "a distinction which is found in the color of the two races, and which must always exist so long as white men are distinguished from the other races by color,"[180] in other words, that the distinctions will always be permanent and easy to see. A few pages later, however, he observed that some states had ruled that "any visible admixture of black blood stamps the person as belonging to the colored race; others that it depends upon the preponderance of blood; and still others that the preponderance of which blood must only be in the proportion of three fourths,"[181] in other words, that reasonable people may disagree on the subject. The confusion is indicative of the Justices' lack of interest in the question. Apparently, they thought the answer obviously lay with "natural affinities,"[182] "racial instincts,"[183] or physical observation – though in Plessy's case it was emphatically not obvious at all.

Brown conceded *arguendo* that Plessy's reputation was a kind of property, but disposed of his claim with the observation that as Plessy was not white, "he is not

[174] Plessy, *supra* note 171, at 538.
[175] Brief for the Plaintiff in error at 81, Plessy v. Ferguson, 550 U.S. 537 (1896) 1893 WL 10660, at 6. Tourgee had earlier written a novel that sympathetically depicted a black man passing as white. Albion W. Tourgee, A Royal Gentleman (1874).
[176] *Id.*
[177] *Id.*
[178] *Cf.*, Cheryl Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1709, 1747 (1993).
[179] Tourgee*, supra* note 175.
[180] Plessy, supra note 171, at 543.
[181] *Id.* at 552.
[182] *Id.* at 543.
[183] *Id.* at 551.

entitled to the reputation of being a white man."[184] For Brown, Plessy's reputational claim was simply based on a claimed right to deceive. Plessy had argued that his reputation had created a presumption of whiteness; Brown replied that, conversely, whiteness was the basis of his reputation. Even Justice Harlan's famous color blind dissent ignored Plessy's claim. His reference to blackness as a "badge of slavery" was directed at identity,[185] but his opinion was silent as to how the identity was to be determined. What Plessy sought was the power to determine his own racial designation.

It is not difficult to grasp Brown's point. Given the countless advantages of whiteness, some Black people will misidentify themselves to enjoy these advantages. Self-identification, then, has an ineradicable problem of conflict of interest. That there might be something wrong with whiteness' advantages seems never to have crossed his mind.

It is also not difficult to grasp Plessy's point. The Louisiana law, which ended the established practice of men of both races occupying second class cars, never bothered to define the races. The so-called objective test, racist to the core, told Plessy that seven-eighths white and one-eighth Black meant he was Black. Even the arithmetic made no sense. And as racial classification touched virtually every aspect of existence, his life was profoundly affected by premises thoroughly hostile to his interests. Brown was surely correct that under the current system, Plessy was simply a Black man not entitled to be taken for white; but Plessy, addressing a more fundamental issue, insisted that the system was incoherent and should be disregarded, a plea that Brown ignored. Yet as a practical matter, in claiming that he should be treated as white, Plessy was not so much attacking a system of white supremacy as asking that the benefits of whiteness be a little more broadly shared.

To him, it was plain that as objective definitions are unstable, so are subjective definitions, which may vary over time,[186] across contexts,[187] and according to the norms and expectations of others.[188] In the best of circumstances, moreover, many individuals will find their discretion limited by their physical appearance and the perceptions of those around them. Brown's pretense at objectivity was refuted daily in the real world.

Plessy by implication raises the issue of racial defamation. In the South, it was universally acknowledged among the white legal establishment that calling a white person Black was libelous *per se*;[189] that is, the mere showing of publishing the words would be sufficient to establish guilt, with no need to prove actual damages. In *Upton v. Times Democrat* (1901),[190] a reporter sent a telegram to his newspaper, referring to Thomas Upton as a "cultured" gentleman; in transmission, the word was altered to "colored"; because the newspaper used "Negro," it was changed again in print. The newspaper printed a retraction and apologized to Upton, but

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[184] *Id.* at 549.

[185] *Id.* at 553.

[186] James M. Doyle & Grace Kao, *Are Racial Identities of Multiracials Stable? Changing Self Identity among Single and Multi Race Individuals*, 70 Soc. Psychol. Q. 405 (2007).

[187] David R. Harris & Jerimiah J. Sim, *Who Is Multiracial: Assessing the Complexity of Lived Race*, 67 Am. Socio. Rev. 14 (2002).

[188] Joanne Nagel, *Constructing Ethnicity: Creating and Recreating Ethnic Identity and Culture*, 41 Soc. Prob. 152 (1994).

[189] Eden v. Legare, 1 S.C.L. 171 (1791); King v. Wood, 10 S.C.L. 184 (1818).

[190] Upton v. Times Democrat, 104 La. 141 (1900).

his libel judgment was upheld. *Flood v. News & Courier* (1905)[191] concerned a man struck by a streetcar; the local newspaper reporting the incident called him colored. The Georgia Supreme Court observed that calling "a white man a negro or a mulatto. . . would not only be galling to his pride, but would tend to interfere seriously with the social relation of the white man with other white men."[192] As late as the 1950s, similar libel judgments were upheld.[193]

*Major Concrete Construction Co. v. Erie* (1987)[194] saw a business executive try to have his company certified as a minority business enterprise for affirmative action purposes on the ground that he was one-quarter Mexican. He conceded that he had no tie to the Hispanic community, had no Hispanic friends, and did not identify as Hispanic, but maintained that his ancestry was sufficient to win the certification. Neither the administrative judge nor the New York Supreme Court, Appellate Division, found this persuasive. Ancestry had to be supplemented by some cultural tie.[195] His self-identification was not enough.

A Massachusetts case raised the matter of racial self-identification in the context of an affirmative action policy that benefitted minority public employees. *Malone v. Civil Service Commission*[196] involved two Malone brothers, who, identifying as white, took a civil service examination to become firefighters and failed; two years later, they took the exam, identifying as Black under an affirmative action decree order, and were hired, though their grades were below those of the cut-off for successful white applicants. A decade later, they sought promotions; the fire commissioner noticed that they were classified as Black but appeared white; they asserted without proof that their great grandmother was Black. A personnel administrator appointed a hearings officer, who then applied three criteria to determine the accuracy of the Malones' self-identification: visual appearance, Black ancestry, evidence that they identified as Black and were so regarded by the Black community. As they failed to meet any of the criteria, the officer concluded that the Malones had "willfully and falsely identified themselves as black in order to receive appointments in the department."[197] They sued for reinstatement, arguing that the hearing officer was biased, based on her membership in the NAACP and a remark reported by an unidentified person. The Supreme Judicial Court of Massachusetts rejected the bias contention as baseless, and seems to have accepted the hearings officer's criteria as workable. A Boston newspaper reported that eleven other firefighters were under investigation for similar deceptions.[198]

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[191] Flood v. News & Courier ,71 S.C. 112 (1905).

[192] *Id.* at 117.

[193] Natchez Times v. Dunigan, 2321 Miss. 320 (1954) (a newspaper report of a car accident described a white woman as Black and in the company of two Black men); Bowen v. Independent Pub., 230 S.C. 509 (1957) (an erroneous photograph of a white woman's son appeared under a newspaper column "Negro News"). In 2004, a losing Black candidate sued a newspaper for libel for mistakenly identifying a picture of a white man of the same name as him. Johnson v. Staten Island Advance Newspaper, Inc., 38480/03, 2004 WL 4986754, at *1 (N.Y. City Civ. Ct. July 23, 2004).

[194] Major Concrete Construction Co. v. Erie, 134 A.D. 2d 872 (1987).

[195] *Id.* at 873.

[196] 646 N.E. 2d 150 (Mass. App. Ct. 1995).

[197] *Id.* at 151.

[198] Peggy Hernandez, *Firemen Who Claimed to Be Black Lose Appeal*, BOST. GLOBE (July 26, 1989).

More recently, a Seattle small business owner, Ralph Taylor, sought to have his insurance company certified by the state as a minority business enterprise, so it could qualify for a federal affirmative action program targeting disadvantaged business enterprises. Taylor had lived his life as a white man and had experienced no discrimination, but an ancestry DNA test revealed that he was ninety percent white, six percent Native American, and four percent Black, and he applied to be certified. He was certified by the state, but denied certification by federal authorities, who asked him questions they had never asked other applicants. He appealed to a federal district court, arguing that the law defined Black as "having origins in any of the black racial groups in Africa," that he met this criterion, and that its absence of formal procedures for determining racial identity resulted in a process void for vagueness. The court upheld the denial, noting that Taylor failed to show discrimination, that the agency had a "well founded reason" (namely, his appearance as a white man) to question his self-identification, and dismissed his appeal.[199] The ninth circuit affirmed the judgment.[200] A Seattle newspaper, however, reported that a Yakima man who claimed to be six percent Black and appeared white had qualified for similar state and federal programs and been awarded millions of dollars in contracts.[201]

In *Major Concrete Construction, Malone,* and *Orion*, subjective racial identification collided with objective identification and collapsed under the weight of obvious conflicts of interest. Nonetheless, self-identification is far from dead. Indeed, perhaps as a result of the growing number of mixed race persons, the Census in 1970 switched from enumerators determining the race of respondents to respondents making the determination themselves.[202] This may improve the overall accuracy of the count, but the instances of passing may indicate that self identification may not be trustworthy in every specific case. For example, a study of self identification and affirmative action policies found that Black mixed race individuals were thirty percent more likely to identify as Black when there were affirmative action policies than when there were not.[203] Still, the practice of self-identification is gaining acceptance, so much so that it is entirely predictable to read of a "right to racial self-identification."[204] Or as a pair of scholars put it, "Racial

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[199] Orion Insur. v. Washington State Office of Minority and Women's Business Enterprise, 2017 WL 3387344 (D. Wash. 2017).

[200] Orion Insur. v. Washington State Office of Minority and Women's Business Enterprise, 754 F. App. 556 (9th Cir. 2018). *Cert. denied* S. Ct. 2755 (2019).

[201] Christine Willmsen*, Lynnwood Man Tries to Use a Home DNA Test to Qualify as a Minority Business Owner. He Was Denied – Now He's Suing*, Seattle Times (Sept. 13, 2018), https://www.seattletimes.com/seattle-news/lynnwood-man-tried-to-use-a-home-dna-test-to-qualify-as-a-minority-business-owner-he-was-denied-now-hes-suing/.

[202] Interviewers also may find that their racial classifications vary over time. James Scott Brown, Steven Hitlin & Glen H. Elder, Jr., *The Importance of Being "Other": A Natural Experiment about Lived Race Over Time,* 36 Soc. Sci. Res. 159 (2007).

[203] Francisca Antmann & Brian Duncan, *Incentives to Identify: Racial Identity in the Age of Affirmative Action*, 97 Rev. Eco. & Stat. 710, 713 (2015).

[204] Camille Gear Rich, *Affirmative Action in the Era of Elective Race: Racial Commodification and the Promise of the New Functionalism*, 102 Geo. L. J. 178, 190-93 (2013); Taunya Lovell Banks, *Personal Identity & Racial Misrecognition: Review Essay of Multiracials and Civil Rights: Mixed-Race Stories of Discrimination*, 34 J. Civ. Rts. & Eco. Devel. 13, 17 (2021).

identity refers mainly to the subjective understanding of oneself as a racialized person."[205] Indeed, elective race "is poised to become one of the dominant frameworks for understanding race in the United States."[206] Is Dolezal, then, Black?

## V. Some Conclusions

The slaveowners took immense pride in the civilization they had created, so superior to the money-grubbing, wage-slavery that mocked the pretensions of the North and so exquisitely epitomized by the South's grand plantation mansions, all with columns echoing the villas of Palladio, who in turn had echoed the temples of ancient Greece and Rome. This civilization, a thin and precarious crust maintained by elites vigorously enforcing racial rules and conventions, depended on some human beings owning other human beings, posing the question as to how civilized the civilization actually was. When eventually it was vanquished in combat, the rules and conventions continued on, like runners who do not instantly stop upon crossing the finish line. Among those rules and conventions, the most powerful and durable, indeed, like runners who deny the race had ended at all, have proven to be those that stigmatize Black people. Hence, the perennial matter of constructing race has sadly retained its social centrality.

Constructing race, however, would seem to present inherent problems that may well doom the enterprise, at least intellectually. For generations, it was based on the assumptions that race is a neutral biological category and that racial identification is a straight forward matter of good faith common sense. Mixed race people, however, have become so numerous that focusing on appearance is frequently problematical, as the utility of the racial binary dwindles before our eyes. Increasingly, good faith common sense is seen to be inadequate. More basically, racial concepts themselves have become hard to defend.[207] Why should a person a fraction Black be termed Black? How can we even talk in terms of blood? What is the point of classifying people on the basis of skin color, hair, or the shape of their eyes?

At the same time, whatever the invalidity of race, the notion has acquired tremendous inertia over the centuries. Nearly all of us think in terms of race, perceive other people in terms of race, and consciously or unconsciously make use of race nearly every day of our lives. As to its history, one thinks of Faulkner's famous aphorism, "The past is never dead. It's not even past."[208] Thus, a careful study of the 2008 Obama election found that though old notions of Blacks' biological inferiority "had faded to the margins of white society," a racism of white resentment had taken its place.[209] There is even the grim possibility that humanity may be "universally

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[205] Kerry Ann Rockquemore & Patricia Arend, *Opting for White: Choice, Fluidity and Racial Identity Construction in Multiracial America*, 5 Race & Soc'y 49, 51 (2003).

[206] Camille G. Rich, *Elective Race*, 102 Geo. L. J. 1501, 1506 (2014).

[207] *E.g.*, Sharona Hoffman, *Is There a Place for "Race" as a Legal Concept?* 36 Ariz. St. L. J. 1093, 1136-44 (2004).

[208] William Faulkner, Requiem for a Nun (1950).

[209] Donald R. Kinder & Allison Dale-Riddle, The End of Race? Obama, 2008, and Racial Politics in America 52 (2011). A study of white reactions to the Obama presidency found little evidence of decline in opposition to Black leaders, policies intended to benefit Blacks, prejudice against Blacks, or the impact of prejudice on vote

inclined to dehumanize people who differ from them in physiognomy, phenotype, language, religion, social status, and even gender, [leaving] racism simply a variant on intergroup prejudice."[210] Thus, it is fatuous to urge that we jettison the concept, on account of its intellectual incoherence and its painful and corrupting record. These are good and sensible reasons, but it is simply and obviously not possible.

Is recognizing and not glossing over the existence of mixed race people the answer?[211] This may mollify some who feel ignored or slighted by the traditional approach, and with this in mind, the Census now permits respondents to check off more than one racial category or to select Other. But in the end, this merely tweaks the problem; creating new racial classifications will do little for members of these groups and nothing at all for those designated as Black.[212] Nor will it end the task of assigning or self-identifying individuals to specific racial pigeon holes. More basically, the centrality of the flawed concept of race remains, an unwanted guest having changed clothes but otherwise remained recognizably the same.

choice. If anything, Obama's rise to power increased perceptions that Blacks threatened white dominance. Nicola Yadon & Spencer Piston, *Examining Whites' Anti-Black Attitudes after Obama's Presidency*, 7 Pol., Groups, & Identities 794 (2019).

[210] David Brion Davis, In the Image of God: Religion, Moral Values, and Our Heritage of Slavery 308 (2001).

[211] Leong, *Supra* note 86; Lauren Sudeall Lucas, *Undoing Race? Reconciling Multiracial Identity with Equal Protection*, 102 Calif. L. Rev. 1243, 1277-79 (2014); Desiree D. Mitchell, *A Class of One: Multiracial Individuals under Equal Protection*, 88 U. Chi. L. Rev. 237 (2021).

[212] Russell maintains that the rule may have the positive effect of reinforcing a sense of unity within the Black community. Kathy Russell, The Color Complex: The Politics of Skin Color among African Americans 74 (1992).

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# King Mob and Contempt of Congress

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## ABSTRACT

*The aftershocks of the riot at the United States Capitol on January 6, 2021, continue to ripple through the American public square. The United States Department of Justice brought over 750 criminal charges against the assailants. The United States House of Representatives appointed a Select Committee to investigate the riot. And the public continues to discuss the meaning of January 6 as these criminal prosecutions continue and the House's investigation concludes. Although this is the first time in American history that a mob actually breached the Capitol, riots and insurrections attempting to overawe parliamentary bodies on their own grounds are well precedented in the Anglo-American legal tradition.*

*The purpose of this article is to provide historical context for affrays like the Trump Riot of January 6 and provide a framework for how legislatures should respond. Parliamentary precedents on both sides of the Atlantic prove that anyone who riots at the legislature is in contempt of parliamentary privilege. The legislature can refer such contempt to the executive for criminal prosecution. In egregious cases, however, the legislature should not hesitate to vindicate itself by using its own contempt power. The legislature should appoint a joint select committee or independent commission to investigate and hold those politically responsible to account.*

*There may be cases when an officer or an agent of the executive provokes or incites a riot at the Capitol. The legislature must prevail in its efforts to bring them in for a hearing and compel them to produce discovery. Of the three coordinate branches of the federal government the legislature is first among equals. Parliamentary privilege must therefore trump executive privilege during an investigation of an assault on the national assembly. Any member of the executive who contemptuously incites a mob at the seat of government is liable for discipline under the inherent power of Congress.*

## KEYWORDS

*Congress, Parliament, Parliamentary Privilege, Contempt, Impeachment, Riot, Insurrection, Sedition, Treason, Populism, Nationalism*

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* Joshua T. Carback is an independent author and civil litigator. He thanks the editors of the *British Journal of American Legal Studies* for their work on this manuscript. The opinions expressed in this article are strictly those of the author and should not be construed to reflect the views of any other person or institution. Please note that this article was written during the investigation of the Select Committee to Investigate the January 6th Attack on the United States Capitol and was in the final editing stages at the time the Select Committee published its final report.

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# I. Introduction

> The crier of Parliament shall stand without the door of the Parliament, and the doorkeeper shall announce to him what he shall proclaim. The King used to send his serjeant at arms to stand amid the great space without the door of Parliament to keep the door, so that none should make assaults or tumults about the doors by which the Parliament might be disturbed under the pain of caption of their bodies, because by right the door of Parliament ought not to be shut but guarded by the doorkeepers and king's serjeants at arms.
>
> *Modus Tenendi Parliamentum* (c. 1294 – 1327)

January 6, 2021, was the first day in American history that a riot penetrated the United States Capitol while the national legislature was in session. The United States Congress assembled that day to debate the certification of the Electoral College vote in the 2020 Presidential Election.[1] After a bruising race tarnished by heated rhetoric, partisan rivalry, and false allegations of voter fraud—"The Great Lie"—the worst was thought to be over.[2] President-elect Joseph Biden emerged as the apparent victor. Incumbent President Donald Trump insisted that the election was stolen despite the lack of any substantial corroborating evidence. "[I]f you don't fight like hell you're not going to have a country anymore," he trumpeted to his supporters on social media as thousands of them gathered in person to protest on his behalf at the "Save America" rally in Washington, D.C.[3] "Be there, will be wild."[4] His personal lawyer, Rudolph W. Giuliani, attended the rally and roared to the masses, "Let's have trial by combat."[5]

Inflamed by this splash of vitriol, thousands of Trump supporters formed a mob and marched on the Capitol. Some intended to riot for weeks. Others joined the fray on impulse. The assailants hurled themselves over the walls, stormed the halls, and overwhelmed security. Members of Congress fled their floors and hid for their lives. The certification stalled. The authorities eventually restored order, but not before the rabble committed gross indignities against the honor of the national assembly. Two rioters died during the assault. Five Capitol police officers later perished from health complications or suicide. The disturbance shook the nation. The United States Department of Justice brought criminal charges against over 750 rioters across 45 states. The legislature attempted to impeach Trump for

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1 *See generally* U.S. Const. art. 2, § 12; U.S. Nat'l Archives & Record Admin, Off. of the Fed. Reg., The 2020 Presidential Election Provisions of the Constitution and U.S. Code 1 (2020).

2 *Compare*, *e.g.*, *Donald J. Trump for President, Inc v. Sec'y of the Com. of Pa.*, Case No. 20-3371, at **1, 1 (3d Cir. Nov. 27, 2020), *and* Nat'l Intel. Council, Foreign Threats to the 2020 US Federal Elections i (Mar. 10, 2021), *with* Rep. Zoe Lofgren, Social Media Review: Members of the U.S. House of Representatives Who Voted to Overturn the 2020 Presidential Election 791 (2021).

3 H.R. 24 (Jan. 11, 2021); U.S. H.R., Trial Memorandum of the United States House of Representatives in the Impeachment Trial of President Donald J. Trump 2 (2021).

4 *Id.* at 12.

5 *Id*. at 20–21.

incitement but failed due to partisan gridlock.[6] Its investigation of the riot remains unfulfilled.

Elements of populism and nationalism are often at the heart of political disturbances like the Trump Riot. In my view, these elements are not dichotomous, but rather akin to a choral counterpoint in music: harmonically interdependent yet melodically independent. You can visualize them singing along in the same march or broadsiding back and forth against each other across a picket line. These elements frequented the steps of the Palace of Westminster long before they did so at the Capitol. Eighteenth century English demagogues like John Wilkes and Lord George Gordon stood at the helm of mass movements motivated by class-based grievances against propertied elites. Although not every riot at the doors of Parliament was necessarily "populist" or "nationalist," for those terms are anachronistic, the rhythm of larger eighteenth century metropolitan disturbances once manifested at least aspects of what those terms mean today. Those disturbances often coincided with popular causes, including the petitioning movement, resistance to general warrants, anti-popery, etc. Parliamentary precedents for responding to riots and insurrections at the seat of government in Great Britain provide not only institutional best practices for handling them in the United States today, but also yield insights into the social, economic, and political factors that motivate them in the first place.

On June 30, 2021, the United States House of Representatives approved House Resolution 503, creating the Select Committee to Investigate the January 6 Attack on the United States Capitol (the "Select Committee"). The Select Committee held hearings, conducted discovery, and published a final report.[7] The purpose of this article is to put the Select Committee's work into historical perspective and edify its conclusions. My focus is strictly on best practices for managing a particular flavor of direct contempt of Congress—riot or insurrection directly targeting the Capitol itself. The balance of parliamentary precedents confirms that the affray at the seat of government on January 6 constituted a high contempt of the United States Congress and the United States Constitution as well as a high crime and misdemeanor. Those who incited, conspired, and actually participated in the riot are therefore all technically liable for contempt and subject to impeachment.

The mission of the Select Committee was justified. Congress must develop policies for responding to riots on Capitol grounds and preventing them in the future. Although contempt and impeachment proceedings are rare devices, they are indispensable to the legislative power the Select Committee represented. To know that power, we must return to its origins. As we trace the footsteps of King Mob—a famed personification of urban riots well known in the eighteenth century—we shall see that his followers marched to a tempo eerily reminiscent of populist and nationalist rhythms animating contemporary politics. That similarity suggests that far from being exceptional, the Trump Riot was only the most recent explosion

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6 U.S. Dep't of Justice, *Capitol Breach Cases*, U.S. Attorney's Off. D.C., https://www.justice.gov/usao-dc/capitol-breach-cases (last visited January 22, 2022; 11:31 a.m.).

7 U.S. H.R. Res. 503 (June 30, 2021); *cf*. Chairman Bennie G. Thompson, Thompson Statement on Senate Judiciary Committee Report, U.S. H.R. (Oct. 7, 2021); U.S. Sen., Comm. on Homeland Sec. & Gov. Affairs & Comm. on R. & Admin., Examining the U.S. Capitol Attack; A Review of the Security, Planning, and Response Failures on January 6, 1–13 (June 8, 2021).

of tumultuous elements percolating at the core of the Anglo-American political tradition.[8]

## II. Contempt of the Parliament of Great Britain

The British Constitution is not a written instrument crafted at a particular point in time. It was induced over a thousand years from both written and unwritten sources of law: natural law, customary law, and positive law. Anglo-Norman custom ripened into more mature forms of law by the thirteenth century. Two are of particular importance here. The first was the common law (*ius commune*), which consisted of reasoned, systematically applied judicial precedents (*corpus iuris*) interpreting the law of the land (*lex terrae*). The second was the law of parliament (*lex parliamentaria*), which consisted of customs, usages, traditions, and precedents governing parliamentary assemblies.[9] Contempt power persisted as a tool for defending the prerogatives of the courts of common law and the Parliament of the United Kingdom and Great Britain, even against riot and insurrection at its doorstep, at the time of the American Revolution.[10]

### *A. The British Constitution and Contempt Power*

The origin of "contempt power" is traditionally ascribed to two thirteenth century instruments at the core of the English constitutional canon—the Great Charter of 1215 (Magna Carta) and the Statute of Westminster Second of 1285. These instruments prohibited disobedience of the law of the land.[11] Disobedience or disrespect of the law could be generically characterized as "contempt." But the word "contempt" also carried a special sense intertwined with the principle of inherent power, the notion that any delegation of sovereignty bestowed, at bare minimum, the sufficient amount of authority necessary to fulfill a prescribed duty.[12] There is a famous maxim—*cuicunque aliquis quid concedit concedere videtur*

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8 *See infra,* Parts II–V.

9 *See generally* Josh Chafetz, Democracy's Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions 47 (2007).

10 *See generally* J.H. Baker, An Introduction to English Legal History 232–23 (4th ed. 2002); Marjorie Chibnall, Anglo-Norman England: 1066–1166, 105–07, 166–70 (1986); Albert Venn Dicey, Introduction to the Study of the Law of the Constitution 12–18 (Liberty Fund 1915); Erskine May, Law and the Usage of Parliament 1 (10th ed. Reginald F.D. Palgrave & Alfred Bonham-Carter eds. 1893) [hereinafter, "Erskine May's 1893 Manual"]; Jean Louis De Lolme, The Constitution of England; Or, An Account of the English Government 23–54, 72–80, 84–88 (David Lieberman ed, Liberty Fund 2007) (1784); George Petyt, Lex Parliamentaria: or, A Treatise of the Law and Custom of the Parliaments of England 235–36 (1689).

11 Magna Carta, art. 39; Second Statute of Westminster of 1285, 13 Edw. I c. 39; William Blackstone, V Commentaries on the Laws of England 285–86 (St. George Tucker ed. 1803) (1765–1770); Linton D. Landrum, *Contempt: Origin and History of the Doctrine of Contempt*, 58 Albany L. J. 396, 396 (1898).

12 William Hawkins, I Treatise of the Pleas of the Crown cap. 22, § 5 (John Curwood ed. 1824) (1716) [hereinafter, "Hawkins, I Pleas of the Crown"].

*et id sine quo res ipsa esse non potuit*—"Whoever grants a thing is deemed also to grant that without which the grant itself would be of no effect."[13] Under this maxim, "contempt power" meant power incident or inherent to a grant of authority ultimately derived from the King to punish disobedience of the law.[14]

### *B. The Law of Parliament and Contempt Power*

Parliament operated under its own law, the *lex parlimentaria*, from at least the time of Richard II. Both Houses possess the inherent power to punish contempt under that law.[15] Contempt can either be direct or constructive—within Parliament's proximity or beyond. The earliest reference to contempt of Parliament I am aware of appears in the *Modus Tenendi Parliamentum*, a manual on parliamentary procedure probably written during the reign of Edward II. In that ancient treatise, the anonymous author notes that communities were collectively responsible for the appearance of members sent on their behalf. If the burgesses, knights of shires, or barons defaulted, their respective boroughs, cities, or baronies were liable to be amerced.[16]

The experience of Parliament crystalized the contours of its contempt power gradually over time as usages became precedents, precedents became customs, and customs became tradition. Contempt liability extended to members of the public as well as sitting Members of Parliament ("MPs"). Contemptuous conduct encompassed a range of disruptive behavior including any misconduct in the presence of either House or their committees, misconduct committed by members or officers, obstruction of members or officers in their execution of their duties, obstruction of witnesses or other persons involved in parliamentary matters, disobedience of rules or orders, premature or fraudulent publication of parliamentary proceedings, violations of the privileges of either House, etc.[17] Penalties for contempt of Parliament committed by lay people included fine, imprisonment, and corporal punishment; penalties for MPs included suspension, expulsion, and impeachment.[18]

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[13] Herbert Broom, A Selection of Legal Maxims 314 (10th ed. 1931).

[14] Henry Finch, A Description of the Common Laws of England 72–76 (1759) (1619).

[15] *See generally* Erskine May, Parliamentary Practice c. 15 (25th ed. 2019) [hereinafter, "Erskine May's 2019 Manual"]; *see also*, *e.g.*, Burdett v. Abbott [1812], 128 Eng. Rep. 384, 4 Taunt 401 (Eng.).

[16] Modus Tenendi Parliamentum 28–30 (c. 1294 – 1327); Dorothy K. Hodnett & Winifred P. White, *The Manuscripts of the Modus Tenendi Parliamentum*, 34 Eng. Hist. Rev. 209, 215 (1919); *cf.* V.H. Galbraith, *Modus Tenendi Parliamentum*, 16 J. Warburg & Courtauld Inst., 81, 85–87, 95 (1953).

[17] *See generally* Erskine May's 2019 Manual, *supra* note 15, at §§ 15.3–15.40; Erskine May's 1893 Manual, *supra* note 10, at §§ 57–90, 330.

[18] *E.g.*, Petyt, *supra* note 10, at 264–289 (1690); Mohun's Case, 15 H.L. Jo. 211–219 (Feb. 1, 1693) (acquitting Charles Mohun, 4th Baron Mohun of Okehampton, of the charge of aiding in the murder of a friend's romantic rival in an impeachment trial concluding on December 9, 1692); Lord Thomas Savile's Case (1642), *reprinted in* William Cobbett, 2 Cobbett's Parliamentary History of England from the Norman Conquest, in 1066 to the Year 1803, 1241 (1808) (punishing Thomas Savile, First Earl of Sussex, for failure to attend the House when summoned and accordingly suspending his privilege to sit and vote for the remainder of the session); Walter Long's Case (1629), *reprinted in id.* at 518 (punishing Walter Long, sheriff for the County of Wilts, for contempt in attempting to serve as an MP despite his obligation to remain within his bailiwick with

No court of law stood above either House of Parliament in adjudicating contempts of those Houses respective privileges. There was no such thing as judicial review. The judgment of Parliament on any breach of its privileges was final.[19]

The contempts of interest here are direct assaults on Parliament itself by riotous mobs.[20] The security of Parliament and the enforcement of its prerogatives historically belonged to the Serjeant at Arms of the House of Commons and the Usher of the Black Rod of the House of Lords. In the Middle Ages it was the Serjeant at Arms' responsibility to stand by the door of Parliament to guard it from assault. The experience of history teaches us that sometimes one serjeant is not enough.[21]

### *C. Direct Contempt by Riot and Insurrection*

Eric Hobsbawm defined the mob as "the movement of all classes of the urban poor for the achievement of economic or political changes by direction action."[22] Hobsbawm conceived the mob as a pre-political movement lacking any particular political program or ideology but characterized by traditionalist sentiments, patriotic fervor, and a contempt for the political establishment, the elite. If we tinker with this definition by expanding the demographics of the mob to include the lower and middling orders and accentuating the role of demagogic rhetoric about threats to constitutionally enshrined liberties, I believe we fairly describe the populist phenomenon.[23]

Although the contemporary scholarship of Ronald P. Formisano and Michael Kazin defining populism is impressive, neither sufficiently examines the connection between modern populism and the politics of the urban masses in eighteenth century Britain.[24] It is my position that the primitive roots of modern populism trace back to seeds of English Radicalism and the colorful antics of John Wilkes. This position challenges, of course, the idea that populism is historically a more liberal phenomenon and that it only recently endeared itself to conservative politics. "In its beginnings, at least," remarked Lewis Namier, "urban radicalism saw itself as a conservative movement."[25] Therefore, to the extent that urban radicalism is the seedbed of modern populism, I believe the case can be made that populism, if not objectively conservative, originally at least saw itself as such.

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a 2000 mark fine and imprisonment in the Tower of London).

19 *See* Erskine May's 1893 Manual, *supra* note 10, at 50–53, 128–30; Petyt, *supra* note 10, at 247–48 ("It doth not belong to the Judges to judge of any Law, Custom, or Privilege of Parliament.").

20 *See generally* Erskine May's 2019 Manual, *supra* note 15, at §§ 15.4 & n.1; 15.11 & n.2; 15.8 & nn.1–4; 15.38.

21 Modus Tenendi Parliamentum, *supra* note 16, at 38–39.

22 Eric Hobsbawm, Primitive Rebels 145–46 (2017).

23 *See id*. at 145–48.

24 *See* Michael Kazin, The Populist Persuasion: An American History 1–14 (rev. ed. 2017); Ronald P. Formisano, For the People: American Populist Movements from the Revolution to the 1850s 1–14 (2008).

25 *See* Lewis Namier & John Brooke, The House of Commons: 1754–1790, 16–18 (1964); *cf*. E.P. Thompson, The Making of the English Working Class 21–22, 69–70 (1966).

The clamoring of metropolitan mobs over issues of labor, dogma, and creed, whether one characterizes them as populist or nationalist by today's standards, were politically significant but often tainted by violence. The depredations of King Mob during the eighteenth century, especially in the vicinity of Westminster Palace, created a distinct body of precedent supporting the notion that a riot or affray in the presence of the legislature is contempt of the legislature as such. Parliament found that riots or insurrections that threatened the political process were especially dangerous to the national welfare and therefore constituted contempt of the British Constitution itself as well as high crimes and misdemeanors subject to impeachment.[26]

An incident in early April 1733 is exemplary. A mob assembled in different parts of the House of Commons, including the lobby and the Court of Requests, for the purpose of expressing political grievances. On April 12, 1733, the House responded by issuing a resolution condemning the mob's behavior as contemptuous of parliamentary privilege and an assault on the rule of law.

> *Resolved* and *declared, Nemine contradicente,* That the assaulting, insulting, or menacing, any Member of this House, in his coming to, or going from the House or upon the account of his Behaviour in Parliament, is an high Infringement of the Privilege of this House, a most outrageous and dangerous Violation of the Rights of Parliament, and an high Crime and Misdemeanour.
>
> *Resolved* and *declared, Nemine contradicente,* That the Assembling and Coming of any Number of Persons in a riotous, tumultuous, and disorderly, manner, to this House, in order either to hinder or promote the Passing of any Bill, or other Matter, depending before the House, is an high Infringement of the Privilege of this House, is destructive of the Freedom and Constitution of Parliament, and an high Crime and Misdemeanour.
>
> *Resolved* and *declared*, *Nemine contradicente*, That the Assembling and Coming of any Number of Persons in a riotous, tumultuous, and disorderly, manner, to this House, in order either to hinder or

[26] Piratin's and Lucy's Case, 202 H.C. Jo. 91 (Feb. 10, 1947); Carlisle's Case, 41 H.L. Deb. 1024, 1026, 1237–39 (Aug. 9, 1920); Stranger's Case, 86 H.C. Jo. 323, 325 (Feb. 28, 1831); Clifford's Case, 85 H.C. Jo. 461 (May 24, 1830); King v. Lord George Gordon [1781], 99 Eng. Rep. 372, 2 Dougl. 590, 592 (Eng.); Ratcliffe v. Eden [1776], 98 Eng. Rep. 1200, 2 Cowp. 485 (Eng.); Rowe's and Atkinson's Case, 20 H.C. Jo. 185 (Apr. 2, 1723); Purser Rioters' Case, 13 H.C. Jo. 228, 230–31 (Mar. 27, 1699); Silk Rioters' Case, 11 H.C. Jo. 667–68 (Jan. 21, 1697); Proceedings Related to the Silk Riot of 1697, *reprinted in* William Cobbett, 5 Parliamentary History of England from the Norman Conquest in 1066 to the Year 1803, 1163 (1808); Theauro's Case, 7 H.C. Jo. 410 (Dec. 30, 1654); Carye's and Percy's Case, 1 H.C. Jo. 259–260 (Jan. 25, 1606); Goodwyn's Case, 5 H.C. Jo. 232–33 (July 5, 1647); Case 13: Memorandum re: Puritans [1604], 79 Eng. Rep. 30, 31, Cro. Jac. 37 (Eng.); Hall v. Fettiplace [1604], 72 Eng. Rep. 887, Moore K.B. 758 (Eng.); Bellew v. Bullocke [1604], 74 Eng. Rep. 1067, Noy 101 (Eng.); Erskine May's 2019 Manual, *supra* note 15, at § 15.3; Hawkins, I Pleas of the Crown, *supra* note 12, at 92, 309, 310, 354.

> promote the Passing of any Bill, or other Matter, depending before the House, is an High Infringement of the Privilege of this House, is destructive of the Freedom and Constitution of Parliament, and an high Crime and Misdemeanour.
>
> *Resolved* and *declared*, *Nemine contradicente*, That the inciting and encouraging any Number of Persons to come, in a riotous, tumultuous, and disorderly, manner, to this House, in order either to hinder or promote the Passing of any Bill, or other Matter, depending before this House, is an High Infringement of the Privilege of this House, is destructive of the Freedom and Constitution of Parliament, and an high Crime and Misdemeanour.[27]

These resolutions are representative of the kind of resolutions Parliament promulgated in wake of tumultuous assemblies at its gates throughout the seventeenth and eighteenth centuries.[28] Parliamentary resolutions in the aftermath of riots were often followed by an order designating a committee with the responsibility to investigate and inquire how to prevent similar affrays in the future.[29]

During the Hanoverian period, defeated parties commonly contested the outcome of elections through petitions to Parliament on allegations of election interference or bribery. Petitions, however, could catalyze violent interference with the political process.[30] Parliament passed legislation designed to preclude or at least mitigate riots circumscribing petitioning rights. The Vexatious Arrests and Delays at Law Act of 1661, for example, prohibited more than ten people from accompanying a petition to Parliament. Parliament went so far as to enact a law in 1817 providing that any gathering of more than fifty people within a mile of Westminster for the purpose of supporting a petition was a seditious assembly. By the by, Parliament deemed petition riots to be contemptuous high crimes and misdemeanors. Three examples shall illustrate.[31]

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[27] Case of the Tumultuous Crowd, 22 H.C. Jo. 115–116 (Apr. 12, 1733).

[28] *See, e.g., id.*

[29] Lord George Gordon's Case, 37 H.C. Jo. 902 (June 6, 1780); Case of the Tumultuous Crowd, 31 H.L. 209 (May 17, 1765); Case of Tumultuous Crowd, 22 H.C. Jo. 115–116 (Apr. 12, 1733); Silk Rioters' Case, 11 H.C. Jo.667–68 (January 21, 1697).

[30] *See, e.g.*, Case 13: memorandum re; Puritans [1604], 79 Eng. Rep. 30, 31, Cro. Jac. 37 (Eng.); William Craig, *Hampton Court Again: The Millenary Petition and the Calling of the Conference* 77 Anglican & Episcopal Hist. 46, 68–69 (2008); *cf*. Don L. Smith, The Right to Petition for Redress of Grievances: Constitutional Development and Interpretations, A Dissertation in Government 11 (Tex. Tech. Univ., 1971); Richard Chandler, I The History and Proceedings of the House of Commons 127–132 (1742).

[31] Frank O'Gorman, Voters, Patrons, and Parties: The Unreformed Electoral System of Hanoverian England 1734–1832, 12–13 (1989); Carl Wittke, The History of English Parliamentary Privilege 22, 33 (1970); Erskine May's 2019 Manual, *supra* note 15, at §§ 24.2, 24.7; Erskine May's 1893 Manual *supra* note 10, at 493 & n.1–500; Seditious Meetings Act of 1817, 57 Geo. 3, c. 19, s. 23; Vexatious Arrests and Delays at Law Act of 1661, 13 Car. 2, c. 5; Michael Lobban, *From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c. 1770–1820*, 10 Oxford J. of L. Studies, 307, 334 (1990).

### *1. The Purser Riot of 1699*

On March 27, 1699, the House of Commons considered a petition of Royal Navy pursers—warrant officers responsible for handling money onboard naval vessels. The pursers complained of physical abuse by their commanders while they served at sea. An angry mob consisting of seamen and their wives gathered outside the House during session. The House summoned the justices of the peace for Middlesex and Westminster to attend the House, bring constables with them, and disperse the mob. The authorities took one James Gardener into custody for inciting a riot by uttering insolent words. Gardener was promptly convicted and committed to the Gatehouse for his contempt. This is the earliest precedent I found confirming contempt liability lies for inciting a disturbance at the seat of government.[32]

Angry sailors would find their way back to Westminster in the course of the following century. They faced difficulties with unemployment and wage rates following the end of the Seven Years War. In May 1768, for example, somewhere between five and fifteen thousand of them presented a petition to Parliament conveying their grievances. After they did so, however, they simply gave three cheers and dispersed. I am not aware of any historian who would label these disturbances as incidents of "populism" per se. In fact, most petition movements in the eighteenth century, whether they involved riots or not, appear to be simply trade lobbying by other means. The next two disturbances, in my view, however, did savor of populism and nationalism, were of a much greater magnitude, and left an indelible mark on the political landscape.[33]

### *2. The Wilkes' Riots of 1763 & 1768*

There was no figure in the annals of Hanoverian London whose personality was more flamboyant or whose politics were more electrifying than John Wilkes. Wilkes was born to a wealthy distiller in London on October 17, 1725. He married well, served as High Sheriff of Buckinghamshire in 1754, and was elected as MP for Aylesbury in 1757. He was a notorious libertine with an earthly appetite. He was, for example, a member of the Hellfire Club, a secret society that carried out orgiastic rituals at Medmenham Abbey, and filled his belly at the Sublime Society of Beefsteaks in Covent Garden. Edmund Burke characterized him as a "lively agreeable man, but of no prudence and no principle." Benjamin Franklin called him "an outlaw and exile of bad personal character, not worth a farthing." In 1762, he cofounded an opposition paper, *The North Briton*, to rival Tobias Smollett's pro-government publication, *The Briton*. The title of Wilkes' publication winked at North-South relations, which, as in the United States today, remain an important political axis. Wilkes' publication was dark and satirical, but managed to kick off without any legal reprisals.[34]

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32 Purser Rioters' Case, 13 H.C. Jo. 228, 230–31 (Mar. 27, 1699).

33 George Rudé, Wilkes and Liberty: A Social Study of 1763 to 1774, 91–92, 103 (1962) [hereinafter, "Rudé, Wilkes and Liberty"]; John Stevenson, Popular Disturbances: 1700–1832, 89–92, 155–56 (2d ed. 1992).

34 Rudé, Wilkes and Liberty, *supra* note 33, at xiii–xiv, 18–21.

Controversy did not hold off for long. On April 23, 1763, *The North Briton* printed issue No. 45, which included a scathing critique of George III's speech in favor of the Peace of Paris. No. 45 ignited a political chain reaction that distinguished Wilkes as the demagogue of the decade. Officers of the Crown concluded that No. 45 went too far and constituted seditious libel. They discovered that Wilkes personally edited No. 45 but were impeded from prosecuting him initially because of the privilege of freedom from arrest Wilkes enjoyed as a sitting MP. MPs were generally immune from arrest under the *lex parliamentaria*. The authorities justified their decision to arrest Wilkes anyway on the theory that Wilkes' libel constituted a breach of peace and therefore could not be shielded by parliamentary privilege. A general warrant was issued. The Sergeant at Arms of the House of Commons executed the warrant on April 30, apprehended Wilkes, and committed him to the Tower of London.[35]

The Court of Common Pleas granted a writ of habeas corpus and called Wilkes to the bar on May 3. Wilkes played to the crowd in court, declaring that "the liberty of an Englishman should 'not be sported away with impunity.'"[36] His audience loved his performance so much that the whole affair converted from an inquisition into the propriety of his writing into a referendum on the propriety of general warrants. "As Wilkes left the court-room he was greeted with thunderous shouts of 'Liberty! Liberty! Wilkes forever!'"[37] Three days later, the Court upheld the propriety of the warrant but discharged Wilkes on the basis that parliamentary privilege shielded him from liability for a misdemeanor. Chief Justice Charles Pratt, 1st Earl Camden, in writing for the Court, held that seditious libel, even if it tended to breach the peace, was still protected by parliamentary privilege. "Whereupon there was a loud huzza in Westminster-hall. [Wilkes] was discharged accordingly."[38]

"Wilkes and Liberty" was a genius slogan and a populist one by today's standards. It evoked patriotic tropes expressed in songs like "The Roast Beef of Old England." It embodied popular political totems like Magna Charta, Alfred the Great, "the true born Englishman," etc. It reflected Wilkes' rhetoric of liberty that addressed the people's passion for English constitutionalism, fervor for fundamental freedoms, and resistance to arbitrary power. It played upon a resentment and suspicion against propertied elites harbored by the working classes during the eighteenth century that fueled the force of opposition to the government. Wilkes' wit and charisma won him a large following as a favored Radical in those demographics. He manipulated them with the help of external interests of wealthier merchants, manufacturers, and tradesmen to fulfill his own political ambitions much like the demagogues of today.[39]

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35 John Wilkes' Case [1763], 19 Howell's St. Tr. 981, 990, 993 (1816); Rudé, Wilkes and Liberty, *supra* note 33, at 23–24.

36 Rudé, Wilkes and Liberty, *supra* note 33,at 26.

37 *Id*.

38 Definitive Treaty of Peace Between Great Britain, France and Spain (1763), *reprinted in* William Cobbett, 15 Parliamentary History of England from the Norman Conquest in 1066 to the Year 1803, 1291, 1291–1307 (1808); Proceedings in the Commons on the Expulsion of Mr. Wilkes (Dec. 9, 16, 1763; Jan. 19, 1764), *reprinted in id*. at 1386–87.

39 *See* Horace William Bleackley, Life of John Wilkes 5–6, 47–48, (1917); *Lucy Sutherland, The City of London in Eighteenth-Century Politics*, *in* Essays Presented to Sir Lewis Namier 49, 60 (Richard Pares & A.J.P. Taylor ed. 1956); Thompson, *supra* note 25, at 69–71 & n.1, 79–81, 83; Namier & Brooke, *supra* note 25, at 331–35.

Wilkes also owed his success to his penchant for political playfulness, and attracted complimentary slogans like "Beef and Liberty," no doubt inspired by the "sublime society" of which he was a member. That he was an ugly, witty, devious rake made him even more glamorous. He refused to play the lamb and struck back hard against the government for subjecting him to effectively what constituted a political trial by ordeal. He filed a civil suit and recouped £2,900 in damages for false imprisonment. Despite the technicality of the Court's reasoning, the mob believed that the judgment vindicated their disapproval of general warrants. Wilkes was their man, a mirror for both reflecting and projecting their contempt for the government.[40]

Wilkes did not surrender his pen. He helped to publish an obscene poem parodying Alexander Pope's "Essay on Man," entitled "Essay on Woman," later that year. Both Houses of Parliament balked at the judgment of the Court of Common Pleas. Incensed by Wilkes' continuing insolence, they debated a resolution to exclude libelous conduct from the protection of the parliamentary privilege from arrest when they resumed session on November 15, 1763. Members of the House of Lords found the "Essay on Woman," in particular, to be a "most scandalous, obscene, and impious libel," and possibly grounds for expulsion. John Montagu, 4th Earl of Sandwich, delivered the complaint to the House of Lords seeking Wilkes' expulsion on November 16, 1763. As a fellow member of the Hellfire Club, Montagu was by no means disinterested. He sought retaliation for a prank Wilkes played on him during a séance at one of their meetings.[41]

On November 24, the House of Commons approved the following resolution by a vote of 258 to 133: "That Privilege of Parliament does not extend to the case of writing and publishing seditious Libels, nor ought to be allowed to obstruct the ordinary course of the laws, in the speedy and effectual prosecution of so heinous and dangerous an offence." William Pitt the Elder, 1st Earl of Chatham, spoke out strongly against this retreat of privilege. "This proposed sacrifice of privilege," he said, "was putting every member of parliament, who did not vote with the minister, under a perpetual terror of imprisonment." Lord Richard Grenville-Temple, 2nd Earl Temple, led a similar resistance in the upper chamber. But all was for naught. The House of Lords did not agree with the Great Commoner or Grenville-Temple. It passed a concurring resolution on November 29 supporting the Commons instead. Expulsion proceedings began on December 9. Wilkes fled to Paris, so he was tried *in absentia*. On January 19, 1764, the House of Commons found Wilkes in contempt of its privileges, expelled him for seditious libel, and declared him an outlaw for absconding.[42]

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[40] Rudé, Wilkes and Liberty, *supra* note 33, at 28.

[41] Proceedings in the Lords Against Mr. Wilkes for Publishing the Essay on Woman (Nov. 15, 17, 1763; Dec. 14, 1763; Jan. 24, 1764), *reprinted in* William Cobbett, 15 Parliamentary History of England from the Norman Conquest in 1066 to the Year 1803, 1346, 1346–1352 (1808); Proceedings in the Commons Against Mr. Wilkes for Writing the North Briton, Number Forty-Five (Nov. 15, 23–24, 1763), *reprinted in id.* at 1354–1364; Donald Goddard, *The Hell-Fire Club: Visions of Debauchery Danced in Their Heads*, N.Y. Times (Feb. 27, 1972)

[42] The Lords' Report of Precedents and Punishments for Breaches of Privilege and Contempts of Their House (Mar. 8, 1764), *reprinted in* William Cobbett, 15 Parliamentary History of England from the Norman Conquest in 1066 to the Year 1803, 1352, 1352–1354 (1808); John Wilke's Case, 29 H.C. Jo. 843 (Feb. 14,

Pressured by his debts, Wilkes was forced to return to England in 1768. He stood for election to Parliament in Middlesex and won. In the interim, Sir John Pratt, Lord Chief Justice of the Court of King's Bench, ruled that general warrants were illegal.[43] Whatever else one thinks about John Wilkes, moving the political needle towards the abolition of general warrants is an achievement for which he deserves credit. Chief Justice Pratt's judgment was not made in a vacuum. The government's position on Wilkes' arrival was that he should be arrested on account of his outlawry. Wilkes saw a political opportunity and voluntarily surrendered himself to the King's Bench on May 9. In doing so, he waived his parliamentary privilege from arrest. In return, the House of Lords revoked his status as an outlaw. Wilkes was a martyr to the cause of liberty once again. And he amplified his momentum by playing upon the Court's unwillingness to grant bail, a decision that enraged everyone who supported him.[44]

The next day, Parliament opened session. The thirteenth assembly was inaugurated by a demonstration at King's Bench prison and later at St. George's Fields by as many as forty thousand people. The Wilkites grew restless as the day went on. Justice Samuel Gillam, a magistrate of Surrey, eventually read the Riot Act. The feverish mass, undeterred, eventually compelled the soldiers to open fire. Five or six people in the crowd were killed and fifteen were wounded, casualties for whom the whole ordeal was later named "The St. George's Field Massacre." Disorder spread to other parts of the capital, including the seat of government itself. A riot formed in Old Palace Yard and outside of the House of Lords. One John Biggs was later found criminally liable for disturbing the peace.[45]

Though the riots were violent and ugly, Wilkes gained even greater political momentum from the power asymmetry between the military and the mob. The troops who fired on the crowd belonged to a Scottish regiment, doubly detested by Londoners both as soldiers and as foreigners (Celts). The coroner returned a guilty verdict for intentional homicide against a soldier who shot a boy named Allen. On May 16, both Houses of Parliament gave thanks to the Lord Mayor for suppressing the riots notwithstanding the civilian casualties sustained. A standing order enacted during the previous Parliament refusing admission to any spectators in the gallery

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1764); Proceedings in the Commons Concerning General Warrants and the Seizure of Papers (1764), *reprinted in id.* at 1393, 1399; Proceedings in the Lords Against Mr. Wilkes for Publishing the Essay on Woman (Nov. 15, 17, 1763; Dec. 14, 1763; Jan. 24, 1764), *reprinted in id.* at 1346–1352; Proceedings in the Commons on the Expulsion of Mr. Wilkes (Dec. 9, 16, 1763; Jan. 19, 1764), *reprinted in id.* at 1386–1388; Proceedings in Both Houses Respecting the Riot at the Burning the North Briton Number 45 (Dec. 6–7, 1763), *reprinted in id*. at 1380, 1380–86; Address of Both Houses to the King Concerning the North Briton, Number Forty-Five (Dec. 1, 1763), *reprinted in id.* at, 1378–1380; Protest Against the Resolution, "That Privilege of Parliament Does Not Extend to the Case of Libels" (Nov. 29, 1763), *reprinted in id.* at 1371–1378; Proceedings in the Lords Against Mr. Wilkes for Writing the North Briton Number Forty-Five (Nov. 29, 1763), *reprinted in id*., at 1365–1371.

[43] Entick v. Carrington [1765], 19 Howell's St. Tr. 1029 (1816).

[44] *See* Rudé, Wilkes and Liberty, *supra* note 33, at 42–44, 46–47; *Entick* at 1029.

[45] Rudé, Wilkes and Liberty, *supra* note 33, at 53; Meeting of the New Parliament (May 10, 1768), *reprinted in* William Cobbett, 16 Parliamentary History of England from the Norman Conquest in 1066 to the Year 1803, 424, 424–28 (1808); Riot Act of 1715, 1 Geo. 1 stat. 2. c. 5.

of the House of Commons continued in force.[46] None of the Wilkites were ever held in contempt for rioting at Parliament. But in view of the precedent established by the Purser Riot of 1699, I think Parliament certainly could have punished the rioters through contempt proceedings. On June 18, 1768, the King's Bench finally sentenced Wilkes to twenty-two months incarceration and a fine.[47]

On November 14, 1768, the House of Commons initiated expulsion proceedings against Wilkes for the second time and eventually succeeded in removing him on February 3 of the following year. Undaunted, Wilkes stood for reelection three more times—in February, March, and April—the so-called "Middlesex Election Affair of 1769." Each time, the "working classes" of Middlesex championed their hero. Each time his enemies sought to void the result. Wilkes' position was that since he submitted to criminal judgment, he should not be doubly punished for his prior conduct by losing his (new) seats as well. Those who took Wilkes' side in the House also emphasized that expulsion for seditious libel was unprecedented. "Let him who has not sinned cast the first stone" was another sentiment presented in favor of Wilkes. If this new precedent was allowed, so the argument went, Parliament would slide down a slippery slope of constant dissolution on account of the improprieties of its members. "The arguments for his expulsion were founded on the badness of the man, and the impropriety of suffering such a one to be part of the legislature."[48] The latter view prevailed and Wilkes was expelled. Technically, the Commons voided these elections on the theory that Wilkes' prior expulsion disqualified him from running in the first place. On December 21, 1769, the House of Lords heard Wilkes' appeal in his criminal case and quickly upheld the ruling of the King's Bench.[49]

Wilkes' supporters rioted once again, and on April 29, in response to the judgment of the House of Lords, submitted a petition for him to be readmitted to the Commons. Parliament considered the petition on May 8 but nevertheless resolved by a vote of 221 to 152 that Colonel Luttrell, Wilkes' latest opponent, was duly elected. Though Wilkes' gambit to sit in Parliament was initially frustrated, his political career survived. He sat in the House of Commons from 1774 to 1790, served as Lord Mayor of London from 1774 to 1775, and held the position of

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46 *See* Rudé, Wilkes and Liberty, *supra* note 33, at 49–56; The Thanks of the Commons Given to the Lord Mayor of London for His Conduct During the Late Disturbances (May 16, 18, 1768), *reprinted in* William Cobbett, 16 Parliamentary History of England from the Norman Conquest in 1066 to the Year 1803, 462–466 & n.* (1808); Joint Address of Thanks (May 10, 1768), *reprinted in id*. at 460, 461; Meeting of the New Parliament (May 10, 1768), *reprinted in id.* at 424, 424–28; Riot Act of 1715, 1 Geo. 1 stat. 2. c. 5.

47 King v. Wilkes [1770], 98 Eng. Rep. 327, 353, 4 Burr. 2527, 2574.

48 Proceedings in the Commons on the Expulsion of Mr. Wilkes (Feb. 2, 1769), *reprinted in* William Cobbett, 16 Parliamentary History of England from the Norman Conquest in 1066 to the Year 1803, 531, 545 (1808).

49 Rudé, Wilkes and Liberty, *supra* note 33, at 57, 59, 65–69, 88–89, 133–34; Proceedings in the Commons on Mr. Wilkes's Re-Election for Middlesex (Feb. 10, 17, 1769; Mar. 17, 1769; Apr. 7, 14–15, 1769), *reprinted in* William Cobbett, 16 Parliamentary History of England from the Norman Conquest in 1066 to the Year 1803, 575–587 (1808); Proceedings in the Commons on the Expulsion of Mr. Wilkes (Nov. 14, 1768; Jan. 23, 27, 31, 1769; Feb. 1–3, 1769), *reprinted in id.* at 531–575 ; Proceedings in the Lords on Mr. Wilkes's Appeal Upon a Writ of Error (Dec. 21, 1769), *reprinted in id.* at 511, 518 (1808); George Rudé, *The Middlesex Electors of 1768–1769*, 75 Eng. Hist. Rev. 601, 601–02 (1960).

Chamberlain of the City of London from 1779 until his death in 1797. His crusade against general warrants, campaign for free speech, and rhetoric of liberty, confirm his place as one of the greatest demagogues of all time. He is, in my estimation, the first father of modern populism.[50]

### *3. The Gordon Riots of 1780*

Akin to an old adage about the American Civil War, one could rightly ask whether the Gordon Riots were the last carnivalesque revolt, or the first industrial insurrection. The Gordon Riots are in fact the closest analogy to the Trump Riot and therefore require a more extensive discussion. The ostensible cause of the Gordon Riots was contempt for papal supremacy. The coals of religious tension between protestant and Catholic smoldered long after the fires of the English Civil War burned out. During the years when Protestants were in power, Parliament passed two statutes to thwart the spread of "Popery." The Jesuits Act of 1584 dictated that any Roman Catholic priest that did not leave the Kingdom within forty days would be punished for high treason unless he swore an oath to obey Queen Elizabeth I.[51] The Popery Act of 1698 prohibited Roman Catholics from organizing their own schools and from inheriting and purchasing lands.[52]

The Papists Act of 1778 accomplished greater toleration by allowing Roman Catholics to serve in the military and purchase land if they swore an oath of allegiance. That legislation, however, unleashed widespread disapproval. The land was rife with anti-popery. A popular conspiracy even touted that there were twenty-thousand Jesuits hidden in underground tunnels by the Thames waiting for an order from the Holy See to flood the city of London in a manner reminiscent of the tactic used by Cyrus the Great to seize Babylon.[53] The stage was set for a bout of demagogic destruction of unprecedented proportions. Lord George Gordon, scion of Scottish noble Cosmo George, 3d Duke of Gordon, was in my view a paragon of populism. He had a large ego, a loud mouth, and loose morals. He was high born, and a Mason at that. But he failed to advance in his naval career, so he moved on to enjoy the best luxuries that civilian life had to offer. He got into a spat with the Church after a lusty visit to Paris. Rather than confessing his sins, he indignantly called the Archbishop of Canterbury the "Whore of Babylon." Lady Mary Wortley Montagu humorously reflected that this "was very uncivil, as it is the only whore his Lordship dislikes." Gordon's hypocrisy typified populist demagoguery: pious creeds, debauched deeds.

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[50] *See* Rudé, Wilkes and Liberty, *supra* note 33,at 103; Proceedings in the Commons on Mr. Wilkes's Re-Election for Middlesex (Apr. 29, 1769; May 8, 1769), *reprinted in* William Cobbett, 16 Parliamentary History of England from the Norman Conquest in 1066 to the Year 1803, 575, 588–89 (1808).

[51] An Act Against Jesuits, Seminary Priests, and Such Other Like Disobedient Persons of 1584, 27 Eliz. 1, c. 2.

[52] An Act for the Further Preventing the Growth of Popery of 1698, 11 Will. III c. 4.

[53] *See* Roman Catholic Relief Act of 1778, 18 Geo. III c. 60; Christopher Hibbert, King Mob: The Story of Lord George Gordon and the Riots of 1780, 20–21 (2004); Dana Rabin, *Imperial Disruptions: City, Nation and Empire in the Gordon Riots*, *in* The Gordon Riots: Politics, Culture and Insurrection in Late Eighteenth-Century Britain 93, 96 (Ian Haywood & John Seed eds., 2014); *cf*. Herodotus, The Histories 3.150–160 (Robert H. Strassler ed., Andrea L. Purvis trans. 2009) (484 – 425 B.C.).

He was a fanatic for the constitution and saw toleration as an existential threat to its existence. The Catholic question became his favorite cause, and so he formed the Protestant Association, an ecumenical arrangement of Anglican and dissenting middle class subjects, for the purposes of seeking the repeal of the Papists Act of 1778. He was brash and base. He insulted the King while pleading his aversion to Catholic toleration in a private audience. He insulted the courts. "The Judges," he said, "are the mirrors by which the King's image is reflected." His character was a foul portent of the degradations to come in a more decadent age.[54]

On June 2, 1780, Gordon marched at the head of a crowd 60,000 strong to Parliament to submit a formal petition to repeal the Papists Act of 1778. Philip Jennings Clerke, a bystander, later remarked that the crowd was composed of "*The better sort of tradesmen; they were all well-dressed decent sort of people*; I stopped in the fields and conversed with a great number of them; I asked them what was the occasion of their assembling? There was a great number of different parties, for I rode close by the side of the foot-path."[55] These words were neither ironic nor inaccurate. The historical record corroborates this testimony: the crowd initially consisted of people from the working classes, not simply unemployed vagabonds and career criminals. Like an army on parade, the demonstrators marched eight abreast, carried banners emblazoned with the phrase "No Popery," and wore blue cockades in their caps as a symbol of their cause, a grim omen of insurrectionary doom. In a matter of hours, the crowd of "well-dressed decent sort of people" devolved into a riotous mob.

The Commons considered Gordon's petition but divided; when it came to a vote, the "Yeas" could not be counted because some of the mob gathered in the lobby to disturb the proceedings. The Serjeant-at-Arms informed the House that he could not lift the siege. Field Marshal Henry Seymour Conway grew irate with the ordeal and talked of drawing swords with the horde outside like the three hundred Spartans at Thermopylae. "I am a military man and I shall protect the freedom of debate with my sword," he said in a loud voice, "Do not imagine that we will be intimidated by a rabble. The entry into the House is a narrow one. Reflect that men of honour may defend this pass."[56] Fortunately, reinforcements relieved the Commons of its predicament. The Speaker summoned the magistrates of Middlesex and the city of Westminster. Several Justices of the Peace arrived with the Foot Guards and Horse Guards. The Commons adjourned. The Mob did not. Although MPs were able to escape after some guards cleared a path, they were verbally abused and physically attacked along the way. The mob moved on and began attacking Roman Catholic neighborhoods and other places of political importance.[57]

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54 Hibbert, *supra* note 53, at 20–21, 38; Dominic Green, *George Gordon: A Biographical Reassessment*, *in* The Gordon Riots: Politics, Culture and Insurrection in Late Eighteenth-Century Britain 245, 247–49, 256–57 (Ian Haywood & John Seed eds., 2014).

55 King v. Lord George Gordon (1781), 21 Howell's St. Tr. 485, 578 (T.B. Howell ed. 1816) (emphasis added).

56 As quoted in Hibbert, *supra* note 53, at 55–57.

57 *See* Lord George Gordon's Case, 37 H.C. Jo. 900 (June 2, 1780); King v. Lord George Gordon, (1781), 21 Howell's St. Tr. 485, 578; Hibbert, *supra* note 53, at 41, 48–57, 100–106; Robert B. Shoemaker, *The London "Mob" in the Early Eighteenth Century*, 26 J. of Brit. Studies 273, 284–85 (1987); George Rudé, *The London "Mob" of the Eighteenth Century*, 2 Hist. J. 1, 3, 5–7 (1959).

On June 6, 1780, the Commons briefly reassembled and appointed a committee to inquire into the causes of the riot that penetrated the lobby. But the mob descended on Parliament once again and compelled the Commons to adjourn. "The phrase Read the Riot Act" originates form the requirement that magistrates in these times read the Riot Act of 1714 out loud. If the mob did not disperse within the hour its members were guilty of a felony punishable by death. The Riot Act was read in this instance but to no avail. The mob moved on to assault Newgate, Old Bailey, Clerkenwell, Bridewell, and the New Prison, and set their captives free. It sacked the home of William Murray, 1st Earl of Mansfield, Lord Chief Justice of the King's Bench. The following day—"Black Wednesday"—the mob continued to destroy Roman Catholic businesses and residences, Fleet Prison, King's Bench Prison, the New Gaol, the Southwark and the Surrey Houses of Correction, and the Marshalsea debtor's prison. It was finally repulsed when it attempted to storm the Bank of England. To their credit, both Lord George Gordon and John Wilkes took up arms in defense of the Old Lady.[58]

On June 8, 1780, George III issued a proclamation that called in the army. Ten thousand troops swept clean the streets of London. Martial power restored civil order. The most common crimes committed by the rioters were destruction of movable objects and setting bonfires in the streets, not looting or theft. That is not to say that there was not a great loss of property. The damage inflicted on public buildings is estimated at £30,000. The cost to human life was even more tragic. The death toll stood at 458 civilians and 210 soldiers, with scores more maimed and wounded. There was a righteous demand for a reckoning. Yet some urged caution. The dialogue between Edmund Burke and Frederick North, 2nd Earl of Guilford, resembled the tension between George Washington and Alexander Hamilton in handling the Whiskey Rebellion fourteen years later: the former feared inciting more violence by over-playing the government's hand; the latter desired to stamp out the fire of insurrection so that it should never light again.[59]

The Gordon Riots proceedings in the Old Bailey expressed a conservative reflex to purge disorder through discipline and punishment. Out of the 450 people who were arrested for riot-related crimes, 160 appeared for trial. Of those that appeared, sixty-two were given death sentences (though only twenty-five were ultimately hanged), twelve were given terms of imprisonment ranging from one month to five years, and one was privately whipped. Another eighty-five arrestees were found not guilty. The executions were cathartic. *Carnaval revolte* atoned through *carnaval macabre*—liturgical inhale and exhale for the masses.[60]

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[58] An Act for Preventing Tumults and Riotous Assemblies, and for the More Speedy and Effectual Punishing the Rioters of 1714, 1 Geo. 1, c. 5; Lord Gordon's Case, 37 H.C. Jo. 902–03 (June 6, 1780); George Rudé, *The Gordon Riots: A Study of the Rioters and Their Victims: The Alexander Prize Essay*, 6 Transactions of the Royal Historical Society 93, 96–98, 104–06 (1956).

[59] *See* Lord George Gordon's Case, 37 H.C. Jo. 903–993 (June 8, 1780); Lord George Gordon's Case, 37 H.C. Jo. 903–910 (June 19, 1780); Matthew White, *For the Safety of the City: The Geography and Social Politics of Public Execution After the Gordon Riots*, *in* The Gordon Riots: Politics, Culture and Insurrection in Late Eighteenth-Century Britain 204, 218 (Ian Haywood & John Seed eds., 2014); The National Archives of the U.K., WO 34/103, f. 100 (June 7, 1780).

[60] *See* White, *supra* note 59, at 204, 208–10, 218; Rudé, Wilkes and Liberty, *supra* note 33, at 98–100, 105–111.

On June 19, 1780, the Commons convened and was informed that the King would prosecute the Mad Scotchman for high treason. After being summoned to hear a royal address in the House of Lords, the Commons made a resolution in thanks. The Commons also drew up a formal response to King, thanking him again for the measures he implemented as "the Guardian of the Public Safety, […] in the Hour of extreme and imminent Necessity, for the immediate and effectual Suppression of those rebellious Insurrections." Lord George Gordon's petition was overwhelmingly voted down. His jury ultimately found him *not guilty* of high treason, however, because the Crown could not satisfy its burden to prove beyond a reasonable doubt, in light of his speech and conduct, that he deliberately *planned or intended* the riots. Lord George Gordon's conduct, at any rate, was certainly contemptuous, though no contempt charges were brought against him or used as a predicate for impeachment or expulsion proceedings. One wonders if those were better remedies. The decision not to elect them was arguably more a political determination more than anything else.[61]

The Gordon Riots were a powerful inflection point in British history. The real impetus, in my view, was not so much puritanical bigotry as plebeian *ressentiment*—it was the native lower and middling classes groping desire to settle accounts with cosmopolitan elites, to salve the sting of foreign-born workers, to protest imperial conflicts, to achieve, if only for a little while, social justice on their terms. The claim of John Stuart, 1st Marquess of Bute that the riots destroyed 35,000 Roman Catholic homes, however, is a myth. The Roman Catholic neighborhoods that suffered the most, Moorfields and Spitalfields, were Irish migrant enclaves to be sure. But Irish day-laborers competed with natives for work by accepting lower wages. These neighborhoods were derided as "Dens of Popery," but that derision was arguably another example of trade lobbying by other means. An Irish-Catholic merchant named Malo, for example, employed over a thousand men in workshops in a part of Moorfields near Finsbury yard, was a Roman Catholic, and was always eager to employ fellows from the Emerald Isle. The rioters plausibly targeted him more for his payroll than his rosary beads.[62]

Sometimes a pinch of humor could dispel a rioter's rage. A mob raised its fists, cried the refrain of "No Popery," and prepared to assault the home of an Italian entertainer named Grimaldi for refusing to respond in kind. But the performer cleverly put his head out of the second story window, made comical grimaces, and screamed "Genteelmen in dis hose dere be no religion at all!" The mob laughed, gave him three cheers, and moved on to the next victim. That episode nearly says it all so far as the true religious "convictions" of the rioters were concerned.[63]

King Mob exploited other tribal differences, but often for similarly base motives that had nothing to do with theology. Jews scrawled "This house is a true

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[61] Lord George Gordon's Case, 37 H.C. Jo. 903–910 (June 19, 1780); King v. Lord George Gordon, 21 St. Tr. 485, 647–48; Rudé, Wilkes and Liberty, *supra* note 33, at 102.

[62] *Cf.* Hibbert, *supra* note 53, at 66–68; Rudé, Wilkes and Liberty, *supra* note 33, at 108–113. *But see* M. Dorothy George, London Life in the 18th Century 118–19 (1965) (indicating that anti-Catholic prejudice was still an important factor).

[63] *See* Hibbert, *supra* note 53, at 66–68, 97–98, 106, 135, 122, 139–40; Rabin, *supra* note 53, at 106–07; Lord George Gordon's Case, 37 H.C. Jo. 903–910 (June 19, 1780); Rudé, *supra* note 58, at 98–100, 105–111; Rudé, Wilkes and Liberty, *supra* note 33, at, at 12.

Protestant" on their doors so that the Spirit of Democracy would pass overhead without inflicting punishment. King Mob made his rounds through the city with the efficiency of a slum lord well versed in the art of calling to collect. Christopher Hibbert recounts that rioters left notes on the doors of each home he visited for future reference: O—meant the "contribution" was poor; Ŏ—meant a "contribution" was refused so the house should be destroyed; ✓—meant the "contribution" was so generous a second loot might be worthwhile; and ⊙⊙ meant that there was a woman in the house. King Mob was therefore apparently rapacious in more ways than one.[64]

The Protestant Association was, by and large, a body made up of people belonging to the working classes, and, like so many associations similarly composed, suffered from bad leadership, lost sight of its core values, and allowed baser elements to corrupt its energy into a maelstrom of destruction. E.P. Thompson broke down the petition march into three phases encompassing a process of cascading degradation from a revolutionary crowd consisting of well-behaved tradesmen—to a mob reminiscent of the Wilkite era engaged in "licensed spontaneity"—to an unprecedented and unlicensed insurrection beyond the pale of even what eighteenth century standards would tolerate in terms of "activism by other means."[65]

There is a difference of opinion among the historians of the period about the extent to which the insurrectionary phase of the petition was the fault of members of the working classes vis-à-vis members of the London criminal underbelly. E.P. Thompson correctly characterizes that difference as depending upon the source of information given primacy. George Rudé gives priority to criminal records yielding statistical evidence that the rioters were indeed members of the working classes, therefore, this was an insurrection of "sober workmen." Christopher Hibbert and J. Paul Castro emphasize eyewitness accounts and anecdotal evidence indicating that the insurrectionaries were lowlifes, thugs, criminals, and prostitutes. Both sources are imperfect. The criminal data from that time is limited, incomplete, and not necessarily representative. Anecdotal evidence and eyewitness accounts notoriously have their own problems: prejudice, issues with recollection, etc. The exact composition of the rioters is impossible to tell, but from my viewpoint, the evidence of their criminal character is overwhelming—to the extent tradesmen were involved, it seems that they were the converse of the kind observed in the initial march of the Protestant Association—tradesmen of the "lesser sort."[66]

The disaffection of the rioters for the British Empire put symbols of nationalism like the Bank of England right in their crosshairs. Just as the Irish day-laborers of Moorfields and Spitalfields were not necessarily targeted for their Roman Catholicism as such, but as a symbol of economic competition, the Roman Catholic Church itself was an institutional target not simply on its own terms, but for its association with the wild exploits of John Bull. The motives for tolerance bills were not pure; they were designed to swell the ranks of armies engaged in conflicts in North America and elsewhere, wars that the middling and lower classes simply

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[64] *See* Hibbert, *supra* note 53, at 122.

[65] *See* Thompson, *supra* note 25, at 71–72.

[66] *See generally, e.g.*, J. Paul de Castro, The Gordon Riots 144–46, 178, 242–43 (1926); Thompson, *supra* note 25, at 71–72 & n.2; Hibbert, *supra* note 53, at 45–46, 106; Rudé, Wilkes and Liberty, *supra* note 33, at 93, 95–96, 104–06; Rudé, *supra* note 58, at 118–19.

did not want. Many detested Britain's services as a "nurse of liberty throughout the world" and the cultural feedback that colonial émigrés and colonized peoples returned to the homeland.[67]

I take the view that the Gordon Riots manifested populist and nationalist elements simultaneously. The sentiments of "Don't tread on me" and "My nation first" often run together. This is because populism and nationalism are, in my view, paradoxically intertwined, not dichotomous. As Dana Rabin persuasively demonstrated in her work on the Gordon Riots, nationalism and imperialism are cosmopolitan forces. Empire was made by the elite, for the elite. Yet the incidental effect of empire was to introduce demographic change through conquest, colonization, and commerce. Cosmopolitan chauvinism was, ironically, a force for diversity and inclusion. The law of nature is that great nations, like great heat, expand. Populists wanted their nation to be great; yet they desired to conserve its identity by consolidating its culture and retracting its foreign entanglements. Horace Walpole recognized the costs of empire were not merely economic or martial, but also cultural and constitutional.[68] Papism was the faith of absolutism in Europe. Papal supremacy was unconstitutional. But in addressing the complicated issue of how to balance demographic pluralism with national creed, Walpole never contemplated burning down Mansfield's house, no matter how much he hated that man. He believed in government, even if he did not believe in *that* government.[69]

In the final analysis, neither the Protestant Association nor Protestantism as a whole can be blamed. The riot was not the work of the nucleus of the petition movement. Perhaps the most striking fact of this whole episode is that out of the 44,000 signatories to Lord George Gordon petition, not a single one was arrested, let alone tried and convicted, for any crime related to the riots. There is no evidence of a coordinated plan of action from any source, George Rudé concluded, such as that imagined by Charles Dickens in *Barnaby Rudge*. What the rioters had in common was not that they *were* of one faith or one color, but that they *were not* elite. The shepherds in the ranks occupied "pulpits of the lower sort;" the sheep of a Protestant persuasion were "chiefly Methodists and bigoted Calvinists of the lower ranks of life."[70] Naturally, there were conspiracy theories that the riots were instigated by foreign agents from France and the United States. But none of them were accurate. In truth, King Mob was less a bigot and a supremacist than he was a blundering bully and a fool. The demagogue was received unto his own in Scotland as a hero after the trial was over and serenaded with a familiar refrain: "Gordon and Liberty."[71]

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[67] *See* Rabin, *supra* note 53, at 94–97.

[68] *As discussed in id.* at 97.

[69] *See id.* at 93, 93–97, 105–06, 108–09.

[70] *See* Mark Knights, *The 1780 Protestant Petitions and the Culture of Petitioning*, *in* The Gordon Riots: Politics, Culture and Insurrection in Late Eighteenth-Century Britain 46, 52, 55 (Ian Haywood & John Seed eds., 2014); John Seed, *The Fall of Romish Babylon Anticipated: Plebeian Dissenters and Anti-Popery in the Gordon Riots*, *in* The Gordon Riots: Politics, Culture and Insurrection in Late Eighteenth-Century Britain 69, 69–70 (Ian Haywood & John Seed eds., 2014); Rudé, *supra* note 58, at 102.

[71] *See* Rabin, *supra* note 53, at 93, 102–04; Nicholas Rogers, *The Gordon Riots and the Politics of War*, *in* The Gordon Riots: Politics, Culture and Insurrection in Late Eighteenth-Century Britain 21, 22–23 (Ian Haywood & John Seed eds. 2014); *cf.* Hibbert, *supra* note 53, at 66–68, 97–98, 106, 122, 163–169.

Let it not be supposed that what transpired was squarely the fault of the Tories or the Whigs. Neither the leaders of the government nor the opposition were swayed by Lord George Gordon. Consider the example of Edmund Burke, that venerable champion of conservatism, who put an end to his own friendly relations with the "Mad Scotchman." Lord Gordon himself wrote that Burke "never once shewed the smallest sign of that acquaintance or familiarity which had formerly subsisted between us for some years.'" Like any decent student of the classical tradition, Burke recognized that the end of friendship was *virtue*, not loyalty. When it became apparent that the word "virtue" could never again be associated with Lord Gordon or his legacy, Burke terminated the relationship, and in doing so gave posterity a marvelous lesson in character: Do not indulge the pretender, the pied piper, or the petty tyrant, even for an instant, no matter the temporal gain.[72]

We might wonder why the Gordon Riots did not send St. James's Palace into a death spiral as the French Revolution did for Versailles. Britain supposedly had a proletariat too, after all, didn't it? The answer, funnily enough, might be that Britain had better elites. The dexterity of the British Constitution and the character of its best men, though far from perfect, navigated the crisis to a swift resolution. The casualties inflicted by the army could have been far higher if the troops had not been so hesitant to fire on civilians. Even in the heat of the greatest terror to antagonize London since the Great Fire of 1666, leading statesmen kept an ever-watchful eye on the civil liberties of their fellow subjects. Burke urged against "establishing a military on the ruins of the civil government," for the London he saw filled with troops looked more like "Paris, Berlin or Petersburg then the capital of government by law." The Anglo-Saxon political sensibility suffered neither the stamping Prussian jackboot nor the Napoleonic whiff of grapeshot. In insurrections as in government, Great Britain was more moderate than Europe.[73]

### *D. Parliamentary Contempt Policy*

Over the centuries the scope, mode, and policy of the *lex parliamentaria* sustained considerable debate. It was long a subject of contention, for example, whether the law of Parliament was completely untouchable or could be circumscribed by common law courts.[74] There now exists a state of comity between Parliament and the judiciary on that issue. The judiciary can dispose of legal questions relating

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72 *See* Hibbert, *supra* note 53, at 51; *cf.* Frederich Nietzsche, Beyond Good and Evil: On the Prejudices of Philosophers 30 (1989) (1886); Marcus Tullius Cicero, Laelius: On Friendship 5.19, 187 (Michael Grant trans., 1971) (44 B.C.); Aristotle, Nicomachean Ethics 1101b13–20, 1165b10–20 (David Ross trans., Lesley Brown ed., 2009) (c. 340 B.C.).

73 *See* Edmund Burke, Reflections on the Revolution in France 45, 87, 105 (2009) (1790); Hibbert, *supra* note 53, at 55–57, 74, 97–98, 100–05.

74 *E.g.*, Baron Mereworth v. Ministry of Justice [2011] EWHC 1589 (Ch), [2012] Ch 325, [2012] 2 WLR 192 (Eng.); Bradlaugh v. Gosset (1884), 12 Q.B.D. 271; Howard v. Gosset (1845), 116 Eng. Rep. 139, 10 Q.B. 359 (Eng.); Stockdale v. Hansard (1840), 113 Eng. Rep. 428, 11 Ad. & E. 297 (Eng.); Stockdale v. Hansard (1839), 113 Eng. Rep. 411, 11 Ad. & E. 251 (Eng.); Stockdale v. Hansard (1830), 112 Eng. Rep. 1112, 9 Ad. & E. 1 (Eng.); Burdett v. Abbot (1810), 128 Eng. Rep. 384, 4 Taunt. 398 (Eng.); Ashby v. White (1704), 91 Eng. Rep. 19, 1 Salk 20 (Eng.); Ashby v. White (1703) 90 Eng. Rep. Holt, K.B. 524 (Eng.); Erskine May's 2019 Manual, *supra* note 15, at §§ 16.2 & nn. 1, 10, 16.3, 16.4, 16.27.

to parliamentary privilege. There is a lack of consensus on whether Parliament should define the boundaries of its contempt power through positive law. A bill doing so would be roughly analogous to declaratory acts that Parliament passed for centuries to clarify or amend other common law doctrines. The Contempt of Court Act of 1981 does this for the contempt power of the English judiciary. Parliament, however, has no analogue legislation for its own contempt power.[75]

The House of Commons resolved in 1978 that, going forward, it would exercise its contempt power as sparingly as possible and only when satisfied that doing so is necessary to provide reasonable protection for its members, officers, and processes.[76] Parliament's power to punish criminal contempt is now selective and mild. In fact, no one has been imprisoned for contempt since 1880. The Joint Committee on Parliamentary Privilege recommended that Parliament pass a bill codifying contempt procedures and eliminating imprisonment as a penalty. That recommendation, however, did not pass into force. There is no contempt policy in place for riots and insurrections that threaten Parliament.[77] Parliament's principal weapons against mob violence—election related or otherwise—are the Metropolitan Police Act of 1839, the Civil Contingencies Act of 2004, and the Police Reform and Social Responsibility Act of 2011. If the police cannot protect Parliament from a large-scale insurrection or riot, the military can help as a last resort under the Civil Contingencies Act.[78]

No Act of Parliament, resolution of either House, or judicial decision of any court of common law explicitly abrogated Parliament's power to punish riotous mobs interfering with its proceedings or elections through contempt proceedings.[79] The traditional rights of the House of Commons to commit a contemnor for the duration of the session and of the House of Lords to commit indefinitely persist to this day. Given Parliament's more relaxed posture since 1978, however, both Houses are more likely to refer contempt in the form of large-scale election interferences or rioting to the Attorney General than initiate contempt proceedings against the assailants or their leaders themselves. Participation in a modern "tumult" is liable to be prosecuted under statutory offenses, including treason under the Treason Act of 1351, or violent disorder under the Public Order Act of 1986. Basic common law crimes are punishable as well, including assault, battery, arson, etc.[80] With this comparative standpoint in place, we can now turn to the American framework of government and episodes of disorder at American seats of government.

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[75] *See* Contempt of Court Act of 1981, c. 49; U.K. Parliament, House of Commons, Comm. on Issue of Privilege, Police Searches on the Parliamentary Estate: First Report, Together With Formal Minutes, Oral and Written Evidence 60, 66 (2010); Erskine May's 2019 Manual, *supra* note 15, at §§ 16.1, 16.25; English Bill of Rights art. IX (1689).

[76] Erskine May's 2019 Manual *supra* note 15, at §§ 15.2; 15.32 & n.1.

[77] *See* U.K. Parliament, Joint Comm. on Parliamentary Privilege, First Report §§ 271–73, 324 (Mar. 30, 1999).

[78] Police Reform and Social Responsibility Act of 2011, Part 3, ss 142–149; Civil Contingencies Act of 2004, c. 36; Representation of the People Act of 1983, c. 2, ss 65–67; Metropolitan Police Act of 1839, 2 & 3 Vict. c. 47, s. 52.

[79] Erskine May's 2019 Manual, *supra* note 15, at § 15.14.

[80] Public Order Act of 1986, c. 64; Treason Act of 1351, 25 Edw. 3, c. 2, s. 5.

## III. Contempt of the United States Congress

The United States Constitution establishes a republican system of government in seven concise articles. A portion of it is yet unwritten, for as the pre-Socratic philosophers well observed in the *nomos/physis* debates over two and a half millennia ago, positive law can never be totally severed from natural law because human language constructing legal meaning can never be completely separated from right reason. The universe of all possible meanings can seldom be exhausted through the written word, though careful draftsmanship can restrict the compass of plausible meanings to the conceptual horizon perceived by its author. To navigate with that compass justly and equitably requires not only an understanding of the text but also the reason and tradition it imbibes. Tradition is indeed the great custodian of reason, for it disciplines reason with the test of time. The black letter of the United States Constitution takes precedence in its construction but tradition fills its interstices and balances its ingredients with the wisdom of the ages. The contempt power of Congress falls within the four corners of this brilliant text and stands upon an impressive historical tradition.[81]

### *A. The United States Constitution and Contempt Power*

Article I establishes the legislative branch of government. Several sections relate to the contempt power of Congress. Article I, Sections 2 and 3, in conjunction with Article II, Section 4, outline the congressional impeachment process: the House of Representatives investigates and charges impeachable offenses; the Senate then sits as a Court of Impeachment and tries those charges. Article I, Section 5 provides that each House is to be the judge of its own elections, returns, and qualifications of its own members; moreover, each House can punish its own members and expel them by a two-thirds majority. Article I, Section 6 notes that both Houses enjoy parliamentary privileges. Two are explicitly enumerated: freedom from arrest while attending session and freedom of speech and debate. There are many privileges incidental to Section 6 as well.[82] The privileges of each House are not necessarily coextensive, moreover, the privileges of each House belong to them institutionally rather than to their constituent members individually.[83]

Since the Founding, the national legislature relied on the *lex parlimentaria* to construe the contours of its own law—the *lex parlimentaria americana*—under Article I.[84] In 1817, the House of Representatives held a non-member, one

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81 *See* U.S. Const. arts. I–III; Pseudo-Demosthenes, *Against Aristogeiton* 15.1–16.8, 17.4–17.7, 20.1–20.2, 35.1–35.4, 91.3–93.3, *reprinted in* The First Philosophers: The Presocratics and the Sophists 303, 311–12 (Robin Waterfield trans. & ed., 2009) (c. 580 – 400 B.C.); Plato, Laws 4.713c–4.714a & n.33 (Malcolm Schofield ed., Tom Griffith trans., 2016) (428–328 B.C.).

82 *E.g.*, Annals of the 15th Congress, H.R., 1st Session 631–36 (Jan. 9, 1818).

83 *See* Cong. Globe, 27th Cong., H.R., 2nd Session 209 (Feb. 3, 1842).

84 *See generally*, *e.g.*, Thomas Jefferson, A Manual of Parliamentary Practice 17–19 (1871) (1801) (discussing the scope of the contempt power towards enforcing congressional privileges); Luther Stearns Cushing, Lex Parliamentaria Americana: Elements of the Law and Practice of Legislative Assemblies in the United States of America §§ 655–691, at 259–270 (1866) (1845) (discussing congressional procedures

Colonel John Anderson, in contempt for attempting to bribe one of its members, notwithstanding the fact that the bribery occurred outside of Capitol grounds. In 1821, the Supreme Court of the United States affirmed the conviction in *Anderson v. Dunn*. Colonel Anderson's Case constitutes a double precedent—legislative and judicial—that governs the law of the land and the law of Congress simultaneously. It unequivocally establishes the power of both Houses of Congress to punish both direct and constructive contempts with imprisonment. That power is inherent to the constitutional prerogatives of each House and implied in Article I.[85] Indeed, the two provisions of the Constitution where the Founding Fathers incorporated the common law principle underlying contempt power are the Privileges Clause of Section 5 and the Necessary and Proper Clause of Section 8.[86]

### *B. The Law of Congress and the Contempt Power*

Contempt proceedings are *sui generis*; therefore, they are not circumscribed by the Bill of Rights to the same degree as judicial proceedings. An allegation of contempt is traditionally investigated by an ad hoc select committee and then tried before a Committee of the Whole House sitting as a Court of Contempt. A conviction requires a two-thirds majority. The precise burdens of proof and persuasion for a House to convict an alleged contemnor are not definitively established. The Supreme Court only has limited judicial review of the law of Congress, such as in the case of habeas petitions arising from contempt proceedings. The Supreme Court decided in *Marshall v. Gordon* in 1917 that contempt power exists for the sake of Congress's self-preservation, not punishment as such. Members of both Houses, congressional officers, and members of the public at large are subject to contempt proceedings. The available penalties for contempt tried by both Houses include reprimand and incarceration. The maximum period of incarceration for contempt of the House of Representatives is the duration of the session per the Supreme Court's decision in *Anderson* That decision was silent, however, on what period is appropriate for the Senate, leaving open the possibility that the Senate can impose a longer period of imprisonment. There is no statute of limitations. Contempts can be tried and punished a year or more year after they occur.[87]

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for judicial functions, including contempt proceedings); Joseph Story, I Commentaries on the Constitution of the United States § 845 (4th ed. Thomas M. Cooley ed. 1873) [hereinafter, "Story, I Commentaries on the Constitution"); *see also* 66 H.R. Jo. 194–96 (Jan. 15, 1868); Cong. Globe, 34th Congress, H.R., 1st Session 179–81 (Mar. 17, 1856); Cong. Globe, 28th Cong., HR. 578 (May 6, 1844); Cong. Globe, 27th Cong., H.R 178 (Jan. 27, 1842); Cong. Globe, 26th Cong., H.R. 394–95 (May 14, 1840); 32 H.R. Jo. 1012–15 (June 4, 1838); Register of Debates, H.R., 22nd Cong. 3895–3899 (July 11, 1832); Register of Debates, H.R., 22nd Cong., 1st Session 3888–3908 (July 10, 1832); Register of Debates, H.R., 22nd Cong., 1st Session 3867–69, 3876–3877, 3887 (July 9, 1832).

85 *See* U.S. Const. I, §§ 5–6, 8; Anderson v. Dunn, 19 U.S. 204, 230–33, 235 (1821); Register of Debates, H.R., 22nd Cong. 3890 (July 10, 1832); Annals of the 15th Congress, 1st Session 595–99, 603, 624, 631–42, 695–700, 742–46, 89–90 (1818); 2 H.R. Jo. 413 (Jan. 13, 1796); Story, I Commentaries on the Constitution, *supra* note 84, at § 847.

86 *See* James Madison, Federalist No. XLIV; *see also* Alexander Hamilton, Federalist No. XXXIII; Alexander Hamilton, Federalist No. LIX.

87 *See* U.S. Const. I, §§ 5–6, 8; Marshall v. Gordon, 243 U.S. 521, 542 (1917); *Anderson*, 19 U.S. at 204, 230–33, 235; Register of Debates, H.R., 22nd Cong. 3890 (July 10,

A congressional committee has a variety of tools for enforcing its prerogatives. The Senate has authority, by rule, to pursue the enforcement of its orders and subpoenas through a civil action in federal court. Though the House of Representatives lacks a comparable rule, it presumably has the same authority under its inherent power.[88] A man who violates the injunction of a federal court may be liable for civil or even criminal contempt of court.[89] The contemnor may be criminally prosecuted and held in contempt of Congress for the same conduct without violating the Double Jeopardy Clause.[90] Congress can certify contempt of a congressional investigation to the executive for criminal prosecution under a particular statute codifying contempt of congress in that particular domain: 2 U.S.C. § 192. This is the only specie of congressional contempt that is truly "criminal" in the proper sense of the word. All other species of contempt remain *sui generis*.[91] The contempts of interest here are riots and insurrections on Capitol grounds. No scholarly work to my knowledge ever directly addressed this class of contempt. I will do so now

### *C. Direct Contempt by Riot and Insurrection*

The danger of politically motivated riots directly assaulting the coordinate branches of government is well precedented. In 1689, for example, a demagogue by the name of John Coode spread a rumor in the Province of Maryland that Catholic elites were conspiring with the Indians to exterminate the Protestant majority. He led an insurrection to the doors of the State House and overthrew the provincial government.[92] This is just one example illustrating the precarious exposure of colonial governments to extortion by mass intimidation. The possibility of tumult interfering with official proceedings is the very reason why the nation's capital is a federal district. The next three precedents from the time of American Revolution onward inform the scope of congressional contempt power in the realm of protecting

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1832); Annals of the 15th Congress, 1st Session 595–99, 603, 624, 631–42, 695–700, 742–46, 89–90 (1818); 2 H.R. Jo. 413 (Jan. 13, 1796); Story, I Commentaries on the Constitution, *supra* note 84, at §§ 848–49.

88 Sen. R. XXIX.5.

89 *See generally* Cong. Res. Serv., A Survey of the House and Senate Committee Rules on Subpoenas 1 (Jan. 29, 2018); Todd Garvey, Cong. Res. Serv., Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure 1–2 (May 12, 2017).

90 *Cf.* United States v. Houston, 26 F. Cas. 379, 380–83 (C.C. D.C. 1832) (holding Samuel Houston criminally liable for conduct also constituting contempt of the House of Representatives and breach of privilege), *with* 8 Register of Debates 2822–3021, 3017–18 (1832) (holding Samuel Houston in contempt of the House of Representatives); *see also* B.F. Butler, Punishment by the House of Representatives No Bar to an Indictment, 2 U.S. Op. Att'y Gen. 655 (U.S.A.G.), 1834 WL 1131 (June 25, 1834).

91 U.S. Const. amend. V.

92 The Narrative of Colonel Henry Darnall, 8 Md. Arch. 155, 156 (Dec. 31, 1689); *cf.* William E. Nelson, E Pluribus Unum: How the Common Law Helped Unify and Liberate Colonial America, 1607 – 1776, 234–35 (2019); Herbert L. Osgood, III The American Colonies in the Eighteenth Century 562–63 (1958); Herbert L. Osgood, II The American Colonies in the Eighteenth Century 378–79 (1958); Herbert L. Osgood, III The American Colonies in the Seventeenth Century 491–504 (1907).

its own grounds: a riot on the Congress of Confederation, a riot in the proximity of the United States Congress, and a riot on a state legislature.

### *1. The Philadelphia Mutiny of 1783*

The Trump Riot provides an excellent illustration of the fact that even distinguished veterans are capable of perfidious behavior. The same was true at the birth of the Republic. On December 14, 1782, George Washington informed Joseph Jones by letter that "the temper of the Army is much soured, and has become more irritable than at any period since the commencement of the War."[93] The 3rd Continental Light Dragoons, a regiment of cavalry led by Lieutenant Colonel George Baylor, was raised on January 1, 1777, and fought bravely in several major actions during Revolutionary War. In June 1783, however, they grew dissatisfied with their pay and elected to mutiny. Robert Morris, Superintendent of Finance, and Benjamin Lincoln, Secretary of War, reported the mutiny to Congress by letter dated June 17. They requested permission to issue an ultimatum: Surrender and be pardoned or resist and be executed.[94]

The mutineers bivouacked in Lancaster, Pennsylvania. Both Congress and the Supreme Executive Council of the Commonwealth of Pennsylvania were located in Philadelphia at the Pennsylvania State House, a building that later came to be known as Independence Hall. The serpent of disorder slithered their way, but Congress was helpless because it had no direct control over the military under the Articles of Confederation. It was entirely dependent on state militias for protection. No militia was on call to quickly suppress the threat. Delegate John Dickinson (Pennsylvania) explained that "without some outrages on persons or property, the militia could not be relied on.[95]

Eighty armed mutineers arrived in Philadelphia on the night of June 20 and merged with local soldiers stationed at the city barracks. The mob, now totaling around 500 men, surrounded the State House the next day, and blocked the door, preventing the members of the Congress of Confederation from leaving. The situation brought a new meaning to the term "House arrest." Although they demonstrated no initial willingness to engage in violence, the mob uttered offensive language, recklessly pointed their muskets at the windows, and drank to "hasty excesses" from nearby "tippling houses." Bayonets were fixed. Moods were hot. The mob sent a note to the session, demanding that Congress appoint officers to represent their grievances since the mutineers' own officers had strong enough mettle to avoid the ruckus.[96]

Constance McLaughlin Green downplays the danger of the mutiny in her classic history of the capital.[97] She overlooks, however, evidence that the mutineers were contemplating more desperate tactics to convey their complaints, including

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93 George Washington, *Letter to Joseph Jones* (Dec. 14, 1782), *reprinted in* George Washington: Writings 478-79 (John Rhodehamel ed., Library of America, 1997).

94 24 Cont. Cong. Jo. 399–401 (June 17, 1783).

95 *See* U.S. Art. Confed. art. VII, IX; 5 Elliot's Debates 93–94 (June 21, 1783).

96 25 Cont. Cong. Jo. 973 (June 21, 1783); 20 Letters of Delegates to Congress 349–350 (June 21, 1783).

97 *See* Constance McLaughlin Green, Washington: A History of the Capital: 1800 – 1950, 10–11 (1962).

an assault on a nearby bank, and even a plan to seize members of Congress to physically coerce indemnification.[98] The mutineers were bold enough to seize the public magazine, rendering the whole affair into a literal powder keg. Alexander Hamilton (New York) managed to talk them into letting the members leave at the end of the day, but the mob did not let down. The situation was dire.[99] Elias Boudinot (New Jersey) wrote to George Washington, urging that "this wound to the dignity of the Federal Government should not go unpunished."[100]

On June 21, Oliver Ellsworth (Connecticut) and Alexander Hamilton conferred with the Supreme Executive Council. Congress reported to the Council "[t]hat though they had declined a specification of the measures which they would deem effectual, it was their sense, that a number of the militia should be immediately called out, sufficient to suppress the revolt." The Council's reply was infuriating. The local militia was unwilling to intervene until someone was shot or the State House was torched. These militia were fellow Pennsylvanians. They were no more disposed to fire on their own countrymen than the British regulars were in the Gordon Riots three years earlier. The glory of relieving the legislators from their misery instead fell to Cincinnatus.[101]

Upon receiving word of the mutiny on June 24, President George Washington dispatched 1,500 soldiers under the command of Generals William Heath and Robert Howe. Hamilton proposed that this force assume a constabulary role—to discover, disarm, and detain anyone who participated in the mutiny. The mutiny actually disbanded before the troops arrived. This was in part because Congress managed to remove itself (with indignation) to Princeton, New Jersey. The removal succeeded for two reasons. First, Benjamin Rush, a fellow Pennsylvanian, skillfully negotiated with the mutineers about their grievances. Second, the storm ran its course. The mutineers had enough and went home. The troops sent by President Washington were discharged on August 21.[102]

The Council maintained that it was just as dishonored as Congress. But that was not true.[103] There could be no greater proof of the Commonwealth's hypocrisy than the Council's decision not to investigate the mutiny. Congress, on the other hand, appointed committees to investigate the incident and later resolved that the mutineers should be deprived of the ordinary privilege of carrying home their arms.[104] During the late Summer, General Howe conducted courts martial for the mutineers and kept Congress informed of those proceedings. As to the six members of the mutineer committee that negotiated with Rush, one was not court-martialed, three were acquitted, and two fled. Four mutineers were convicted and received whippings. Two

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[98] 25 Cont. Cong. Jo. 974 (June 21, 1783).

[99] 20 Letters of Delegates to Congress 349–350 (June 21, 1783).

[100] 20 Letters of Delegates to Congress 350–52 (June 21, 1783).

[101] *See* Kenneth R. Bowling, *New Light on the Philadelphia Mutiny of 1783: Federal-State Confrontation at the Close of the War for Independence*, 101 The Pennsylvania Magazine of History and Biography 419, 443–46 (1977); 25 Cont. Cong. Jo. 973–74 (June 21, 1783); 20 Letters of Delegates to Congress 350–52 (June 21, 1783).

[102] 24 Cont. Cong. Jo. 517–18 & n. 1 (Aug. 21, 1783); 24 Cont. Cong. Jo. 411–21 (July 1, 1783); 24 Cont. Cong. Jo. 411 & n.1 (June 30, 1783); Bowling, *supra* note 101, at 443–46.

[103] 24 Cont. Cong. Jo. 423–33 (July 15, 1783); 24 Cont. Cong. Jo. 425 (July 4, 1783); 24 Cont. Cong. Jo. 423–25 (July 2, 1783).

[104] 24 Cont. Cong. Jo. 452–53 (July 28, 1783).

men who led the mutiny—John Morrison and Christian Nagle—were sentenced to death but pardoned. No civilians were ever found to have conspired or participated in the mob. On September 13, James Duane (New York), John Rutledge (South Carolina), and Jacob Read (South Carolina) delivered Howe's final report.[105]

Although the offenses committed by the mutineers were prosecuted under military justice, not civil justice or any inherent authority of the Confederation Congress, I believe they were in the genre of contempt and proper crimes at common law. Hamilton was livid with Pennsylvania's "weak and disgusting position," during the mutiny. "New governments emerging out of a revolution, are naturally deficient in authority," he later reflected, "This observation applies with peculiar force to the government of the union; the constitutional imbecility of which must be apparent to every man of reflection."[106]

The trauma of the Philadelphia Mutiny moved Congress to explore a deeper question: How could it better protect itself from riots, tumults, and insurrections in the future? It appointed a committee to consider defining a jurisdiction where the national legislature could reside, and thereby exercise full control over its own security.[107] The work of that committee was ultimately fulfilled in the United States Constitution. Article I, Section 8 formally invests the United States Congress with authority to govern the District of Columbia, a federal city, as well as the right to call upon militias to defend it in the event of riot or rebellion.[108]

### *2. The Buckshot War of 1838*

The next major episode occurred at the peak of the Anti-Mason movement. It all started in 1826, when one William Morgan, a printer from Batavia, New York, published a piece attacking the Free-Masons and then disappeared. The public raised its eyebrows. Did the Masonic Order kidnap Morgan, or worse? The incident stirred up public suspicions. At the turn of the century, there were eleven grand Masonic lodges and 16,000 members across the country. The Freemasons were indeed a powerful organization, with important connections in politics and the press.[109]

Over the next five years, legal proceedings related to Morgan's disappearance resulted in several indictments. These proceedings were tainted by the fact that Masonic witnesses refused to appear; moreover, several jurors and judges in these cases were Masons themselves. It came to light that the Masons did indeed abduct Morgan and (probably) murdered him. The public also learned that Eli Bruce, Sheriff for Niagara County, New York, was a Mason and not only participated in the abduction, but packed juries to frustrate its investigation and prosecution. Bruce and two others were ultimately convicted of kidnapping in 1828.[110]

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105 24 Cont. Cong. Jo. 540–41 & n.1 (Sept. 9, 1783); 24 Cont. Cong. Jo. 535 (Sept. 4, 1783); 24 Cont. Cong. Jo. 533 & n.1 (Sept. 2, 1783); Bowling, *supra* note 101, at 444–47.

106 *See* Alexander Hamilton, Nat'l Arch. *Defense of Congress,* FOUNDERS ONLINE (July 1783), https://founders.archives.gov/documents/Hamilton/01-03-02-0273, *derived from* III THE PAPERS OF ALEXANDER HAMILTON (Harold C. Syrett ed. 1962 (1782–1786)).

107 24 Cont. Cong. Jo. 428 & n.1 (July 8, 1783).

108 *See* U.S. CONST. art. 1, § 8, cl. 15–17; Bowling, *supra* note 101, at 449.

109 *See generally* FORMISANO, *supra* note 24, at 96–99, 137.

110 *Id*. at 137.

The Morgan affair inflamed the anxiety of constituencies around the country. The Masons were widely perceived to be a danger to the American family because of their machinations to suppress public criticism, their grip on positions of power and influence, their exclusion of women, and their reputation for intemperance. As a result, a faction known as the "Anti-Masons" formed on planks that appealed to many voters among the working classes: an evangelical perspective on family values, temperance, and theological orthodoxy, plus a contempt for Masonic-Democratic elites.[111]

Anti-Mason fervor, the "Blessed Spirit," found a warm political reception in the Keystone State. The Pennsylvania House of Representatives began investigating the Masonic order across the state in 1835. Anti-Masonic candidate Joseph Ritner was elected Governor. His "humble farmer" image and antipathy for Masonic domination of elite public offices were agreeable to populist sentiments animating the electorate. Pennsylvania adopted a new constitution in 1838 curbing the Governor's appointment power by, among other things, requiring the Senate to confirm judicial nominations. Ritner was re-nominated that same year and supported by a coalition of the Whigs and Anti-Masons. The Democrats put up a desperate fight. The final tally showed that the Democratic candidate, David R. Porter, was the winner by a mere 5,540 votes. The Blessed Spirit was reduced but not retired.[112]

The struggle for the executive was finished. But the struggle for the legislature had just begun. The Fall election of 1838 for the Pennsylvania General Assembly was tight. The Democrats and Whig/Anti-Mason coalition contested eight seats in the Pennsylvania House of Representatives. The Whig/Anti-Mason coalition needed those seats to win a majority in the Pennsylvania House of Representatives. They already won a majority in the Senate. Those seats therefore not only represented control of the General Assembly, but possession of a seat in the United States Senate for their faction as well. During the course of those contested elections, the Democrats threw out all the votes from the Northern Liberties precinct of Philadelphia, a working-class district, on the grounds of election fraud.[113] Members of the Van Buren administration stationed in Philadelphia conspired with local elites in the Democratic party to take additional steps to ensure that there was no challenge. John J. McCahen of the U.S. Post Office, James H. Hutchinson of the U.S. Customs House, and Charles F. Meusch, Deputy U.S. Marshal, shipped an angry mob by train to Harrisburg, the state capital, to prevent the legislature from investigating and overturning the election. Pennsylvania was in for a political showdown the likes of which had not seen since the Whiskey Rebellion of 1794.[114]

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[111] *Id*. at 118–19, 125–26.

[112] *Id*. at 131–32; William Henry Egle & Joseph Ritner, *The Buckshot*, 23 Pa. Mag. Hist & Bio. 137, 137–143 (1899); Roy H. Akagi, *The Pennsylvania Constitution of 1838*, 48 Pa. Mag. Hist. & Bio. 301, 332 (1924).

[113] Egle & Ritner, *supra* note 112, at 137–143.

[114] *See* David Grimsted, American Mobbing, 1828–1861: Toward Civil War 207 (1998) (citing Pennsylvania General Assembly, House of Representatives, The Report of the Minority Committee Appointed to Enquire into the Cause of Disturbances 3 (1839); and then citing 55 *Niles Register* 225 (Dec. 8, 1838)); Egle & Ritner, *supra* note 112, at137–143, 147–53; Akagi, *supra* note 112, at 332; Formisano, *supra* note 24, at 131–32.

On December 4, 1838, the Pennsylvania House of Representatives came to order. There were one hundred representatives. The Democrats held forty-eight seats in other quarters besides the eight contested in Philadelphia. The Anti-Masons and Whigs held forty-four seats. The contest for the eight seats from Philadelphia prevented the constitution of a lawful quorum, a condition precedent for electing a Speaker of the House. Both factions were so incensed by each other that they began electing *their own* Speakers on an independent basis. The Whigs and Anti-Masons elected Thomas S. Cunningham (Beaver County) as their Speaker. The Democrats elected William Hopkins (Washington County) as theirs. This was a terrible development. A servant cannot obey two masters, let alone a house full of public servants.[115]

The rancor in the Pennsylvania Senate was even worse. The lobbies in the rear of the upper chamber began to fill with the mob of "concerned citizens" that trained in from Philadelphia. Charles B. Penrose (Anti-Mason, Philadelphia) presided as Speaker. Two members of the Pennsylvania House of Representatives were present on the floor of the Senate at that time: Thaddeus Stevens (Anti-Mason, Adams County) and Thomas H. Burrowes (Anti-Mason, Lancaster County). Representative Burrowes also served as the Secretary of the Commonwealth; in the past he served on the Anti-Mason State Committee as well. He was given the task of reading the returns for the contested elections.[116]

Senator Charles Brown (Anti-Mason, Philadelphia) interrupted Burrowes, protested that one of the returns was false, and presented a substitute document that he claimed was the "true" return. This created an uproar in the gallery. "The scene now became one of fearful confusion, disorder, and terror. . . ."[117] In the words of Stevens, "a gang of rough, ferocious men, addicted to the lowest habits and vices," armed with dirks and clubs, began an assault on the chamber. They were led by one "Balty" Sowers, a Philadelphia butcher so-called because he was originally from Baltimore. "Kill Burrows!"—"Kill Stevens!"—"Kill Penrose!"—cried King Mob.[118] Penrose abandoned his post and escaped the assailants with Stevens and Burrowes. They were forced to jump from a window twelve feet off the ground, run through a row of thorn bushes, and climb over a seven-foot picket fence.[119] Governor Ritner issued a proclamation the same day announcing a state of insurrection.[120]

Men who constructed and maintained public works supported by the Governor's policy, like canals and railroads, seized the state arsenal in anticipation of a fight on behalf of their patron. William Cochran, Sheriff of Dauphin County, Pennsylvania, issued a counter-proclamation, asserting that there was no disorder and that the Governor's proclamation was unnecessary. The next day, Governor Ritner ordered Major-General Robert Patterson of the First Division of the Pennsylvania Militia based in Philadelphia to "call out from your command force sufficient to quell this

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115 *See* Egle & Ritner, *supra* note 112, at 143–46.
116 *Id.* at 146; *About the Buckshot War*, N.Y. Times. (Dec. 18, 1887).
117 Egle & Ritner, *supra* note 112, at 143–46.
118 *As quoted in About the Buckshot War*, N.Y. Times. (Dec. 18, 1887).
119 *See* Grimsted, *supra* note 114, at 208; Egle & Ritner, *supra* note 112, at 143–46; *About the Buckshot War*, N.Y. Times. (Dec. 18, 1887).
120 *As quoted in* Egle & Ritner, *supra* note 112, at 147–48.

insurrection and march them immediately to the seat of government."[121] General Patterson complied, obtained supplies from the United States Arsenal at Frankford, Pennsylvania, and distributed buckshot to his men—the action for which this whole affair is named. Some of the mob in Harrisburg, led by Representative Thomas B. McElwee (Democrat, Bedford County), conspired to derail a train carrying militia but gave up when they realized that Patterson, a wealthy Philadelphia Democrat, was at the helm. General Patterson and 100 of his men arrived on December 8.[122]

Governor Ritner appealed to President Martin Van Buren for aid. He contended that the federal government had an obligation to support him because several federal officers lead the insurrection. President Van Buren did not bother to respond personally; rather, he elected the Secretary of War, Joel R. Poinsett, to serve as his mouthpiece. The message was eerily reminiscent of the Pennsylvanian Council's response to the Congress of the Confederation during the mutiny of 1783: There would be no intervention unless it became impossible for the Pennsylvania legislature to reconvene. A dark irony of history indeed. One can imagine Hamilton turning over in his grave. Unsatisfied, Governor Ritner requisitioned Major-General Alexander of the Eleventh Division of the Pennsylvania State Militia, to support him. General Alexander, a staunch Whig, marched out on December 15 and joined the First Division in Harrisburg.[123]

There was no additional violence or insurrectionary activity following the riot on December 4. The only martial arrest, ironically, seems to have stemmed from military rather than civilian sources. The state militias only compounded the political strain rather than relieving it. The city received an influx of soldiers with nothing to do, no enemy to fight. King Mob was nowhere in sight. So, the bored troops enjoyed their time in Harrisburg as "a mere frolic." The deadlock in the state legislature was eventually broken by compromise. On December 17, three lawfully elected Whig Representatives from Union County defected from the Anti-Masons and joined "Hopkins' House." On December 27, a resolution was passed 17 to 16 in the Senate recognizing that this advantage of three votes gave the Democrats a quorum, rendering the House properly constituted and ready to proceed with business. Both Houses reconciled. David R. Porter was officially declared the lawfully elected Governor.[124]

The riot of December 4, in my view, constituted a direct contempt of the Pennsylvania legislature because it occurred on the grounds of the State House itself. The mob in the gallery and the lobbies of the Pennsylvania Senate certainly committed direct contempt of that House by suspending election proceedings and driving public servants out of the windows. Some of the ruffians committed offenses that could be prosecuted by the Pennsylvania executive at common law as well. The federal government could have anticipated and planned for the eventuality of a similar disturbance at the Capitol. But alas, Congress ignored the

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[121] *Id.* at 149–150.

[122] *Id.* at 147–152; *About the Buckshot War*, N.Y. Times (Dec. 18, 1887).

[123] *Compare* Egle & Ritner, *supra* note 112, at 152–54, *and About the Buckshot War*, N.Y. Times (Dec. 18, 1887), *with* Alexander Hamilton, Nat'l Arch. *Defense of Congress,* Founders Online (July 1783), https://founders.archives.gov/documents/Hamilton/01-03-02-0273, *derived from* III The Papers of Alexander Hamilton (Harold C. Syrett ed. 1962 (1782–1786).

[124] *See* Egle & Ritner, *supra* note 112, at 153–54.

cry of Pennsylvania, the perennial canary in the coal mine of political unrest. The Buckshot War is nevertheless helpful towards informing the posture of Congress towards direct assaults and interferences with its elections. Although the Buckshot War was not an instance of contempt of Congress per se, it naturally informs congressional posture, *mutatis mutandis*, towards direct contempts of its own prerogatives.[125]

### *3. The Bank Riot of 1841*

The Age of Jackson was named for one of, if not the greatest, populist personages in American history. In word, President Andrew Jackson took political opposition personally and always wore his heart on his sleeve. In deed, however, President Jackson never directly incited mob violence. He actively suppressed riots of every kind during his tenure, perhaps better than any president before the Civil War. It was the incidental effect of President Jackson's fiery words and brash actions that gave him the veneer of a rabble-rousing kingpin. "[T]he central charge of the Whigs by 1835," David Grimsted recounts, "was that 'King Andrew,' very like that of 'King Mob,' was 'marked by violence, obstinacy, and daring disregard' for any legal restraints on 'his violent impulses.'" These tendencies were well on display throughout his administration.[126]

The issue at the heart of the so-called Bank War, which defined the Age of Jackson, was whether the Second Bank of the United States should be dissolved. The national bank was the darling of Alexander Hamilton, the nationalist of his generation. The national republican wing of the Whig Party—an indirect successor to Federalist ideology—long supported the national bank because it was their favored mechanism for financing infrastructure and promoting economic growth. Democratic resistance to the national bank did not, however, qualify this partisan divide as a straightforward clash between nationalist and populist sensibilities. There was division within the Democratic party about the propriety of a national bank. Moreover, the Bank War intersected with other axes of political conflict—the tension, for example, between the money power in the East and the debtor class in the West.[127]

The death blow to the national bank, ironically enough, was delivered neither by Jackson, nor any other Democrat, but rather by a politician who ran on the Whig ticket for the office of President of the United States: John Tyler.[128] The Second Bank of the United States liquidated as a result of payment complications induced by the Panic of 1837. Resolutions from citizens' meetings around the country poured into Congress concerning a proposal to create a Third Bank of the United States,

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125 *Cf.* Case of the Tumultuous Crowd, 22 H.C. Jo. 115–116 (Apr. 12, 1733).

126 *See* Grimsted, *supra* note 114, at 5–7.

127 *See* Fed. Res. Bank of Phila., The First Bank of the United States: A Chapter in the History of Central Banking 2–4 (2015); Harry N. Scheiber, *Some Documents on Jackson's Bank War*, 30 Penn. History: A J. of Mid-Atl. Studies 46, 48–52 (1963); George Frederick Mellen, *Some Documents on Jackon's Bank War*, 10 The Sewanee Review 56, 63–67 (1902).

128 *John Tyler*, Encyclopedia Britannica, https://www.britannica.com/biography/John-Tyler (last updated Jan. 14, 2021).

the Whigs being for it, and the Democrats being mostly against.[129] On August 16, 1841, President Tyler dispatched a letter to the Senate that made his position clear. "The power of Congress to create a National Bank to operate per se over the Union, has been a question of dispute from the origin of the Government," he wrote. "It will suffice for me to say, that my own opinion has been uniformly proclaimed to be against the exercise of any such power by this Government."[130] He vetoed the bank bill. Groans of disapprobation reverberated in the chamber. One indignant spectator in the gallery was detained by the Sergeant-at-Arms for causing a disturbance.[131]

The capital up until this point was relatively peaceful. There were rowdy children and some gang activity by fire companies stationed around the district. The authorities were helpless to deal with these issues, however, because there was no municipal police force, only part-time ward constables who rarely patrolled at night. The city was about to pay the price for its threadbare security.[132] On August 17, the day following the veto, a mob gathered at the Log Cabin Hotel with the intention of marching on the White House. Its goal was to vocalize its displeasure about the defeat of the bank bill. The Mayor of Washington, D.C., William W. Seaton, addressed the mob in person and ordered them to desist. The rabble shunned the Mayor's admonitions, intoxicated themselves at a tavern on the corner of 10th street, and then gathered around the White House around 2:00 a.m. They "commenced hooting, hissing, drumming, and making a variety of noises sufficient to arouse all and to alarm several of the inmates of the house," hurled stones, shot guns in the air, and then dispersed. Some of that mob later convened to burn President Tyler in effigy a short distance from the White House as well.[133]

On August 25, 1841, Mayor Seaton submitted a letter to the Speaker of the House of Representatives declaring his regret and indignation over a riot that took place the week prior. He expressed "the anxious wish of the people of Washington that an efficient and vigorous police be established in the city, under the Authority of the Government of the United States."[134] If we read between the lines, there seems to be an inference that the "vigorous police" envisioned would prevent like riots from assaulting the Capitol itself. This was not necessarily an episode in nationalist or populist violence per se. But it does, in my view, showcase the potential for more dangerous disturbances in the future animated by those ideas to cause greater harm. The Bank Riot of 1841 was a very real act of intimidation. Shooting firearms outside of the office of the Chief Magistrate with impunity is no trivial matter.[135]

Congress did not take proactive steps after this incident to protect itself from riots in particular. The riot did motivate Congress, however, to pass legislation

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[129] 36 H.R. Jo. 383 (Aug. 19, 1841); 36 H.R. Jo. 350 (Aug. 12, 1841); 36 H.R. Jo. 347 (Aug. 11, 1841); 36 H.R. Jo. 307 (Aug. 3, 1841); 32 S. Jo. (Aug. 2, 1841).

[130] 32 S. Jo. 165 (Aug. 16, 1841).

[131] *See* 32 S. Jo. 165–69 (Aug. 16, 1841); The Madisonian (Aug. 21, 1841); The Madisonian (Aug. 17, 1841).

[132] *See* Green, *supra* note 97, at 159–60.

[133] *See* The Madisonian (Aug. 19, 1841);*President Tyler is Burned in Effigy Outside White House*, History, https://www.history.com/this-day-in-history/tyler-is-burned-in-effigy-outside-white-house (last updated Aug. 13, 2020).

[134] 36 H.R. Jo. 412 (Aug. 25, 1841).

[135] *See* 36 H.R. Jo. 412 (Aug. 25, 1841); Green, *supra* note 97, at 160–61; *President Tyler is Burned in Effigy Outside White House*, History, https://www.history.com/this-day-in-history/tyler-is-burned-in-effigy-outside-white-house (last updated Aug. 13, 2020).

promoting the better policing of the District of Columbia as a whole. On May 20, 1842, the House Committee for the District of Columbia reported H.R. No. 468, entitled "An Act to Establish a Police for the Protection of Public and Private Property in the City of Washington, and for Other Purposes." The bill authorized the establishment of an auxiliary police force. The force initially consisted of one captain and one lieutenant appointed by the President, and thirty men, including five sergeants, to be appointed by the United States Marshall for the District of Columbia. Its purpose was to serve as a night watch. The bill was amended to give the Mayor of the capital the authority to appoint the captain and his subordinates due to concerns that the force would otherwise become a "presidential 'praetorian guard.'"[136] It made its way to the President's desk and was signed into law on August 23, 1842, nearly a year to the day when Mayor Seaton sent his letter of apology to Congress.[137]

The Bank Riot is not a congressional contempt precedent per se. There was no direct contempt in the form of a mob, riot, or insurrection committed against Congress itself. It is, however, a meaningful case study representing the possibility of political violence in one quarter of the capital spilling over onto Capitol grounds. Mobs in other places in the city can make their way to the Capitol itself even if the Capitol is not their premeditated target. In the case of insurrections transpiring over the course of several days or weeks, this is especially true, as illustrated by the Gordon Riots. This case is also a meaningful precedent in the annals of congressional efforts to better police the District of Columbia that vicariously impact its capacity for protecting the Capitol and quelling any disorders that arise there.[138]

### *D. Congressional Contempt Policy*

The efficient policing of the District of Columbia remains a work in progress. Congress was practically naked against immediate threats to the safety of its members and guests during the Early Republic. But it became apparent over time that there should be a Congressional Guard of some kind. On February 4, 1828, Representative Stephen Van Rensselaer III (Anti-Jacksonian, New York) reported from the House Committee on Public Buildings and Grounds a joint resolution to create a police force for the Capitol. The tipping point came when a member of the Presidential family was victimized. Russell Jarvis, a Jacksonian journalist, assaulted John Adams II, the President's son and personal secretary, while he was in the Rotunda on his way to deliver a message to the House of Representatives.[139]

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[136] Bills and Resolutions, 27th Cong., H.R., 2nd Session, H.R. No. 468 (May 20, 1842).

[137] 37 H.R. Jo. 1366 (Aug. 20, 1841); Bills and Resolutions, 27th Cong., H.R., 2nd Session, H.R. No. 468 (May 20, 1842); Cong. Globe, 27th Cong., H.R., 2nd Session 421 (June 2, 1842); 37 H.R. Jo. 1392 (Aug. 23, 1842); Green, *supra* note 97, at 160–61.

[138] *Cf.* Case of the Tumultuous Crowd, 22 H.C. Jo. 115–116 (Apr. 12, 1733).

[139] Benjamin Perley Poore, I Sixty Years in the National Metropolis 22–24 (1886); An Act Making Appropriation for Public Buildings and Other Purposes, 1 Stat. 265, ch. 45 (May 2, 1828) (codified as amended at 2 U.S.C. §§ 1901 et seq.); NARA HR 20A-B1, RG233, Rec. H.R., https://www.archives.gov/legislative/features/capitol-police; Statutes at Large, 20th Cong., 1st Session 265–66 (May 2, 1828); John P. Deeben, *To Protect and to Serve: The Records of the D.C. Metropolitan Police, 1861 – 1930*, 40 Prologue Mag. (2008), https://www.archives.gov/publications/prologue/2008/spring/metro-police.html#nt4.

Neither House ever held Jarvis in contempt, perhaps because zealous punishment of the man who assaulted the President's son (and employee) would give an appearance of impropriety and incite political backlash. Congress opted to just focus on the overarching security concern instead. By the Public Buildings Appropriations Act passed on May 2, 1828, Congress established the United States Capitol Police. The Capitol Police operates under the auspices of the Sergeants-at-Arms of both Houses; therefore, they are a force that belongs to the legislature, not the executive. Prudence suggested that the legislature required an in-house constabulary to effectuate its prerogatives, including its inherent power. Two Sergeants in modern times were indeed not enough.[140]

The Capitol finally had its own force but the district did not. The district was only patrolled by local constables before the Civil War—at first those from other states, and, after the city incorporated, by its own. Reform came in ten-year intervals. In 1851, Congress regularized the salary for local constables. At that time the force was still less than 100 men strong—not nearly enough to secure an entire city. On July 26, 1861, Senator James W. Grimes (Republican, Iowa), a member of the Senate Committee for the District of Columbia, laid before the whole House a petition of the city residents to create a municipal constabulary. Senator Grimes introduced S.B. 49 to do exactly that. The force initially consisted of 1 superintendent, 10 sergeants, 5 commissioners, and not more than 150 officers. On August 6, 1861, the President signed the bill into law, and the Metropolitan Police for the District of Columbia was born.[141]

To this day, there is no comprehensive framework for how Congress might respond to a riot or insurrection imperiling its members or congressional proceedings. The Trump Riot is the first event of its kind; therefore, it presents a case of first impression as to how civil authorities should defend Congress and punish disorder of great magnitude. Congress lacks the experience of Parliament in this arena. It has no contingency plan for coordinating the Capitol Police, other law enforcement agencies, and the militia power in the event of a large-scale attack. It has no general policies governing its inherent contempt power generally or in the case of riot or insurrection specifically. First experiences are the most formative. Congress must address these issues.[142]

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[140] *See* 21 H.R. Jo. 589–60 (Apr. 18, 1828) (emphasis omitted); 17 S. Jo. 314 (Apr. 18, 1828) (emphasis omitted); Register of Debates, 20th Cong., S., 1st Session 668–69, 671–72 (Apr. 18, 1828); 21 H.R. Jo. 587–88 (Apr. 17, 1828); 17 S. Jo. 309–10 (Apr. 17, 1828); Poore, *supra* note 139, at 22–24 John P. Deeben, *To Protect and to Serve: The Records of the D.C. Metropolitan Police, 1861 – 1930*, 40 Prologue Mag. (2008), https://www.archives.gov/publications/prologue/2008/spring/metro-police.html#nt4. The Capitol Police share concurrent jurisdiction with other national and local police and can be reinforced by militia.

[141] *See* 53 S. Jo. 181, 256 (Aug. 5, 1861); Cong. Globe, 37th Cong., S., 1st Session 275, 288 (July 27, 1861); S. 49 (July 26, 1861); Green, *supra* note 97, at 227; John P. Deeben, *To Protect and to Serve: The Records of the D.C. Metropolitan Police, 1861 – 1930*, 40 Prologue Mag. (2008), https://www.archives.gov/publications/prologue/2008/spring/metro-police.html#nt4.

[142] *Cf.* U.S. Sen., Comm. on Homeland Sec. & Gov. Affairs & Comm on R. & Admin, Examining the U.S. Capitol Attack; A Review of the Security, Planning, and Response Failures on January 6, 1–13 (June 8, 2021).

## IV. Defense of the United States Congress

The scope of the inherent contempt power of the United States Congress is incoherent and poorly understood. This is largely because it has fallen out of use. There was no need to systematically organize its principles and precepts since the influx of contempt cases during the McCarthy Era. But this power is useful and belongs to the national legislature by right. Congress must ensure that when an appropriate occasion arrives, it will hold to account those persons who treat it with contempt through riot and insurrection. Contempt proceedings provide a unique forum for political accountability.

As the report of the House Select Committee in Rousseau's Case declared in 1866, "An act of violence against a representative is an act of insurrection against the people he represents."[143] Having thoroughly combed the annals of Parliament and Congress for useful precedents and case studies, we now begin a daunting task—blending the experience of Great Britain and America together to formulate a comprehensive framework for the defense of the legislature against riots and insurrections. If King Mob strikes, Congress must strike back. Both Houses must develop a bicameral policy for dealing with King Mob. My recommendations for that policy come next.

### *A. Detect the Threat*

The intelligence community and law enforcement institutions, including the Federal Bureau of Investigation, must detect the impending assault. If the executive obtains reliable intelligence of a pending attack, there may be enough time for law enforcement to neutralize the threat and in doing so spare the legislature any effort. Alternatively, it may obtain intelligence at least far enough in advance to allow law enforcement time to bolster its defense and facilitate an evacuation. But in the event that the executive fails to provide timely intelligence, and the attack comes as a surprise, it will probably be impossible for the legislature to evacuate most if not all members, staff, and guests. Instead, as illustrated in the case of the Trump Riot, the Capitol will lockdown and hold until relieved. Prudence demands that the members of both Houses adjourn and take refuge until the tumult is suppressed. In either event, Congress must ensure that it has effective evacuation and lockdown protocols.[144]

### *B. Defeat the Threat*

The Capitol is a fortress of national sovereignty built to last for posterity. When a riot or insurrection threatens the national legislature, the first priority is to eliminate that threat by force of police and, if necessary, militia. The District of Columbia is home to several local and federal law enforcement agencies who can respond when the

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[143] *See* 63 H.R. Jo. (July 14, 1866); Cong. Globe, 39th Cong., H.R., 1st Session (3818–19 (July 14, 1866).

[144] *See* 24 Cont. Cong. Jo. 423–25 (July 2, 1783); 24 Cont. Cong. Jo. 411–21 (July 1, 1783); U.S. Capitol, *U.S. Capitol Visitor Emergency Evacuation Information*, Visitor Ctr., https://www.visitthecapitol.gov/plan-visit/us-capitol-visitor-emergency-evacuation-information (last visited on Mar. 24, 2021; 2:35 p.m.).

Capitol is threatened.[145] The three law enforcement organizations whose prerogatives most directly bear upon the security of the Capitol are the United States Capitol Police, the United States Park Police, and the Metropolitan Police Department for the District of Columbia ("MPD"). The Capitol Police is the principal security force for Congress. The Park Police and the MPD are available to support the Capitol in a time of crisis. The mission of the Park Police in the District of Columbia is to protect national monuments, the nearest to Congress being the Capitol Reflecting Pool. The MPD is the local police force that serves the city. All three forces share concurrent jurisdiction over 200 city blocks around the Capitol complex. These forces must cooperate with each other and call for reinforcement should the need arise.[146]

The Capitol Police are the first line of defense. The second line of defense consists of national and local law enforcement units that are available to respond. In the event of a significant emergency, the Mayor of the District of Columbia is compelled give the President of the United States control of the MPD for at least forty-eight hours under Section 740 of the District of Columbia Home Rule Act. This is a substantial force. As of 2008, the MPD had the highest ratio of full-time officers to citizens in the country—34 officers per 100,000 residents. The President can retain control for a longer period if he consults the Chairman and ranking minority members of both Houses' Committees on the District of Columbia. The legislature and the executive must ensure that there is an effective protocol for communicating to each other about invoking Section 740. The latter must be able to respond to a congressional request quickly; it must also be able to invoke Section 740 on its own if it deems that step prudent. The use of Section 740 is unprecedented.[147]

If the threat is sufficiently serious, the legislature may call upon the executive to send in the National Guard.[148] The Wilkes Riots of 1763/1768, Gordon Riots of 1780, Philadelphia Mutiny of 1783, Buckshot War of 1838, District of Columbia Bank Riot of 1841, and Trump Riot of 2021 all illustrate the perils of relying on local police forces for effective and immediate relief from large scale instances of public disorder.[149] The Founders' understanding of this peril is why the District of Columbia is a federal city to begin with. Law enforcement may lack the strength or the will to stop the attack—their integrity may even be compromised by a criminal conspiracy, and even a treasonous one at that.[150] The First Militia Clause grants Congress the authority to raise troops to execute the laws, suppress insurrections,

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[145] Architect of the U.S. Capitol, *U.S. Capitol Building*, https://www.aoc.gov/explore-capitol-campus/buildings-grounds/capitol-building (last visited Mar. 22, 2021; 8:21 p.m.).

[146] 2 U.S.C. §§ 1901 et seq; D.C. Code §§ 5-101.01 et seq; D.C. Code §§ 5-201 et seq.; U.S. Dep't of Justice, Off. Justice Prog., Bur. of Justice Stat., Brian A. Reeves, Census of State and Local Law Enforcement Agencies, 2008, 5 (2011).

[147] *See* U.S. Const. art. I, § 8; District of Columbia Home Rule Act, Pub. L. 93-198, § 740, 87 Stat. 774 (Dec. 24, 1973); D.C. Code § 10-503; D.C. Code § 5-101.01; D.C. Code §§ 5-201 et seq; 2 U.S.C. §§ 1901 et seq.); 40 U.S.C. § 6306.

[148] *Cf.* Story, I Commentaries on the Constitution, *supra* note 84, at § 1186.

[149] *See* 36 H.R. Jo. 412 (Aug. 25, 1841); 24 Cont. Cong. Jo. 517–18 & n. 1 (Aug. 21, 1783); 24 Cont. Cong. Jo. 411–21 (July 1, 1783); 24 Cont. Cong. Jo. 411 & n.1 (June 30, 1783); Lord George Gordon's Case, 37 H.C. Jo. 902 (1778–1780); Rudé, Wilkes and Liberty, *supra* note 33, at 96–98, 105.

[150] *Cf.* 25 Cont. Cong. Jo. 973 (June 21, 1783); 20 Letters of Delegates to Congress 352 (June 21, 1783); 70 S. Jo. 105–110 (Jan. 13, 1875); Rudé, Wilkes and Liberty, *supra* note 33, at 42–43.

and repel invasions. Congress in turn enacted hundreds of statutes governing the militia power.[151] An organized insurrection in which a plurality, if not an outright majority, of participants are members of a criminal conspiracy is the scenario most likely to justify the application of the militia power. I must emphasize, however, that this scenario is rare. The militia power is only appropriate when the local police are truly compromised by an assault involving overwhelming force or internal treachery. [152]

### *C. Dissolve the Defense*

The heightened police presence at the Capitol must dissolve after a disturbance resolves and the dust settles. But when? If a militia is called, how long should it remain in place? If defenses are erected around the Capitol, how long should they stand? By default, I think no more than a fortnight. Every act in exigent circumstances must be treated as precedential. A tentative deadline should accompany the authorization of any militia to deploy in response to an emergency and must be enforced absent a proper showing of good cause. Congress must not invite conspiracy and suspicion by walling itself off from the outside world. Recall Edmund Burke's warning during the Gordon Riots against "establishing a military on the ruins of the civil government." The District of Columbia is not like Paris, Berlin, or Saint Petersburg. In insurrections as in government, the United States, like the Great Britain, is constitutionally more liberal than its European counterparts, to say nothing of other parts of the world.

The rule of thumb in the wake of an attack, as expressed by President Gerald Ford after the Weather Underground bombing of 1971, should be to keep the Capitol "as open as possible. . . ."[153] The *status quo ante* must be restored as quickly as possible. We do not permit state of siege legislation in this country. It is not who we are. Whatever damage is done cannot dissuade us from restoring public access to institutions that work on their behalf, for the damage an assault inflicts upon the Capitol may even be eclipsed by an over-zealous effort to suppress it. The militia must not be allowed to linger as a political firebrand that stokes partisan flames rather than suppressing them. One spectacle ought not produce another.[154]

### *D. Denounce the Threat*

Congress is a ceremonial body. It must respond to any riot or insurrection at its gates with one voice. A public pronouncement is not only appropriate but necessary. Both Houses should express their deep disapprobation, both for sake of their dignity and to benefit posterity. Whether or not a committee ultimately recommends that anyone be tried for contempt by either House, Congress should still pass a joint resolution in the spirit of parliamentary tradition so that the People recall their history, and therefore better appreciate the constitutional significance of the moment.

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151 *See* U.S. Const. art. I, § 8, cl. 15–16; *see also*, *e.g.*, Efficiency in Militia Act of 1903, 32 Stat. 775; Cong. Res. Serv., National Emergency Powers (Feb. 16, 2021).

152 *See* 24 Cont. Cong. Jo. 411–21 (July 1, 1783).

153 Cong. Rec., 92nd Cong., H.R., 1st Session 4216 (Mar. 1, 1971).

154 *See* Burke, *supra* note 73, at 45, 87, 105; *cf.* Ecclesiastes 7:16; Modus Tenendi Parliamentum, *supra* note 16, at 37–38.

> *Resolved* and *declared, Nemine contradicente,* that the assaulting, insulting, or menacing, any member of this House, in his coming to, or going from the House or upon the account of his behavior in Congress, is a high infringement of the privilege of this House, a most outrageous and dangerous violation of the rights of Congress, and a high crime and misdemeanor.
>
> *Resolved* and *declared, Nemine contradicente,* That the assembling and coming of any number of persons in a riotous, tumultuous, and disorderly, manner, to this House, in order either to hinder or promote the passing of any bill, or other matter, depending before the House, is a high infringement of the privilege of this House, is destructive of the freedom and tradition of Congress, and a high crime and misdemeanor.
>
> *Resolved* and *declared, Nemine contradicente*, That the Assembling and Coming of any number of persons in a riotous, tumultuous, and disorderly, manner, to this House, in order either to hinder or promote the passing of any bill, or other matter, depending before the House, is a high infringement of the privilege of this House, is destructive of the freedom and tradition of Congress, and a high crime and Misdemeanor.
>
> *Resolved* and *declared*, *Nemine contradicente*, That the inciting and encouraging any number of persons to come, in a riotous, tumultuous, and disorderly, manner, to this House, in order either to hinder or promote the passing of any bill, or other matter, depending before this House, is a high infringement of the privilege of this House, is destructive of the freedom and tradition of Congress, and a high crime and misdemeanor.

Resolutions of this kind were known to our Founding Fathers. The Congress of Confederation, for example, formally memorialized their disapprobation of the Philadelphia Mutiny of 1783. That resolution is an example that Congress should follow.[155]

### *E. Discuss The Threat*

Congressional committees are essential to the work of both Houses of Congress in preserving their privileges, digesting their experiences, and implementing reforms. The Founding Fathers understood that just as both Houses of Parliament continually delved into their own history to guide their steps, both Houses of Congress must do the same. Both Houses must therefore preserve tradition and employ the lessons of history by assigning committees to investigate contempts of their prerogatives, discover and digest the facts of what occurred into a coherent record, and then apply their precedents to enact reforms and to prevent like indignities in the future. Although the possibility of foreign interference is plausible, history teaches us that

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[155] *See*, *e.g.*, Lord George Gordon's Case, 37 H.C. Jo. 902–910 (June 6, 1780); Case of the Tumultuous Crowd, 31 H.L. Jo. 209 (May 17, 1765); Case of the Tumultuous Crowd, 22 H.C. Jo. 115–116 (Apr. 13, 1733); Silk Rioters' Case, 11 H.C. Jo. 667–68 (Jan. 21, 1697).

the greatest dangers lie within. The true test of any Congress is its capacity for internal inquisition—to look inward and hold its own accountable.[156]

It is parliamentary for Congress to appoint joint select committees and independent commissions to investigate riots and insurrections assaulting the Capitol. Congress routinely appointed committees for investigating all species of contempt since the Founding. If an assault only antagonizes one particular House, only that House need appoint a Select Committee. Alternatively, in the event that the assault targets and interferes with both Houses—as was the case in the Trump Riot—it is advisable for Congress to appoint a joint select committee or independent commission to investigate the affray.[157]

The charter of a joint select committee should enumerate narrowly tailored objectives that are clear, concise, and time sensitive. It should subpoena discovery and hold hearings to elicit testimony. It should consult with the Architect of the United States Capitol on any security improvements that should be made on the grounds. It should liaise with the House Committee on Oversight and Government Reform, the Senate Committee on the District of Columbia, and the Council of the District of Columbia in determining how national and local law enforcement and militia forces can better cooperate and settle jurisdictional or methodological differences in the context of responding to a riot or insurrection. Toward this end, the joint select committee should order the Capitol Police to update its strategic plan with a discrete protocol for handling riots and insurrections.[158]

The joint select committee should recommend what disciplinary actions Congress should take, either by trying contempt, certifying contempts for prosecution, or simply leaving punishment to the full discretion of the executive. The joint select committee should also recommend commendations for individuals who committed acts of valor and heroism in the line of duty and memorialize any lives lost in the struggle. The report will not only edify Congress but will also serve the public by providing a consolidated public record of what transpired. That record is the bedrock of placing the riot in historical and political perspective. That record is the foundation of reform. The Select Committee investigating the Trump Riot, for example, used its record to educate the public and cast those responsible in the proper light, particularly Trump and his associates. The fact-finding, truth telling function of the Select Committee is its greatest. A catastrophe that is not properly investigated and documented in a manner that is publicly accessible is otherwise nothing but a foil for partisan grievances.

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[156] *See*, *e.g.*, Cong. Globe, 39th Cong., H.R., 1st Session, 3818–19 (July 14, 1866); Cong. Globe, 28th Cong., H.R. 577 (May 6, 1844); 39 H.R. Jo. 846–48 (Apr. 23, 1844); Cong. Globe, 28th Congress, H.R., 1st Session 551–54, 678–79 (Apr. 23, 1844); 29 H.R. Jo. 989 (June 11, 1836); 25 H.R. Jo. 616 (Apr. 20, 1832); 21 H.R. Jo. 587–88 (Apr. 17, 1828); 17 S. Jo. 309–10 (Apr. 17, 1828); 3 S. Jo. 98 (Mar. 28, 1800); 3 S. Jo. 52–54 (Mar. 20, 1800); Annals Cong., 6th Cong., S., 1st Session 113–14, 122–24, 126–46 (Mar. 20, 27–28, 1799); 24 Cont. Cong. Jo. 410 (June 21, 1783); Lord George Gordon's Case, 37 H.C. Jo. 902 (June 6, 1780); *cf.* 73 H.R. Jo. 504 (Feb. 27, 1873); 69 H.R. Jo. 363 (Feb. 22, 1870).

[157] *See Brian Michael Jenkins, Why We Need a January 6 Commission to Investigate the Attack on the Capitol*, RAND (Jan. 20, 2021).

[158] *Compare generally* U.S. Capitol Police, Department Strategic Plan 2021–2025, *with* Statement of Inspector General Michael A. Bolton to the U.S. House of Representatives' Committee on House Administration 8 (Apr. 15, 2021).

### *F. Discipline Those Responsible*

Congress should consider disciplinary measures when order is restored. The balance of relevant historical experience supports a broad reading of inherent congressional power. Contempt power is the strong right hand of the national legislature. Its reach is long.[159] Riots, tumults, insurrections, and rebellions that directly assault the Capitol indisputably breach the privileges of both Houses and constitute high contempt. It is within the purview of a joint select committee or independent commission appointed to investigate such incident to recommend any political remedies that are in order, including contempt and impeachment proceedings.[160]

Inherent power is the principal tool of both chambers to discipline direct contempt of their respective privileges, dignities, and procedures. But what about rioting or insurrection in other quarters of the District of Columbia? What if the Capitol is not penetrated, but encircled by a rabble attempting to intimidate or coerce it in some way? Representative John Forsyth (Democrat-Republican, Georgia) forcefully argued in congressional deliberations underlying *Anderson v. Dunn* that even riots in the streets surrounding the vicinity of the Capitol grounds were liable for contempt.[161] Representative St. George Tucker (Democrat-Republican, Virginia) agreed.[162]

When alleged contempts are tried and proven guilty, incarceration and reprimand by the Speaker of the House of Representatives or the President of the Senate are appropriate penalties. When reprimand is justified, the Speaker of the House and the President of the Senate should use substantially similar language to that used in *Colonel Anderson's Case* because of its elegance, firmness, and precision. But Congress should also be creative in setting purge conditions when punishing contempt. Congress might compel a contemnor to make private or public apology to congressional staff and Capitol Police, for example, or physically participate in cleaning up Capitol grounds.[163]

Congress should take the appropriate steps to ensure that contemnors are given jail space at the District of Columbia prison both during the pendency of their proceedings and upon final conviction. It may be prudent for the legislature to collaborate with the executive for the purpose of adding additional prison space for contempt proceedings. They might also create frameworks for joint ventures between the Capitol Police and other law enforcement institutions around the country in arresting persons of interest sought by the Sergeant-at-Arms. The notion that the lack of an official carceral space for those found guilty of contempt of Congress is an insurmountable obstacle is indeed one of the silliest objections to contempt proceedings. Congress is a lawmaking body. It can make one.

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[159] *See* Watkins v. United States, 354 U.S. 178, 187 (1957); William Blackstone, I Commentaries on the Laws of England bk. 1, cap. 2, at pp. 146, 162–64 (St. George Tucker ed. 1803) (1765–1770).

[160] *See* 36 H.R. Jo. 412 (Aug. 25, 1841); 24 Cont. Cong. Jo. 410 (June 21, 1783); 20 Letters of Delegates to Congress 350–52 (June 21, 1783); Purser Rioters' Case, 13 H.C. Jo. 228, 230–31 (Mar. 27, 1699); Silk Rioters' Case, 11 H.C. Jo. 667–68 (1697); Lord George Gordon's Case, 37 H.C. Jo. 900–910 (1778–1780); *see also* Wittke, *supra* note 31, at 38; *cf.* James' Lane's Case, 3 H.R. Jo. 748 (1800).

[161] Annals of the 15th Cong., H.R., 1st Session 612–24 (Jan. 9, 1818).

[162] *Id.* at 631–36.

[163] *See id.* at 789–90.

The legislature can of course certify or refer the role of discipline to the executive—to obtain justice through civil litigation and criminal prosecution. But the legislature should not be so quick to shift this burden of responsibility. The privileges of each House must be preserved. A privilege is like a muscle: if it is not used it will be lost. If nothing else, contempt trials are pedagogical: they show the public that privileges are to be taken seriously. They are one of the last vestiges of the ancient folkmoot. They have an ethnic luster, a historic purpose, and a cathartic quality that can ventilate public outrage and provide communal closure. Making an example of those most responsible for inciting a riot on the Capitol through *legislative* action is, in my view, a sound strategy for signaling bipartisan cooperation and the strength of the First Branch.[164] Congress should not shy away from using its inherent contempt power if the executive is unwilling to prosecute, if executive privilege will bar criminal liability, or if a select committee appointed to investigate the assault on Congress expires. Those who benefit from impunity arising from executive privilege and prosecutorial discretion may be, in fact, the best candidates for contempt proceedings.

It is axiomatic that under the doctrine of the separation of powers, the first branch of government, the national legislature, is *primus inter pares*—first among equals. When there is a charge that the executive levied war against the legislature—if not in the legal sense of those terms under the Treason Clause and the federal criminal code, then at least in the political sense under principles of right reason and natural justice—I believe there ought to be a rebuttable presumption that executive privilege cannot apply in legislative proceedings appointed to investigate and adjudicate that charge. The presumption only ought to be rebutted when the allegation is malicious, frivolous, or presented in bad faith. By default, however, parliamentary privilege trumps executive privilege. Whether executive privilege is invoked in this context by the sitting or former President matters not. Our republican system requires that when the grave charge of incitement against the legislature is brought against a current or former member of a coordinate branch of government, discovery must flow like a river. Executive privilege is not absolute. As parliamentary privilege waxes, executive privilege wanes.

Of course, no Supreme Court case ever grappled with how executive privilege squares with the *lex parlimentaria americana*. But it is well established in the Anglo-Saxon legal tradition that the law of the legislature is a domain where the coordinate branches of government should fear to tread. Never is it so necessary and proper for the veil of executive privilege to be pierced as when there are credible allegations that members of the executive conspired to interfere with congressional freedom of speech and debate, interfered with federal elections, or incited riots and insurrections at the Capitol.[165]

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[164] *Cf.* Purser Rioters' Case, 13 H.C. Jo. 228, 230–31 (Mar. 27, 1699).

[165] *See* U.S. Const. art. I, §§ 5–6, 8; *cf.* Brookings Inst., Lawfare Podcast, *What's Up With the January 6 Investigation?* Lawfare 33:48 et seq. (Oct. 15, 2021); David French & Sarah Isgur, Advisory Opinions Podcast, January 6 and Executive Privilege, The Dispatch 7:05 et seq. (Oct. 11, 2021); 2 U.S.C. § 192.

## V. Reflection on the Trump Riot of January 6, 2021

The affray at the Capitol on January 6 triggered a public debate over where the tipping point between riot and insurrection lies. The exact threshold cannot be formulated with mathematical exactitude. This does not mean, however, that we cannot at least use historical precedents to benchmark and baseline future disturbances. The history of political riots teaches us to consider the scope of the riot, the size of the mob, and the scale of the damage. Not all tumultuous mobs qualify as insurrections or rebellions. A disorganized and spontaneous crowd is a mob. An organized and armed militia or paramilitary force endeavoring to overthrow the government is an insurrection. In the horizon between those two poles, as in all issues of criminality, I believe the more lenient of two or more interpretations is probably the best.

In England during the eighteenth century there was a widely held belief that outbursts of violence like the Wilkes Riots and Gordon Riots stemmed from some kind of conspiracy. "[I]t was almost axiomatic," George Rudé states, "that a 'hidden hand' should be sought behind all outbursts of popular violence."[166] But this was not actually the case. During the Gordon Riots, groups of rioters had "captains," but they tended to emerge on a temporary basis. "It is in fact, remarkable," George Rudé observes, "what a large proportion of those brought to trial resided in the neighbourhood, if not in the actual parish, of the incident with which they were supposed to be concerned."[167]

Today there appear to be many who believe that there was some sort of higher conspiracy provoking the mob that assaulted Congress on January 6. Some even apparently believe that paramilitary groups with representatives in the mob conspired with Trump. But this belief is equally mistaken. Though some radical groups participated in the Trump Riot, they did not control it. I propose that the proportion of a mob that can be convicted of criminal conspiracy presents a compelling test of whether a riot amounts to an insurrection. Of the 750 plus charges brought against participants in the Trump Riot thus far, less than 50 are charged for any kind of criminal conspiracy, and only 11 are for seditious conspiracy in particular. None are charged with conspiracy to commit treason. These proportions are too weak to support the label of "insurrection." The tumultuous crowd at the Capitol was simply a riot. Nothing more. Nothing less. I believe the plurality if not the outright majority of participants in a disturbance at the seat of government must stem from the same criminal conspiracy for the term "insurrection" to apply.

Populist outbursts like January 6 are well-precedented in the Anglo-American tradition. The history of riots and insurrections at the seat of government should instill both calm and caution. We have a baseline. Relative to today, riots and insurrections were far more frequent in the seventeenth and eighteenth centuries. Objectively speaking, however, riots and insurrections were infrequent even during the Early Modern Period in Great Britain and America.[168] As with the Wilkes Riots and Gordon Riots, those who stormed the Capitol on January 6 were not career criminals for the most part; rather, they were, an eclectic assortment of professional

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[166] Rudé, *supra* note 57, at 8–9.
[167] Rudé, *supra* note 58, at 102–03.
[168] *See* Stevenson, *supra* note 33, at 319–20.

and working-class people. The lesson the Anglo-American tradition of riot at the seat of government teaches us time and time again is the proclivity of the masses to engage in conspiracy, contempt, and civil disorder when incited by demagogic hyperbole.[169]

I do not mean to suggest that Donald Trump is an avatar of John Wilkes. There could be no greater difference between two men in capacity for speech and wit. Those who overreacted to Wilkes in his heyday did so at their peril. Those who do so with demagogues today by indulging absurd historical analogies compound this same mistake with their own errors. For all the right-wing hysteria about impending jihadist, globalist, and socialist takeovers, those on the left have not done any better with their reflexive takes casting January 6 as an augur for the rise of fascism. White supremacy does not explain the election of Trump, the riot on January 6, or the populist phenomenon in the Anglo-American tradition.[170] Populism predates fascism and should never be used as a synonym. The Trump Riot featured some extremists, but it was not a coordinated white supremacist uprising like the Battle of Liberty Place.[171] It was an alarm bell, not a death knell. Neither papists nor Persians lie hidden below the floorboards of the Republic.[172]

Horace Walpole wrongly believed that Britain was on the verge of civil war if Lord Frederick North's government was not dismissed by George III. Those who believe the United States is on the verge of internecine conflict are just as wrong today. Burke, the father of modern political conservatism, shunned Wilkes and Gordon. In fact, Gordon later denounced Burke as Catholic agent for his unwillingness to pander to popular ressentiments. True conservatives today similarly turn their back on Trump in spite of the derision they receive from many who nominally identify with the political right. Yet such is the depravity of human nature that politicians all too easily convert the competing anxieties of their constituencies about extremists on each other's fringes into political shuttlecocks to be batted back and forth, inflaming public sentiments of revanche and self-righteousness. True leadership is not so petty or obtuse.[173]

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169 *Compare* Univ. Chic. Project on Sec. & Threats, Robert A. Pape & Keven Rube, The Face of American Insurrection 9–14 (2021), *with* George Rudé, The Crowd in History: A Study of Popular Disturbances in France and England, 1730–1848, 60–61 (1964), *and* Stevenson, *supra* note 33, at 2–3.

170 *Compare* Matthew Porter, *The Society of Cultural Anthropology's Campaign to Present American Populism as Fascism*, Quillet (Aug. 5, 2021), https://quillette.com/2021/08/05/the-society-of-cultural-anthropologys-campaign-to-present-american-populism-as-fascism/, *with* Hugh Gusterson, *American Fascism and the Storming of the Capitol*, Soc'y for Cultural Antho., Hot Spots, Fieldsights, (Apr. 15, 2021), https://culanth.org/fieldsights/american-fascism-and-the-storming-of-the-capitol; see also Sheridan Stewart & Robb Willer, *The Effects of Racial Status Threat on White Americans' Support for Donald Trump: Results of Five Experimental Tests*, Grp. Processes & Intergroup Rel. 1, 9, 13 (Oct. 18, 2021) (reporting that out of five experiments conducted ($N = 3{,}076$), four experiments—including the only one conducted with a nationwide probability sample—showed a null effect for racial demographic shift and support for Donald Trump).

171 *Cf.* Frank L. Richardson, *My Recollections of the Battle of the Fourteenth of September, 1874, in New Orleans*, LA, *in* 3 La. Hist. Soc'y 498, 498–501 (Oct. 1920).

172 *Cf.* Hibbert, *supra* note 53, at 28; Daniel 5:30–31 (ESV); Herodotus, *supra* note 53, at 1.189–191.

173 *See* Seed, *supra* note 70, at 69, 87–88, Green, *supra* note 97, at 245, 249.

Populist movements can speak a language that resonates with the people, grapples with legitimate concerns, and yes, offers or inspires, directly or indirectly, serious solutions. In reflecting upon popular petitions of grievances, Benjamin Franklin wisely reflected that disdain for such movements is dangerous: "Nothing can have a better effect in producing the alienation proposed; for though many can forgive injuries, *none ever forgave contempt*."[174] Disgust for demagoguery cannot lead to a blinding hatred for the middle or lower orders. "Distrust naturally creates distrust," wrote John Jay, "and by nothing is good-will and kind conduct more speedily changed than by invidious jealousies and uncandid imputations, whether expressed or implied."[175] Yes, a particular *kind* of populism can be pernicious, yet its existence is itself a testimony to our liberty. The petitioning movement of the eighteenth century is indeed one of the purest historical expressions of popular sovereignty.

Even if we concede to George Rudé that riot and insurrection was the language of the unheard in the Early Modern Period, that language cannot be so described let alone justified today. Elections are frequent. Suffrage is universal. The People have a greater voice. The House of Representatives is their mouthpiece. The body of the lower chamber is supposed to embody the Spirit of Democracy, to form a breakwater against plutocracy and popular prejudice. As in the famed story of Hans Brinker, however, there is a hole in the dike. Members of the legislative body that was attacked on January 6 stoked the coals of the very conspiracy that caused the conflagration. The demagogic element of populism is always the most dangerous. The Spirit is willing but the body was weak.[176]

Yet even if we concede Wilkes championed the petitioning movement. He led the resistance to general warrants and the crime of seditious libel. He was also the first MP to propose a bill for universal male suffrage. His legacy illustrates the positive potential for populism sans political violence, and not even necessarily on its own, but rather as one stitch in a more eclectic electoral fabric.[177] In its highest form, populism is a vehicle for The People to contend with opaque institutions and decadent elites.

Stripped of its depth and nuance, our nation's founding documents and most precious symbols are harvested by politicians to divide rather than heal. The Democrat-Republican Societies were sympathetic with backcountry sentiments during the Whiskey Rebellion. It is no surprise that populists today typically peddle memes featuring choice quotes from Patrick Henry and Thomas Jefferson. They do so at our peril, for their comments often betray a belief in the old farce that the Constitution is a compact between states, not citizens. I fear that the sails of populism today are propelled by the winds of a renascent Anti-Federalism. The

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[174] Benjamin Franklin, National Archives, Rules by Which a Great Empire May Be Reduced to a Small One, The Public Advertiser (Sept. 11, 1773), Founders Online, https://founders.archives.gov/documents/Franklin/01-20-02-0213, *derived from* 20 The Papers of Benjamin Franklin 389–99 (William B. Willcox ed. 1976).

[175] John Jay, Federalist No. V.

[176] See Stevenson, *supra* note 34, at 2–3; *cf*. Matthew 26:41.

[177] *See generally*, *e.g.*, Knights, *supra* note 70, at 61–62; Arthur H. Cash, John Wilkes: The Scandalous Father of Civil Liberty 52 (2006); Rudé, Wilkes and Liberty, *supra* note 33, at 192–96; Kazin, *supra* note 24, at xi, 1, 31, 63, 82, 112, 116, 131, 137, 151, 165, 237.

specter of the Old South haunts our land like a lion, seeking whom it may devour.[178] The demagogues of our time make contempt of government the populist creed. And it is one that is entirely incommensurable with the American Creed. For the former to prevail, the latter must be rebuked. Contempt of government is contempt of the Sovereign Nation.[179]

## VI. Conclusion

When popular disapproval erupts into violence at the seat of government, the coercive power of the State must compel honor and obedience to Congress. When rioting threatens the fundamental pillars of our Republic, force and fear are the order of the day. There are few truths so evident in history as that the blood of the rabble dignifies the State. Gravity requires weight. Authority requires danger. For contempt of government, if unchecked, may otherwise break out into mass unrest. A riot is not an insurrection, but it certainly can become one. The very justification for a national government lies in its utility as a safeguard against factious insurrection and internecine conflict.[180] The nation is the true victim of the Trump Riot of January 6, 2021, for as Joanne Freeman so poignantly observed, the Capitol is the "Union incarnate." For the sake of the Perpetual Union, the national consciousness must be conserved at all costs. The nation as such must be vindicated. King Mob must be held accountable whenever he rears his ugly head.[181]

History and experience prove the following two propositions to be true: *First,* the law of Parliament declares riots at its door to be high contempts of the Constitution and high crimes and misdemeanors; and *Second,* that law of Parliament is our law. Contempt proceedings and impeachment proceedings in the wake of the Trump Riot are therefore not grotesque institutional manipulations as some would suppose. They are completely commensurate with our national heritage and rooted in the Anglo-Saxon legal tradition. Only a rigorous investigation by the legislature combined with a vigorous prosecution by the executive can make the words of Virgil speak true to our own times: "Fixed the Capitol's foundation lies"—*Capitoli immobile saxum.*[182]

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178 *See* George Washington, *Letter to Henry Lee* (Aug 26, 1794), *reprinted in* George Washington: Writings 875, 876 (John Rhodehamel ed., Library of America, 1997); Formisano, *supra* note 24, at 62; *cf.* 1 Peter 5:8; Cynthia Nicoletti, Secession on Trial: The Treason Prosecution of Jefferson Davis 16 (2017).

179 *See* Story, I Commentaries on the Constitution, *supra* note 84, at § 290; Pauline Maier, *Popular Uprisings and Civil Authority in Eighteenth-Century America*, 27 William & Mary Q. 3, 15–16 (1970).

180 Alexander Hamilton, Federalist No. IX.

181 Joanne B. Freeman, The Field of Blood: Violence in Congress and the Road to Civil War 158–160, 24–25 (2018).

182 *Compare* Virgil, IX Aeneid 446–449, *with* Joseph Story, II Commentaries on the Constitution of the United States § 1222 (Thomas Cooley ed. 1873).

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