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WHERE DID "WE" GO?
Marietta S. Robinson

THE EMERGENCE OF THE AMERICAN CONSTITUTIONAL LAW TRADITION
H. Jefferson Powell

CHANGE AGENTS: LOOKING TO STATE CONSTITUTIONS FOR RIGHTS INNOVATIONS
Judge Jeffrey S. Sutton

Quarterly

Annual Meetings

2021: April 25–May 1, Montage Laguna Beach,
Laguna Beach, California

2022: March 6–11, 2022, Four Seasons Resort Maui,
Maui, Hawaii

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Volume 52 **2020** **Number 3**

CONTENTS

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EDITOR'S NOTE

This issue has been months delayed, and whether and when the next issues are published are questions left to the whimsy of Covid-19. I apologize for these consequences, yet am certain that they are uncertainties that all our readers—who share the sense of uncertainty that only a pandemic can deliver—can comprehend and its consequences pardon.

The first article in this issue was scheduled as the John Reed Lecture at the spring 2019 Annual Meeting in South Carolina, which was canceled because of Covid. But Marti Robinson, a Barrister stalwart and Past President, nonetheless delivered its text, augmented, for publication here. I am certain it will edify and move you, just as it edified and moved me.

The other two articles are reprints from issues of *Judicature*, published by the Bolch Judicial Institute at Duke University School of Law. I am indebted to the Institute and to the authors, Jeff Powell and Judge Jeffrey Sutton, for their permission to republish those articles, just as I am to Justice Sarah Hawkins Warren for allowing me to republish her introduction to Judge Sutton's piece. I am likewise grateful to *Judicature*'s managing editor, Melinda Myers Vaughn, for enabling that permission and the articles' republication.

Judicature was first published in 1917 and adopted by Duke Law School in 2015, when its previous publisher and founder, the American Judicature Society, dissolved. Now in its 104th volume, *Judicature* is a scholarly journal focused on the judiciary, the administration of justice, and the rule of law. It is published three times a year and mailed to all Article III federal judges, state supreme court justices, and many state and appellate and commercial-court judges, among others.[*] If you are interested in reading *Judicature* or in the opportunities provided by the Bolch Judicial Institute, including its program for an LLM in Judicial Studies, please visit its website, judicialstudies@duke.edu.

Joan Ames Magat
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[*] Melinda Myers Vaughn, *Briefs: A New Editorial Board for* Judicature, 103 JUDICATURE 3, no. 1 (Spring 2019).

WHERE DID "WE" GO? *

Marietta S. Robinson**

I
INTRODUCTION

On the night after the election in November 2016, I was having dinner with a group of friends at a restaurant in Washington, DC. As we animatedly discussed our concerns, our waiter was listening closely, unnoticed by us. Finally, he interrupted: "I am sorry, but I must say something. Your country is going to be fine. You have your institutions. I am Syrian, and, in my country, we have only one man. But here, your institutions will save you." We all stopped talking. Our institutions. He believed in our institutions. I hoped his belief was well placed, but was skeptical.

At the time, I was a commissioner on the Consumer Product Safety Commission (CPSC), so my institutional concerns went beyond Congress and our courts to our administrative, or regulatory, agencies. It's their job to provide the rules that protect citizens from the dangers of unrestrained capitalism. I wondered if these little-noticed but essential agencies could survive the new administration and if anyone would pay attention if they did not.

Now, three and a half years later, the Covid-19 pandemic has made us pay attention for the first time in decades to both why we need our regulatory agencies and how enfeebled they have become. We need the agencies now more than ever, because they were created

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* This essay expands remarks prepared for the John Reed Lecture, to have been given at the 2020 Annual Convention of the International Society of Barristers. The meeting was canceled because of Covid-19.

** Past President of the International Society of Barristers, former Commissioner of the Consumer Product Safety Commission, and 2019 Harvard Advanced Leadership Initiative Fellow.

to regulate and thus protect citizens' common interests or occupations, our shared resources, our safety, our institutions' integrity. We need the Occupational Safety and Health Administration (OSHA) to issue and enforce guidelines and regulations on keeping our essential workers safe, on protecting our food supply and on protecting workers who report dangers; we need our Small Business Administration (SBA) to fairly distribute the hundreds of billions Congress has allotted so that large conglomerates with private bankers are not given an unfair advantage over true small businesses; we need the Consumer Financial Protection Bureau (CFPB) to help us avoid foreclosures or evictions and oversee debt collectors; we need the Federal Emergency Management Agency (FEMA) to coordinate the purchase and distribution of protective gear instead of letting the "free market" wreak havoc on the process; we need the Centers for Disease Control (CDC) to give us factual, science-based information on this virus; we need the Food and Drug Administration (FDA) to regulate the quality of tests so we know the results are reliable; and we need the federal government to coordinate testing nationwide to make a scientifically based reopening possible.

But none of that is happening. "Covid-19 shattered what John Stuart Mill called 'the deep slumber of a decided opinion,' forcing many to realize that they live in a broken society, with a carefully dismantled state."[1] Without federal regulatory coordination, profiteers have spawned mayhem. "Where is our government?" we keep repeating incredulously, as we watch institution after institution fail us. Just one heartbreaking example of that abject failure is what has happened during this pandemic to our poultry workers, who lost union protection through an exclusively Republican NLRB and lost any possible protection from dangerous working conditions through OSHA's being missing in action.[2] With neither union power to ameliorate working conditions nor federal agencies to disallow

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[1] Pankaj Mishra, *Flailing States,* 42 LONDON REV. BOOKS, no. 14, July 16, 2020, at 9.

[2] Jane Mayer, *How Trump Is Helping Tycoons Exploit The Epidemic,* NEW YORKER, July 20, 2020, at 28 .

appallingly risky ones, poultry workers have suffered catastrophic consequences.[3]

I did not know it on that November night in 2016, but I was at the beginning of a fascinating journey of discovery, which included how and why the institutions the waiter had praised and I had worked within had disintegrated. And I want to share that journey with you. By the time Covid-19 struck our country, nothing about the failures of our government agencies surprised me. Thanks to that journey, I knew where our government had gone.

II
THE CONSUMER PRODUCT SAFETY COMMISSION

I was a trial lawyer in Detroit for more than thirty years before I took my first government job in 2013. As a lawyer, I had given almost no thought to the important role that government agencies play in every aspect of our lives. Every time we get in our cars, on an airplane, eat food, breathe, drink water, take a pill, deal with our banks, go into our workplaces, or buy a product, there is a government agency whose job it is to be sure we can do those things taking our safety and security for granted.

President Obama appointed me as one of five commissioners of the CPSC in 2013. Only then did I begin to focus on how essential the balance is between government regulations that prioritize consumer protection and the private sector that prioritizes profit.

The CPSC was created in 1971 to protect consumers from unreasonably dangerous products. Its jurisdiction includes virtually all products except food, cosmetics, drugs, automobiles, and planes. Even without aircraft and edibles, the scope of the agency's mandate was daunting: our issues concerned safety in products as varied as All Terrain Vehicles, kids' toys, baby products, kitchen appliances, chemicals, portable generators, unstable dressers, exploding phones, hoverboards, and flame retardants in furniture. It was exciting to be able to work on behalf of consumers at a more macro level than I could

[3] *See id.*

have in my law practice. Yet it did not take long in the job for me to become frustrated at how the agency had been significantly weakened by both political parties over the decades since its creation—through statutes passed by Congress, significant cuts in resources, court decisions, and agency leadership. When the Trump Administration took power, three and a half years into my five-year term, I knew we would see changes within the agency in prioritizing business interests over consumer interests, but I thought it would be within a range of what was viewed as "normal." I was wrong. This was different.

Weeks after Trump took office, Steve Bannon, his then–chief strategist, vowed a daily fight for "deconstruction of the administrative state."[4] Any moorings to "conservative" in any sense that this country had ever experienced before were gone. This was not about less government regulation; this was about *no* government regulation.

The new, Trump-appointed, CPSC Acting Chair, who served as a commissioner with me for three of my five years, had been a one-term Tea Party Congresswoman and, as one of two Republican commissioners on the CSPC, had voted 100% of the time with whatever regulated industry wanted. She was frequently so extreme that her fellow Republican commissioner would not support her. She even voted to allow endocrine-disrupting chemicals in children's toys against the advice of all independent scientists. And she immediately set about appointing department heads who would thwart any effort by staff to protect consumers. The new general counsel she appointed came from inside the portable-generator-manufacturing business while the CPSC was nearing a requirement that industry substantially decrease the unnecessary and outrageous amount of carbon monoxide emissions that kill and seriously injure hundreds each year. The proposed regulation was stopped dead in its tracks.

What happened at the CPSC happened across the board. Those quickly nominated to head each regulatory agency were consistently people who had previously been in positions where they had, in effect,

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[4] Max Fisher, *Stephen K. Bannon's CPAC Comments, Annotated and Explained*, N.Y. TIMES, Feb. 24, 2017, https://www.nytimes.com/2017/02/24/us/politics/stephen-bannon-cpac-speech.html.

advocated for the destruction of the agency they were chosen to lead. Cases in point:

- Scott Pruitt was chosen to lead the Environmental Protection Agency after having repeatedly sued it.
- Rick Perry became Secretary of Energy, heading a department that he formerly wanted to eliminate and that he couldn't remember the name of.
- Mick Mulvaney was chosen to head the Consumer Financial Protection Agency which he had called a "sick, sad" joke.[5]
- Ali Bahrami, a long-time aviation executive who was head of a trade group whose members included Boeing, was chosen to head the Federal Aviation Administration.
- Sam Clovis, "a now-withdrawn nominee for chief scientist at the United States Department of Agriculture, had no scientific background."[6]

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[5] Bess Levin, *Trump Budget Director Expected to Take Over Agency He Called A "Sick, Sad Joke,"* VANITY FAIR, Nov. 16, 2017, https://www.vanityfair.com/news/2017/11/mick-mulvaney-cfpb.

[6] Ed Yong, *Trump's Pick for CDC Director Is Experienced but Controversial,* ATLANTIC, March 22, 2018, https://www.theatlantic.com/science/archive/2018/03/trumps-pick-for-cdc-director-is-experienced-but-controversial/556202/.

As for the CDC, Trump's original choice, Brenda Fitzgerald, seemed "a reasonable choice" until it was reported that she had invested in a tobacco company shortly after assuming her post, and she was compelled to resign. *Id.* It should come as no surprise that Trump's succeeding appointment to head the CDC, Robert Redfield, came with a spotted record regarding his work in HIV research and no experience as a public-health administrator. Though the controversies that tailed Redfield were "decades old" at the time of his appointment, his ties to the religious right are not. *See id.* Such recent missteps as the CDC's advice in the early days of the pandemic to keep cruise ships offshore and its delays in processing early Covid-19 testing were not auspicious indicia of competent leadership. *See* Dan Diamond, *Trump's CDC Chief Faces Increasingly Harsh Scrutiny*, POLITICO, Feb. 2, 2020, https://www.politico.com/news/2020/02/26/trump-cdc-chief-harsh-scrutiny-117792. And we are now having to examine any health

These nominations of anti-government extremists were alarming, but the machine-like efficiency of making these nominations was puzzling, given the utter chaos at the top of the executive branch.

I learned only later how all of this had been orchestrated.

III
HARVARD FELLOWSHIP

After I completed my term as commissioner in 2018, I spent the calendar year of 2019 as one of forty-eight Harvard Advanced Leadership Initiative (ALI) Fellows from around the world who had had rich careers in arenas as varied as finance, education, science, medicine, and law. ALI is Harvard's only cross-university program, and it entails weekly group sessions, intense two-to–three-day deep dives into particular subjects, auditing classes of our choice, and developing an individual project.

I had gone to Harvard with the notion that this venerable, reputedly liberal institution that included what I had known as the Harvard Kennedy School of Government (HKS) would be a place where I would find many who had exciting ideas on how to rebuild our frayed governmental institutions and use them in ways that truly benefited society at large. It was an amazing year, and though I was taught much, I actually learned more from what was *not* being taught.

Let me explain.

Learning Outside the Curriculum

The project I decided to pursue was finding a way to teach, in some venue, about five little-known but essential federal consumer-protection agencies. Four of those agencies—OSHA, the EPA, the CPSC, and the National Highway Traffic and Safety Administration (NHTSA)—had been created, with strong bipartisan support, to assure safe workplaces, safe air and water, and safe consumer

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communications that come out of CDC to ascertain if they are based on science or politics.

products, and automobiles, respectively, and all had been signed into law in the early 1970s by then-President Nixon. The fifth, the Consumer Financial Protection Bureau (CFPB), had been created later, in response to the malfeasance of financial institutions that had led to the 2008 recession. It was designed to protect consumers from the predatory practices of lending institutions, among other things.

I knew that little to nothing was being taught about these agencies anywhere, from high schools to law schools, but I subscribed to the quote by the Senegalese poet Baba Dioum, "In the end, we will conserve only what we love; we will love only what we understand and we will understand only what we are taught."[7]

But I was in for a rude awakening.

One of our early deep-dive sessions was on the opioid and obesity epidemics. We heard hours of lectures by brilliant professors about incidence and treatment, however nothing about cause. Nothing was mentioned about the manufacturers and distributors that made billions from these epidemics. And nothing was mentioned about how the federal regulatory agencies that could have prevented both epidemics had been stripped of powers, resources, and effective leaders for decades. I was puzzling over this as, walking home, I passed the Sackler building.[8] Was it possible that the omission of such essential information was purposeful?

I started focusing on the names of the super-rich Harvard contributors after whom buildings just at HKS were named. One was

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[7] Seen inscribed on a plaque near ruins outside Amman, Jordan.

[8] Members of the Sackler family own Purdue Pharma, which created OxyContin, linked to hundreds of thousands of deaths resulting from Purdue's aggressive and misleading marketing as to the drugs' addictive nature. *The family withdrew almost $11 billion from the company as criminal and civil lawsuits based on their involvement mounted. See, e.g.*, Colin Dwyer, *Sacklers Withdrew nearly $11 Billion from Purdue as Opioid Crisis Mounted*, NPR (Dec. 17, 2019, 11:43 AM), https://www.npr.org/2019/12/17 /788783876/ sacklers-withdrew-nearly-11-billion-from-purdue-as -opioid-crisis-mounted#:~:text=Live%20Sessions-,Sackler%20Family %20Pulled%20Billions%20From%20Purdue%20Pharma%20As%20Opiod %20Crisis,to%20misleading%20regulators%20about%20OxyContin.

David Rubenstein, who worked aggressively to save the "carried interest" loophole, viewed "almost universally as indefensible,"[9] which has allowed him and other billionaires for many years to disguise their billions of income as capital gains and pay only 15% in taxes. This loophole is viewed by some as having contributed significantly to our massive income inequality.[10] Others were A. Alfred Taubman and Lucius Littauer, who were convicted of financial crimes. And then there was Leslie Wexner, a longtime affiliate and supporter of convicted child molester Jeffrey Epstein. Another Epstein affiliate, billionaire Glenn Fine, had an HKS fellowship named for him.[11]

I went to hear Sheryl Sandberg, Chief Operating Officer of Facebook, interviewed at the Harvard Business School. She was not asked a single tough question, though her company is involved in destroying democracies throughout the world while making trillions, all with virtually no U.S. government regulation from the Federal Communication Commission or any other agency. Information on the unrestrained actions of the super rich and how government could or should curb such actions is essential to a fuller understanding of such topics. But not only was such information omitted, opportunities for its being evoked were ignored.[12]

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[9] JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS 51 (2010).

[10] Alec MacGillis*, The Patriot: How Philanthropist David Rubenstein Helped Save a Tax Break Billionaires Love,* PROPUBLICA, March 7, 2016, https://www.propublica.org/article/how-david-rubenstein-helped-save-the-carried-interest-tax-loophole.

[11] Wexner and Fine have only recently stepped down from the HKS board as a result of objections by students. Ema R. Schumer, *Epstein-Linked Donors Dubin and Wexner Depart from HKS Leadership Council*, HARV. CRIMSON, March 17, 2020, https://www.thecrimson.com/article/2020/3/17/dubin-wexner-harvard-kennedy-school-departures/.

[12] ANAND GIRIDHARADAS, in WINNERS TAKE ALL (2019), writes of this phenomenon in observing that our elite institutions are now teaching that to focus on the perpetrator is a win-lose approach and would make one a potentially ostracized critic. A "thought leader," on the other hand, will focus on the victim. *Id.* at 96–97. He quotes Adam Grant, an organizational psychologist who teaches thought leadership: "In the face of injustice, thinking about the perpetrator fuels anger and aggression." This new approach of focusing on the victim is "far more radical" than the previous

As I reviewed the curriculum offered at HKS, audited classes, and went to lectures and panels at its Forum, I gradually came to realize that no voice was informing discussion about the important role of government, let alone the need for good, strong regulatory agencies. Many courses and lectures celebrated hyper-individualism—they lauded leadership, innovation, social entrepreneurship, becoming thought leaders, and one even taught young people how to speak authoritatively. But none of these focused on the complexities of developing society or effective government.

Indeed, a consistent, mostly implicit underlying narrative I discovered in the HKS curriculum (and those of other Harvard schools as well) was distinctly *anti*-government. There seemed to be an almost universally accepted belief that no governmental rules or oversight should get in the way of the profits of any company or individual, and those profits should be only minimally taxed. I was familiar with two of the most celebrated HKS professors, Larry Summers and Cass Sunstein, and knew that both of them had been averse to regulation while they were in government sometimes with disastrous results.[13] But the surprise was that virtually no counter narrative was presented. And so it was not really such a surprise when I discovered, halfway through the year, that HKS had removed "Government" from its name.[14] It is just the Harvard Kennedy School.

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approach that held that capitalists "should not be excessively regulated . . . . The new idea goes further, in suggesting that capitalists are more capable than any government could ever be in solving the underdogs' problems." *Id.* at 45. This "win-win approach" rests on the principle that "after-the-fact generosity is a substitute for and a means of avoiding the necessity of a more just and equitable system and a fairer distribution of power." *Id.* at 120–21.

[13] *See* Michael Hirsh and NATIONAL JOURNAL, *The Comprehensive Case Against Larry Summers,* ATLANTIC, September 9, 2013, https://www.theatlantic.com/business/archive/2013/09/the-comprehensive-case-against-larry-summers/279651/.

[14] Their doing so, in 2007, was not overtly to drop the study of government and its institutions, but was ostensibly a "branding" maneuver. *See* https://www.news-star.com/article/20071207/NEWS/312079941.

Still, when I saw just how pervasive this resistance is to government regulation, particularly from economists, I felt a bit intimidated. After all, I am just a lawyer—not an economist, academician, or historian. And this was *Harvard*, after all. But during the summer break, *Gundy* v. *United States* came down from the U.S. Supreme Court.[15] It was more alarming than *Citizens United.*

Gundy*: Canary in the Coal Mine*

Gundy v. United States is alarming not because of what the plurality held or reasoned. It is alarming because of the clear message sent through Justice Gorsuch's dissent (joined by Chief Justice Roberts and Justice Thomas) and remarks in Justice Alito's concurrence. It is alarming because of the Who's Who of anti-regulation institutions that filed *amici* briefs in this otherwise unremarkable case. And it is alarming because of Justice Kavanaugh's open embrace of Justice Gorsuch's "scholarly analysis"[16] in *Gundy* subsequently, in the Court's denial of certiorari in *Paul v. United States.*[17] These combined make it very clear that what is now a majority on the Supreme Court is on the cusp of reversing nine decades of jurisprudence by massively expanding what has always been a very narrow "nondelegation doctrine" to essentially rule that the way our critically needed administrative agencies have worked for over three-quarters of a century is unconstitutional.

The narrow question in *Gundy* concerned whether the Sex Offender Registration and Enforcement Act (SORNA) properly delegates to the Attorney General the application of "SORNA'S

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[15] *Gundy v. United States*, 139 S. Ct. 2116 (2019).

[16] *Paul v. United States*, 718 Fed. App'x 360 (6th Cir. 2017), *cert. denied,* 140 S. Ct. 342 (2019). Writing separately, Justice Kavanaugh observed that *Paul* raised "the same statutory interpretation issue . . . resolved . . . in *Gundy*." *Id*. Such "scholarly analysis of the Constitution's nondelegation doctrine in [Justice Gorsuch's] dissent may warrant further consideration in future cases," he wrote, echoing Justice's Alito's concurring opinion in *Gundy*. *See infra* text accompanying notes 34–35.

[17] 140 S. Ct. 342 (2019).

registration requirements as soon as feasible to offenders [such as Mr. Gundy] convicted before the statute's enactment."[18] Although this standard, registration "as soon as feasible," is not mentioned in the statute, it was quite evidently what Congress had intended for the Attorney General to order: "*Instantaneous* registration of pre-Act offenders 'might not [have] prove[n] feasible,' or [so] 'Congress might well have thought,'" so it conditioned pre-Act offenders' duty to register on a "prior 'ruling from the Attorney General.'"[19]

The focus of all of the justices was on whether SORNA violated the nondelegation doctrine. The doctrine arises from the Constitution's grant of lawmaking power to Congress: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."[20] Implicitly, Congress may not delegate its lawmaking responsibilities to any other governmental branch. Yet the Constitution also authorizes Congress "[t]o make all Laws . . . necessary" to execute these legislative powers.[21] Since before the New Deal, the Supreme Court has recognized that in this second provision lies considerable congressional license to delegate power by enacting laws such that other branches of government, including executive agencies, might enable their execution. Doing so does not offend the nondelegation doctrine when Congress "set[s] out an 'intelligible principle' to guide the delegee's exercise of authority."[22]

Over the past nine decades, the Supreme Court has repeatedly recognized, as the plurality did again in *Gundy,* that an increasingly complex society compels an increasingly interdependent government; Congress cannot exercise its legislative powers alone and in a vacuum: "Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national

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[18] *Gundy*, 139 S. Ct. at 2121.

[19] *Id*. at 2124 (quoting *Reynolds v. United States*, 565 U.S. 432, 440–41).

[20] U.S. CONST. art. I, § 1.

[21] U.S. CONST. art. I, § 8.

[22] *Id.* at 2129 (quoting *J.W. Hampton Jr. & Co*., 276 U.S. 394, 409 (1928)).

Legislature cannot deal directly," the Court wrote in 1935.[23] "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function[s] . . . ."[24] Congress may "obtain[ ] the assistance of its coordinate Branches"—and in particular, may confer substantial discretion on administrative agencies to implement and enforce the laws.[25]

"[D]elegation is permissible if Congress has made clear . . . 'the general policy' [the delegee] must pursue and the 'boundaries of [his] authority.'"[26] Once a statute's "general policy" has been made clear, the courts will "almost never [feel] qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[27]

In the ninety years since, a requisite "intelligible principle" to guide delegated authority became the test under the nondelegation doctrine. Congress' ability to delegate to administrative agencies has been so broadly construed that only two statutes have been struck down on nondelegation grounds, and both of those were in 1935.[28] Indeed, for nearly four decades, courts have been expressly required

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[23] *Panama Ref. Co. v. Ryan,* 293 U.S. 388, 421 (1935).

[24] *Id.* (quoted in *Gundy*, 139 S. Ct. at 2123).

[25] *Gundy* at 2123 (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)).

[26] *Id*. (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

[27] *Id*. (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)). This reluctance to interfere is longstanding. In *Wayman v. Southard*, perhaps the first case to consider the nondelegation doctrine (though not yet so termed), Justice Marshall wrote that although each branch is to make, execute, or construe the law, as charged under the Constitution, "the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily." 23 U.S. 1, 46 (1825).

[28] *Panama*, 293 U.S. 388, and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), both for presidential overreach.

under the *Chevron* doctrine to defer to the expertise and experience of agencies except in very narrow circumstances.[29]

For many years, anti-regulation zealots have attempted to circumvent the careful and deliberative regulation process where, when challenged in courts, the interests of the public frequently win over the interests of industry. Instead, they seek to fundamentally change existing law by arguing that the statute under which a regulation is being promulgated is unconstitutional. So, the argument would go, even if a regulation by the CPSC banning a dangerous product had been promulgated under the proper administrative process and was neither arbitrary nor capricious based on the proofs presented, that regulation would be struck down because the provisions in the Consumer Product Safety Act enabling it to promulgate such a regulation would be deemed an unconstitutional delegation of Congress's legislative powers. The argument made by these zealots, thus far unsuccessfully, is that Congress cannot delegate responsibility to agencies to regulate, absent stating with unforeseeable specificity the scope of their tasks—which would, practically speaking, make government regulation impossible.

In *Gundy,* the plurality held that the delegation to the Attorney General of "authority to specify" as to how the registration requirements applied and the authority to make concomitant rules "as soon as feasible" for registering such sex offenders as Mr. Gundy "easily pass[ed] muster" under the nondelegation doctrine.[30] In holding that the delegation in this case had been sufficiently specific—that it had followed an "intelligible principle" set out in SORNA to guide the Attorney General's exercise of authority—the Court observed that previous decisions had upheld much more broad delegations—to "various agencies . . . regulat[ing] in the 'public interest'[,] . . . to set 'fair and equitable' prices and 'just and reasonable'

[29] *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 468 U.S. 837 (1984).

[30] *Id*. at 2129.

rates[,] . . . and to issue whatever air quality standards are 'requisite to protect the public health.' And so forth."[31]

Gorsuch argued in his dissent that the Court should ignore the decades of Supreme Court precedent and reinterpret the "intelligible principle" test to be restricted to these questions: "Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments?"[32] This interpretation would severely constrict Congress' ability to delegate to agencies discretion to implement and enforce the laws by requiring that any statute meet criteria that essentially take away all of an agency's power to exercise such discretion. Such constraints would smother agencies' authority to determine how to measure competing considerations and to propose policies that address those considerations.

Think about this for a moment: Such a holding would make it impossible for consumer-protection agencies, for example, to pass regulations that protect workers from unsafe working conditions, consumers from predatory banks and lenders, *all of us* from unsafe airplanes, cars, air and water. And those would just be the beginning. As a law professor at the University of Michigan Law School observed shortly after the *Gundy* decision came down, "On Thursday, the conservative wing of the Supreme Court called into question the whole project of American governance."[33]

Justice Alito concurred with the majority in this case only because SORNA "did not lack a discernable standard . . . adequate under the approach the Court had taken [since 1935]."[34] But, were the Court "willing [when the Court sits as a full panel] to reconsider the

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[31] *Id.* (internal citations omitted).

[32] *Id.* at 2141 (Gorsuch, J., dissenting).

[33] Nicolas Bagley, *Opinion: Most of Government Is Unconstitutional*, N.Y. TIMES, June 21, 2019, https://www.nytimes.com/2019/06/21/opinion/sunday/gundy-united-states.html.

[34] *Id*. at 2130 (Alito, J., concurring).

approach we have taken for the past 84 years,"—"uniformly reject[ing] nondelegation arguments and . . . up[holding] provisions that authorized agencies . . . to adopt important rules pursuant to extraordinarily capacious standards"—he "would support that effort."[35] The dissent, portentously, agreed, but "would not wait." *Id.* at 2131 (Gorsuch, J., dissenting). In his dissent, Gorsuch laid out how the conservative majority might rewrite the law on nondelegation. And now it is clearly awaiting the right case to undo our government.[36]

Why Should We Care?

Even before the pandemic, we knew that our airplanes are not being properly tested by the FAA; self-driving cars are being developed with little to no oversight from NHTSA; our air and water are increasingly polluted, accident prevention requirements have been removed from our chemical facilities, and pesticides that cause cancer and developmental problems in our kids are back in use because the EPA is not doing its job; many of our products including toys are not safe because the CPSC is not doing *its* job; our pristine national parks, where we could take our families, are being opened up to drilling by the National Park Service; there are no mandatory requirements that our meat be inspected by the USDA for safety; OSHA is no longer inspecting our workplaces for safety, and it is not protecting workers who report dangerous working conditions; the CFPB is no longer protecting us from fraudulent banks and lenders; our drugs are not properly regulated or tested by the FDA; the DEA's failures to regulate sales and distribution of opioids has led to hundreds of thousands of deaths.

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[35] *Id*. at 2130–31 (Alito, J., concurring).

[36] In *Little Sisters of The Poor Saints Peter and Paul Home v. Pennsylvania,* 140 S. Ct. 2367 (2020), Justice Thomas cites *Gundy* in the majority opinion, stating that "[n]o party has pressed a constitutional challenge to the breadth of the delegation involved here." *Id.* at 2382. This is a clear and quite terrifying invitation.

Our federal regulatory agencies were created to prevent these catastrophes. Why have the powers originally invested in these agencies by statute been sapped? Between what I had not been taught at Harvard, and why, and my concerns over the implications of *Gundy* down the road, I was emboldened and started to read, as I was thinking, way outside the curriculum. As I read, I kept seeing references to things that had happened "nearly a half century ago," near the time the CPSC was created. Some of what I learned explains so much of where we are today.

IV
A HISTORICAL PERSPECTIVE

Government for the Many

After the Depression and again after World War II, a strong impulse for the government to play an essential role in limiting the excesses and inequalities of unfettered capitalism gained momentum. There was an optimistic view that capitalism can work, but only if it is limited by a strong democratic government. "Struggling to survive [these twin calamities], even extreme individualists were forced to recognize, as Walter Lippman wrote[,]'to create a minimum standard of life below which no human being can fall is the most elementary duty of the democratic state.'"[37] By the 1960s, though, little was being done to protect consumers from monied interests that were largely self-regulated.

The 1960s were turbulent by any definition. But from the standpoint of moving the government to step into a role of protecting its citizens, one of the most earthshaking things to come out of that decade was Ralph Nader's 1965 bestseller *Unsafe At Any Speed*, which revealed an automobile-manufacturing industry that had "an appalling record of indifference to the lives of its customers."[38]

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[37] Mishra, *supra* note 1, at 11.

[38] BINYAMIN APPLEBAUM, THE ECONOMISTS' HOUR: FALSE PROPHETS, FREE MARKETS, AND THE FRACTURE OF SOCIETY 192 (2019).

Nader's attack was on "the primacy of markets,"[39] and he argued that regulations were needed to temper their dominance. This book electrified the imaginations of ordinary citizens as to what their government should be doing for them. The labor movement was strong, and public-interest groups were being formed and gaining tremendous political power. This was a time when it was widely believed that strong government guidelines and enforcement were needed. "[T]he intensification [of regulation] was dramatic, reflecting broad consensus that unfettered markets were producing unacceptable results. Coal dust blackened the shirts of Pittsburgh schoolchildren; in Cleveland, the Cuyahoga River kept catching fire."[40]

Over the next few years, Congress passed most of our consumer-protection laws and created consumer-protection agencies, with strong bipartisan support. It was in this period, from 1970 to 1971, that President Nixon signed into law the statutes creating the CPSC, the EPA, NHTSA, and OSHA. During the years when these consumer-protection agencies were operating as intended, they were good for everyone. They not only saved thousands of lives and billions of dollars in injury costs, but their enforced regulations promoted competition and worked to the advantage of American investors and consumers.

Government for the Few: The Powell Memo

But corporate America and the richest of this country were terrified. Government that worked for the benefit of the many would destroy their power and reduce their riches. So those at the economy's top started a revolution. While causation is always difficult to assign, by most accounts the beginning of the corporate revolution came in the form of a memorandum written in August 1971 by Lewis Powell, a Richmond, Virginia, lawyer, who primarily represented tobacco companies, to his neighbor, who worked for the U.S. Chamber of

[39] *Id*.

[40] *Id.* at 192–93.

Commerce. The memo was entitled "Attack On American Free Enterprise System."[41]

Powell's call to arms quite brilliantly laid out a decades-long plan for corporate America to join forces economically, politically, and through national organizations to squelch the voices of those waging "ideological warfare against the enterprise system and the values of western society."[42] He described Ralph Nader as "[p]erhaps the single most effective antagonist of American business[,] . . . [who] has become an idol of millions of Americans."[43] The memo detailed how to take over everything in the ensuing decades, from higher-education institutions to the media to the courts. Suggested changes involved establishing a "Speaker's [*sic*] Bureau"[44] of scholars, writers, and "attractive, articulate and well-informed" speakers to advocate for American business and evaluate and change textbooks to reflect those views.[45] The memo lays out a long-range project of inserting faculty and courses in colleges, business schools, and high schools, advocating for American business interests. Powell opined that television should be "monitored in the same way as textbooks" for "criticism of the enterprise system" so as not to have news analysis that "results [in] the gradual erosion of confidence in 'business' and

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[41] Lewis F. Powell Jr., "Attack on American Free Enterprise System" (1971). Snail Darter Documents. Paper 79, https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1078&context=darter_materials.

[42] *Id*. at 5. The adversary Powell identified was broad: not only the "small minority" of "extremists of the left"—"Communists, New Leftists and other revolutionaries who would destroy the entire system"—but, more dangerously, those who have come to "welcome[] and encourage[]" their objectives:

> The most disquieting voices joining the chorus of criticism[] come from perfectly respectable elements of society: from the college campus, the pulpit, the media, the intellectual and literary journals, the arts and sciences, and from politicians.

Id. at 2–3.

[43] *Id.* at 6.

[44] *Id*. at 16.

[45] *Id*. at 18.

free enterprise."[46] Businesses should devote 10% to advertising that advocates for the pro-business point of view.[47]

But the primary focus of Powell's memo was on how business must gain political power that must be "assiduously cultivated[] and that, when necessary, . . . must be pursued aggressively and with determination . . . ."[48] His example of the terrifying "impotency of business" was the amount of support ("stampedes") politicians were then giving to legislation that was aimed at "consumerism" or the "environment."[49]

Next, Powell moved to the courts as a "vast area of opportunity for the Chamber, if it is willing to undertake the role of spokesman for American business and, if, in turn, business is willing to provide the funds."[50] "Under our constitutional system, especially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic and political change."[51] Powell observed that "perhaps the most active exploiters of the judicial system have been groups ranging in political orientation from 'liberal' to the far left," such as the ACLU, labor unions, civil-rights groups, and public-interest law firms.[52] Such activism had met with "not inconsequential" success.[53] American business interests should participate in the system equally vigorously, funding such an enterprise and hiring a "highly competent staff of lawyers" to "institute" or "carefully select cases in which to participate [as amicus]."[54]

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[46] *Id*. at 21.

[47] *Id*.

[48] *Id*. at 26.

[49] *Id*. at 25.

[50] *Id.* at 27.

[51] *Id*. at 26.

[52] *Id*. at 27.

[53] *Id*.

[54] *Id*. at 27.

Powell concluded, "There should be not the slightest hesitation to press vigorously in all political arenas for support of the enterprise system. Nor should there be reluctance to penalize politically those who oppose it."[55] Powell used the language that has dominated discourse in this country since it was written: "The threat to the enterprise system . . . is a threat to individual freedom."[56] Of course, the "freedom" of which he speaks is the freedom of the rich and powerful to do as they please, whatever price other Americans pay.

Less than two months after writing this memo, Powell was nominated to the U.S. Supreme Court.

What followed the Powell memo and the efforts of others in the '70s who sought to dramatically increase the political clout of corporate America was, wrote a pair of political scientists, "a domestic version of Shock and Awe."[57]

> The number of corporations with public affairs offices in Washington grew from 100 in 1968 to over 500 in 1978. In 1971, only 175 firms had registered lobbyists in Washington, but, by 1982, 2,500 [had]. The number of corporate PACs increased from under 300 in 1976 to over 1,200 by the middle of 1980. On every dimension of corporate political activity the numbers reveal a dramatic, rapid mobilization of business resources in mid-1970s.[58]

The tenacious and largely successful pursuit of the Powell vision over the next fifty years has been extremely well organized, calculated, unrelenting, patient, and driven primarily by billions of dollars from a few ultra-rich individuals—primarily David and Charles Koch, Richard Scaife, Joseph Coors, and Rebecca Mercer—who share what were once considered fringe political views. Organizations such as the Heritage Foundation were quickly formed, calling themselves "think tanks" and working closely with

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[55] *Id*. at 30.

[56] *Id*. at 32.

[57] HACKER & PIERSON, *supra* note 9, at 118.

[58] *Id.*

organizations like the National Association of Manufacturers and the Chamber of Commerce in pursuit of this corporate-domination ideology. For these ultra-rich individuals, government for the benefit of the many needed to be largely destroyed, for it got in the way of profits. Money spent in this endeavor—to undermine government for the many—was an investment that generated trillions for the relative few.

Two tectonic shifts in our government quickly occurred as this movement took shape, shifts that began the erosion of our government agencies: anti-regulation economists took over policymaking from lawyers, and enormous amounts of money began to flow into our political system.

V
AGENCIES IN THE CROSSHAIRS

Economists and Policymaking

By the mid '70s, anti-regulation economists, many from the new think tanks and heavily funded by monied interests, started controlling the policymaking at our federal regulatory agencies, previously driven by lawyers and individuals from public-interest groups.[59] The influence of this shift on how we got to the enfeebled government we have today cannot be overstated.

Binjamin Applebaum, who writes about business for the *New York Times*, believes "it is possible to speak of economists . . . in the United States in the second half of the twentieth century as a homogeneous community. Most American economists—and in particular, those who were influential in public policy debates—occupied a narrow portion of the ideological spectrum."[60] For example, a 1979 survey of members of the American Economic Association found that 98% opposed rent controls and 90% opposed

[59] THOMAS MCCRAW discusses the events that led to the new regulatory era that he called "the economists' hour" in chapter 7 of his brilliant book, PROPHETS OF REGULATION (1984).

[60] APPELBAUM, *supra* note 38, at 16.

minimum-wage laws.[61] Nor was this just ideological preference: economists started working with corporations against government power. "The economists provided ideas and corporations provided money: underwriting research, endowing university chairs, and funding think tanks . . . ."[62]

These economists had—have—different ways of describing themselves—"free market," "*laissez faire,"* "conservative," and, most misleading to non-economists, "neoliberal," which has absolutely nothing to do with anything identified as "liberal." All of these are, very simply, economists who believe in virtually no regulation and little to no taxes.[63] Milton Friedman was the face of this "ideological shift" for economists who saw their libertarian colleagues

> acting in concert with the right-wing zealot Charles Koch and lobbyists for corporations . . . disseminating radical ideas through a pliable media and a new curriculum for economics education in universities. Partly as a result of their influence, and emboldened by the rhetoric of Reagan and Thatcher, during the 1980s politicians across the ideological spectrum began to dismantle social

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[61] J.R. Kearl et al., *A Confusion of Economists?*, 69 AM. ECON. REV., no. 2, 1979, at 28 (cited in APPLEBAUM, *supra* note 38).

[62] APPELBAUM, *supra* note 38, at 14.

For the past several decades, the economics profession has been almost completely dominated by conservative, white males who have nearly entire control of economics journals. Through their selection of what articles are published, they can determine which economists dominate policy in this country. And some who dominate policy have been quite open about both their racism and sexism. *See, e.g.,* Ben Casselman & Jim Tankersly, *Economics, Dominated by White Men, Is Roiled by Black Lives Matter*, N.Y. TIMES, June 6, 2020, https://www.nytimes.com/2020/06/10/business/economy/white-economists-black-lives-matter.html.

[63] The vast majority of economics publications over the past five decades have expressed this view of government, recently discussed by Mehrsa Baradaran in *The Neoliberal Looting of America*, N.Y. TIMES, July 2, 2020, https://www.nytimes.com/2020/07/02/opinion/private-equity-inequality.html.

> protections, undermine labour rights and slash taxes on the rich. [64]

The libertarian economists and their political brethren believe government should get out of the way of private industry and let it do as it will. One of the few economists who dared speak out in the '70s against the then-new extremism of his profession was John Kenneth Galbraith, who observed, "[W]hat is called sound economics is very often what mirrors the needs of the respectably affluent."[65]

Before the economists' takeover, lawyers and others making public policy had emphasized the importance of a fair process that produced fair outcomes.[66] Economists reduced policymaking to mathematical models, many times without real-world context or application and without ever admitting that their models could be heavily influenced by politics. "The difference in outlook between economists and lawyers is immense," Danielle Allen, a Harvard political philosopher, observes:

> Whereas economists seek out rules that are *in theory* universal—mathematical principles that apply everywhere, and are blind to context—legal thinking is fundamentally about the institutions of specific societies and about how institutions actually work in specific situations. . . .
>
> In the utilitarian model that dominates economics . . . the effort to maximize aggregate utility relies on cost-benefit analyses linked not to the conditions of actual communities—small-town Nebraska, working-class Ohio,

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[64] Mishra, *supra* note 1, at 11.

[65] JOHN KENNETH GALBRAITH, MONEY: WHENCE IT CAME, WHERE IT WENT, loc. 99 (1975) (ebook).

[66] "In the late 20th century, economics established itself firmly as the queen of policy-making sciences. Up until then, . . . people who were trained as lawyers, not economists, had dominated policy making." Danielle Allen, *The Road From Serfdom*, ATLANTIC, Dec. 2019, https://www.theatlantic.com/magazine/archive/2019/12/danielle-allen-american-citizens-serfdom/600778/.

> rural Mississippi—but to broad national measures of expenditure, income, and wealth.[67]

During the Clinton Administration, one of the starkest examples of the difference in approach to regulation came to light—between a brilliant lawyer, Brooksley Born, who had been appointed to head the Commodity Futures Trading Commission (CFTC) and the neoliberal economists who had the President's ear. Born took over the CFTC when derivatives were becoming so popular. By this time, neoliberal economists had such power in our government that it was assumed that what was good for Wall Street was good for the economy. Born simply wanted to get the lights up on what derivatives were, exactly. (Recall that the lack of any enforceable regulations on this type of security was a huge contributing factor to the 2008 recession.)[68]

Vicious opposition to even inquiring about derivatives came from the most preeminent neoliberal economists of the day—Alan Greenspan, Robert Rubin, Arthur Leavitt, and Larry Summers—who were advising President Clinton. Indeed, Larry Summers yelled at Born, with trade-association representatives in his office, that even asking questions was "doing enormous damage to their business," and she should stop.[69] Born said, "I was astonished a position would be taken that you shouldn't even ask questions about a market that was many, many trillions of dollars in notional value—and that none of us knew anything about."[70]

Born tells a story demonstrating just how extremely anti-regulation the most famous neoliberal economists were. Over lunch in Alan Greenspan's office at the Fed, he said, "[Y]ou and I will never agree about fraud. . . . [Y]ou probably will always believe there should

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[67] *Id.*

[68] *See* Richard B. Schmitt, *The Born Prophecy*, ABA J., May 2, 2009, https://www.abajournal.com/magazine/article/the_born_prophecy.

[69] Michael Hirsh, *The Comprehensive Case Against Larry Summers*, ATLANTIC, Sept. 13, 2013, https://www.theatlantic.com/business/archive/2013/09/the-comprehensive-case-against-larry-summers/279651/.

[70] *Id.*

be laws against fraud, and I don't think there is any need for a law against fraud."[71] Greenspan, Born says, believed the market would take care of itself.

Stop for a moment and think about who wins when there are no rules. The winners are the few who get exponentially richer when they do not have to concern themselves with rules that would require them to expend what would otherwise be profits to instead provide protections for society and our institutions. Ultimately, the economists won the argument, the 2008 recession occurred, and many are still suffering the consequences.

We are seeing this wrongheaded opposition to regulation play out yet again today in the corruption and fight for little to no oversight of the $2 trillion pandemic-relief package.

Cost–Benefit Analysis

One of corporate America's biggest victories in achieving dominance over our government agencies came with politicians of both parties accepting the neoliberal economists' argument that policymaking should be based on a cost–benefit analysis (CBA) of any proposed regulation.

In 1981, Ronald Reagan signed Executive Order 12291, requiring CBA of federal agencies, over the loud and passionate objections of top agency officials. Agency officials understood that, as objective as CBA sounds, it is only as good as the numbers used, and those can be easily manipulated for political gain.[72] Policymaking

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[71] Schmitt, *supra* note 68 (quoting Brooksley Born, quoting Alan Greenspan).

[72] There are almost weekly examples of how the Trump Administration is using its own numbers to redo Obama-era CBAs in order to revoke regulations, particularly on pollution. It has been "weaken[ing] [EPA] regulations on the release of mercury and other toxic metals from oil and coal-fired power plants" and "rules to cut planet-warming carbon dioxide emissions from coal-fired power plants [and to] restrict coal companies from dumping debris in streams." Most recently, it has "rushed to loosen curbs on automobile tailpipe emissions, opted not to strengthen a regulation on industrial soot emissions and moved to drop the threat of punishment to companies that kill birds 'incidentally.'" Lisa Friedman &

cannot be reduced to malleable mathematical models. Their objections were well founded: for entities whose effectiveness depended on their regulations, spurred by real-world problems, screened and analyzed and reviewed through a notice-and-comment period, and ultimately promulgated, CBA pitched a wrench into the process that could be used by the regulated community to avoid necessary regulations. Cass Sunstein, the Harvard free-market evangelist who very much approved of this change, says that White House officials viewed "regulation [as] an obstacle to economic growth and job creation."[73]

Let me give you an example to show why relying predominantly on CBA for policymaking is so troubling:

When I was a CPSC commissioner, CBA drove all regulatory activities at the agency, and the regulated community was masterful at manipulating its numbers to avoid any government regulation. One of the agency's important regulatory efforts was to ban tiny, high-powered magnet sets that were imported from China as desk toys. Thousands of infants were swallowing separated magnets, causing horrific injuries often requiring surgeries and a lifetime of disability or death. The CPSC did a CBA on the evidence before us and passed the ban, deciding that the costs to a small number of importers' businesses were vastly outweighed by the benefit of thousands of young children being spared horrific injuries or death. Doctors and medical associations presented compelling evidence in support of the ban. But two anti-regulation judges on the Tenth Circuit Court of Appeals, including Judge (now Justice) Neil Gorsuch, did their own CBA, using their own numbers, that completely ignored both the expertise of the CPSC and all of the extensive medical evidence, and reversed the ban.[74] Justice Gorsuch has made it clear in his dissent in

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Coral Davenport, *E.P.A. Weakens Controls on Mercury*, N.Y. TIMES, Apr. 16, 2020, https://www.nytimes.com/2020/04/16/climate/epa-mercury-coal.html.

[73] CASS SUNSTEIN, THE COST-BENEFIT REVOLUTION, loc. 404 (2018) (ebook).

[74] Zen Magnets, LLC v. Consumer Prod. Safety Comm'n, 841 F.3d 1141 (2016).

Gundy v. United States that he is strongly against virtually all regulations promulgated by agencies, even though these are in fact Congress's means of "execut[ing]" its legislative powers under the Constitution,[75] which explains his shocking decision on magnets, a decision in the guise of doing a CBA.

This fundamental anti-regulatory bias has continued through the administrations of both parties. A memo in the William Clinton Presidential Library, written by junior staffers at the Council of Economic Advisers during the Clinton Administration, concerns a report from the Office of Management and Budget concluding that banking regulations had "cost" the United States approximately $5 billion.[76] The memo expresses astonishment that "[n]o attempt is made in the report or in the studies it cites to estimate the benefits of regulation of financial markets."[77]

By the end of the Obama Administration, leaders of both political parties had clearly caved to battles over regulations being fought totally in the language of economics even though the numbers used are easily influenced by the politics. It had been, Sunstein writes, "a revolution. No gun was fired. No lives were lost. Nobody marched. Most people didn't notice. Nonetheless, it happened."[78]

Today, CBA is being used to place a dollar value on the lives that would be lost in "reopening the economy." What is missing from the discussion is the extensive economic benefit that would come from clear, intelligent, enforceable government regulations on and oversight of SBA loans, antibody testing, virus testing, workplace safety, food distribution, and procurement contracts, to mention a few. [79]

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[75] U.S. CONST. art. I, § 8.

[76] NICHOLAS LEMANN, TRANSACTION MAN 165 (2019).

[77] *Id*. (quoting the memo).

[78] SUNSTEIN, *supra* note 73, at loc. 229 (ebook).

[79] THE WASHINGTON POST reported that large business interests, including the Chamber of Commerce, are asking for some relatively minor "rules," as they see the sheer anarchy of no regulations unfolding in a way that is cutting

Big Money Enters Politics

Economists' takeover of policymaking happened concurrently with really big money entering the political arena. The confluence was essential to the success of anti-regulation economists representing corporate interests in seducing politicians of both parties to pursue corporate-friendly policies of drastically reducing the role of government and allowing businesses to operate with few, if any, rules.

> Business . . . massively increased its political giving [in the '70s]—at precisely the time when the cost of campaigns began to skyrocket (in part because of the ascendance of television). The insatiable need for cash gave politicians good reason to be attentive to those with deep pockets. Business had by far the deepest pockets, and was happy to make contributions to members of both parties.[80]

And the amounts spent on lobbying increased exponentially. As the *Atlantic* reported in 2015, "[t]he evolution of business lobbying from a sparse reactive force into a ubiquitous and increasingly proactive one is among the most important transformations in American politics over the last 40 years."[81] Reported lobbying expenditures in 2015 had reached $2.6 billion and, since *Citizens United*,[82] the amount of unreported expenditures is impossible to know. The lobbying surrounding the billions of federal aid to

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into profit. Paul Kane, *Businesses Seek Nationwide Rules to Face Pandemic,* WASH. POST, July 5, 2020, http://thewashingtonpost.newspaperdirect.com /epaper/viewer.aspx.

[80] HACKER & PIERSON, *supra* note 9, at 121.

[81] Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, ATLANTIC, Apr. 20, 2015, https://www.theatlantic.com/business/archive /2015/04/how-corporate-lobbyists-conquered-american-democracy /390822/.

[82] Citizens United v. Fed. Elec. Comm'n, 555 U.S. 310 (2010).

companies represented by Trump allies has resulted in what a report for Public Citizen calls a "Covid Lobbying Palooza."[83]

And the Destruction Began . . .

During the Carter years, a narrowly focused deregulation movement began, targeting regulations that erected barriers to entry in the transportation, communication, and energy sectors.[84] When Ronald Reagan became President in 1980, the anti-regulation, anti-tax ("Reaganomics") movement "flooded over its narrow banks to become an ever-widening attack on the very idea of economic regulation."[85]

> With Ronald Reagan in the White House, Washington's vast rulemaking machine was to come in for an extensive overhaul. . . . Reagan advisors vowed that the new heads of regulatory agencies would be under more pressure than ever to justify costs of new standards versus the benefits they sought to achieve.[86]

Resources and budgets of federal agencies other than those associated with the military were slashed. By the end of Reagan's administration, the new narrative for this country had taken on a life of its own, using carefully crafted language like "individual freedom" and "choice" to disguise the underlying destruction of government and protections only government could provide. There was no "we" in this conversation. Fairness, generosity, and equality had no place in this story.

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[83] Mike Tanglis & Taylor Lincoln, *Covid Lobbying Palooza*, PUBLIC CITIZEN, July 6, 2020, https://www.citizen.org/article/covid-lobbying-palooza/.

[84] HACKER & PIERSON, *supra* note 9, at 100.

[85] *Id.*

[86] DONALD JUNG, THE FEDERAL COMMUNICATIONS COMMISSION, THE BROADCAST INDUSTRY, AND THE FAIRNESS DOCTRINE 1981–1987, 25 (1996).

Since then, through acceptance (with varying degrees of enthusiasm) by successive administrations of both parties, big-money interests have successfully pursued the narrative that regulations and taxes on the rich are bad and that government just needs to get out of the way of those seeking profit. This message has been preached everywhere from our business schools to our pulpits for decades. And, with the big money in politics coming from those whose economic interests are best served if government is weak, most politicians have fallen in line. And rich corporations and individuals have become only more powerful.

"Yes, we're a charity tackling skyrocketing income inequality, but we're also a charity that should be saying 'I love my billionaire funder.'"

Other fundamental changes to the structure of our government, laws, and society have occurred over recent decades, furthering the destruction of our federal government for the many. Corporate America and the anti-regulatory fervor of the Reagan Administration led to the Federal Communications Commission's stepping back from enforcement and, ultimately, in 1987, repealing the Fairness Doctrine.

The doctrine, in place since 1949, had required those with broadcast licenses to present the issues important to the public interest and to do so in a fair and evenhanded manner. "[A]s late as 1981, [this] right of the audience to have access to ideas, rather than an absolute first amendment right of the broadcasters to speak, was again reinforced . . . [by] the Supreme Court."[87] As a result of the doctrine's repeal, today we have numerous radio and television broadcasts that are ultra-biased and dispense frequently false information, labeling much of it "news." Online platforms that are altogether unregulated have exponentially increased the immeasurable harm of misinformation.[88]

Congressional-support agencies that were created to provide Congress with nonpartisan, expert information have been significantly reduced. The Congressional Budget Office, the Congressional Research Service, and the Government Accountability Office, which provide nonpartisan policy and program analysis to Congress, lost 45% of their combined staffs between 1975 and 2015.[89] This has left Congress heavily reliant on industry experts with a vested interest in the opinions they express.[90] Left with opinion testimony tainted by self-interest, Congress cannot deal effectively

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[87] *Id*. at 10 (referring to Columbia Broad. Sys., Inc. v F.C.C., 453 U.S. 367 (1981)).

[88] The battles over social-media platforms like Facebook and Twitter allowing hate speech, lies, and gross distortions are unfolding with great intensity during this election year. Just one example was the outcry of Trump supporters that resulted from one small effort by Twitter to self-regulate by calling Trump's tweets that mail-in ballots would lead to voter fraud "unsubstantiated," citing "the *Washington Post*, CNN, and others" as saying so. *See* Trump Makes Unsubstantiated Claim That Mail-in Ballots Will Lead to Voter Fraud, TWITTER (May 26, 2020), https://twitter.com/i/events/1265330601034256384?lang=en.

[89] *Vital Statistics on Congress,* BROOKINGS INSTITUTE (updated March 2019), https://www.brookings.edu/wp-content/uploads/2019/03/Chpt-5.pdf.

[90] Lee Drutman & Steven M. Teles, *Why Congress Relies on Lobbyists Instead of Thinking for Itself,* ATLANTIC, March 10, 2015, https://www.theatlantic.com/politics/archive/2015/03/when-congress-cant-think-for-itself-it-turns-to-lobbyists/387295/.

with issues like self-driving vehicles, internet privacy, and foreign intervention in our elections.

Independent experts have also been reduced within agencies. For example, Congress reduced FAA resources to the point that it no longer had the experts needed to oversee plane safety,[91] with tragic results. Then Congress passed a statute requiring FAA deference to Boeing.[92] Boeing used this new level of self-regulation to mislead the FAA and fly its 737 MAX airplanes, knowing there were dangerous deficiencies. Three hundred and forty-six people died as a result.

Budgets for agencies have been slashed, but taxes have been, as well, particularly for the richest Americans. The result is that our public spending can no longer come anywhere close to providing essential government services. Other effects of the anti-regulatory fervor of the past decades that continue to weaken what is left of our government are numerous. A few examples:

- Labor unions and workers' rights have been significantly eroded through corporate consolidation, statutes, leadership at the NLRB and OSHA, and a series of court decisions.
- The interpretation and enforcement of antitrust laws intended to preserve the autonomy of small businesses have fundamentally changed, resulting in the enormous monopolies we have today and further weakening workers' options and rights.

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[91] The approval of the 737 MAX, for example, was under the Organizational Designation Authorization, an FAA rule that "allows aircraft manufacturers to certify parts of their own designs with limited federal oversight." Emma Stodder, *Corrupted Oversight: The FAA, Boeing, and the 737 Max,* OVERSIGHT PROJECT (Oct. 1, 2019), https://oversightproject.org/2019/10/01/corrupted-oversight-the-faa-boeing-and-the-737-max/.

[92] H.R. 302 (P.L. 115-254), the FAA Reauthorization Act of 2018; *see* Natalie Kitroeff & David Gelles, *Before Deadly Crashes, Boeing Pushed for Law that Undercut Oversight*," N.Y. TIMES, October 27, 2019, https://www.nytimes.com/2019/10/27/business/boeing-737-max-crashes.html.

- Corporations became driven by per-share prices resulting in enormous paydays for executives at the expense of workers' wages and benefits.
- Civics education has virtually disappeared from our public schools, so new generations are not learning even about the structure of our government or how it was intended to support and protect our society.

One of the most important successes of the so-called think tanks formed to promote the financial interests of the few (such as the Heritage Foundation) was the careful cultivation of the words used to discuss government. You rarely hear or see the word "regulation" without a pejorative adjective like "burdensome" or "job-killing" in front of it. And such phrases are uttered almost reflexively, without regard to how necessary a specific regulation may be.

Then there are the euphemisms, if you can even call them that: Words like "freedom" and "choice" have been brilliantly used to mask the grim realities of our failed government and to fight systemic healthcare reform, government requirements of flexible hours, subsidized child care, and paid leave. Arguments about "choice" ring particularly hollow now, during the Covid-19 pandemic, when we see that the only ones with real choices are those who retain their jobs, being able to work from home, or who are ensconced in their paid-for homes or second or third homes or yachts. "Choice" is not something we see enjoyed by our medical workers; by workers who clean our nursing homes, hospitals and homes; by those who transport patients or bodies; by those who work assembly lines in poultry or meat-packing plants; or by our grocery-store clerks. Pejoratives, euphemism, and hyperbole: the language used for voices advocating for strong government institutions with evenly enforced regulations and taxes are labeled "radical" or "extreme" while the true radicals who would destroy our government are, irony of ironies, labeled "conservative."

Anti-tax, anti-regulation, anti-government themes that started with Carter and were substantially broadened by Reagan rolled along through each administration since. The effect of those themes on

governmental policy over the past fifty years has been to disempower and defund our agencies. But the process was gradual. It was a classic demonstration of the boiling frog fable.[93] If you place a frog in boiling water, the fable goes, it will jump out. But if you put the frog in cool water and gradually heat the water to a boil, the frog will not notice and it will die.

For Agencies, the Water Is Boiling

With the election of 2016, the water came to a boil. Anti-tax, anti-regulation, anti-government radicals took complete control. Our "free markets" have run amok, unmoored. The Trump Administration exponentially accelerated the destruction of our government with the enthusiastic support of McConnell's Senate.

Even the façade of economic justification was jettisoned. The administration's first budget did not even add up.[94] There was no realistic analysis done before its tax cuts were pushed through. And regulations have been and are being set aside without any CBA or any other analysis.

Only in 2018 did we learn just how the machine-like efficiency of destroying our government agencies had been achieved. Trump turned the job of finding the right people to head government agencies over to the Heritage Foundation, one of the most radical anti-government groups in the country.[95] The Heritage Foundation was

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[93] I stress "fable." It's a political metaphor, more true in application than in amphibian fact: witness the erosion of a political culture under anti-regulation administrations or the effects of the Powell memo. *See* James Fallows, *The Boiled-frog Myth: Stop the Lying Now!*, ATLANTIC, Sept. 16, 2006, https://www.theatlantic.com/technology/archive/2006/09/the-boiled-frog-myth-stop-the-lying-now/7446/.

[94] Jeanne Salradi, *Trump's First Budget: Trillions in Cuts*," CNN BUSINESS, May 23, 2017, https://money.cnn.com/2017/05/22/news/economy/trump-budget/index.html; Robert Gordon, *Trump's First Budget Bill Undoes Trump's First Budget*, DEMOCRACY JOURNAL, March 16, 2017, https://democracyjournal.org/briefing-book/trumps-first-budget-bill-undoes-trumps-first-budget/.

[95] Jonathan Mahler, *How One Conservative Think Tank is Stocking Trump's Government*, N.Y. TIMES, June 20, 2018, https://www.nytimes.com/2018

formed in 1973 to pursue the Powell memo's corporate-domination philosophy and was largely funded by a few multi-billionaires who stood to make trillions—if there was no government regulation of their activities. Recognizing that the Heritage Foundation might be dismissed as a tool of rich Republicans, a "conservative marketing pioneer known for his high-quality mailing list and his uniquely apocalyptic warnings of imminent national collapse" was hired to build a network of 500,000 small donors, who are bombarded "with millions of pieces of direct mail every year."[96]

For almost fifty years, the Heritage Foundation has patiently and relentlessly pursued its primary purpose of defeating the enforcement of government regulations, or destroying them altogether, and putting control of business (and, to whatever extent possible, of government) solely in the hands of wealthy businesses and individuals.[97] And it has never compromised or waivered in its singular pursuit. When Trump called on it, the Heritage Foundation was ready with a list of over 3,000 candidates who had been carefully vetted for the required "loyalty" to its purpose.[98] And it was from that list that nominees to lead federal agencies were chosen. The Heritage Foundation had failed to do during the Reagan Administration what it has done so successfully in the current administration. It had been disappointed, a key political strategist for Reagan explained, because "[Reagan people] were looking for competent people. I tried to explain to them that the first thing you do is get loyal people, and competence is a bonus."[99]

/06/20/magazine/trump-government-heritage-foundation-think-tank.html.

[96] *Id.*

[97] HERITAGE FOUNDATION, BLUEPRINT FOR REORGANIZATION: AN ANALYSIS OF FEDERAL DEPARTMENTS AND AGENCIES (David B. Muhlhausen, ed. , June 12, 2017), https://www.heritage.org/budget-and-spending/report/blueprint-reorganization-analysis-federal-departments-and-agencies.

[98] Mahler, *supra* at note 95.

[99] *Id*. (quoting Lyn Nofziger).

In the Trump Administration, the message has gotten through.[100] The first indication that something had fundamentally changed for agencies was that no one showed up to meet with the "[t]housands of people inside the federal government [who] had spent the better part of a year" preparing for a smooth transition from the Obama Administration. It was to be no mean feat, to shift what "might be the most complicated organization on the face of the earth [with] [i]ts two million federal employees [who] take orders from four thousand political appointees."[101] Instead, there was less transition than destruction. Many of the people eventually hired by some of the agencies were supremely unqualified and uninterested in how anything in government worked. Then came the nominations of people with virtually no qualifications to *lead* agencies which, in many cases, they had devoted their careers to destroying.[102] And they were swiftly confirmed by Mitch McConnell's Senate.

The lethal temperature for our agencies came, once again at the behest of the Heritage Foundation, on May 19, 2020, just as Americans were coming to realize how much we need regulations now—for coronavirus testing and protective equipment, for our nursing homes, our workplaces, our food supply, our financial institutions, and so much else. But instead of using the federal government in ways so essential to all of us, and that can be so very effective when adeptly handled, Trump entered an Executive Order that paves the way for federal agencies to undercut *all* remaining regulations, across the board. In June, the *Washington Post* opined, "The Trump administration is doing by fiat what it has struggled to accomplish through lengthy rulemaking—dismantling federal regulations designed to protect workers, consumers, investors and the environment."[103]

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[100] *See* Alex Shephard, *The DC Think Tank Behind Donald Trump*, NEW REPUBLIC, February 22, 2017, https://newrepublic.com/article/140271/dc-think-tank-behind-donald-trump.

[101] MICHAEL LEWIS, THE FIFTH RISK 37 (2018).

[102] *See* Yong, *supra* note 6 and accompanying text.

[103] Steve Mufson et al., *Citing an Economic Emergency, Trump Directs Agencies Across Government to Waive Federal Regulation,* WASH. POST, June

But this administration's consistent refusal to use government to accomplish anything essential to dealing with this pandemic and its refusal to support state and local governments comes as no surprise. Covid-19 has killed nearly 200,000 people thus far,[104] and it has wreaked economic devastation for many more.[105] And we are seeing the naked reality of what our country has become. Our institutions meant to protect us have simply disappeared.

VI
CONCLUSION

So why do I tell you all this?

First, knowing how and why we arrived at our catastrophic situation with respect to our government institutions is essential to finding ways to fix them.

As we read and listen, we need to be vigilant in identifying manipulative language and ask who is making money off of the narrative presented. And we need to understand that many of our politicians, anxious to retain their seats of power, have sacrificed the greatest strengths of our regulatory institutions in the interests of their richest supporters' seeking yet greater riches. This might bring us to different conclusions.

Most of us have unwittingly been wooed into thinking that government cannot provide solutions. Yet we are also now realizing that *only* good government can save us. But where do we start?

26, 2020, https://www.washingtonpost.com/climate-environment/citing-an-economic-emergency-trump-directs-agencies-across-government-to-waive-federal-regulations/2020/06/05/6a23546c-a0fc-11ea-b5c9-570a91917d8d_story.html.

[104] As of September 18, 2020. *See* Johns Hopkins Univ. & Med., *Coronavirus Resource Center*, https://coronavirus.jhu.edu/region/united-states.

[105] *See, e.g*., Alan Berube and Nicole Bateman, *Who Are the Workers Already Impacted by the Covid-19 Recession?*, BROOKINGS, April 3, 2020, https://www.brookings.edu/research/who-are-the-workers-already-impacted-by-the-covid-19-recession/.

As we see our public welfare threatened, we need to ask, What could good government be doing to address this problem, or that one, and why has it not done so? Who benefitted from the government's not doing its job? When we read about the Boeing 737 MAX crashes and the failures of the FAA, we should think about what politicians drove Congress to weaken the FAA's powers, resources, experts, and leadership, and why. Who benefitted? As for the opioid epidemic, what government agencies could not or did not pass and enforce regulations that could have prevented it? What politicians and companies made money off of the weakened agencies and the travesty their weakness wrought? What statutes or budgetary restrictions *keep* them weak? Who benefits from their being weakened? Even agencies critical to this particular moment—like the Centers for Disease Control—have been stripped of the resources and authority needed to effectively battle the unfolding pandemic. Who benefits from a weakened CDC? Where is the strong voice for the need for its being strengthened?

Apart from taking a more critical look behind what is happening and how that came about, we need to take a critical look ahead. We are living in a time when we can change the trajectory. The Covid-19 pandemic is bringing profound changes to each of us individually and as a society. Attitudes towards government have drastically changed over a period of weeks, and we are examining what our government should look like when we emerge.

What we became as a nation did not just happen to us. We made choices. And we can make new ones. Our morality is based not on how we pursue our individual freedom; it is based in how we behave towards others. And how we behave towards others involves empathy. Empathy is innate.[106] Getting back to its exercise is our most effective tool for reshaping our institutions.

We want—need—so much, for ourselves, for our children, for our society as a whole. We all want our kids to be well educated, our

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[106] Infants show empathy from the time they are born. *See, e.g.*, Gwen Dewar, *Do Babies Feel Empathy?"* PARENTING SCIENCE (citing several recent studies), https://www.parentingscience.com/do-babies-feel-empathy.html.

air and water to be clean, our planes and automobiles to be safe, our workplaces to be safe, our kids' products to be safe. We want people to be able to make a living wage, house themselves and their families, obtain medical care, and feel comfortable that their children are well cared for while they work. Our collective needs may be generated by empathy, but they cannot be met without effective government institutions. No amount of billionaires' largesse can address these problems as can a government that is adequately funded and given appropriate powers.

I do not believe there is some magical time to which we need to return. Every age had its problems. But there was a second path articulated in the 1970s that could have become ours had we made different choices. This second path emphasized "we" but was not backed by billionaires, large political contributions, or think tanks funded by those who would financially profit from the disappearance of taxes and regulations. It did not advocate the destruction of our government, but, rather, the strengthening of good government.

John Gardner, who had been Secretary of Health and Human Services under Lyndon Johnson, articulately laid out the second path in his 1972 book *In Common Cause.* He observed,

> No other nation in the world has enabled more citizens to fulfill their individual purposes, even their whims, than the United States. But we are not doing at all well with the purposes we all share and must pursue together—creating excellent public schools, protecting the environment, preserving livable communities, enforcing the law, administering justice."[107]

Gardner advocated for strong government and institutions. "Ineffective government may be advantageous to some Americans," he wrote, "but it is not advantageous to most citizens."[108] "[A]n era is ending and another era is about to begin," he warned.[109] He was

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[107] JOHN W. GARDNER, IN COMMON CAUSE 16 (1972).

[108] *Id*. at 31.

[109] *Id*. at 97.

prescient when he described some of the certain fateful choices ahead that would decide what was then an uncertain future: "There are powerful historical forces at work, and our contemporary decisions will only partially determine the outcome. But to have only a partially decisive role has always been the human condition. All the more reason to play that role to the hilt."[110]

Decisions made in the past fifty years have fundamentally changed what this country is. And so it is that our decisions today will determine what our country becomes in the coming decades. We simply must start thinking of ourselves as "we" again. And so writes Richard Blanco, remembering singing "America The Beautiful" as a child, in "america the beautiful again":

> How I still want to sing despite all the truth
> of our wars and our gunshots ringing louder
> than our school bells, our politicians smiling
> lies at the mic, the deadlock of our divided
> voices shouting over each other instead of
> singing together. How I want to sing again—
> beautiful or not, just to be harmony—*from*
> *sea to shining sea*—with the only country
> I know enough to know how to sing for.[111]

I, too, want to hear our harmony again.

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[110] *Id*. at 98.

[111] RICHARD BLANCO, *america the beautiful again*, *in* HOW TO LOVE A COUNTRY, loc. 66 (2020) (ebook).

THE EMERGENCE OF THE AMERICAN CONSTITUTIONAL LAW TRADITION*

H. Jefferson Powell**

My title is "The Emergence of the American Constitutional Law Tradition," and what I want us to think about today is the process by which American constitutional law came to be what it is in 2018. Now, that's a long, complicated story, and all I can do is give you a few outtakes from what is a much broader book project. I'm going to summarize some specific stories from the overall narrative, and hope to give you a sense of how the big story hangs together.

Before I begin, however, I want to say something about the word "tradition." By tradition we often mean some practice that a particular group or community engages in over time. In my maternal grandparents' family, it is a tradition to eat celery stalks stuffed with homemade pimento cheese on Thanksgiving. I don't know when the Carters began doing so—but it's something we do: If the people you're dining with on Thanksgiving don't have a plate full of celery and pimento cheese, they're probably not Carters. Repeating this little tradition year after year is an identifying mark of my family.

Intellectual traditions differ in the way they cohere over time. As the great philosopher Alasdair MacIntyre said years ago, a tradition of rational inquiry does not maintain its continuity through the simple

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repetition of what has been thought and said in the past. What gives life to such a tradition is not so much agreement about answers as it is agreement about questions. In MacIntyre's words, an intellectual "tradition is an argument extended through time in which [even its] fundamental agreements are defined and redefined . . . [through] conflict."[1] An intellectual tradition, unless it goes dead, is a continuity of conflict, and debate and disagreement are its lifeblood. The emergence of the American constitutional law tradition, then, is the story of an ongoing debate, an endless argument over, among other things, what constitutional law is about.

One other thing: Let me tell you up front my hidden agenda. First, I want you to be optimistic and also anxious about the health of our constitutional law tradition. We're living in a time of deep constitutional division, but severe disagreement is nothing new, and raucous debate is a sign of health, not decay. But at the same time, the tradition will not maintain itself: It depends on our commitment to carry on our debates in good faith, to recognize whenever possible the good faith of those with whom we disagree, and to resist the perennial temptation to convert constitutional law into a mere tool of ideological warfare. And second? I hope to persuade some of you that the study of our constitutional law's past for its own sake is endlessly fascinating, quite apart from any value it may have in present-day debates.

Now, let me take you back to the very beginning of the American constitutional law tradition. It's somewhat artificial to choose a specific year, and even more a specific day, as the beginning of any great intellectual tradition: They don't spring fully formed from the forehead of Zeus; they take shape gradually. That said, I feel confident that few lawyers in this room will question the date I've chosen to begin my story. After all, an obvious starting point for our tradition is Feb. 7, 1292.

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[1] ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 12 (1988).

Perhaps there's someone here who's not a lawyer, and I should say a bit about the significance of Feb. 7, 1292. It was on that day that King Edward I commissioned William de Bereford as a judge on the Court of Common Pleas, thus setting in motion the intellectual and institutional developments that eventually lead to American constitutional law in 2018.[2] Bereford himself is a fascinating character: He came from a modest family in the English midlands, and he declined to pursue a career in the church or in the king's household, the only options for a brainy and ambitious young man without means. Instead, Bereford somehow managed to worm his way into the small group of non-clerics who in the 1270s and '80s were coalescing as full-time advocates in the Court of Common Pleas. By the late 1280s, Bereford was what a modern scholar called "the Common Bench specialist par excellence," and the king himself had retained Bereford in several cases.[3] Appointing this familiar, skilled, and no doubt reliable legal henchman to the court likely seemed a safe choice to Edward and his advisors, but putting Bereford on the bench would have repercussions the king could never have guessed.

For one thing, Bereford was one of the first royal judges chosen for his professional skills and accomplishments in the law. Before him, appointment to a royal court almost always went to a senior government bureaucrat, often a churchman: Such judges came to the bench with little knowledge of legal procedure and no personal interest in expanding the role of the courts in government. Bereford was a judge of a different ilk: He owed his elevation to his mastery of the law, and his interests and his judgments were shaped by professional pride and expertise. His appointment was a successful experiment. After him, almost all royal judges had backgrounds similar to his, and the judiciary quickly became the preserve of an

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[2] On Bereford, see generally 2 THE EARLIEST ENGLISH LAW REPORTS, viii–xxi (Paul A. Brand ed., 1996); WILLIAM C. BOLLAND, CHIEF JUSTICE SIR WILLIAM BEREFORD (1924); and THOMAS LUND, THE CREATION OF THE COMMON LAW 23–63, 349–55 (2015).

[3] 2 THE EARLIEST ENGLISH LAW REPORTS, *supra* note 2, at cxxxii.

autonomous profession, rather than a branch of the church or the bureaucracy.[4]

Perhaps this would not have mattered so much if William de Bereford had been a different character or his appointment had occurred in a different era, but, at times, history is shaped by the accidental convergence of the personal and the societal. Bereford was a self-confident and forceful individual, politically shrewd and utterly convinced that it was lawyers who ought to say what the law is. He was long-lived as well, and served for almost thirty-four years, half of the time as chief justice. By the time he died, no common law judge or advocate knew any vision of law but Bereford's.

Of equal importance, Bereford was given the opportunity to shape bench and bar in a time of great legal ferment. King Edward I was later named the English Justinian because it was in his reign, and that of his son Edward II, that the common law of the realm was overhauled root and branch and began to assume its developed medieval and early modern form.[5] For the first Edward's first twenty years, legal reform was centered in the high Court of Parliament. The dominant judicial body was the Court of King's Bench, and the clerks in the royal Chancery held a tight grip on what cases the royal courts could and could not hear. By the time Chief Justice Bereford died, all of this was in the process of transformation: The initiative for legal change now lay in the Court of Common Pleas, the authority of King's Bench to review Common Pleas decisions was largely a dead letter, and Bereford had wrested effective control over his court's jurisdiction from Chancery. Bereford was, in short, the first great

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[4] F.T. Plucknett, *The Legal Profession in English Legal History*, in T.F.T. PLUCKNETT, STUDIES IN ENGLISH LEGAL HISTORY XIX 332–33 (1983).

[5] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *23 (1765) (English laws reached a "pitch of perfection . . . [u]nder the auspices of our english justinian, king edward the first."). On legal reform under Edward I, *see* F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 27–31 (5th ed. 1956).

practitioner of what later became a legal maxim, "It is the duty of a good judge to expand his jurisdiction."[6]

But to what end, you ask? What was Chief Justice Bereford trying to accomplish in expanding his court's authority? The Yearbooks—those marvelous but often perplexing records of legal argument in the medieval courts that begin their regular appearance under Bereford—give us no clear answer, though they give many examples of his wit and his quick temper. But if you examine his patterns of commentary and judgment, you begin to see overarching themes. Let me give you a couple of examples.

The law of real property before Bereford was largely a description of the personal, political, and constitutional relationships among the Crown, its great noble vassals, their lesser tenants, and so on. By Bereford's death, what were originally personal duties owed between specific individuals were well on their way to becoming obligations running with the land itself, and ownership was increasingly determined by legal rules and the market rather than heredity.[7] This was no accident: As Bereford said in a 1320 case enforcing a bargain concerning land, the decision rested in part on the existence of a quid pro quo, "there [was here] one thing in return for another, for which principle we have great regard."[8]

Again, Bereford usually insisted that litigants and their lawyers turn square corners in satisfying the law's technical requirements. But he detested attempts to use legal technicalities to achieve unfair

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[6] On Bereford's successful expansion of the role of Common Pleas, see Professor Lund's brilliant detective work: LUND, *supra* note 2, at 65–126. *See also* Collins v. Blantern, 95 ENG. REP. 850, 852 (C.P. 1767) (Wilmot, C.J.) (quoting the maxim in the usual Latin, "*est boni judicis ampliare jurisdictionem*").

[7] On Bereford and changes in real property law, see T.F.T. PLUCKNETT, STATUTES AND THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY 155–56 (1922). *See generally* F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 99–118 (2d ed. 1981).

[8] Ashby v. Langton (C.P. 1320), YEAR BOOKS OF EDWARD II, 1320, 127, 131 (S.J. Stoljar & L.J. Downer eds., 1988).

advantage. In a 1310 case, Bereford exploded when a defendant invoked a trivial pleading error in order to avoid a clear duty to pay half the plaintiff's loss: "Reason requires that you [pay], and the law is founded on reason, and good faith demands it. You want to have the eggs and the half penny too."[9] (By the way, according to one historian, a half penny would buy a dozen eggs about this time).[10]

By and large, the changes Bereford and his colleagues effected in the law are ones most of us would think desirable. But Bereford's central importance for our story lies elsewhere, in the style of judicial personality he bequeathed the common law, and ultimately American constitutional law.

Our tradition is not the product of anonymous bureaucrats, but the creation in large measure of strongminded and strong-willed judges prepared to use their creativity to reshape the law. Think of the truly influential constitutional judges in U.S. history from John Marshall and Joseph Story to William Brennan and William Rehnquist. They were all heirs of William de Bereford in their willingness to exercise power. We can say of each what Justice Benjamin Cardozo wrote about Chief Justice Marshall: He "gave to the Constitution . . . the impress of his own mind . . . [so that] our constitutional law is what it is, because he moulded it . . . in the fire of his own intense convictions."[11]

And thereon hangs the other side of Chief Justice Bereford's legacy to us. That he, and his American heirs, have acted out of intense conviction, I have no doubt. But was it right for him, or for them, to do so? What is and what should be the relationship between the judge's personal convictions and the "law" supposedly being expounded? Bereford upended many of England's previous constitutional arrangements, and he often did so by strained readings of

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[9] Gaunt v. Gaunt (C.P. 1310), YEAR BOOKS OF EDWARD II, 1309–1310, 79, 80 (F.W. Maitland ed., 1905).

[10] *See* Kenneth Hodges, "List of price of medieval items," http://medieval.ucdavis.edu/120D/Money.html (last visited Aug. 9, 2020).

[11] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 169–70 (1921).

Parliament's acts, by ignoring common law rules that were in his way, and by finding means to circumvent the limitations on his court's authority. All of this should sound familiar: American constitutional law has been deeply shaped by the exercise of judicial power in the Bereford style by judges cast in the Bereford mold . . . and one of our central debates has been over how to ensure that the exercise of such power by such judges is legitimate.

This problem of legitimacy is not a modern or American discovery. Eighteen years after Bereford died, the Court of Common Pleas heard a case*, Flaundres v. Rychman*, in which the plaintiff's lawyer invoked a Bereford decision. When one of the judges sounded doubtful, the lawyer insisted: "I think you will do as others have done in the same case, or else we do not know what the law is." Justice Roger Hillary, the first known Legal Realist, answered: "[Law] is the will of the Justices." To which Chief Justice John Stonor immediately replied—and I will quote the law French since I took a course in that bizarre language years ago and seldom get to mispronounce it: "*Nanyl, ley est resoun*." "Nonsense! [it's an emphatic negative], law is reason."[12]

Resoun in law French is sometimes best translated by a phrase like "what makes sense" or "what is in fact truly just," and Stonor was, I think, taking a step beyond Bereford's dislike for the use of technicalities employed to achieve unjust ends. Over the next three centuries, this idea that law is reason was fleshed out, and it was another chief justice of Common Pleas, Sir Edward Coke, who gave the equation its canonical formulation.[13] In November 1608, King James I convened a meeting at Westminster of judges and other high officials: James was unhappy about the Common Pleas interfering with the

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[12] Flaundres v. Rychman (C.P. 1344), *Year Books of Edward III, 1344*, 377 (Luke O. Pike ed., 1905).

[13] On Coke, *see generally* Christopher Hill, *Sir Edward Coke—Myth-Maker, in* CHRISTOPHER HILL, INTELLECTUAL ORIGINS OF THE ENGLISH REVOLUTION 225–65 (1965); DAVID LITTLE, RELIGION, ORDER, AND LAW 167–217 (1969); DAVID CHAN SMITH, SIR EDWARD COKE AND THE REFORMATION OF THE LAWS (2014).

work of commissions exercising the king's personal prerogative and wanted to rein Coke in.[14] In the course of the discussion, James commented that if law is reason, then he himself—being a reasonable and learned king—was perfectly competent to make legal decisions or delegate them to his political councilors. Coke tried to find a polite way to say no:

> [T]rue it is that God has endowed your Majesty with excellent Science and great endowments of nature, but your Majesty is not learned in the Lawes of your Realme of England, and causes which concern the life, or inheritance, or goods of your Subjects . . . are not to be decided by naturall reasoning but by the artificiall reason and judgment of Law . . . which requires long study and experience.

The authority of the courts over political actors, in other words, stems from the judges' intellectual immersion in the tradition of legal thought. Even when the law requires judges to give effect to an act of Parliament or of the monarch, such political acts must enter the domain of law governed by the judges' reasoned judgment before they can rightly touch the "life or inheritance or goods" of the individual. It's a bold and indeed breathtaking claim about the authority of legal reason, and the scope of judicial authority, and it is one that underlies virtually all of modern American constitutional law.

King James was not amused. Indeed, he was enraged by what he called "treason," and Coke only barely escaped a cell in the Tower of London. But the episode had no effect on Coke's behavior as a judge, and Anglo-American lawyers have long cited it as an important milestone in the history of the rule of law: For all the king's bluster, it was Coke and the common law that had the last laugh. It's a great tale, and more or less true. But of equal importance for our story is what

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[14] Coke's account of the incident is in his reports. *Prohibitions del Roy*, 12 CO. REP. 63, 64–65. For a fuller picture, in addition to the works cited *supra* note 13, *see* Roland G. Usher, *James I and Sir Edward Coke*, 18 ENG. HIST. REV. 664 (1903) (reproducing accounts by other participants).

the king actually said. James didn't simply lose his temper; he also delivered a shrewd counter to Coke's argument: "If the judges interprete the lawes themselves, and suffer none else to interprete, then they may easily make of the laws shipmens hose."[15]

I don't know why the king thought of sailors' socks, but his point is clear: If, as Coke claimed, it is the province and duty of the courts *alone* to say what the law is, there is no institutional check on the judges. Neither legal texts, which clever construction can leave as flexible as a stocking, nor the forms of legal reason, which the courts themselves define, can prevent a supremacy not of law, but of lawyers—and, above all, judges.

The distinguished legal historian William Holdsworth once wrote that the U.S. Supreme Court embodies "Coke's ideal of the supremacy of the law."[16] Precisely because that is true, the American constitutional law tradition continues to wrestle with King James's objection: that to legitimate judicial decision by judicial reasoning is viciously circular, and that a court acting on Coke's ideal is free to assume an illegitimate political role at will.

Now let me bring you forward not quite two centuries and across the Atlantic to Washington, D.C. It is the winter of 1800–1801, and the infant United States is in a constitutional crisis, a crisis of constitutional politics rather than constitutional law. It's become clear that both the House and the Senate in the next federal Congress will have Republican majorities, and that the current president, Federalist John Adams, will not keep his office, barring some sort of political coup d'etat. It's quite unclear who *will* become president, since the pre-12th Amendment electoral college arrangements have produced a tie between two Republicans. And in the meantime and up to the beginning of March, the old Federalist-controlled Congress is

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[15] Usher, *supra* note 14, at 669 (quoting James I from Sir Julius Caesar's "Notes. Touching Prohibitions."). Howard Nenner's succinct discussion of James's remark is illuminating. *See* HOWARD NENNER, BY COLOUR OF LAW 71–72 (1977).

[16] WILLIAM S. HOLDSWORTH, SOME MAKERS OF ENGLISH LAW 131 (1938).

sitting, Adams is still president, and the defeated Federalists have one last window of opportunity to wield power.

The story by which the crisis was surmounted and Jefferson became president is no doubt familiar.[17] I want us to focus instead on a different aspect of that winter's events. On Dec. 22, 1800, a Republican congressman, Thomas Davis, gave a speech in which he smugly warned his Federalist colleagues that political time was running out on them: "The sun of Federalism is nearly set—not three months, and it sets forever."[18] Davis's image apparently hit a nerve, and the Federalists repeatedly brought it up to rebut it. But the rhetorical argument over the twilight of Federalism took a new turn the following month, as the House debated a bill to reauthorize the Sedition Act of 1798.

On Jan. 21, Federalist Jonas Platt reminded the House of Davis's sunset imagery and "confessed that he viewed with horror the awful night that would follow."[19] Platt quickly made it clear that he and other Federalists dreaded the Republican triumph not only for its immediate political ramifications, but also for what it implied about the future of the Constitution itself. Congress was the central locus for federal constitutional debate at first, and, over the previous twelve years, the emergence of Federalists and Republicans as partisan political factions in Congress was paralleled by the emergence of two distinct approaches to constitutional argument. Republicans generally insisted on construing the Constitution with painstaking adherence to its precise wording and literal meaning. James Madison's great speech against the national bank bill in February 1791 offered a dense list of "rules" of interpretation emphasizing the duty to obey "the natural and obvious force of the terms and the

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[17] There are many accounts. I think one of the most insightful is JOANNE B. FREEMAN, AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC 199–261 (2001).

[18] 10 ANNALS OF CONG. 840 (Joseph Gales & William W. Seaton eds., 1851).

[19] *Id*. at 917.

context" of particular constitutional provisions.[20] Other Republicans took even more stringent views: As Stevens Mason put it in a later debate, "[n]ot only sentences, but words, and even [punctuation] points elucidate its meaning," and the elucidation of the text's meaning is constitutional law.[21]

In contrast, the Federalists, in that long first decade, regularly denounced Republican textualism as a betrayal of the written Constitution. Rising to answer Madison's attack on the bank bill, the great Federalist Fisher Ames mocked Madison's arguments: "I never suspected that the objections I have heard stated had existence; I consider them as discoveries [that] the acute penetration of that gentleman [has] brought . . . to light."

Sarcasm to one side, according to Ames, Madison's textualism was a radical mistake. Contrary to Madison, dogmatic "rules" about how to interpret the Constitution were quite incapable of ensuring correct constitutional answers. Madison's attempts to parse its words "will be found as obscure [as the arguments he] condemn[s]; they only set up one construction against another."[22]

For Ames, and for the Federalists generally, fidelity to the Constitution lay in adherence to the Constitution's purposes rather than its precise wording. "That construction may be maintained to be a safe one which promotes the good of the society, and the ends for which the Government was adopted."[23] As someone else put it, "the boundaries of the Constitution cannot be laid down with mathematical precision, by the square and compass. They must be ascertained by . . . the exercise of discretion."[24] Congressman Platt was

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[20] 2 ANNALS OF CONG. 1945–46 (1834).

[21] 11 ANNALS OF CONG. 59–60 (1851).

[22] 2 ANNALS OF CONG., *supra* note 20, at 1954–55.

[23] *Id*. at 1956.

[24] 31 ANNALS OF CONG. 633 (1854) (remarks of Henry St. George Tucker). Congress reprised the 1790s debates over constitutional method at later points—in 1811 over the unsuccessful effort to recharter the first national bank and in 1817 and 1818 over internal improvements bills. By then, most congressional Republicans had moved away from the severe textualism of

mourning not just a defeat on the level of power and policy, but a deeper tragedy: the Constitution's transformation from a coherent instrument of governance into a grab bag of separate clauses for lawyers to quibble over.

It's important to understand what was actually at stake in the winter of 1800 and 1801. There was of course a political and partisan dimension to the debate over constitutional method: Federalist discretion conveniently legitimated their legislative program, while Republican textualism happily vindicated their general opposition to Federalist legislation. But the debate over constitutional method was not simply a matter of political expedience. It also reflected principled concerns, on the part of both factions, about the capacity of Lord Coke's "artificiall Reason and judgment of Law" to reach legitimate decisions under the Constitution. Republicans were echoing King James's fear that professional legal reason is the tool by which legal insiders can circumvent written limits on their power. Federalists, for their part, thought that most constitutional difficulties "arise from a narrow, technical, lawyer-like view of the Constitution" at odds with "the great national purposes for which the Constitution was adopted."[25]

If our constitutional law tradition had followed either set of fears, in 2018 it might not really be a *legal* tradition at all. Strict textualism can produce rampant disregard for the too-strict textual limits on power: As one congressman said, the text "will be habitually broken whenever the pressure of events shall seem to require."[26] A thoroughgoing emphasis on purpose, on the other hand, tends to reduce constitutional questions to straightforward questions of policy: The Constitution, as a senator once asserted, "is one eternal

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the 1790s to a position increasingly indistinguishable from that of the Marshall Court, and the banner of strict textualism was carried by a dwindling minority of "Old Republicans."

[25] *Id*. at 1222 (remarks of Eldred Simkins).

[26] 32 ANNALS OF CONG. 1324 (1854) (remarks of Henry St. George Tucker).

now" and authorizes whatever seems "necessary and proper" to do "this day."[27]

Our tradition went neither of these paths, and one of the reasons goes back to that fateful winter. The day before Congressman Platt bemoaned the sunset of Federalism, President Adams nominated his secretary of state, John Marshall, to be chief justice. The Federalist majority in the Senate made no public objection, but, behind closed doors, many Federalist leaders were disappointed. Marshall's political heart was in the right place, most of them conceded, but constitutionally he was all too similar to his cousin Thomas Jefferson, another nit-picking Southern lawyer. After meeting Marshall, Oliver Wolcott wrote Ames that

> Marshall . . . is doubtless a man of virtue . . . but he will think too much of the State of Virginia, and is too much disposed to govern the world according to rules of logic; he will read and expound the Constitution as if it were a penal statute, and will sometimes be embarrassed with doubts of which his friends will not perceive the importance.

Ames was less indulgent: "False Federalists or such as act wrong from false fears should be dealt hardly with, if I were Jupiter the Thunderer."[28] But he kept quiet too, and Marshall was quickly confirmed.

Ames, who died in 1808, doubtless went to his grave thinking he had been right about Marshall. In a series of early, mostly forgotten decisions—I have in mind such headliners as *Clarke v. Bazadone* and *Hepburn v. Ellzey*[29]—Marshall led the Court in reaching constitutional

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[27] 22 ANNALS OF CONG. 142 (1853) (remarks of William H. Crawford).

[28] 2 WORKS OF FISHER AMES, 1799 (William B. Allen ed., 1983) (letter from Wolcott to Ames); *id*. at 1302–03 (letter of Ames to Christopher Gore).

[29] Clarke v. Bazadone, 5 U.S. 212 (1803) (holding that Supreme Court had no general supervisory authority over territorial court); Hepburn & Dundas v. Ellzey, 6 U.S. 445 (1805) (holding that the District of Columbia is not a "state" for constitutional purposes).

decisions by carefully textual means, but, as time passed, it became clear that Marshall was no Jefferson, and no Fisher Ames either. He and his allies stood, rather, in the tradition of Lord Coke and sought to answer constitutional questions by applying what Marshall called "that great paramount law of reason, which pervades and regulates all human systems," while observing the American principle that the written Constitution is "a rule for the government of *courts*, as well as of the legislature."[30] Constitutional law is reason, reason operating to give reasonable effect to the written supreme law. The underlying intellectual structure of American constitutional law in 2018 descends in lineal succession from the common law of Chief Justice Coke in no small measure because Chief Justice Marshall made it so. And, as a consequence, our tradition is also a debate over the extent to which the Supreme Court has been guilty of the sins about which King James warned us.

My last story begins a few years before the winter of 1800 and 1801, in 1793 on the ground floor of the Philadelphia City Hall, where the Supreme Court of the United States is announcing its first substantive decision, *Chisholm v. Georgia*.[31] By a four to one vote, the justices have concluded that the Court has original jurisdiction over a contract action brought by a South Carolina citizen against the state of Georgia, but our concern today is not with the decision itself; instead, I want us to think about a single line in Chief Justice John Jay's seriatim opinion.

In Jay's view, the only important objection to the Court's jurisdiction lay in the idea that Georgia as a sovereign enjoyed immunity from suit, and Jay thought the answer to that objection

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[30] The first quotation is from one of the newspaper essays Marshall published under a nom de plume to defend *McCulloch v. Maryland*. *See A Friend of the Constitution III*, ALEXANDRIA GAZETTE (July 2, 1819), *reprinted in* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 168 (Gerald Gunther ed., 1969). For the second quotation, see *Marbury v. Madison*, 5 U.S. 137, 180 (1803).

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

obvious: The idea of sovereign immunity has no place in American constitutional law. As the term itself suggests, Jay explained, sovereign immunity stems from "feudal principles, [a political] system [that] considers the Prince as the sovereign, and the people as his subjects."

> No such ideas obtain here; at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects . . . and have none to govern but themselves; the citizens of America are equal . . . as joint tenants in the sovereignty. . . . [and t]he attention and attachment of the Constitution to the equal rights of the people are discernable in almost every sentence of it.[32]

Jay's understanding of equality was not ours, and by "equal rights" he meant that every member of the community is equally entitled to the protection of the law, not that everyone's rights are the same. But in one respect, Jay's views do not differ from ours: As he had written a few years before, he believed that "all our inhabitants of every colour and denomination [should] be free and equal."[33] And because he believed that, Jay had to recognize a glaring anomaly in his account of the American constitutional order.

I left out a phrase from the *Chisholm* passage I quoted; now let me restore the missing words. Americans, Chief Justice Jay asserted, "are truly the sovereigns of the country, but they are sovereigns without subjects (unless the African slaves among us may be so called)." As Jay painfully recognized, the existence of human chattel slavery in the United States contradicted what he believed to be the fundamental premise of the Republic: that, among its inhabitants, there can be no subjects, "for in this country there are none; [no one

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[32] *Id*. at 471–72, 478.

[33] *See* Jake Sudderth, *Jay and Slavery*, THE PAPERS OF JOHN JAY (2002), http://www.columbia.edu/cu/ libraries/inside/dev/jay/JaySlavery.html (quoting Jay to Dr. Benjamin Rush, March 24, 1785, Jay ID #9450).

is] an inferior . . . for all ["our inhabitants"] are, as to civil rights, perfectly equal."[34] But no, not all Americans were free or equal, and Jay had no constitutional answer to that ultimate contradiction: In *Chisholm*, he simply acknowledged it.

Later constitutional lawyers cut the Gordian knot. In 1806, Jackey Wright and her daughter and granddaughter brought a suit for their freedom in the Virginia Court of Chancery.[35] The Wrights claimed that they could prove their direct descent from a Native American ancestor and thus could not be held as slaves under Virginia law. Based on the evidence, Chancellor George Wythe, a legendary figure in founding-era American law, ruled in their favor—and he gave a constitutional basis for his decision as well. Article I of the Virginia Declaration of Rights states that "all men are by nature equally free and independent and have certain inherent rights," including personal liberty. Under this article, Wythe concluded that "freedom is the birth right of every human being" in Virginia, and the burden of proof lay on a would-be slaveholder to prove with clear evidence his claim to hold another person in bondage.[36]

Chancellor Wythe's constitutional holding left slavery legal on its face, but nonetheless threatened to topple the institution one successful suit for freedom after another, and it is not surprising that the state court of appeals rejected his Article I reasoning while affirming his judgment on the facts. One of the judges sitting on the appeal was St. George Tucker, who had serious anti-slavery credentials: Three years earlier, he had published a direct attack on the institution.[37] But in *Hudgins v. Wright*, Tucker denied that slavery

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[34] *Chisholm*, 2 U.S. at 472. I supplied the words "our inhabitants" from the letter to Rush, *supra* note 33.

[35] Hudgins v. Wright, 11 Va. 134 (1806).

[36] Wythe's opinion is not extant but the reporters of the appellate decision indirectly quoted him. *Id*. at 134.

[37] Tucker originally published *A Dissertation on Slavery* in pamphlet form in 1796. He later included the essay as an appendix to his widely used BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION

was inconsistent with Virginia constitutional *law*, however poorly it fit with Virginia constitutional principle. According to Tucker,

> the first clause of the Bill of Rights . . . was meant to embrace the case of free citizens, or aliens only; and not by a side wind to overturn the rights of property, and give freedom to those very people [who] had no concern, agency or interest [in "the revolution"].[38]

Slaves, in other words, might be "people" but they were not part of our people, the people for whom American constitutions are made. In Jay's terms, slaves are *among* us, but Tucker insisted, they are not of us. Tucker's reasoning defused the revolutionary potential of constitutional language about liberty and equality and quickly became standard judicial fare; but Tucker's was not the only possible answer to Jay's dilemma.

Let's now go to Raleigh: It's December 1829. The North Carolina Supreme Court has before it a case called *State v. Mann*.[39] Mann shot a slave named Lydia whose services he had leased, and a jury convicted him of a "cruel and unwarrantable" battery. State law was clear that had he killed Lydia, Mann would have been criminally liable, but she survived the injury. Now the supreme court had to decide what other limits North Carolina law imposed on the use of violence to impose a slaveholder's will. Defending the jury verdict, State Attorney General Romulus Saunders argued that the master/slave relation was analogous to other asymmetrical legal relationships—parent/child, master/apprentice, and so on—and that in every case the law regulated the relationship and required that the person in authority act reasonably and without unnecessary cruelty.[40]

AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA (1803).

[38] *Hudgins*, 11 Va. at 141 (Tucker, J., concurring).

[39] State v. Mann, 13 N.C. 263 (1829).

[40] For the verdict and Saunders's argument, see *id*. at 263–64.

The court, however, concluded that state law allowed the slaveholder to use any level of violence short of murder, and left the task of justifying its decision to its newest member, Thomas Ruffin, no doubt with the expectation that Ruffin would write an opinion sugar-coating the harsh result. But for unknown reasons, Ruffin took a different tack.

Three drafts of his opinion survive. The first fits the usual model followed by opinions on the law of slavery: It's defensive, apologetic, intended to persuade the reader that the holding is a just and appropriate balancing of "the rights of the owner" with "the general protection and comfort of the slave."[41] Over the next two drafts, however, Ruffin systematically stripped away most of the self-exculpatory language and refashioned the opinion to deny any claim that the court was upholding something that could be called a right:

> [I]t may well be asked, which power of the master accords with right? The answer will probably sweep them all away. But we cannot look at the matter in that light. The truth is that we are forbidden to enter upon a train of general reasoning on the subject. We cannot allow the right of the master to be brought into discussion in courts of justice.[42]

Over 500 years earlier, Chief Justice Bereford and his colleagues had begun the process of subjecting the power relationships of medieval England to the power of legal reason. In 1829, Judge Ruffin conceded that at the heart of republican North Carolina, there was an area of social life into which legal reason could not go, within which violence was unchecked by law. While the legislature could, by an act of political will, modify this reality, Ruffin denied the competence of law to do so. "The difficulty is determining where a Court may properly begin. . . . The Court, therefore, disclaims the power of

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[41] Ruffin's drafts are printed in THE PAPERS OF THOMAS RUFFIN 249–57 (J.G. de Roulhac Hamilton ed., 1920). The quoted language is from his first draft. *Id*. at 249.

[42] *Mann*, 13 N.C. at 267.

changing the relation in which these parts of our people stand to each other."[43]

Wait!—did you hear that? *These parts of our people*. In *State v. Mann*, Ruffin resolved the ambiguity in Jay's words, "the African slaves among us," an ambiguity that Tucker and others exploited by denying that slaves were ever part of the American people or entitled to the equal liberty our constitutions seek to protect. Ruffin denied himself that easy excuse. *Our people*: The African slaves among us *are* us, or part of us, and *Mann*'s disavowal of any power on the part of the court to protect those Americans from harm was an outright confession that slavery rendered American constitutional law incoherent, a confession all the more sweeping because its constitutional dimension was almost invisible.

We've now come full circle, from the promise of 1292 to the dead end of 1829. However powerful Ruffin's merciless portrayal of slavery, his opinion ended on a helpless note: In the face of slavery, Marshall's "great paramount law of reason" was powerless.

In a sense, Ruffin was right: As a matter of history the constitutional self-contradiction of American slavery came to an end (to the extent it did) only through political acts of will—the Civil War and the Reconstruction Amendments. But I want to suggest in conclusion that Ruffin was also wrong, not just morally wrong in his complicity in radical injustice, but wrong in reaching so quickly the conclusion that law was helpless in the face of that injustice. One of the most persistent themes in the American constitutional law tradition has been our refusal to accept too quickly a limit on the problems "the artificiall Reason and judgment of law" can address. That there are such limits is also a theme in the tradition, but, in identifying those limits, I believe we should always question any assumption, whether comfortable or despairing, that constitutional law cannot address a social wrong.

Whether we have reached a limit on the law's domain is itself a critical and often difficult question of constitutional law. At times,

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[43] *Id*.

whatever answer we give will fall short of geometric proof, and when that is so, the assumptions, the preconceptions, and the prejudices we bring to the question may determine our answer. We are responsible for our assumptions and should be mindful of our prejudices. The constitutional law tradition may and should structure our decisions; it cannot relieve us of the burden and the privilege of responsible decision.

CHANGE AGENTS: LOOKING TO STATE CONSTITUTIONS FOR RIGHTS INNOVATIONS*

Judge Jeffrey S. Sutton **

INTRODUCTION

Sarah Hawkins Warren***

When most people—and even most lawyers—think about "constitutional law," they think only of the United States Constitution. That is not entirely surprising, given that the federal constitution is usually the focus of civics lessons and law school courses alike. But any study of American constitutional law that ignores state constitutions—many of which initially predated ratification of the U.S. Constitution—casts aside a critical aspect of our country's dual-sovereign system and fails to recognize that "virtually all of the foundational liberties that protect Americans originated in the state constitutions and to this day remain independently protected by them."

The shortcomings of this approach to constitutional law are the subject of Judge Jeffrey Sutton's new book, *51 Imperfect Solutions: States and the Making of American Constitutional Law.* Although Judge Sutton currently serves on the U.S. Court of Appeals for the Sixth Circuit, he is

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*** Sarah Hawkins Warren is a Justice on the Georgia Supreme Court.

uniquely situated to opine on state law because of his prior service as Ohio State Solicitor—a state-level position modeled closely after that of the U.S. Solicitor General—when he represented Ohio in cases involving claims under both the U.S. and Ohio Constitutions. It was this set of experiences, which included representing his state before the Ohio Supreme Court and the U.S. Supreme Court, that "recalibrated" his "views about the role of the States in our federalist system of government."

The "central conviction" of *51 Imperfect Solutions* is grounded in the notion that states can set "positive examples that hold the potential to be . . . influential in the development of American constitutional law," and that the "underappreciation of state constitutional law has hurt state and federal law and has undermined the appropriate balance between state and federal courts in protecting individual liberty." This is especially true when, for example, a "National Court declines to enforce a right, [and] the state courts become the only forum . . . for enforcing the right under their own constitutions, making it imperative to see whether and, if so, how the States fill gaps left by the U.S. Supreme Court."

Judge Sutton's examination of these issues is particularly relevant in light of his suggestion that we look to state constitutions to help "handle our country's differences of opinion." Federalism, he argues, "could be a solution, or at least a partial answer, to some of the deep divides that persist in today's chapter of American history" and "a useful process for ameliorating and eventually resolving them." And although "state courts at times have played a critical role in advancing some constitutional rights," the current question—at least according to Judge Sutton—"is whether there is room for them to play a greater role in the future."

If lawyers, academics, and jurists heed Judge Sutton's call to take our "state constitutions more seriously," we may soon have an answer to that question.

EXCERPT FROM CHAPTER 2
AMERICAN CONSTITUTIONALISM: A SECOND SOURCE OF POWER COMES WITH DUAL CONSTRAINTS ON THAT POWER

The point of this chapter is twofold: (1) to explain how we got here—how the bench and bar became so one-sided in their understanding of American constitutional law and diminished the States' constitutions in the process, and (2) to consider reasons for changing course—why American lawyers and judges (and citizens) would benefit from taking our state constitutions more seriously than they currently do.

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A few features of American constitutional law confirm the similarities between the two situations. In this country, state and local laws face two sets of constitutional constraints: those under the U.S. Constitution and those under the relevant state constitution. The Framers of the U.S. Constitution modeled all individual rights guarantees after guarantees that originated in a state constitution—usually one of the state constitutions ratified between 1776 (after, in most cases, the colonies declared independence from England) and 1789 (when the people ratified the U.S. Constitution). Take some of our most celebrated rights: free speech; free exercise of religion; separation of church and state; jury trial; right to bear arms; prohibitions on unreasonable searches and seizures; due process; prohibition on governmental taking of property; no cruel and unusual punishment; equal protection. *All* of them, and all of the other individual rights guarantees as well, originated in the state constitutions and were authored by a set of not inconsequential political leaders in the States, such as John Adams, Benjamin Franklin, Robert Livingston, James Madison, and George Mason.

The upshot is that American constitutional law creates two potential opportunities, not one, to invalidate a state or local law. Individuals who wish to challenge the validity of a state or local law thus usually have two opportunities to strike the law—one premised

on the first-in-time state constitutional guarantee and one premised on a counterpart found in the U.S. Constitution. Yet most lawyers take one shot rather than two, and usually raise the federal claim rather than the state one.

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What we have today is not an inevitable feature of the Framers' vision. It is in reality quite remote from anything the Framers could have imagined. The original constitutional plan created largely exclusive federal and state spheres of power as opposed to largely overlapping spheres of power. Which makes sense: Why would a libertarian group of Framers, skeptical of governmental power and intent on dividing it in all manner of ways, have *doubled* the governmental bodies that could regulate the lives of Americans? And tripled and quadrupled them if one accounts for cities and counties? A system of largely separate dual sovereignty (federal *or* state power in most areas) has become a system of largely overlapping dual sovereignty (federal *and* state power in most areas). Good or bad, textually justified or not, this feature of American government is not going away. American constitutional law today thus permits at least two sets of regulations in every corner of the country and what comes with it: the potential for dual challenges to the validity of most state or local laws. That has been true since the end of the Warren Court for most liberty guarantees, and it is difficult to envision a scenario in which that reality disappears.

This history, much abridged for sure, suggests two explanations for the seeming reluctance of lawyers and courts to take one part of American constitutional law seriously. The first is a function of time. Because it took until the 1960s for the U.S. Supreme Court to complete the individual rights revolution by incorporating most of the Bill of Rights into the Fourteenth Amendment, it was not until then that American lawyers, law schools, and state courts had any reason to think about using state and federal court systems, and state and federal constitutions, to vindicate civil rights. We thus are not talking about a set of litigation opportunities, a litigation strategy, that existed

for most of American history. It's been roughly fifty years since the U.S. Supreme Court completed much of this transformation. That's not a long time, less than a fourth of American legal history. And that's even less time if we consider the most recently incorporated right [as of 2018]: the Second Amendment in 2010.

The second reason emerges from a central explanation for the success of the federal rights revolution: the States' relative underprotection of individual rights. Who could blame lawyers and their clients for being reluctant to develop a strategy built in part on state constitutional rights? The U.S. Supreme Court recognized many of the rights it did between the 1940s and the 1960s *because* many state courts (and state legislatures and state governors) resisted protecting individual rights, most notably in the South but hardly there alone. One can forgive lawyers from this era for hesitating to add state constitutional claims to their newly minted federal claims. Why seek relief from institutions that created the individual rights vacuum in the first place?

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EXCERPT FROM CHAPTER 9: EPILOGUE

When told in full, [the stories told in the book] provide a healthy counterweight to received wisdom. They show the risk of relying too heavily on the U.S. Supreme Court as the sole guardian of our liberties as well as the farsighted role the state courts have played before in dealing with threats to liberty. Even the most acclaimed individual rights decision in American history, *Brown v. Board of Education*, is more complicated than it might at first appear when it comes to the role of the States and national government in rights protection. It's worth remembering the other half of that story. The companion case to *Brown* was *Bolling v. Sharpe*, in which the Court demanded the end of segregation in the public schools of the District of Columbia, an enclave controlled by the federal government, not a State. Those who

place complete faith in just *one* branch of American government to protect their rights will eventually be disappointed.

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All of this prompts an essential question, one of the most crucial underlying this book. What is it about the issues in *San Antonio Independent School District v. Rodriguez*, *Mapp v. Ohio*, *United States v. Leon*, *Buck v. Bell*, or *Minersville School District v. Gobitis* (or for that matter, *Kelo v. City of New London* or *Employment Division v. Smith* or *Baker v. Nelson*) that prevented Supreme Court defeats from becoming the death knell of the claimants' objectives and instead spurred equally promising, if not more promising, state and local initiatives? Why in these areas? Why not others?

A common thread in many of these examples—and others in which the States have been leaders rather than followers—is the complexity of the problem at hand. While national interest groups will invariably favor winner-take-all approaches, complexity often stands in the way. The more difficult it is to find a single answer to a problem, the more likely state-by-state variation is an appropriate way to handle the issue and the more likely a state court will pay attention to an advocate's argument that a single State ought to try a different approach from the one adopted by the National Court. Just as the intricacy of a problem might prompt different, even competing, answers, it might prompt state courts (and legislatures) to pace change at different speeds. In many areas of law affected by changing social norms, the most important question is not whether but when, not whether but by whom.

A second consideration prompted by these stories is accountability. When the U.S. Supreme Court shifts the spotlight from the national to the local stage, it clarifies the lines of authority.

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A third consideration relates to the selection method for most state court judges: elections. Dissonant though it may sound, judicial

elections sometimes are the friend of innovative individual rights litigation, not its enemy. Some supposedly countermajoritarian constitutional issues are not countermajoritarian at all when presented effectively to elected state court judges. Just as there may be politically functional and politically dysfunctional issues in legislation, the same may be true in litigation. And the two do not always overlap. That reality may explain why these education, criminal procedure, property-rights, free exercise, and eventually marriage issues resonated with some state-elected judges but not life-tenured federal judges. In the Ohio school-funding litigation, in which I represented the State, I thought it helped the plaintiffs—the advocates of change—that the justices of the Ohio Supreme Court were elected. I say this not to plug one method of appointment over another but to show that traditional assumptions about judicial elections and constitutional guarantees may not always hold true.

Even the crudest electoral practicalities do not invariably warrant distrust in the capacity of state court judges to construe their constitutions independently. Truth be told, there are many settings in which judicial elections should lead to *more* state court independence from the U.S. Supreme Court, not less. Aren't there many federal constitutional rulings that *increase* the scope of a protected right and with which elected judges in some States disagree? And with which a majority of the electorate in those States disagree? Aren't there many federal constitutional rulings that *decrease* the scope of a protected right and with which elected judges in some States disagree? And with which a majority of the electorate in those States disagree? The answer of course will depend on the issue and the State. Think about it another way. Surely there are originalist justices on the state courts who disagree with living constitutionalist U.S. Supreme Court decisions. And surely the opposite is true. Electoral practicalities often should liberate, not confine, state court judges in following their own interpretive approaches.

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An objective of this book is to urge a few modest steps toward closing the gap between *one* feature of the original design of American government and current practice by returning the States to the front lines of rights protection and rights innovation. As written, the U.S. Constitution was *not* designed to facilitate rights innovation, whether through Congress or the courts. The document contains one blocking mechanism after another, all quite appropriate given the potential breadth of power exercised by the federal branches. As written, the state constitutions were change incubators, governing smaller, often more congenial populations with shared world views. And the state constitutions were, and remain, easy to amend. Unlike the Federal Constitution, the state constitutions are readily amenable to adaptation, as most of them can be amended through popular majoritarian votes, and all of them can be amended more easily than the federal charter. The design of each charter signals that the States were meant to be the breakwater in rights protection and the national government the shoreline defense.

Increasing the salience of the state courts and state constitutional law honors some worthy traits of the original federal constitutional framework, most notably its conspicuous horizontal *and* vertical separations of powers. If there's one feature of American government worth preserving over every other, it's that differentiated lines of constitutional structure—honored and undiluted—preserve liberty. Only by retaining a balance of authority among the branches do we keep the most malignant risks to liberty at bay.

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A revival of independent state constitutionalism not only might return us to something approximating the original design, but it also might ease the pressure on the U.S. Supreme Court to be the key rights innovator in modern America. Why not put the state constitutions, state courts, and state legislatures on the front lines (or more precisely return them to the front lines) when it comes to rights innovation? Even if one accepts that many of the Warren Court

decisions were for the good as a matter of policy, and even if one assumes that the States brought this diminishment of authority upon themselves, that does not tell us what to do next. All essential constitutional questions ultimately come down to structure. And structure concerns who, not what—who should be the leading change agents in society going forward, not looking backward. One point of telling these stories is to make the case that it's time to shift the balance back to the state courts.

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While nearly all interest groups and most Americans seem to remain comfortable with using the U.S. Supreme Court (as opposed to the state courts) as their preferred change agent, it's easy to wonder how long this can last and to worry how it will end. So long as we insist on casting the Court in this role, two things are inevitable: The people will care deeply about who is on the Court, and the people will criticize the Court, as opposed to the elected branches, when five justices do not do their bidding. The confirmation process—picking justices to resolve structural and individual rights debates known and unknown for the next twenty-five to thirty years—is not well-equipped to handle the first development, and the Court as an institution is not well-equipped to respond to the second.

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Whatever the prospects for change through state constitutions and state courts may have been in the 1950s and 1960s, I have a hard time understanding why they remain inappropriate vehicles for rights innovation in the twenty-first century—and why they should not be the lead change agents going forward. When Justice Brandeis launched the laboratory metaphor for policy innovation, he used the plural, not the singular, signaling an interest in hearing how the States in the first instance would respond to new challenges. A single laboratory of experimentation for fifty-one jurisdictions and 320 million people poses serious risks. A ground-up approach to

developing constitutional doctrine allows the Court to learn from the States—useful to pragmatic justices interested in how ideas work on the ground, useful to originalist justices interested in what words first found in state constitutions mean. It gives both sides to a debate time to make their case. And it places less pressure on the U.S. Supreme Court. The Court may wait for, and nationalize, a dominant majority position, lowering the stakes of its decision in the process. Or it may treat occasionally indeterminate language in the way it should be treated, as allowing for fifty-one imperfect solutions rather than one imperfect solution.