FROM *RATIO* TO *AUCTORITAS*: THE DECLINE OF REASON AND THE RISE OF AUTHORITY IN AMERICAN AND ROMAN LAW[*]

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Are we Rome? In the United States, the question is usually directed at our politics and government.[1] But it could just as well be directed at our law. Like Roman law before it, American law has in recent years become less dynamic and more formalistic. Where it once embraced inquiry, reason, and yes, morals, it now focuses almost exclusively on authority—the authority of the law as declared by public officials.[2] This shift to authority mirrors a similar historical shift in Roman law. In the third and fourth centuries, Roman law transitioned from a system founded on reason and inquiry to one based on binding legal pronouncements. Romans stopped asking whether the law was logical, or even good. Instead, they asked only whether it was legitimate—whether it was the will of the Roman emperor.[3]

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[*] Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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[1] *See, e.g.*, PETER HEATHER & JOHN RAPLEY, WHY EMPIRES FALL: ROME, AMERICA, AND THE FUTURE OF THE WEST 9 (2023) (comparing U.S. politics and government of 1999 to those of Rome in 399). *See also* CULLEN MURPHY, ARE WE ROME? THE FALL OF AN EMPIRE AND THE FATE OF AMERICA (2007); Cullen Murphy, *No, Really, Are We Rome?*, THE ATLANTIC (Mar. 11, 2021), https://www.theatlantic.com/magazine/archive/2021/04/no-really-are-we-rome/618075/.

[2] *See, e.g.*, HAROLD BERMAN, LAW AND REVOLUTION 32-37 (1985) (describing growing skepticism toward Western legal tradition and descent of law into "a hodgepodge, a fragmented mass of ad hoc decisions and conflicting rules"); Steven D. Smith, *The Mindlessness of Bostock*, LAW & LIBERTY (July 9, 2020), https://lawliberty.org/bostock-mindlessness/ (describing a "descent into mindlessness" afflicting legal interpretation, driven by a wooden application of textualism); WILLIAM ESKRIDGE JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 371 (2021) [hereinafter STATUTORY INTERPRETATION] (describing the "increasingly twisted and decreasingly relevant" doctrines developed to determine whether courts should defer to administrative agencies).

[3] *Compare* Jacob Giltaij, *Greek Philosophy and Classical Roman Law*, *in* THE OXFORD HANDBOOK OF ROMAN LAW AND SOCIETY (Paul J. du Plessis et al., eds. 2016) (discussing role of logic and

There are other echoes as well. Like the Roman shift to authority, our own shift has coincided with a profusion of "binding" legal instruments.[4] Our statute and code books swell every year with the product of ever more detailed legal enactments.[5] Topics once dealt with under private-law methods (e.g., contract and tort) have become the subject of public regulation. Employment, personal injury, and fair competition were once dealt with by courts as a matter of common law; but now, they have become the subject of an evermore multivarious public law.[6]

The transition to public-law regulation has been well documented. Less well documented has been the transition's effect on legal methodology. Like their Roman forebears,[7] American lawyers once embraced a "scientific" view of the law.[8] They saw the law less as a collection of rules than as the product

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dialectic in classical Roman law) *with* Dig. 1.14 (*lex regia*) (declaring in the 6th century that "what pleases the prince is law"). *See also* CHARLES FREEMAN, THE CLOSING OF THE WESTERN MIND: THE RISE OF FAITH AND THE FALL OF REASON 79-88 (2007) (describing Roman transition in imperial period from culture of reason to one of authority).

[4] *See, e.g.*, NEIL GORSUCH & JANIE NITZE, OVER RULED: THE HUMAN TOLL OF TOO MUCH LAW 13-14 (2024) (describing explosive growth of statutes and regulations in 20th century); Thomas E. Baker, *Tryannous Lex*, 82 IOWA L. REV. 689, 691 (1997) (describing growth of lawyers and output of courts). *See also* A.B.J. Sirks, *Public Law*, in THE CAMBRIDGE COMPANION TO ROMAN LAW 332, 336 (David Johnston, ed. 2015) (describing profusion of new forms of imperial legislation); Wolfgang Kaiser, *Justinian and the Corpus Iuris Civilis*, *in* THE CAMBRIDGE COMPANION TO ROMAN LAW, *supra*, at 120-21 ("The vast amount of classical literature . . . made it impossible for the average legal expert to familiarize himself with it . . . .").

[5] *See* GORSUCH & NITZE, *supra* note 4, at 13-18 (describing growing volume of laws); BERMAN, *supra* note 2, at 32-38 (describing trend toward centralized regulation of affairs once handled through private law).

[6] *See, e.g.*, BERMAN, *supra* note 2, at 32-38 (describing migration of law from private- to public-law ordering); Edward L. Glaeser & Andrei Shleifer, *The Rise of the Regulatory State*, 41 J. ECON. LIT. 401, 401 (2003) (describing expansion of regulation into new spheres in the early 19th century).

[7] *See, e.g.*, Laurent Mayali, *The Legacy of Roman Law*, *in* THE CAMBRIDGE COMPANION TO ROMAN LAW, *supra* note 4, at 120-21 (quoting the glossator Accursius) ("[T]o know the law meant to know everything, since there was nothing outside the corpus of the law."); David Ibbetson, *Sources of the Law from the Republic to the Dominate*, *in* THE CAMBRIDGE COMPANION TO ROMAN LAW, *supra* note 4, 25, at 35 (describing role of jurists in developing that system through reasoned opinion and advice to judges); CICERO, DE LEGIBUS 1.18 (describing law as the "highest reason, implanted in nature, which orders those things that be done and prohibits the opposite"); HANS JULIUS WOLFF, ROMAN LAW: AN HISTORICAL INTRODUCTION 5 (1951) (describing development of Roman general law and contribution to later conception of natural or universal law).

[8] *See* STUART BANNER, THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED 53 (2021) ("Like their English predecessors, early American lawyers understood the common law as judges' efforts to use customary practices as a guide to resolving disputes."). *See also* CAROLINE WINTERER, THE CULTURE OF CLASSICISM: ANCIENT

of applied reason.[9] They looked to custom, experience, and formal rationality: the law wasn't just what was commanded; it was what was right.[10] But that kind of analysis requires flexibility, training, and time—things we might today dismiss as "decisional costs."[11] And as lawyers wrestle with an ever-growing legal corpus, those costs become too great for them to bear. They reach for shortcuts and bright-line rules of thumb—heuristics to help them cut through the underbrush.[12] Their approach becomes less flexible and more mechanical.[13]

That trend is more than just a professional curiosity. In Rome, a similar change not only drained the law of its intellectual sheen; it robbed the law of

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GREECE AND ROME IN AMERICAN INTELLECTUAL LIFE: 1780-1910, at 4-5, 17, 25 (2004) (observing that Americans in the antebellum period turned to Roman thinkers like Cicero for political and legal philosophy, including "general principles of Universal Law"); CHRISTOPHER G. TIEDMAN, UNWRITTEN CONSTITUTION OF THE UNITED STATES 67 (1890) ("Perhaps no product of the Roman law has exerted so potent an influence upon the development of modern jurisprudence as the Roman doctrine of *jus naturale* [natural law]."); WOLFF, *supra* note 7, at 82-83 & nn.27-28 (explaining that Cicero and other classical jurists conceived a "natural" law "of higher authority than all positive customs and statutes").

[9] *See, e.g.*, Coppage v. Kansas, 236 U.S. 1, 10 (1915), *overruled by* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) (reasoning that liberty and property rights may be restrained by legislation, but only when legislation promotes common good and general welfare—i.e., when the exercise of the state's police power is "reasonable"). *See also* BERMAN, *supra* note 2, at 528 (describing "dialectical" methods of classic Western jurists, drawn from Roman law, "which is still that of legal science in the United States today").

[10] *See* BERMAN, *supra* note 2, at 528. *Cf.* Mayali, *supra* note 7, at 378-79 (describing Roman law concept of *ius commune*, or universal law applying to all peoples, independent of local law or custom).

[11] *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 166-67 (2006) (explaining that judges operating in conditions of complexity and uncertainty rationally seek mechanisms to reduce uncertainty and thus decision costs—i.e., they look for convenient rules of thumb).

[12] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179-81 (1989) [hereinafter *Law of Rules*] (arguing that search for "right" answer is illusory and that modern judicial system is ill-suited to that kind of common-law inquiry).

[13] *See, e.g.*, Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 144-61, 169-71 (2009) (arguing that unlike prior interpretive methods, modern textualism grows increasingly narrow and insular through application because it rejects external interpretive resources); Elena Schiefele, *When Statutory Interpretation Becomes Precedent: Why Individual Rights Advocates Shouldn't Be So Quick to Praise* Bostock, 78 WASH. & LEE L. REV. 1105, 1105-06 (2021) (criticizing interpretation based on "muscular textualism" which "causes the interpreter to adopt the most basic, narrow, and superficial interpretation of the text"). *See also* STATUTORY INTERPRETATION, *supra* note 2, at 361 (observing that rule-like structure of *Chevron* doctrine may have attracted judges because it lightened their decisional burden) ("*Chevron's* impressive citation count might just be evidence of a judicial culture desperate to manage its workload").

its moral force.[14] When law is binding because it is right, it commands its own respect.[15] It is followed because it should be—because it reflects the best possible rule.[16] But when law is binding only because it is declared by the right person, its authority depends on that person.[17] It relies on the power of the lawmaker to command.[18]

The Romans learned that lesson the hard way. Even as their laws became more numerous, they were applied more sporadically.[19] In large parts of the empire, the laws were simply ignored.[20] They failed, in short, to gain the respect and adherence of the people whose lives they were supposed to govern.[21]

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[14] *See* FREEMAN, *supra* note 3, at 314 ("The Ancient Greek tradition that one should be free to speculate without fear and be encouraged to take individual moral responsibility for one's views was rejected.").

[15] *See* HADLEY ARKES, MERE NATURAL LAW: ORIGINALISM AND THE ANCHORING TRUTHS OF THE CONSTITUTION 28, 41, 50 (2023) (arguing that certain principles of law apply in every case because they are necessarily and empirically true and therefore command adherence on their own merits).

[16] *See id.*

[17] *See id.* at 18-19, 36 (arguing that law stripped of moral significance loses meaning), 265 (arguing that it is a mistake to treat the Constitution as a mere "artifact of positive law"). *See also* Stephen E. Sachs, *Finding Law*, 107 CAL. L. REV. 527, 531 (2019) (arguing that some legal principles can be discovered without resort to positive enactment of a lawgiver) ("These norms are addressed to society as a whole, and they're generally perceived as binding, without anyone in authority having formally enacted them or laid them down."). *Cf.* Werner Eck, *The Emperor, the Law, and Imperial Administration*, *in* THE OXFORD HANDBOOK OF ROMAN LAW AND SOCIETY, *supra* note 3, at 106 (discussing unilateral lawmaking power of emperors in late empire) ("[T]he assent of the emperor was necessary for every single constitution [i.e., imperial legislative act]."). *Cf.* THOMAS AQUINAS, SUMMA THEOLOGIAE art. 1, q. 94 (CreateSpace Indep. Pub. ed. 2009) (1274) (explaining that "the natural law is something appointed by reason, just as a proposition is a work of reason"); CICERO, DE OFFICIIS 3.5 (B.C. 44).

[18] *See* ARKES, *supra* note 15, at 9, 160-63 (criticizing modern constitutional doctrine as "moral relativism"). *Cf.* Sachs, *supra* note 17, at 529 (noting broad acceptance in modern legal culture of law as the product of an authoritative lawgiver) ("To modern scholars, law is always made by somebody: written law is made by legislators, and unwritten law is made by judges.").

[19] *See* FREEMAN, *supra* note 3, at 253 (noting doubt among historians about how precisely imperial laws were implemented in provinces away from imperial supervision); Bernard H. Stolte, *The Law of New Rome: Byzantine Law*, *in* THE CAMBRIDGE COMPANION TO ROMAN LAW, supra note 4, at 363 (noting similar doubt). *Cf.* Dario Mantovani, *More Than Codes: Roman Ways of Organizing and Giving Access to Legal Information*, *in* THE OXFORD HANDBOOK OF ROMAN LAW AND SOCIETY, *supra* note 3, at 23, 32 (noting that law schools were established in part to help spread Roman law through provinces, suggesting difficulty in ensuring adherence).

[20] *See* FREEMAN, *supra* note 3, at 253; Stolte, *supra* note 19, at 363.

[21] *See* FREEMAN, *supra* note 3, at 314; Eck, *supra* note 17, at 102 (describing controversy over and resistance to certain imperial laws, including the *lex iulia*, a law imposing certain marriage and procreation requirements on citizens).

And that failure left a gap between the law as written and the law as applied—a gap that eventually widened into an age of legal stagnation.[22]

In America, the same cracks are starting to show. American lawyers increasingly deal with complexity by imposing hierarchy: they ask not which authority is more persuasive, but which is higher in the legal food chain. Their approach to the law, in short, has ossified.[23] And in turn, a portion of the American public has come to see the law as devoid of moral meaning.[24] They see it instead only as an instrument—a tool fashioned by one generation, to be discarded by the next.[25] That view has colored not only their attitude toward regulations, or even statutes, but also the country's most fundamental law, the Constitution of the United States.[26]

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[22] *See* Mayali, *supra* note 7, at 387 (explaining that statement of imperial power—the *lex regia*—was used by emperors and medieval kings to justify unilateral lawgiving power for centuries after "fall" of Rome). *See also* WOLFF, *supra* note 7, at 111-14 (describing how juristic creativity and flexibility declined with advent of imperial legislation and transformation of jurists into imperial servants); Kaiser, *supra* note 4, at 119-20 (describing simultaneous rise of imperial *constitutiones* and decline in juristic writings).

[23] *See* BERMAN, *supra* note 2, at 37 ("Law in the twentieth century, both in theory and in practice has been treated less as a coherent whole, a body, a *corpus juris*, and more as a hodgepodge, a fragmented mass of ad hoc decisions and conflicting rules, united only by common 'techniques.'").

[24] *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 167-71 (3d ed. 2012) (denying that morals are natural to society or that there is any such thing as moral law); Troxel v. Granville, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting) (denying that judges could enforce unwritten fundamental norms through the Ninth Amendment or any other provision of the Constitution). *See also* James Murphy, *Legal Positivism and Natural Law Theory*, NATURAL L., NATURAL RIGHTS, AND AM. CONSTITUTIONALISM (2011), https://www.nlnrac.org/critics/legal-positivism.html (explaining that dominant modern theory of law, legal positivism, denies moral component to law); Wiliam C. Starr, *Law and Morality in H.L.A. Hart's Legal Philosophy*, 67 MARQUETTE L. REV. 673, 674 (1984) ("Positivism, in theory, does not recognize as scientific any knowledge beyond that which can be acquired through the senses. It can never, therefore, assert what men should do; but only what they actually do.") (quoting R. BEGIN, NATURAL LAW AND POSITIVE LAW 49 (1959)).

[25] *See, e.g.*, Jedediah Britton-Purdy, *No Law Without Politics (No Politics Without Law)*, LPE PROJ. (Oct. 2, 2018), https://lpeproject.org/blog/no-law-without-politics-no-politics-without-law/ (arguing that law is not a separate institution, but instead only a subset of politics) ("I think we have to look into the abyss and admit the possibility that politics really does come first, that the question is not for or against politicization, but what kind of politicization.").

[26] *See* ERWIN CHEMERINSKY, NO DEMOCRACY LASTS FOREVER: HOW THE CONSTITUTION THREATENS THE UNITED STATES 165 (2024) (arguing that U.S. Constitution is so riddled with flaws and difficult to amend that it would be "better to start over and adopt a new constitution").

The result is paradoxical. Even as law grows in volume, its legitimacy erodes beneath its feet.[27] We know what that paradox produced in Rome.[28] What it will produce in America remains to be seen.

I. A PROFUSION OF AUTHORITIES

Modern America is awash in law.[29] In the last century, the United States Code has swollen from 1 to 54 volumes. It now stretches to more than 60,000 pages, about fifty times the length of the Bible. At the same time, even more "law" has sprouted from administrative agencies, as shown by the growth of the Federal Register. Established in 1936, the Federal Register was designed to notify the public about new agency rules. The first issue was modest—a mere 16 pages.[30] But ninety years later, it now regularly tops 70,000 pages a year.[31] The Code of Federal Regulations has also grown apace, now spanning more than 200 volumes.[32]

Large as those numbers are, they don't even begin to capture agencies' full output. Besides formal rules, agencies publish a daily stream of subregulatory

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[27] *See* David M. Crane, *The Erosion of Respect for the Rule of Law*, JURISTNEWS (Oct. 29, 2024), https://www.jurist.org/commentary/2024/10/the-erosion-of-respect-for-the-rule-of-law-in-america/ (arguing that American institutions show a declining respect for rule of law in part because of courts and partisans in Congress).

[28] *See generally* EDWARD GIBBON, THE DECLINE AND FALL OF THE ROMAN EMPIRE (Hans-Friedrich Mueller, ed. 1987).

[29] *See, e.g.*, *About Classification of Laws to the United States Code*, OFFICE OF THE LAW REVISION COUNCIL. U.S. HOUSE OF REPRESENTATIVES, https://uscode.house.gov/about_classification.xhtml (last visited Dec. 22, 2023) ("During the past 20 years, each Congress has enacted an average of over 6,900 pages of new public laws."); *Federal Register Facts*, FED. REG. (2010), https://www.federalregister.gov/uploads/2011/01/fr_facts.pdf (noting that every annual issue of the Federal Register since 2002 has exceeded 70,000 pages).

[30] *See* Lissa N. Snyders, *Federal Register by the Numbers*, FED. REG., https://www.federalregister.gov/reader-aids/office-of-the-federal-register-announcements/2015/05/federal-register-by-the-numbers (last visited Dec. 22, 2024) (noting that the first issue was published in 1936). *But see* Clyde Wayne Crews, *Tens of Thousands of Pages and Rules in the Federal Register*, COMPETITIVE ENTER. INST. (June 30, 2021) https://cei.org/publication/tens-of-thousands-of-pages-and-rules-in-the-federal-register-2/ (noting that the proportion of pages in the Federal Register devoted to final regulations dropped during the first three years of the Trump administration, which had implemented a "one in, one out" policy for major rules, before spiking again in the 2019-2020 edition).

[31] *See Total Pages Published in the Federal Register*, REG. STUDIES CTR. (March 4, 2024), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2024-03/federal_register_pages_by_calendar_year.pdf (tracking growth graphically).

[32] GORSUCH & NITZE, *supra* note 4, at 13-14. *See also Total Pages Published in Code of Federal Regulations*, Reg. Studies Ctr. (July 2, 2024), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2024-08/cfr_pages_by_calendar_year.pdf (tracking growth of C.F.R. in number of pages).

guidance.[33] This guidance covers topics ranging from overtime pay to bathroom access.[34] But exactly how much guidance is out there is impossible to say. No official repository exists, even at the federal level.[35] In 2019, the White House tried to remedy the problem by ordering OMB to collect and account for all official guidance.[36] But the task proved so daunting that it was abandoned only two years later.[37] So even the regulators don't know how much they regulate.[38]

The same bloat has afflicted the output of courts. The Federal Reporter (the official publication of federal judicial decisions) now stretches across five thousand volumes.[39] And each of those volumes runs about a thousand pages.[40] So in total, the Reporter now contains about five million pages of law.[41] No human could possibly absorb it all—much less understand the profusion of "unreported" federal cases and the work of the fifty separate state-court systems.[42]

II. The Roman Deluge of Law

That kind of output would have sounded familiar to lawyers in imperial Rome. For much of Rome's history, the law was dominated by quasi-formal

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[33] *See, e.g.*, *Final Rulings and Opinion Letters*, U.S. Dep't of Labor, https://www.dol.gov/agencies/whd/opinion-letters/request/existing-guidance (collecting various forms of subregulatory advice and guidance); *Memos & Research*, Nat'l Lab. Rels. Bd., https://www.nlrb.gov/guidance/memos-research (same). *See also* Gorsuch, *supra* note 4, at 13-14 (describing growth of this guidance).

[34] *See, e.g.*, U.S. Dep't of Justice & U.S. Dep't of Education, Dear Colleague Letter on Transgender Students (May 13, 2016), https://www.ed.gov/sites/ed/files/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf (later rescinded) (discussing treatment of transgender students by schools receiving federal funds); U.S. Dep't of Labor, Wage & Hour Div., FLSA2021-1 (Jan. 8, 2021) 2021) https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2021_01_08_01_FLSA.pdf (discussing eligibility for administrative exemption to overtime requirements).

[35] Gorsuch & Nitze, *supra* note 4, at 17.

[36] Exec. Order No. 13891, 54 Fed. Reg. 55235 (Oct. 9, 2019).

[37] Exec. Order No. 13992, 86 Fed. Reg. 7049 (Jan. 20, 2021).

[38] *See* Gorsuch & Nitze, *supra* note 4, at 17.

[39] *See id.* (citing Thomas E. Baker, *Tyrannous Lex*, 82 Iowa L. Rev. 689 (1997)).

[40] *Id.*

[41] *Id.*

[42] *Id. Cf.* Adam Feldman, *Empirical SCOTUS: An Opinion Is Worth at Least a Thousand Words*, SCOTUSBlog (April 3, 2018), https://www.scotusblog.com/2018/04/empirical-scotus-an-opinion-is-worth-at-least-a-thousand-words/ (noting that opinions have also become more lengthy, with the mean Supreme Court majority opinion growing from about 4,000 words in 1951 to 6,000 in 2013).

custom and tradition—the *ius civile*.[43] But in the third and fourth centuries, that system gave way to a wave of imperial legislation.[44] Emperors started issuing new forms of binding commands, or "*constitutiones*," including *rescripta* (answers to written petitions), *edicta* (affirmative commands), and *mandata* (instructions to imperial officials). These commands differed in form but not in foundation.[45] They were "law" not because they were persuasive, well-reasoned, or even fair.[46] They were law because of who issued them: the emperor.[47]

Having a single authoritative lawgiver might seem straightforward, or at least easy to administer. But it quickly led to problems. The emperors were prolific legislators: they made "law" on everything from international trade to family relations.[48] And as these laws accumulated, they became too voluminous to track.[49] In the late third century, a man named Gregorianus (about

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[43] *See generally* GEORGE MOUSOURAKIS, FUNDAMENTALS OF ROMAN PRIVATE LAW (2012) (providing an overview of classic private-law principles). *See also* WOLFF, *supra* note 7, at 103-17 (describing classical-period methods); Reinhard Zimmerman, *Roman Law in the Modern World*, *in* THE CAMBRIDGE COMPANION TO ROMAN LAW, *supra* note 4, at 460 (describing flexibility and debate marking classical juristic system), 65 (describing statutes, or *leges*, as a "supplement" to the *iuris civile*). The term *ius civile* has been used to refer to different concepts at different times. It is used here in its widest sense: "the law in all its appearances originating from all recognized sources," including the opinions of jurists, *senatus consulta* (senatorial decrees), and legislation adopted by the popular assemblies. *See ius civile*, OXFORD CLASSICAL DICTIONARY (1949).

[44] *See* Ibbetson, *supra* note 7, at 40-41 (tracking shift from juristic methods to imperial legislation in third and fourth centuries); FREEMAN, *supra* note 3, at 5-6, 314 (marking simultaneous decline in Greek-infused freedom of thought and debate).

[45] *Roman Legislation: Constitutiones Principium*, BRITANNICA, https://www.britannica.com/topic/constitutiones-principum#ref175208.

[46] *See* FREEMAN, *supra* note 3, at 83 (observing that many of the emperor's laws were in fact unjust and ill-advised, such as Diocletian's attempt to control inflation through empire-wide price controls on goods and services).

[47] *See* Sirks, *supra* note 4, at 336-38 (describing new forms of imperial legislation and effect on Roman legal system); Eck, *supra* note 17, at 105-06 (observing that imperial-age legislation, including decrees of the nominally independent Senate, required the emperor's blessing to have binding effect).

[48] *See* Kaiser, *supra* note 4, at 120 (describing adoption of code); Eck, *supra* note 17, at 106 (describing imperial *constitutiones* on subjects including citizen status of children, problems with public transportation, and disputes between local communities); Jean-Jacques Aubert, *Law, Business Ventures, and Trade*, *in* THE OXFORD HANDBOOK OF ROMAN LAW AND SOCIETY, *supra* note 3, at 621 (explaining that by the late third century mercantile trade was covered almost entirely by edictal law).

[49] *See The Law of Justinian*, BRITANNICA (Dec. 9, 2024), https://www.britannica.com/topic/Roman-law/The-law-of-Justinian ("The entire mass of work was so costly to produce that even the public libraries did not contain complete collections.").

whom we know little else) tried to distill all extant imperial laws into a code.[50] But the effort was fleeting, as imperial edict piled on top of imperial edict. So a few years later, the code was updated by the jurist Aurelius Hermogenianus.[51] No one knows how comprehensive these two codes were at the time.[52] But they couldn't have been current for long, since emperors were making new "law" every time they answered a letter.[53]

Volume wasn't the only problem; another problem was coherence. The emperors had no duty to be consistent with themselves, much less with their predecessors. Contradictions were endemic.[54] So in 390 A.D., the Emperor Theodosius adopted yet another code.[55] This *Codex Theodosianus* was a true codification: it collected all official laws and declared everything else obsolete.[56] But of course, it couldn't cure the confusion on its own.[57] It didn't wipe the conflicting laws out of existence. It merely subordinated them to a more authoritative code.[58] In effect, it established a new hierarchy of biding laws.[59]

That process continued with the now-famous *Corpus Civilis*, or Code of Justinian.[60] Like the prior codes, the Code of Justinian aimed to reconcile an increasingly convoluted legal corpus.[61] With the passage of time, the law had grown ever more unwieldy and self-contradictory—a problem made worse by

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[50] *Id.*

[51] *Id.*

[52] *See Law of Justinian*, *supra* note 49 (noting that many authorities "had become scarce or had been lost altogether, and some were of doubtful authenticity").

[53] *See* Sirks, *supra* note 4, at 338 (noting that because of the binding effect of imperial *rescripta*, private parties started to compile their own collections); Eck, *supra* note 17, at 106 (describing practice of establishing general legal rules through *epistula*—letters from the emperor).

[54] *See, e.g.*, WOLFF, *supra* note 7, at 159 (noting problem of inconsistency in the "vast" corpus of classical law); *The Law of Justinian*, BRITANNICA (Dec. 9, 2024) (observing that pre-*Corpus Civilis* law was perceived to contain "many inconsistencies").

[55] *See* WOLFF, *supra* note 7, at 160-62 (describing codification in general and Theodosius' code in particular as an effort to mitigate conflicts in the source material).

[56] *See* Codex Theodosianus 1.1 ("Si qua postahc edicta sive constitutones sine die et consule fuerint deprehensae, auctoritate careant.") *See also* Kaiser, *supra* note 4, at 20-21 (explaining preclusive effect of the code).

[57] *See* WOLFF, *supra* note 7, at 162 (explaining that while the code was a "remarkable achievement," it "did not solve the difficulties with which the lawyers of the time were struggling"—i.e., "that of finding and making effectively useable" the vast store of prior law).

[58] *See* Codex Theodosianus 1.1; Kaiser, *supra* note 4, at 120-21.

[59] *See* Kaiser, *supra* note 4, at 120-21 (explaining that the code in theory supplanted uncodified law).

[60] *See* Zimmerman, *supra* note 43, at 461 (arguing that Justinian's Code marked a sharp break with prior, more flexible classical legal system).

[61] *See* Kaiser, *supra* note 4, at 123-24.

a scarcity of reliable written sources.[62] It was hard even to find all the laws, much less to know which one controlled a given case.[63] Justinian therefore instructed his editors to survey the extant authorities, extract the "best" rules, and purge the contradictions.[64] The result was yet another "authoritative" recitation of the law.[65]

III. Law Without Reason

The codes of Theodosius and Justinian did more than just tidy up the statute. They also fundamentally changed Roman legal methods.[66] They increasingly presented the law not as a product of logic, but as a body of rules.[67] These rules weren't law because they were correct; they were correct because they were law.[68] And the legal system they produced ultimately proved more rigid, more brittle, and less adaptable to new conditions.[69]

This new paradigm can be fully appreciated only by considering what came before. In the classical age, Roman law had been dominated by the writings of "jurists." The jurists were essentially private legal experts; rather than represent parties in court, they offered wisdom on difficult questions of doctrine.[70] They even advised public officials, including judges.[71] And

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[62] *See* W.J. Zwalve, *"Scriptura recepta et usitata": The Impact of the* Lex Citandi *on Justinian's Digest*, BRILL (Aug. 20, 2024), https://brill.com/view/journals/lega/92/1-2/article-p37_3.xml#ref_fn5 (describing difficulties even in ancient times of locating original legal sources).

[63] *See id. See also* Kaiser, *supra* note 4, at 124 ("Justinian said that the collection was necessary because the traditional jurists' law was so extensive that it had become unmanageable.").

[64] *See id.* (explaining that Justinian instructed his editors to purge the law of all "contradictions").

[65] *See id.*

[66] *See* Mantovani, *supra* note 19, at 35 (explaining that codes set out to systematize and centralize previously decentralized body of law).

[67] Zimmerman, *supra* note 43, at 461 (describing Justinian's Code, which authoritatively codified the laws, as "alien" to classic juristic methods).

[68] *See* Code Just. 14.1 (Constantine) (reserving to the emperor authority to decide all questions of law and equity). *See also* Dig. 1.41 (lex regia) (declaring that what pleases the emperor is law); WOLFF, *supra* note 7, at 109-11 (describing process by which classical jurisprudence was supplanted by imperial prerogative in form of edicta and even direct imperial intervention in lawsuits).

[69] *See id.* at 109 (noting that the praetorian edict stopped evolving; became effectively frozen), 111-14 (observing contemporaneous decline in evolution of juristic doctrine and "doctrinaire" approach); Kaiser, *supra* note 4, at 119-20 (describing decline in overall flexibility and originality of legal doctrine).

[70] *See* Ibbetson, *supra* note 7, at 35 (describing influence of jurists in "Golden Age" of Roman law); Mantovani, *supra* note 19, at 27 (describing role of jurists in advising private parties (and judges) on the law).

[71] *See* WOLFF, *supra* note 7, at 109-11 (1951) (describing historical evolution of role of jurists). *See also The Jurists and the Evolution of the Roman Legal System*, GEO. WASH. L. LIBRARY (Aug. 12, 2024)

importantly, they also wrote legal treatises.[72] These treatises weren't "binding" in any formal sense; they didn't dictate the result of any given case.[73] Instead, they were what we might today call "persuasive" authority: they persuaded through the strength of their reasoning.[74] And through the power of their reasoning, they helped shape the broader legal system.[75]

But that approach sat uneasily within a system based on command. So as emperors started governing by edict, the jurists took a back seat.[76] Jurists mostly stopped publishing treatises, none of which appear in the historical record from 235 to 284 A.D.[77] And when the jurists reemerged, they did so mostly as servants of the emperor, relegated to drafting the emperor's legal documents.[78]

The old treatises still remained, but their influence waned due to increasing skepticism from the imperial seat.[79] In 327, Emperor Constantine I voided certain critical writings by the jurists Ulpian and Paul.[80] In 426, Emperor Valentinian III went further, banning citation to all but a handful of juristic

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[hereinafter *Evolution of the Roman System*], https://law.gwu.libguides.com/romanlaw/jurists (describing classical role of jurists) ("The jurists did not participate in administering the law, but rather focused on interpreting and generating formal opinions on the law.").

[72] *See, e.g.*, GAIUS, INSTITUTES (W.M. Gordon et al., trans. 2015). *See also* Kaiser, *supra* note 4, at 119 (referring to the publication and influence of treatises in "Golden Age" Roman law); WOLFF, *supra* note 7, at 104 (same).

[73] *See* Ibbetson, *supra* note 7, at 35 (explaining that value of juristic opinions was in their power to evidence custom, and thus accepted law, not in their authority from a position of power).

[74] *See id. See also* Kaiser, *supra* note 4, at 129-30 (noting that the Code's compilers systematically removed references to differences of opinion or expressions of doubt in the classical juristic writings).

[75] *See* WOLFF, *supra* note 7, at 103-122 (describing classical practice and influence of jurists). *See also Evolution of the Roman System*, *supra* note 71 (observing that jurists drew principles from the "law of nations," which was thought to be a form of universal law applying to all peoples).

[76] *See* WOLFF, *supra* note 7, at 109 (describing displacement of jurist-driven law by a system of "imperial law").

[77] Kaiser, *supra* note 4, at 119.

[78] *See* Ibbetson, *supra* note 7, at 35-37 (describing jurists' new role under the Dominate-era emperors).

[79] *See* WOLFF, *supra* note 7, at 110 ("Thus, the Roman jurist was gradually being transformed from a member of the ruling class in an aristocratic republic into a servant of authoritarian government.").

[80] Kaiser, *supra* note 4, at 120; WOLFF, *supra* note 7, at 159.

writings.[81] And in 534, Emperor Justinian completed the process, codifying the opinions he liked and expurgating the ones he didn't.[82]

At the same time, Justinian also made clear that the law wasn't a product of reason or debate. Instead, the law flowed from one source: Justinian himself. Alongside his Code, he published the *Digest* (essentially, a collection of "official" juristic opinions).[83] The *Digest* included a statement that came to be known as the *lex regia*—a principle that whatever pleased the emperor was the law.[84] This *lex regia* was both a cornerstone of Justinian's legal philosophy and its most enduring feature.[85] For centuries afterward, emperors and their lawyers cited the *lex regia* as a universal principle of monarchy.[86] They argued that law didn't flow from natural right; it wasn't something to be discovered through natural reason.[87] It was instead a product of sheer will—the will of the emperor.[88]

In that way, Justinian's codification project killed off whatever remained of the juristic tradition.[89] It didn't just reject the idea of reasoned debate in law;

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[81] *See* Codex Theodosianus 1.4.3 (the "lex citandi"). *See also* Zwalve, *supra* note 62 (explaining that the original "Law of Citations" does not survive; we know it only from its restatement in the later Codex Theodosianus); WOLFF, *supra* note 7, at 159-60 (describing the Law of Citations as incorporated in Codex Theodosianus).

[82] *See* Code Just. 17.1.4 (S.P. Scott trans. 1932) (declaring uncodified juristic opinions "not worthy of Our attention"). *See also* Kaiser, *supra* note 4, at 120.

[83] *See generally* DIGEST OF JUSTINIAN (Alan Watson trans. 2009). *See also* Kaiser, *supra* note 4, at 119 (discussing drafting and role of Digest among Justinian's projects).

[84] Dig. 1.4.1 ("*Quod principi placuit, legis habet vigorem* . . . .") ("What pleases the prince has the force of law.").

[85] *See* Magnus Ryan, *Political Thought, in* THE CAMBRIDGE COMPANION TO ROMAN LAW, *supra* note 4, at 424-25 (describing reception and subsequent interpretation of the *lex regia*).

[86] *See id. See also* Mayali, *supra* note 7, at 389-90 (noting that the Code and its *lex regia* were later cited to justify absolute rule of medieval kings) ("The subsequent objectification of the will of the sovereign placed law (lex) at the heart of the body politic.").

[87] *See* Mayali, *supra* note 7, at 389-90.

[88] *See* Dig. 1.41 (stating that whatever pleases the prince has the force of law). *See also* ANDREW LINOTT, IMPERIUM ROMANUM: POLITICS AND ADMINISTRATION 115 (2013) (noting that disobedience to imperial command was made treasonous under the concept of *maius imperium proconsulare*). *Cf.* Eck, *supra* note 17, at 106 (discussing imperial *edicta*) ("The emperor himself was the immediate source of these legislative acts."). *But see* Ryan, *supra* note 85, at 430-36 (noting that some glossators later interpreted the *lex regia* as a kind of proto-popular sovereignty, reflecting a voluntary surrender of authority from the people to the ruler).

[89] *See* Ibbetson, *supra* note 7, at 40-41 (describing decline of juristic influence coinciding with rise of imperial legislation and new role for jurists as the writers of *rescripta* and other *constitutiones*).

it pretended that the debate had never existed.[90] *Ratio* had fully given way to *auctoritas*.[91]

IV. LAW AS PROCESS

A similar change is afoot in American law. Like Roman lawyers before them, American lawyers have increasingly sought refuge from a flood of enactments in rigid analysis.[92] They decreasingly ask whether an enactment is well-reasoned, or even right.[93] They instead ask only what the lawmaker (however defined)[94] wants.[95] That is, like their Roman forebears, they have stopped looking for the law's "best" meaning.[96] Dialectic and inquiry have all but vanished from their methods.[97]

A dialectical method was once the core of American jurisprudence. Following the British common-law tradition, American lawyers once saw the law as a coherent body—a living, breathing organism that could be developed and

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[90] *See* WOLFF, *supra* note 7, at 111-14 (observing tendency of post-classical jurists—men largely in the emperor's employ—to gloss or ignore debate among the classical sources).

[91] *See* Linott, *supra* note 88, at 22 (arguing that the Roman Empire was built on the principle of imperium—the power of the emperor to issue binding legal commands).

[92] *See, e.g.*, WILLIAM ESKRIDGE, INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 43-144 (2016) (describing modern "canons" for interpreting legal texts); ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012) (same).

[93] *See* ARKES, *supra* note 15, at 33 (criticizing positivist approaches for essentially equating might and right).

[94] *See* Lawrence B. Solum, *What Is Originalism? The Evolution of Originalist Theory*, GEO. UNIV. L. CTR. 1-2 (2011), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2362&context=facpub (describing evolution in originalist thinking about how best to determine original meaning—for example, from the subjective perspective of legislators or from the objective perspective of a person at the time trying to determine what intent the legislator's words conveyed).

[95] *See, e.g.*, Niz-Chavez v. Garland, 593 U.S. 155, 171 (2021) (rejecting any role for "raw consequentialist calculation" in interpretation of statutes); Axis Surplus Ins. Co. v. Universal Visions Holdings Corp., 725 F. Supp. 3d 299, 304 (E.D.N.Y. 2024) (refusing to engage in "consequentialist, policy-based reasoning" when interpretating statute). *See also* ESKRIDGE, *supra* note 92, at 4-11 (describing contemporary debate among two modes of interpretation, textualism and purposivism, both of which focus ultimately on deriving intended meaning of a law rather than best meaning of the law).

[96] *See* BERMAN, *supra* note 2, at 37 (arguing that changes in the law are now seen "not as responses to the internal logic of legal growth, and not as resolutions of the tensions between legal science and legal practice, but rather as responses to the pressure of outside forces").

[97] *See* Murphy, *supra* note 24 (explaining that modern legal positivism, despite sharing a name with older theories, in fact sheds the western tradition's reliance on empiricism and logic and instead elevates the will of political authorities as the only legitimate law).

discovered through human reason and experience.[98] Jurists like John Marshall, James Wilson, and even Thomas Jefferson were educated in the natural-law tradition.[99] They subscribed to a capacious view of natural rights, including unwritten rights discoverable by the thorough the application of first principles.[100] Jefferson, for one, believed in a "universal law" stretching back to pre-Conquest England.[101] While that universal law had been suppressed by the monarchy for centuries, it had survived in the law of nature and traveled with the colonists to the New World.[102] There, it served as the foundation for the new nation and its laws.[103]

Jefferson was hardly alone in that view. Lawyers of his generation were steeped in the classical western tradition.[104] They drew on the classical Roman jurists and, before them, Greek philosophers like Aristotle.[105] Through the

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[98] *See* BANNER, *supra* note 8, at 53 ("Like their English predecessors, early American lawyers understood the common law as judges' efforts to use customary practices as a guide to resolving disputes."); Clarence Manion, *The Founding Fathers and the Natural Law: A Study of the Source of our Legal Institutions*, 35 NOTRE DAME L. REV. 461, 461 (1949) (explaining that the founding generation took lessons from Blackstone and Lord Coke, who saw the common law as consisting of "particulars processed reasonably from basic generalities taken from medieval cases and customs").

[99] *See, e.g.*, Manion, *supra* note 98, at 463 (explaining that Jefferson and other founding fathers came up in a legal culture infused with natural-law concepts); Morgan D. Dowd, *Justice Joseph Story: A Study of the Legal Philosophy of a Jeffersonian Judge*, 18 VAND. L. REV. 643, 643-44 (1965) (arguing that Story's early writings ground unwritten legal principles in natural law) (citing Terret v. Taylor, 13 U.S. (9 Cranch) 43 (1815)); Roberta Bayer, *Natural Law and Democracy: The Philosophy of James Wilson*, LAW & LIBERTY (Nov. 20, 2018) (citing James Wilson, *Lectures on Law*, *in* 1 COLLECTED WORKS OF JAMES WILSON (Kermit Hall et al., eds. 2007)).

[100] *See* Bayer, *supra* note 99 (describing prevailing philosophy as articulated by Wilson) ("We make laws for ourselves guided by reason and conscience, and in conscience lie the first principles of that natural law."); BANNER, *supra* note 8, at 58 ("Like their English predecessors, American lawyers also conceived of the common law as founded in reason.").

[101] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (Robert Bell ed. 1771-72) (describing judges as "the depositary of the laws, the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land"). *See also* Allan Beever, *The Declaratory Theory of Law*, 33 OXFORD J.L. STUDS. 421, 421-44 (describing English theory of law, articulated by Blackstone, whereby judges "found" the law through application of experience and reason).

[102] *See* L.K. Caldwell, *The Jurisprudence of Thomas Jefferson*, 18 IND. L.J. 193, 196 (1943).

[103] *See id.* ("That their Saxon ancestors had, under this universal law, in like manner left their native wilds and woods in the north of Europe, had possessed themselves of the island of Britain, then less charged with inhabitants, and had established there that system of laws which has so long been the glory and protection of that country.") (quoting 2 THE WORKS OF THOMAS JEFFERSON 64-65 (P.L. Ford ed. 1904)).

[104] *See* BANNER, *supra* note 8, at 58,

[105] *See* ARTHUR L. HARDING ET AL., ORIGINS OF THE NATURAL LAW TRADITION 1 (1954) (tracing natural-law theory to Greek philosophy and Roman legal thought, in particular the writings of Cicero); DAVID MAYER, LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL

late 19th century, they regularly invoked principles of natural right and reason in their arguments.[106] In effect, they treated the law as a coherent body of principles, independent of any single statute or regulation.[107]

But that approach fell out of favor in the late 19th century. After the Civil War, American society underwent dramatic changes: industrialization and urbanization transformed a nation of farmers into one of capitalists.[108] As factories sprouted up and railroads crisscrossed the countryside, people were drawn into ever more complex economic and social relationships.[109] The law changed as well, adapting to the complexity with new legislative and regulatory schemes.[110] These schemes supplemented or displaced the common law in major spheres of activity, including competition, employment, and tort. Statutes like the Sherman Antitrust Act,[111] the Interstate Commerce Act,[112]

RIGHT loc. 141-80 (2011) (ebook) (tracing doctrine of natural contract rights to 17th-century Whig philosophers and even Roman writers such as Cato the Younger); BANNER, *supra* note 8, at 168 (tracing natural-law philosophy to Greek and Roman law).

[106] *See, e.g.*, Calder v. Bull, 3 U.S. 386, 388 (1798) (invoking natural rights tradition); R.H. HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE 142-72 (2015) (describing early American practice).

[107] *See, e.g.*, *Calder*, 3 U.S. at 388 (concluding that a law against the "first principles of social compact" could not be properly considered "rightful exercise of legislative authority"). *See also* BANNER, *supra* note 8, at 63 ("To the extent the common law was understood as based on custom, it followed that then common law was found, not made, by judges."). *But see Calder*, 3 U.S. at 399 (Iredell, J., concurring) (reasoning that a "legislative act against natural justice" might be void, but doubting whether a court had the authority to declare it void).

[108] *See* JAMES W. ELY, THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY 147 (2016) [hereinafter THE CONTRACT CLAUSE] (describing "sweeping" changes of the late 19th century, including industrialization and urbanization); JAMES W. ELY JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 8 (3d ed. 2007) (explaining that by late 19th century, urbanization and industrialization had "transformed" American society, creating "novel pressures" aimed at private property).

[109] *See* EDWARD KEYNES, LIBERTY, PROPERTY, AND PRIVACY: TOWARD A JURISPRUDENCE OF SUBSTANTIVE DUE PROCESS loc. 1729 (1996) (ebook), (tracing new limits on economic liberties to economic boom and social upheaval following Civil War); BANNER, *supra* note 8, at 143 (noting that American lawyers started to doubt natural law only in the late 19th century).

[110] *See* THE CONTRACT CLAUSE, *supra* note 108, at 147 (observing that states reacted to economic change by intervening more aggressively in markets with new regulation and legislation); KEYNES, *supra* note 109, at loc. 1729 (noting proliferation in late 19th century of economic regulation, including wage laws and antitrust laws); TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW loc. 317 (2010) (ebook) (arguing that late-19th century regulation went further than anything that had come before: "Government's primary role was now viewed as *the shaping of society* rather than the protection of individual rights . . . .").

[111] Pub. L. 51-647, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1-7).

[112] Pub. L. 49-104, 24 Stat. 379 (1887).

and state-level workers'-compensation laws[113] replaced case-by-case development with centralized regulation.[114]

Along with the new statutes came a new attitude about the law. Increasingly, lawyers rejected the idea that law could be "discovered."[115] It could not be found in longstanding traditions or universal truths.[116] There was no "general" or "natural" law.[117] Rather, the law was a product of process and authority. Certain people—legislators, regulators, administrators—had been given the power to make law.[118] Their decisions were law not because the decisions were correct in some empirical sense; they were law because the designated officials followed the prescribed steps.[119] In other words, law was the product not of reason but of process.[120]

This view came to be called "positivism." At its core, positivism means that the only law is the law posited by a legitimate authority.[121] In the late 19th century, positivism was embraced by luminaries such as Oliver Wendell

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[113] *See* Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States*, 1900-1930, 41 J.L. & ECON. 305, 306-07, 314-19 (1988) (describing adoption of workers' compensation laws, many in the 1910s, and explaining that these statutes displaced common-law negligence suits for workplace injuries).

[114] *See* Edward L. Glaeser & Andrei Shleifer, *The Rise of the Regulatory State*, J. ECON. LIT. 401, 401 (2003) ("During the Progressive Era, regulatory agencies at both the state and the federal level took over social control of competition, antitrust policy, railroad pricing, food and drug safety, and many other areas."). *See also* Fishback & Kantor, *supra* note 113, at 313 (observing that legislatures could have simply allowed employers and workers to negotiate own benefit levels under workers'-compensation schemes, but opted instead for centralized administration).

[115] *See* Erie Railroad Co. v. Tompkins, 304 U.S. 64, 79 (1938) ("The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word." (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 535 (1928) (Holmes, J., dissenting))). *See also* Sachs, *supra* note 17, at 129-30 (tracing end of "general law" approach to *Erie*).

[116] *See* Sachs, *supra* note 17, at 130 ("Finding this kind of law is impossible, the modern view argues, because there's nothing out there to find . . . .").

[117] *See id.*

[118] *See Erie*, 304 U.S. at 79; *Black & White Taxicab*, 276 U.S. at 535 (Holmes, J., dissenting).

[119] *See* STATUTORY INTERPRETATION, *supra* note 2, at 21 ("What could be more legitimate than laws adopted by a popular vote?").

[120] *See* BERMAN, *supra* note 2, at 37 ("The view that law transcends politics . . . seems to have yielded to the view that law is at all times basically an instrument of the state, that is, a means of effectuating the will of those who exercise political authority."); ARKES, *supra* note 15, at 18-19, 36 (arguing that law stripped of moral significance loses meaning); *id.* at 265 (arguing that it is a mistake to treat the Constitution as a mere "artifact of positive law").

[121] *See, e.g.*, Reginald Parker, *Legal Positivism*, 32 NOTRE DAME L. REV. 31, 31 (1956) ("The legal positivist holds that only positive law is law; and by 'positive law' he means legal norms by authority of the state. Nothing else is 'law to him . . . ."); SANDEFUR, *supra* note 110, loc. 342 (describing Progressive-era rejection of traditional western-law methods for positivist legal philosophy).

Holmes, who heralded the new regime with his famous dictum: "The life of the law has not been logic; it has been experience."[122] In effect, Holmes was saying that law was not an exercise in empirical discovery.[123] The law could not be deduced through observation, as if it were a natural science.[124] The law was instead a raw political fact: the product of government processes and majority will.[125]

Today, that idea pervades American legal culture.[126] When modern lawyers talk about the "law," what they mean is the words adopted by some designated legal authority.[127] Indeed, they often reject any source but that authority's words.[128] Their main interpretive mode is textualism, a technique that presumes the only source of law is the enactment's plain text.[129] That presumption grows implicitly from Holmesian positivism:[130] if the only law is the enacted law, then naturally, the only source of legal meaning is the enacted law's

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[122] *See* Oliver Wendell Holmes, *The Path of the Law*, *in* THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 169-72 (Richard Posner, ed. 1997) [hereinafter *Path of the Law*]. *See also* Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 487 (1909).

[123] *See Path of the Law*, *supra* note 122, at 169-72.

[124] *See id.*

[125] *See id. See also Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting) ("Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it.").

[126] *See* Sachs, *supra* note 17, at 129 (explaining that positivism is now seen as the "only conceivable" approach to law). *See also* BERMAN, *supra* note 2, at 37 ("The belief in the growth of the law, its ongoing character over generations and centuries, has . . . been substantially weakened.").

[127] *See* Statutory Interpretation: General Principles and Recent Trends, Cong. Res. Serv. No, 97-589 (Sept. 24, 2014), https://www.everycrsreport.com/reports/97-589.html#ifn13 ("More often than before, statutory text is thought to be the ending point as well as the starting point for interpretation.").

[128] *See* William Baude & Stephen Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1082 (2017) (describing the "standard view" of the judge's job as being to "read the [text] and do what it says") (alterations in original). *See also* Parker, *supra* note 121, at 31 (describing legal positivism as akin to a historian's search of the record for verifiable facts).

[129] *See, e.g.*, Thompson v. Thompson, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring) (rejecting reliance on legislative history as opposed to text, only the latter of which was adopted according to prescribed constitutional processes); Note, *Textualism's Mistake*, 135 HARV. L. REV. 890, 901 (2022) (describing Justice Scalia's philosophy of textualist interpretation) ("Intentions do not go through the constitutional requirements of bicameralism and presentment; the text alone is the law.").

[130] *See* Sachs, *supra* note 17, at 529-30 (attributing decline of general-law methods and ascent of positivism to Supreme Court's acceptance of Holmesian positivist views in *Erie*).

words.[131] Textualism is therefore a distillation of Holmes' philosophy and a terminal end of law as a rational inquiry.[132] It leaves the idea of unwritten law—the law of logic—as an oxymoron.[133]

V. SAFETY IN RULES

Justice Antonin Scalia once described the rule of law as a law of rules.[134] And while the founding generation might have quibbled, modern lawyers have largely agreed.[135] They have gradually discarded dialectical, contextual analysis in favor of mechanistic rules.[136] That shift may owe as much to the sheer volume of authorities as it does to Scalia's influence. But regardless of its source, it has made American law more rigid.[137]

The change is perhaps nowhere better illustrated than in the long-running debate over administrative deference. The basic question is this: when Congress tells an agency to administer a statute, and the agency interprets that statute in some official forum, how much weight should the agency's

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[131] *See Law of Rules*, *supra* note 12, at 1183 ("Even where a particular area is quite susceptible of clear and definite rules, we judges cannot create them out of whole cloth, but must find some basis for them in the text that Congress or the Constitution has provided.").

[132] *Cf.* BERMAN, *supra* note 2, at 37 (describing modern positivist approach as "a hodgepodge, a fragmented mass of ad hoc decisions and conflicting rules, united only by common 'techniques'").

[133] Sachs, *supra* note 17, at 533 (explaining that the idea of "unwritten" law independent of a lawgiver (be it a legislature or court) is now broadly rejected, even ridiculed). *See also* Donald H.J. Hermann, *Max Weber and the Concept of Legitimacy in Contemporary Jurisprudence*, 33 DEPAUL L. REV. 1, 2-4 (noting the tension between legal positivism (law as an authoritative command) and legal legitimacy (law as an institution deserving of respect)).

[134] *See Law of Rules*, *supra* note 12, at 1175.

[135] *See* Andrei Marmor, *The Immorality of Textualism*, 38 LOY. L.A. L. REV. 2063, 2064 (2005) (stating that textualism "is increasingly popular in courts, and perhaps more so, in certain neo-conservative political-ideological circles in the United States").

[136] *See Law of Rules*, *supra* note 12, at 1176-77 (arguing that rule-like judicial analysis is not only preferable, it is often required by the Constitution). *See also* Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal,* 85 GEO. WASH. L. REV. 857, 870-74 (2017) (describing influence of Scalia's textualist philosophy on modern interpretive practices). *But see id.* at 874-78 (noting that Scalia was unable to persuade Supreme Court to accept all of his ideas, including his rejection of legislative history).

[137] *See, e.g.*, Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 144-61, 169-71 (2009) (arguing that unlike prior interpretive methods, modern textualism grows increasingly narrow and insular through application because it rejects external interpretive resources); Elena Schiefele, *When Statutory Interpretation Becomes Precedent: Why Individual Rights Advocates Shouldn't Be So Quick to Praise* Bostock, 78 WASH. & LEE L. REV. 1105, 1105-06 (2021) (criticizing interpretation based on "muscular textualism" which "causes the interpreter to adopt the most basic, narrow, and superficial interpretation of the text").

interpretation have in court?[138] For a generation, the answer was "it depends." Courts respected agency interpretations when the interpretations reflected true expertise and experience.[139] When they didn't, courts used their own judgment.[140] But in *Chevron USA, Inc. v. NRDC*, the Supreme Court adopted a more rule-like approach.[141] It instructed courts to defer to an agency whenever (1) the statute was ambiguous, and (2) the agency's interpretation was reasonable.[142] In effect, *Chevron* replaced dynamic interpretation with a simple, rule-like structure.

Scholars still debate whether the *Chevron* Court meant to create a new deference regime.[143] Some have suggested that the Court was only trying to distill the preexisting law.[144] But there's no debate over how lower courts saw the decision: they adopted *Chevron*'s new test with alacrity, applying the "two-step" in more than eighteen thousand cases.[145] Judges, it seems, were as eager as anyone for rule-like analysis.[146]

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[138] *See* ESKRIDGE, *supra* note 92, at 269 (describing the basic issue).

[139] *See* Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944).

[140] *See id.* (observing that agency interpretations may have "the power to persuade, if lacking power to control"). *See also* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 953-65 (2011) (describing models courts developed to review agency orders, which often included limited or deferential review of factual findings, but independent review of questions of law).

[141] 467 U.S. 837, 842-43 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

[142] *See id.*

[143] *See generally* THOMAS MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE (2022) [hereinafter *CHEVRON* DOCTRINE] (arguing that *Chevron*, properly understood, merely articulated preexisting (and more nuanced) standards of review); STATUTORY INTERPRETATION, *supra* note 2, at 358 (arguing that *Chevron*'s change was, at most, a "gradual" one, but noting that some scholars treat it as a "revolution").

[144] *See* Isaiah McKinney, *From Justice Stevens' Papers—Justice Stevens Crafted the* Chevron *Two-Step Test in an Afternoon*, YALE J. ON REG.: NOTICE & COMMENT (Feb. 28, 2024), https://www.yalejreg.com/nc/from-justice-stevens-papers-justice-stevens-crafted-the-chevron-two-step-test-in-an-afternoon-by-isaiah-mckinney/ (arguing that Justice Stevens's papers show that he meant to preserve prior standards of review and that any revolution in deference doctrine was unintentional).

[145] *See* Amy Howe, *Supreme Court Strikes Down Chevron*, SCOTUSBLOG (June 28, 2024), https://www.scotusblog.com/2024/06/supreme-court-strikes-down-chevron-curtailing-power-of-federal-agencies/.

[146] *Cf.* CONG. RES. SERV., LSB11210 CONGRESSIONAL COURT WATCHER: FEDERAL APPELLATE DECISIONS IN RECENT YEARS APPLYING *CHEVRON* DEFERENCE (July 26, 2024), https://crsreports.congress.gov/product/pdf/LSB/LSB11210/2 (reporting that even after the Supreme Court stopped relying on *Chevron* for several years, lower courts continued to invoke it "with some

Of course, *Chevron* ultimately collapsed under its own weight. As the Supreme Court applied the new test, it developed new subrules and caveats.[147] Sometimes, it said that *Chevron* applied only to certain kinds of agency interpretations.[148] Other times, it said that *Chevron* applied only when a court hadn't interpreted the statute beforehand.[149] And in still other cases, it said *Chevron* didn't apply to an agency's interpretation of its own regulations.[150] Ultimately, in 2024, the Court abandoned the whole business and tossed *Chevron* in the jurisprudential trash heap.[151] But even so, the episode betrayed a system-wide distaste for rational inquiry and an abiding preference for black-letter rules.[152]

VI. *THE ROAD TO* AUCTORITAS

In some sense, that preference is understandable. It flows from the profusion of legal enactments. As the enactments multiply, they flood the law with competing commands. They force lawyers to grasp for help to navigate the storm. That help often appears in the guise of rule-like heuristics. For example, consider the famous (or infamous) canons of construction. The canons tell lawyers how to apply certain grammatical and linguistic features. They offer stability because they apply uniformly across different statutes.[153] They therefore free lawyers from having to decide in each case how an enactment fits within the broader legal system. Indeed, textualism itself can be thought of as just such a tool: its whole goal is to reduce judicial discretion and produce predictable results.[154]

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regularity"); STATUTORY INTERPRETATION, *supra* note 2, at 361 (observing that "*Chevron*'s impressive citation count might just be evidence of a judicial culture desperate to manage its workload").

[147] *See* McKinney, *supra* note 144, at 268-318 (observing growing number of exceptions and complexity to the doctrine).

[148] *See* Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (refusing to apply *Chevron* to Department of Labor opinion letter lacking the force of law).

[149] *See* United States v. Home Concrete & Supply, LLC, 566 U.S. 478, 490 (2012) (refusing to defer to agency interpretation addressed by prior Supreme Court decision).

[150] *See* Kisor v. Wilkie, 588 U.S. 558, 563 (2019) (applying a distinct, multi-step test to agency interpretation of own regulations).

[151] *Loper Bright*, 603 U.S. at 378-79.

[152] *See* STATUTORY INTERPRETATION, *supra* note 2, at 358, 361 (explaining that *Chevron* can be understood "to articulate a default rule of statutory construction" that helps the judiciary "manage its workload").

[153] *See* SCALIA & GARNER, *supra* note 92, at xxix (defending the canons as a pro-predictability tool).

[154] *See* Mary Ann Glendon, *Comment*, in ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 110 (1997) (arguing that a primary virtue of textualism is its ability to "assur[e] predictability and stability").

Many would describe that kind of rule-bound approach as a virtue. For example, in his book *Judging Under Uncertainty*, Adrian Vermeule argued that rule-bound analysis helps judges reduce decisional costs.[155] Judges are generalists; they confront swollen dockets filled with complex litigation. They don't have time to sort through the complexity and tease out the nuances of statutory meaning in every case. Nor would we want them to: as post hoc decisionmakers, judges lack the institutional expertise and resources available to professional rule makers like legislators and regulators.[156] Judges are therefore better off if they apply rigid (even wooden) rules that produce predictable results. They can both make decisions more efficiently and signal to legislators how certain linguistic features will be treated in court.[157]

But of course, rigid rules also come with a cost: they move the law even further away from rational inquiry.[158] Positivism, textualism, and the preference for rules all push the law toward a centralized, even dictatorial, model of governance.[159] Law no longer needs to justify itself on its own terms; it need not situate itself within longstanding customs or established legal norms. Instead, it need only flow from an authoritative source.[160] We might defend that model as democratic; after all, those who write our laws are theoretically the people's chosen representatives.[161] But nothing about the model is necessarily democratic. After all, it was the same model taken up by the Romans in the

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[155] *See* VERMEULE, *supra* note 11, at 166-67.

[156] *See id.* at 37 (explaining the problem from the vantage point of judges' institutional limitations and capacities).

[157] *See id.* (arguing that rule-bound approach decreases the risks of certain kinds of errors, including "the error that an ambitious antiformalist court would make by misreading statutory purposes, misidentifying sensible text as absurd, or mispredicting the consequences of its rulings"). *See also* SCALIA & GARNER, *supra* note 92, at xxix ("Textualism will not relieve judges of all doubts and misgivings about their interpretations . . . But textualism will provide greater certainty in the law, and hence greater predictability and greater respect for the rule of law."). *Cf. Law of Rules*, *supra* note 12, at 1178-79 (arguing that nontextualist models overvalue "perfection" in judicial decisions at expense of predictability and accountability).

[158] *See Law of Rules*, *supra* note 12, at 1178 (arguing that classical common-law approach is ill-suited for modern judicial systems, which are better served by rule-bound analysis).

[159] *See* BERMAN, *supra* note 2, at 38 (observing that recent trends centralize power in hands of a few administrators and legislators). *Cf. Black & White Taxicab*, 276 U.S. at 535 (Holmes, J., dissenting) (arguing that "the only authority is the State")

[160] *See Law of Rules*, *supra* note 12, at 1176 (describing the "rule of law" as a "product" of legislatures).

[161] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25 (1997) ("Of all the criticisms leveled against textualism, the most mindless is that it is 'formalistic.' The answer to that is, of course it's formalistic! The rule of law is about form."); SCALIA & GARNER, *supra* note 92, at xxix (arguing that textualist methods produce results that more "accurately represent the judgment of the people").

third and fourth centuries. And for them, the model was decidedly imperial.[162]

VII. WHEN IN ROME

Ultimately, the Roman turn to authority-based methods proved disastrous. Historians typically track the shift in Roman legal thought from the accession of Diocletian.[163] Diocletian's reign saw the law grow more centralized and monarchical.[164] While he and his predecessors remained subject to the law in theory,[165] they were in fact despots.[166] They faced few real checks on their power. And while they sometimes wielded that power wisely, they often acted with disastrous consequences. For example, in the late third century, the empire was racked with runaway inflation.[167] Diocletian tried to curb it by fixing prices.[168] But the results were predictable—shortages, black markets, and widespread suffering.[169] A more flexible legal system might have been able to mitigate the damage; for example, it might have been able to carve out exceptions for essential goods and services. But the emperor's status made that kind of ad hoc adjustment nigh impossible.[170] The law was the emperor's command, so the only way to question the law was to question the emperor himself.[171]

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[162] *See* Eck, *supra* note 17, at 106 (observing that *constitutiones* in the imperial period, notwithstanding their sometimes-republican form, required consent in every case from the emperor).

[163] *See, e.g.*, Kaiser, *supra* note 4, at 119; FREEMAN, *supra* note 3, at xvii-xviii, 82-83.

[164] *See* FREEMAN, *supra* note 3, at 253; Eck, *supra* note 17, at 105-06.

[165] *See* Sirks, *supra* note 4, at 335 (observing that emperors remained theoretically subject to the law even after disappearance of popular assemblies in second century). *See also* U.S. Dep't of Transp. v. Ass'n of Am. Railroads, 575 U.S. 43, 70 (2015) (Thomas, J., concurring) (noting the "ancient" idea, tracing to Greek and Roman times, that the ruler was himself subject to law).

[166] See GIBBON, *supra* note 28, at 43 ("Every power was derived from their authority, every law was ratified by their sanction."). *See also Reorganization of the Empire of Diocletian*, BRITANNICA, https://www.britannica.com/biography/Diocletian/Reorganization-of-the-empire (noting that reforms under Diocletian "led toward a kind of centralized absolute monarchy").

[167] *See also* HEATHER & RAPLEY, *supra* note 1, at 18 (describing the challenge of "hyper-inflation" in the late fourth century).

[168] *See* FREEMAN, *supra* note 3, at 83 (describing the inflation crisis and Diocletian's response).

[169] *Id.*

[170] *See* GIBBON, *supra* note 28, at 43 (describing absolute authority of the emperors).

[171] *See* Eck, *supra* note 17, at 106 (noting that the source of legislative acts was "the emperor himself"). *See also* FREEMAN, *supra* note 3, at xvii-xviii (discussing decline of culture of debate and inquiry in Dominate-era Rome).

In an imperial system, questioning the emperor isn't an option—unless you're willing to press the point at the tip of a sword.[172] So instead, many Romans took the path of least resistance: they just ignored the law. Historians think that many imperial *constitutiones* were followed unevenly.[173] The *constitutiones* enjoyed better adherence close to the capital, where the emperor could more closely monitor compliance. But in the provinces, many were simply disregarded. The Roman empire was vast—vaster even than its geography suggests today, given the slower rate of travel.[174] And because the law had become simply a product of the emperor's command, where the emperor's command ran thin, so did the law.[175] The law offered no reason on its own to comply because it had no intrinsic logical or moral force.[176]

VIII. ALL ROADS LEAD TO AUCTORITAS

In our own time, the law hasn't fallen quite so far. Many Americans still believe that the law is more than a brute political fact.[177] But even so, the cracks have started to show. It is now common to hear educated Americans question the law's legitimacy. American writers, politicians, and even lawyers now routinely attack the judiciary.[178] They question not only the motives of

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[172] *See* GIBBON, *supra* note 28, at 24 ("The public authority was everywhere exercised by the ministers of the senate and of the emperors, and that authority was absolute and without control."); FREEMAN, *supra* note 3, at 353 ("As leader of the armies, [the emperor] controlled of all foreign relations and with absolute power over life and death, the emperor had enormous destructive force at his disposal.").

[173] *See* Stolte, *supra* note 19, at 363 (observing a lack of evidence that many statutes ever took effect in the provinces).

[174] *See* HEATHER & RAPLEY, *supra* note 1, at 17 (observing that because of contemporary travel and communication methods, "the whole Empire was actually twenty times as vast" as it appears to us today).

[175] *See* FREEMAN, *supra* note 3, at 253 (noting gap between imperial legislation and application in the provinces). *See also* Mantovani, *supra* note 19, at 30-31 (describing codification as an effort to close gap and ensure more compliance in provinces).

[176] *See* FREEMAN, *supra* note 3, at 316-17, 337 (arguing that the imposition of authority ultimately "crushed all forms of reasoned thinking"). *Cf.* Berman, *supra* note 2, at 39 (describing long-running debate over whether law has independent force or is merely the "will of the political ruler").

[177] *See* BERMAN, *supra* note 2, at 29-39 (defending a classical view of western law); ARKES, *supra* note 15, at 2-3, 11-18 (arguing for a view of law that incorporates principles of natural justice); Sachs, *supra* note 17, at 533 (arguing that law can function like etiquette, grammar, and other social customs, developing and gaining acceptance independent of a central lawgiver).

[178] *See, e.g.*, Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2240-42 (2019); Jay Willis, *The Supreme Court's Most Important Power Is Its Ability to Bullshit*, BALLS & STRIKES (Oct. 24, 2024) (accusing U.S. Supreme Court of meddling in elections to promote goals of Republican party).

individual judges, but also the whole judicial system.[179] They suggest that the system has a conservative, perhaps even antidemocratic, bias.[180] In fact, President Joe Biden considered the problem so pressing that, in 2021, he convened a panel of experts to consider "court reform."[181] And he reiterated those calls three years later, calling for (among other things) an end to lifetime tenure for Supreme Court Justices.[182] The idea, it seemed, was that judges should be less insulated from electoral pressures so they would produce decisions the electorate liked.[183]

These "reform" proposals reflect an intellectual shift. For their proponents, it doesn't matter whether courts' decisions are correct in a legal sense. Nor does it matter that the founding generation gave judges life tenure to insulate them against precisely this kind of pressure.[184] Instead, all that matters is whether courts produce decisions that the proponents like.[185] And that attitude makes sense if we accept Holmesian positivism and all its implications.

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[179] *See* Charles Franklin, *New Marquette Law School Poll National Survey Finds Approval of U.S. Supreme Court Rises to Highest Levels Since March 2022*, MARQUETTE UNIV. L. SCH. (Dec. 19, 2024), https://law.marquette.edu/poll/2024/12/19/new-marquette-law-school-poll-national-survey-finds-approval-of-u-s-supreme-court-rises-to-highest-level-since-march-2022/ (reporting that Supreme Court disapproval ratings have risen from 30% to 52% since 2020).

[180] *See* Marmor, *supra* note 135, at 2065-66 (arguing that textualism is a tool for producing politically conservative, deregulatory outcomes).

[181] *See* Exec. Order No. 14023 (April 9, 2021) (establishing commission). *See also Presidential Commission on the Supreme Court of the United States*, WHITE HOUSE (Dec. 7, 2021), https://www.whitehouse.gov/pcscotus/.

[182] *See* Fact Sheet: President Biden Announces Bold Plan to Reform the Supreme Court and Ensure No President Is Above the Law, WHITE HOUSE (July 29, 2024), https://www.whitehouse.gov/briefing-room/statements-releases/2024/07/29/fact-sheet-president-biden-announces-bold-plan-to-reform-the-supreme-court-and-ensure-no-president-is-above-the-law/.

[183] *See* Keith Whittington, *Did the President Forget About Judicial Independence?*, THE DISPATCH (July 31, 2024), https://thedispatch.com/article/what-ever-happened-to-judicial-independence/ (comparing Biden's proposal to prior effort to influence Supreme Court's decisions by Franklin Delano Roosevelt in 1930s) ("The current White House is not shying away from saying that it wants to shuffle justices off the court because it is unhappy with the substance of its decisions.").

[184] *See* U.S. CONST. art. III; FEDERALIST NO. 78 (Hamilton).

[185] *See, e.g.*, Madiba Dennie, *Is Court Reform Possible?*, BRENNAN CTR. (June 7, 2022), https://www.brennancenter.org/our-work/analysis-opinion/court-reform-possible (arguing that court reform is justified by "extremist" decisions from U.S. Supreme Court); Sahol Kapur, *Schumer Vows Supreme Court Reform Will Be "a Very Big Priority" If Democrats Win Election*, NBC NEWS (2024), https://www.nbcnews.com/politics/2024-election/schumer-vows-supreme-court-reforms-democrats-win-2024-elections-rcna164719 (quoting Sen. Chuck Schumer (D-NY)) (arguing that reform was needed because of the "'hard right' agenda" of federal courts).

After all, if law is merely a political fact, why not treat judges like politicians in robes?[186]

Nor are judges the only casualties. The commentariat has also taken aim at the Constitution itself. Reporters, lawyers, and even prominent constitutional scholars have called the Constitution "broken" and "dangerous."[187] They have described it as a document written by a past generation with no claim on the current one.[188] These arguments are not new.[189] They used to take the form of complaints about "the dead hand" of the past.[190] But their lack of novelty is made up for by their directness. Elite, well-educated Americans are increasingly willing to attack the legitimacy of their own founding documents.[191]

To be sure, those voices are still in the minority. Most Americans still believe in the Constitution.[192] And even some in the legal field have moved back toward reasoned analysis. The Supreme Court's decision to overturn *Chevron* was one such corrective: it rejected rigid deference to agencies in favor of a

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[186] *See also* Ralf Michaels, *"Law Is Politics by Other Means?": In Support of Differentiation*, LPE PROJ. (Oct. 5, 2018), https://lpeproject.org/blog/law-is-politics-by-other-means-in-support-of-differentiation/ (arguing that the "trial"-like confirmation hearings of Brett Kavanaugh in 2018 showed a further conflation of law and politics); Sam Moyn, *Political Courts and Democratic Politics*, LPE PROJ. (Oct. 2, 2018), https://lpeproject.org/blog/political-courts-and-democratic-politics/ ("If the Supreme Court is a forum of universalization where, in high stakes cases, legal reasoning is little more than a mask for ideological choice and minority rule, it is not clear how much a difference its principled rhetoric of decision should make to progressive observers.").

[187] *See, e.g.*, Jenifer Szalai, *The Constitution is Sacred. Is It Also Dangerous?*, N.Y. TIMES (Aug. 31, 2024), https://www.nytimes.com/2024/08/31/books/review/constitution-secession-democracy-crisis.html ("Books and op-eds critiquing the Constitution have proliferated."); CHEMERINSKY, *supra* note 26, at 154; Ryan Doerfler & Samuel Moyn, *The Constitution is Broken and Should Not Be Reclaimed*, N.Y. TIMES (Aug. 19, 2022).

[188] *See* CHEMERINSKY, *supra* note 26, at 154 (rejecting the Constitution as a legal precommitment strategy because the founders made amendment too hard for the current generation).

[189] *See* Michaels, *supra* note 186 ("The idea of a legal system that is somehow autonomous from the political system has always been suspicious for a progressive left that saw law and courts as conservative bulwarks against radical change.").

[190] *See* Britton-Purdy, *supra* note 25 (describing longstanding criticisms of originalism and judicial review).

[191] *See, e.g.* Emmanuel Terray, *Law Versus Politics*, NEW LEFT REV. (July/Aug. 2003), https://newleftreview.org/issues/ii22/articles/emmanuel-terray-law-versus-politics.pdf (arguing that "it is politics that makes the law and, as the case demands, remakes it"). *See also* BERMAN, *supra* note 2, at 37 ("The law is [now] presented as having no history of its own, and the history which it proclaims to present is treated as, at best, chronology, and at worst, mere illusion.").

[192] *See* Emily Ekins, *New Poll: 74% Worry Americans Could Lose Our Freedoms if We're Not Careful*, CATO INST. (July 4, 2024), https://www.cato.org/blog/new-poll-74-worry-americans-could-lose-our-freedoms-were-not-careful (reporting that 85% of respondents had a favorable view of the Constitution).

more contextual, rational approach.[193] But even that decision was a product of its time. While it rejected rule-like deference, it retained the primacy of authoritative text.[194] The law was still the words on the page; those words were still the law because they were pronounced by an authoritative lawgiver.[195] Law was still a product, not of reason, but of power.[196]

Legally speaking, are we Rome? The answer is: not yet. But just as all roads once led to Rome, our road at least seems to run parallel to the Roman one. Like the Romans, we increasingly subordinate reason to power—*ratio* to *auctoritas*. And like them, we may live to regret it.[197]

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[193] *See Loper Bright*, 603 U.S. at 400 (urging courts to find the "best meaning" of a statute). *See also* Isaiah McKinney, *The Many Heads of the* Chevron *Hydra: Chevron's Revolutionary Evolution Between 1984 and 2023*, 99 N. DAK. L. REV. 253, 253 (2024) (arguing that overturning *Chevron* would "free[] courts to find the right answer").

[194] *See Loper Bright*, 603 U.S. at 400 (focusing the inquiry on the "fixed" meaning of a statutory text).

[195] *See id. See also* CHEVRON DOCTRINE, *supra* note 143, at 195 (noting that the debate over *Chevron* was about who could authoritatively interpret Congress's handiwork, not whether a more contextual analysis was needed).

[196] *See* Michaels, *supra* note 186 (contrasting American legal formalism with atextual approach embraced in other Western democracies) ("[T]he Blackstonian idea that judges find law and do not make it—is of course a fiction but a valuable one; it forces judges to find arguments within the law, and invites specific criticism when they do not do that."). *Cf.* Jeff Neal, *The Argument for Overturning Erie Railroad Co. v. Tompkins*, HARV. L. TODAY (Nov. 17, 2023) (quoting Prof. Stephen Sachs as arguing that courts' abandonment of general law "left us unable to understand basic aspects of American jurisprudence").

[197] *See* Michaels, *supra* note 186 (arguing that the conflation of law with politics impoverishes both).