TOCQUEVILLE'S PROPHECY: THE ROOTS OF AMERICAN POLARIZATION

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INTRODUCTION

Rush Limbaugh versus Anderson Cooper.
Fox News versus CNN.
President Donald Trump versus Senator Nancy Pelosi.

These contrasts are nothing new. Americans have never been shy to engage wholeheartedly in political controversy. But many Americans seem to think that today's situation is different. Think tanks and commentators decry the "vast and growing gap between liberals and conservatives" that polarizes the country.[1] Evidence suggests that these partisan divides have grown more significant over the past five years and are continuing to expand.[2] Meanwhile, 85% of all Americans, regardless of political views, say that "political debate has become more negative and less respectful."[3] Many lament a loss of civility in public discourse.[4]

This article argues that today's polarized society is the result of the adoption of post-Enlightenment rationalist ideals that have fundamentally changed the American republic. At a conceptual level, this change has shifted what Americans see as the point of government. Rather than viewing it as a structure designed to preserve a *process*, Americans have come to view it has a tool that can be used to achieve particular substantive *outcomes*. This shift is clearly reflected in two of the most significant developments in American legal history: the emergence of the administrative state and the judiciary's development of "substantive due process." It is this fundamental mindset shift that has led, in large part, to the polarization that permeates the country today.

This article begins in Part I by examining the roots of the American constitutional system and the concepts that animated its protections of process. In Part II, the article discusses the incorporation of post-Enlightenment rationalist ideals into the American subconscious. Part III describes the effect of this fundamental mindset shift by providing two examples of its manifestation in the American order: the emergence of the administrative state and the judiciary's development of the concept of "substantive due process." Part IV shows how this mindset shift has led to today's polarized society by reorienting the focus from *process* to *outcomes*. It also describes how this result was predicted by 19th-century French political theorist Alexis de Tocqueville. Part V proposes a way forward that – although unlikely to be used – would steer American society toward a robust, mature, and less polarized civil discourse.

I. THE AMERICAN CONSTITUTION'S PROTECTION OF PROCESS

The American Constitution was built to protect the process of political deliberation, which the framers believed was essential for the preservation of liberty.

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[1] https://www.pewresearch.org/topics/political-polarization/.
[2] *Id*.
[3] https://www.people-press.org/2019/06/19/public-highly-critical-of-state-of-political-discourse-in-the-u-s/ (noting that that three-quarters (76%) say American public discourse has become less fact-based and 60% say it has become less focused on issues).
[4] *See* NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 20 (Random House LLC, 2019) [hereinafter Gorusch].

A. Roots

The framers of the American Constitution did not conjure it out of thin air. They drew from a long line of philosophical inquiry into the nature and purpose of government that included the writings of John Locke, Montesquieu, William Blackstone, and others.

At the most foundational level, the American Constitution was based on Locke's "social contract" theory. Drawing on agency and contract law,[5] this theory posited that citizens conveyed to the government certain powers and received in return the protection of their inalienable rights.[6] As in a contract between two persons,[7] the government could only utilize the powers that had been granted to it by the people.[8] This grant of power gave rise to a fiduciary relationship in which the government had an obligation to wisely utilize the powers entrusted to it by the people.[9]

The framers were well aware, however, of the corrupting nature of power.[10] They realized that this posed a risk to the proper exercise of the fiduciary responsibility that the people granted to the government in the social contract. This concern stemmed from their historical understanding of the potentially coercive nature of governmental power.[11] Instances of such coercion were fresh in their recent memory. For instance, the coercive power of the British crown had come to American shores in the form of the 1765 Stamp Act, which taxed the colonies' use of paper products.[12] The Constitution was designed "to prevent the federal government from becoming as oppressive as British rule was perceived to be."[13] In sum, the

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[5] *See* GARY LAWSON & GUY SEIDMAN, A GREAT POWER OF ATTORNEY: UNDERSTANDING THE FIDUCIARY CONSTITUTION, 48 (2017) [hereinafter Seidman] (describing the fiduciary background the U.S. Constitution and arguing for the role of the government as the fiduciary agent of the people).

[6] *See generally* John Locke, Second Treatise of Civil Government (1690) [hereinafter Locke]. *See also* GARY LAWSON, THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE, Cambridge. U. Press, 1st ed., 53 (2010) [hereinafter Origins] ("As elaborated by Locke, the terms of the social compact were that citizens conveyed to government certain powers (alienable rights) so those citizens could enjoy more fully the powers retained (inalienable rights) . . . .").

[7] *See* Seidman, *supra* note 5, at 48.

[8] *See* Locke, *supra* note 6, at § 134 ("[N]or can any edict of any body else, in what form soever conceived, or by what power soever back, have the force and obligation of a law, which has not its sanction from that legislative which the public has chosen and appointed: for without this the law could not have that would is absolutely necessary for its being a law, the consent of the society.").

[9] *Id.* (noting that, as a result of this social compact, "*the government had a fiduciary obligation to manage properly what had been entrusted to it*"). *See also* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 23 (2014) [hereinafter Hamburger] ("[L]urking not far below was the Lockean reasoning about consent, from which it was evident that legal obligation rests on consent and that binding laws have to be made by the society's representative legislature.").

[10] *See* Gary Lawson & Steven Calabresi, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 821, 843 (2018) [hereinafter Calabresi] ("Montesquieu argued for a separation of legislative, executive, and judicial powers because he believed, as Lord Acton would later say, that '[p]ower tends to corrupt and absolute power corrupts absolutely.'") (internal citations omitted).

[11] *See* Philip Hamburger, *The Administrative Evasion of Procedural Rights*, N.Y.U. J. OF LAW & LIBERTY 915, 923 (2017) [hereinafter Evasion] ("Americans learned the value of procedural rights by reading the history of English prerogative power, and they experienced the contemporary value of procedural rights in the struggles that led up to their revolution.").

[12] *See* Hermann Ivester, *The Stamp Act of 1765 – A Serendipitous Find*, 87-89, THE REVENUE JOURNAL, Vol. XX, No. 3 (December 2009).

[13] *See* ROBERT BORK, SLOUCHING TOWARD GOMORRAH 319 (Harper Perrenial 1996) [hereinafter Gomorrah].

framers understood that governmental power could be used to coerce citizens into accepting certain *outcomes* without providing them with process.

The framers also understood that mankind was unable to solve all of the problems that would inevitably arise in society. In their view, government would be barely able to restrain itself, never mind solve all of society's problems. As James Madison stated in Federalist 51, "if men were angels, no government would be necessary."[14] The framers therefore structured the Constitution to protect a process that would restrain the government's reach and ensure the citizens' ability to govern through their elected representatives.[15]

To accomplish this, the framers established a government of separated powers. They drew this concept from many great thinkers, including the French philosopher Baron de Montesquieu, who popularized the separation of powers in his book *Spirit of the Laws*.[16] Montesquieu argued that this separation was necessary to limit the corrupting nature of power.[17] English legal thinker William Blackstone likewise posited that a tyrannical government was one in which "the right of both of making and of enforcing the laws[] is vested in one and the same . . . body of men" and that "wherever these two powers are united together, there can be no public liberty."[18] Drawing on this foundation, the framers created a system of separated powers to ensure the proper exercise of the fiduciary responsibility that the people granted to the government in the social contract. They believed the separation of powers was necessary in order to ensure that the government could not enlarge its power and create its preferred *outcomes* at the expense of the political *process*.

B. Protection of Process in the American Constitution

The framers' creation of a government that could "control the governed" while also "control[ling] itself"[19] suggests that they were concerned with limiting the government's ability to disregard the procedural rights of its citizens.[20] The Constitution is replete with examples of the framers' process-oriented viewpoint.

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[14] *See* James Madison, Federalist 51.

[15] *See* John McGinnis & Michael Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 393-94 (2007) [hereinafter Rappaport] (noting that the framers "took account of the fact that the Constitution should contain only a framework for government that would respond to the enduring realities of human nature and the problems of social governance").

[16] *See* MONTESQUIEU, SPIRIT OF THE LAWS, Pt. 2, Book 11, Chap. 6, (1748) [hereinafter Montesquieu]. The framers were drawing on a long tradition of political thought when they separated the powers of the American government. For instance, the Romans had instituted a division of powers at the suggestion of Cicero, and the English monarch's powers were separate from the Parliamentary power during the sixteenth and seventeenth centuries. *See* Hamburger, *supra* note 9, at 381 (noting that John Locke recognized the king's separation from the Parliament). *See also* Suri Ratnapala, *John Locke's Doctrine of the Separation of Powers: A Re-Evaluation*, 38 AM. J. JURIS. 189, 190 (1993) [hereinafter Ratnapala].

[17] *See* Calabresi, *supra* note 10, at 843 ("Montesquieu argued for a separation of legislative, executive, and judicial powers because he believed, as Lord Acton would later say, that '[p]ower tends to corrupt and absolute power corrupts absolutely.'") (internal citations omitted).

[18] *See* WILLIAM BLACKSTONE, COMMENTARIES 129, 134, 137–38, 142 [hereinafter Blackstone].

[19] *See* James Madison, Federalist 51.

[20] See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 320 (2000) (noting that the legislative process is "an important guarantor of individual liberty, because they ensure that national governmental power may not be brought to bear against individuals without a consensus, established by legislative agreement on relatively specific words").

At the most fundamental level, the U.S. Constitution provides "negative" rights that do not guarantee freedom to do something but instead guarantee freedom from governmental intervention. The framers drew this definition of liberty from John Locke, who wrote that liberty consisted of having a "standing rule to live by," rather than the "inconstant, uncertain, unknown, arbitrary will of another man."[21] In other words, liberty is the ability to be free from arbitrary governmental interference.[22] This definition of liberty reflects a view of the American constitutional order as a guarantee of fair process, free from governmental coercion.

Nowhere is this more apparent than in the Bill of Rights.[23] The most obvious example is the Fifth Amendment's Due Process clause, which states that the federal government cannot deprive citizens of "life, liberty, or property, without *due process* of law."[24] It protects citizens from arbitrary government action by making sure that the government doesn't disregard process. Another example is the Sixth Amendment, which requires the government to provide a particular process – "speedy and public trial[] by an impartial jury."[25] The Eighth Amendment protects the process through which criminals are dealt with by prohibiting excessive bail, excessive fines, and "cruel and unusual punishments."[26] None of these provisions guarantee a particular social result, such as the legalization of a particular weapon or the imposition of a particular jail sentence. Instead, they solidify processes that are crucial for protecting the inalienable rights upon with the United States was founded.

Some may object that other provisions of the Constitution disprove the process-oriented view. For instance, Article III gives the courts the power to resolve "cases . . . and controversies."[27] And the Guarantee Clause of the Fourth Amendment requires the United States to "guarantee to every State . . . a Republican Form of Government."[28] These provisions give relatively specific grants of power to the government, grants that would seem to create certain outcomes in many cases. Do they disprove the process-oriented view of the Constitution? Not at all. Even those provisions of the Constitution that are not expressly process-oriented are carefully limited to ensure that the government cannot consolidate too much power. Under Article III, the judiciary's power is limited to "case and controversies" – certainly not a limit that suggests any particular outcomes will prevail. And under Article IV, the guarantee of a republican form of government is a guarantee of a governmental *process*, not a particular governmental *outcome*.

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[21] *See* Locke, *supra* note 6, at § 141.

[22] *See* George Washington, *Letter to the Society of Quakers*, October 13, 1789 (https://founders.archives.gov/documents/Washington/05-04-02-0188). In granting the Quakers a religious exemption from military service, George Washington wrote that the purpose of government is to "protect the Persons and Consciences of men from oppression." This was a negative guarantee in the vein of Locke.

[23] *See* U.S. CONST., amend. I; U.S. CONST., amend. II; U.S. CONST., amend. III; U.S. CONST., amend. IV; U.S. CONST., amend. V. The process-oriented aspects of the Constitution are not limited to just the first eight amendments. The Ninth Amendment, which protects the states' right to legislate regarding civil liberties from federal interference, and the Tenth Amendment, which gives the states to power to do anything not enumerated in the Constitution, are aimed not at ensuring particular outcomes but rather at protecting the states' legislative processes.

[24] *Id*., amend. V (emphasis added).

[25] *Id*., amend. VI.

[26] *Id*., amend. IX. The combination of the Fourth, Sixth, Seventh, and Eighth Amendments – which are essentially the foundation the entire American criminal justice system – is entirely focused on process. Nowhere in those four amendments is a particular outcome even suggested.

[27] *See* U.S. CONST., art. III.

[28] *Id.*, art. IV.

These limits show that even the broader grants of power in the Constitution are, at their core, process-oriented.

The Federalist Papers provide additional evidence for the framers' process-oriented viewpoint. Locke's belief that liberty consisted of having a "standing rule to live by"[29] is echoed in Federalist 78, which states that "the best expedient which can be devised in any government . . . [is] to secure a steady, upright, and impartial administration of the laws."[30] Madison's view of the judiciary as having "neither force nor will, but merely judgement" further supports the conclusion that their role is not to create results through the exercise of will but protect a process through the exercise of judgment.[31] The framers were concerned with protecting the process by which the variety of interests were free to thrive.[32]

This focus on process was reflected in the courts as well. Decisions from the early years of the U.S. Supreme Court's history reflect a focus on protecting the procedural and structural integrity of the Constitution. For instance, in *Marbury v. Madison*, the Supreme Court made it clear that Congress could not give its power to another entity because doing so would invalidate the political process of self-government.[33] Likewise, the Court reiterated that the judicial branch was limited to interpreting and applying the law, not creating it.[34]

In sum, the Constitution was designed to protect the people's ability to participate in the political process. "[T]he selection and accommodation of substantive values [wa]s left almost entirely to the political process and instead the document is overwhelmingly concerned, on the one hand, with procedural fairness."[35]

II. The Influx of Post-Enlightenment Rationalism

As the young American nation matured, it began to think differently about the core purposes of its constitutional structure. These changes were the result of the infiltration of post-Enlightenment rationalist thought, which embodied a commitment to the achievement of certain *outcomes* regardless of their effects on *process*. Over time, these ideals wound themselves into the nation's political thought and effected a seismic shift in American governance.

A. The Philosophical Roots of the Outcome-Oriented View

The outcome-oriented view can be traced to several prominent thinkers, but one of its earliest and most prominent advocates was the French philosopher Voltaire. Voltaire believed

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[29] *See* Locke*, supra* note 6, at § 141.
[30] *See* James Madison, Federalist 78.
[31] *Id.*
[32] *See* James Madison, Federalist 51 ("Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.").
[33] *See* Marbury v. Madison, 5 U.S. 137, 176-77 (1803) ("The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.")
[34] *See Marbury*, 5 U.S. at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").
[35] *See* John Ely, Democracy and Distrust 87 (1980).

that society should be oriented around achieving the best possible social outcomes.[36] In order to do this, he advocated for a society managed by "truly enlightened philosophers" who would be "strangers to ambition."[37] Put another way, Voltaire believed that the goal of government was to utilize experts to achieve particular outcomes.[38] It is interesting – and perhaps telling – that Voltaire's philosophy was adopted as the guiding inspiration of the violent and failed French Revolution.

Perhaps the most influential proponent of the outcome-oriented viewpoint was 19th-century German philosopher Georg Wilhelm Friedrich Hegel. In *The Philosophy of Right*, Hegel espoused the view that history was oriented around the ultimate realization of human potential.[39] Underlying this view was the Enlightenment-era belief, known as rationalism, that humans had the ability to rationally achieve such ultimate ends.[40] As he wrote, "Everything depends on the extent to which rationality has replaced nature."[41] Applying this to a societal scale, Hegel argued that these ends could only be achieved by an efficient administration of the state by disinterested members of the intellectual class.[42] He was part of a "cultural tradition that viewed the bureaucratic class as a sort of *pouvoir neutre* above social and political divisions in society."[43] This class would function as guides for the rest of society in the quest for achieving the ultimate ends of mankind.

Hegel's belief in the ability of the intellectual class to efficiently guide society toward ultimate ends relies on the assumption that ultimate ends exist in the first place *and* that those ends are achievable through human effort. As a result, Hegel downplayed the role of the individual in society. He believed that the state was an extension of individual that acted as the creator of the individual's preferred outcomes. Hegel therefore synthesized a philosophical tradition that viewed the aim of government as the achievement of substantive outcomes rather than the protection of process.

B. Crossing the Atlantic

The outcome-oriented viewpoint came into vogue in Europe many years before it was transmitted to the United States. However, in the late 19th and early 20th centuries, American political thinkers began to study the works of Hegel and his contemporaries. Many of them

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[36] *See* VOLTAIRE, ENCYLOPEDIE.

[37] *See* MARQUIS DE CONDORCET, SKETCH FOR A HISTORICAL PICTURE OF THE PROGRESS OF THE HUMAN MIND, 109 (1795) [hereinafter Condorcet]. Hegel's sentiments also aligned closely with those of Jean-Jacques Rosseau, who wrote in *The Social Contract* that "the best and most natural arrangement is for the wisest to govern the multitude." *See* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT, 115 (1762).

[38] Voltaire remains an icon for those who believe that critical reason goes hand in hand with political resistance in projects of progressive idealism.

[39] *See* G.W.F. HEGEL, LECTURES ON THE PHILOSOPHY OF WORLD HISTORY, 63 (Cambridge U. Press 1975).

[40] *See* G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, § 260, (Allen Wood ed. 1991) [hereinafter Hegel] ("The principle of modern states has enormous strength and depth because it allows the principle of subjectivity to attain fulfilment in the self-sufficient extreme of personal particularity ....").

[41] See G.W.F. HEGEL, LECTURES ON NATURAL RIGHT AND POLITICAL SCIENCE, 242 (U. California Press, 1996).

[42] *See* JAMES J. SHEEHAN, GERMAN HISTORY, 1770-1866, 430-33 (1989). *See also* Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2061-62 (2019).

[43] *See* Peter Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s*, 113 YALE L.J. 1341, 1346 (2004) [hereinafter Lindseth].

began to incorporate these ideas into the American mindset, joining the ranks of intellectual leaders whose "exclusive concern [was] the creation of 'better worlds.'"[44]

One such thinker was U.S. President Woodrow Wilson. He wholeheartedly[45] embraced Hegel's argument that a class of intellectual elites could efficiently achieve the best outcomes for society.[46] He wrote extensively on the topic, most prominently in his 1887 article *The Study of Administration* and his 1918 book *The State: Elements of Historical and Practical Politics*. These works display his outcome-oriented view of history and its unmistakably Hegelian roots.

Wilson's adoption of the Hegelian belief in the superiority of the intellectual class stood in sharp contrast to his elitist disdain for representative government.[47] He bemoaned the constant political "tinkering" associated with a constitutional republic.[48] Wilson believed that the American people were insufficiently enlightened as to the best societal outcomes: "The bulk of mankind is rigidly unphilosophical, and nowadays the bulk of mankind votes."[49] In contrast to the legislative process, which was "slow" and "full of compromises,"[50] the Wilsonian intellectual class would be "removed from the hurry and strife of politics."[51] His proposed administration of experts would "straighten the paths of government" and "purify its organization."[52]

These sentiments betray the unmistakably Hegelian notions at the core of Wilson's view of government. Like Hegel, Wilson ascribed to the doctrine of historicism, which is the idea that things are product of their time and must therefore be discarded as the pursuit of progress moves beyond them. He believed that the purpose of government was to achieve the ultimate ends of mankind. And achieving those ultimate outcomes required sidestepping the supposedly un-enlightened citizens and the process that protected their representation. Wilson's views display an outcome-oriented view of government that is fundamentally at odds with the Lockean roots of the American Constitution and the political participation it was designed to protect.

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[44] *See* FRIEDRICH HAYEK, THE CONSTITUTION OF LIBERTY 2 (U. Chicago Press 1960).

[45] *See* WOODROW WILSON, THE STATE: ELEMENTS OF HISTORICAL AND PRACTICAL POLITICS 202 (1889) [hereinafter The State] ("[W]e must Americanize [administration], and that not formally, in language only, but radically, in thought, principle, and aim as well."). *See also* Woodrow Wilson, *Democracy and Efficiency*, 87 ATLANTIC MONTHLY 289, 299 (1901) ("Expert organization [has] become imperative, and our practical sense . . . must be applied to the task of developing [it] at once and with a will.").

[46] *See* Ronald Pestritto, *The German Stamp on Wilson's Administrative Progressivism*, THE AMERICAN MIND, THE CLAREMONT INSTITUTE, (2019), https://americanmind.org/post/the-german-stamp-on-wilsons-administrative-progressivism/ [hereinafter Stamp] (noting that Wilson also attributes his perspective to Hegel's *Philosophy of Right*). *See also* JOHN MARINI, UNMASKING THE ADMINISTRATIVE STATE: THE CRISIS OF AMERICAN POLITICS IN THE TWENTIETH-FIRST CENTURY, 225-26 (2018) [hereinafter Marini] (noting that Wilson discarded the founders' principles as "obsolete" and relied on Hegel's conclusion that the modern state was the key driver of progress).

[47] *See generally* Woodrow Wilson, *The Study of Administration*, POLITICAL SCIENCE QUARTERLY, Vol. 2, No. 2 (1887) [hereinafter Wilson]. Wilson valued "a trained and thoroughly organized administrative service instead of administration by men privately nominated and blindly elected." *Id.*

[48] *See* The State, *supra* note 45, at 214. Wilson argued that constitutions are concerned with "who shall make the law, and what shall the law be?", while administration is concerned with "how law should be administered with enlightenment, with equity, with speed, and without friction." *Id.* at 198-99.

[49] *Id.* at 208-09.

[50] *Id.* at 208.

[51] *Id.* at 209-10. The reader may observe that Wilson's goal, which was to avoid the "confusion and costliness of empirical experiment," directly contradicts Justice Louis Brandeis' famous characterization of the American political process as an "experiment." *See id.* at 210; New State Ice Co. v. Leibmann, 285 U.S. 262, 387 (1932) (Brandeis, J., dissenting). It is also interesting that Wilson, as the President of a constitutional republic, would characterize constitutional study as "debatable."

[52] Wilson, *supra* note 45, at 210.

Wilson's hubris and enamored view of the intellectual class can be almost unbearable. For instance, he wrote in *The Study of Administration*:

> It is [the intellectual class'] peculiar duty to moderate the *process* in the interests of liberty: to impart to the peoples . . our own principles . . . . This we shall do, not by giving them . . . the full-fangled institutions of American self-government, – a purple garment for their nakedness, for these things are not blessings, but a curse . . .; – but in giving them . . . a government and rule which shall moralize them . . . . In other words, *it is the aid of our character they need, and not the premature aid of our institutions. Our institutions must come after the ground of character and habit has been made ready for them; as effect, not cause, in the order of political growth*.[53]

In these words, Wilson openly admitted that the institutions of the American system of self-government – which he called a "curse" – should be subsumed by the social preferences of the intellectual class. More elitist or Hegelian sentiments could hardly be written. In addition, by arguing that the country's "institutions must come . . . as effect, not cause, in the order of political growth,"[54] Wilson contradicts the design of the American constitutional order, which recognized that men are not angels[55] and that a system of separated powers was the best way to manage the competing ambitions that would seek to place their preferred outcomes above the processes protected by the Constitution.[56]

Most concerning of all, however, is the final sentence: "Our institutions must come after the ground of character and habit has been made ready for them; as effect, not cause, in the order of political growth."[57] To the framers, the structure of the government was essential to minimize the dangers associated with the "character and habit" of individual leaders. Wilson, however, flipped this on its head. He argued that the "character and habit" of individual leaders – which, in his mind, were a group of "trained and thoroughly organized administrat[ors]" from the intellectual class of which he was a central part[58] – were more important than the structure of the government. Gone was the notion that "all men are created equal and should democratically govern themselves" through political processes and institutions.[59] In its place were "the modern descendants of Platonic philosopher kings, distinguished by their academic pedigrees rather than the metals in their souls—who should administer the administrative state as freely as possible from control by representative political institutions."[60]

Wilson soon had company. Political scientist Frank Goodnow, in direct opposition to the framers' Lockean notion of political accountability through elected representatives, embraced Hegel's humanist view that an enlightened intellectual class could overcome the "polluted" nature of the political realm in order to achieve the best results for society.[61] His argument

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[53] *See* Wilson, *supra* note 47.
[54] *Id.*
[55] *See* James Madison, Federalist 51.
[56] *Id.*
[57] *Id.*
[58] *See Democracy and Efficiency*, *supra* note 45, at 289.
[59] *See* Calabresi, *supra* note 10, at 829.
[60] *Id.*
[61] *See* FRANK GOODNOW, POLITICS AND ADMINISTRATION: A STUDY IN GOVERNMENT 82 (1900) [hereinafter Goodnow]. Whether history has in fact shown us the exact opposite is highly debatable. This view parallels that of

openly assumes that the achievement of such outcomes is the proper end of government. It also assumes that the citizens' rights were granted to them by the government.[62] It is impossible to miss the fact that this view is the exact inverse of the Lockean "social contract" theory on which the Constitution was built, in which the citizens grant certain powers to the government in order to protect the citizens' inalienable rights.[63] Likewise, Professor James Landis, in his book *The Administrative Process*, lamented the "inadequacy of a simple tripartite form of government to deal with modern problems."[64] It is interesting to observe that Landis' justification for the outcome-oriented viewpoint – the ability of experts to see above the masses to achieve the greater ideals of humanity – was the same as Hegel's.[65] Landis and Goodnow were joined by Harvard Law School dean Roscoe Pound, who insisted that law was "a science of social engineering" whose purpose was "the ordering of human relations."[66]

In sum, Wilson, Landis, Goodnow, and Pound were "united in their view . . . that the organic or rational state must replace the social compact, or constitutionalism."[67] They "fundamentally did not believe that all men are created equal and should democratically govern themselves through representative institutions."[68] Instead, they believed instead that "there were 'experts'—the modern descendants of Platonic philosopher kings, distinguished by their academic pedigrees rather than the metals in their souls—who should . . . [govern] as freely as possible from control by representative political institutions."[69] Freed from the *procedural* restrains that were designed to keep the government accountable to its citizens,[70] these intellectual elites would then be able to set about the Hegelian task of efficiently achieving ultimate *outcomes* for society.

III. The American Adoption of the Outcome-Oriented View

The outcome-oriented view gradually became embedded in how the American people viewed their government. Rather than a government that was granted fiduciary power by the people through a *process* that guarded their existing rights against arbitrary governmental power, the government came to be seen as the fount of all preferred social *outcomes*. (The progressive intellectuals who adopted this view never said so, but this viewpoint obviously translates to the *intellectual class'* preferred outcomes, since they are more likely to have the power to create

English philosopher William Godwin, who argued that the intellectual expert class would be the "guides and instructors" of the rest of society. *See* William Godwin, Enquiry Concerning Political Justice, Vol. I, 70 (1793).

[62] *See* Frank Goodnow, The American Conception of Liberty and Government 11 (1916).

[63] *See* Hamburger, *supra* note 9, 355 (noting that the delegation of Congressional authority to agencies "inverts the relationship between the people and their government, reducing the people to servants and elevating government as their master.").

[64] *See* James M. Landis, The Administrative Process 1 (1938) [hereinafter Landis]. *See also* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1231 (1994) [hereinafter *Rise and Rise*] (noting that "Landis's classic exposition of the New Deal model of administration[] fairly drips with contempt for the idea of a limited national government subject to a formal tripartite separation of powers").

[65] *See* Calabresi, *supra* note 10, at 829.

[66] *See* Roscoe Pound, *Justice According to Law*, Midwest Quarterly 1 (1959).

[67] *See* Marini, *supra* note 46, at 226.

[68] *See* Calabresi, *supra* note 10, at 829.

[69] *Id.*

[70] *See* Philip Hamburger, *How Government Agencies Usurp Our Rights*, City Journal (Winter 2017), https://www.city-journal.org/html/how-government-agencies-usurp-our-rights-14948.html [hereinafter City Journal].

outcomes). The impacts of this fundamental change have been numerous and far-reaching. This article limits itself to an examination of the two impacts that the author believes are the most significant. These include the emergence of the administrative state and the development of the judicial theory of "substantive due process."

A. The Emergence of the Administrative State

The American administrative state, which is composed of the executive and independent agencies that regulate vast portions of American society, is a result of a Hegelian belief in the ability of a bureaucratic class to see above the political realm and achieve ultimate social outcomes. Its emergence was largely justified by the economic difficulties of the Great Depression, but it soon became a tool for proactive creation of social results, as evidenced by the Great Society.

1. The Original Design: A Norm of Non-Delegation

The U.S. Constitution was modeled after a Lockean conception of government "from which it was evident that legal obligation rests on consent and that binding laws have to be made by the society's representative legislature."[71] The framers created a system of separated powers to ensure the proper exercise of the fiduciary responsibility that the people granted to the government in the social contract.[72] This fiduciary relationship was based on the common principles of agency law, which limited an agent's ability to use or delegate the powers it was entrusted with.[73] Since fiduciary duties were considered nondelegable,[74] it is telling that the American Constitution was built on the assumption that the government was the fiduciary agent of the people.

John Locke, one of the framers' primary inspirations, strongly believed that the people's entrustment of power in the branches of government was something that the branches could not delegate away to each other.[75] This was because it was already delegated to those particular branches by the people.[76] Locke wrote:

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[71] *See* Hamburger, *supra* note 9, at 23.

[72] *SEE* JOHN LOCKE, AN ESSAY CONCERNING THE ORIGINAL EXTENT AND END OF CIVIL GOVERNMENT, 185 (1689) (noting that the separation-of-powers ideal was based on the idea that government's three branches all had important roles to play in governing a nation.

[73] *See* Seidman, *supra* note 5, at 48 (describing the fiduciary background the U.S. Constitution and arguing for the role of the government as the fiduciary agent of the people).

[74] *See* Origins, *supra* note 6, at 58 ("When not authorized in the instrument creating the relationship, fiduciary duties were nondelegable. The applicable rule was *delegatus non potest delegare* – the delegate cannot delegate."). *See also* Hamburger, *supra* note 9, at 380 (noting that a delegation of fiduciary power to an agent meant that the agent could not "subdelegate the power to a sub-agent."). *See also* MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW, 203, Oxford U. Press (1730) ("One who has an Authority to do an Act for another, must execute it himself, and cannot transfer it to another; for this being a Trust and Confidence reposed in the Party, cannot be assigned to a Stranger.").

[75] *See* Locke, *supra* note 6, at § 141.

[76] *See* Hamburger, *supra* note 9, at 381. Locke maintained that "the people's delegation of legislative power to the legislative body precluded it from transferring its power. *Id.* This fiduciary relationship was based on the Latin phrase *potestas delegate non potest delegare* – "that delegated power cannot be further delegated"). *Id.* at 386.

> The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to *make laws, and not to make legislators*, the legislative can have no power to transfer their authority of making laws and place it in other hands.[77]

> The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said we will submit to rules, and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those whom they have chosen and authorized to make laws for them.[78]

The framers likewise believed that "[i]f the separation of powers mean[t] anything at all, it mean[t] that one branch of government [could] not permit its powers to be exercised substantially by another branch."[79] They maintained that liberty would suffer from a union of any of the branches.[80] This principle was expressly established in the Constitution when the framers wrote that Congress has "all" legislative power.[81] They recognized that when "blurring of the lines occurs, liberty and the rule of law are placed at risk."[82]

2. Necessity and Efficiency

Like Hegel, Woodrow Wilson and his colleagues believed in the essential rationalist idea that mankind could rationally achieve ultimate social outcomes. Therefore, they "wanted agencies to be able to make policy outside of traditional political systems, which they felt were

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[77] *See* Locke, *supra* note 6, at § 141.
[78] *Id.*
[79] *See* Ronald J. Pestritto, *The Birth of the Administrative State: Where It Came From and What It Means for Limited Government*, THE HERITAGE FOUNDATION, FIRST PRINCIPLES SERIES, No. 16, 3-4 (2007) [hereinafter Pestritto]. *See also* James Madison, Federalist 47 ("The accumulation of all powers legislative, executive and judiciary in the same hands…may justly be pronounced the very definition of tyranny.").
[80] *See* Alexander Hamilton, Federalist 78.
[81] *See* U.S. CONST. art. I, § 1. *See also* Department of Transp. v. Assoc. of Am. Railroads, 575 U.S. 43, 67 (2015) (Thomas, J., dissenting) ("The Constitution does not vest the Federal Government with an undifferentiated 'governmental power.' Instead, the Constitution identifies three types of governmental power and, in the Vesting Clauses, commits them to three branches of Government . . . . These grants are exclusive."). *See also* Hamburger, *supra* note 10, at 401-02 ("[W]ith the word *all*, the Constitution expressly bars the subdelegation of legislative powers."). Indeed, it would be contradictory for the framers to have limited the powers of each branch if "these limits may, at any time, be passed by those intended to be restrained." *See* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 340 (2002) [hereinafter Delegation and Original Meaning] ("If Congress could pass off its legislative power to the executive branch, the 'vesting [c]lauses, and indeed the entire structure of the Constitution,' would 'make no sense.'").
[82] *See* Gorsuch, *supra* note 4, at 9. *See also* James Madison, The Federalist 10 (noting that the main benefit of the American system of government was "the delegation of the government . . . to a small number of citizens elected by the rest").

too backwards to serve the needs of modern society."[83] "They sought something new: 'a nonpartisan, expert bureaucracy.'"[84] They "assumed, just as Hegel had in the *Philosophy of Right*, that a secure position in the bureaucracy . . . would relieve the civil servant of his natural self-interestedness . . . and allow[] him to focus solely on the objective good of society."[85] The importance of achieving this "objective good" (whose version of the "objective good," it was never specified) justified releasing those administrators from the procedural restrains that were designed to keep the government accountable to the citizens who granted it power.[86]

Wilson cleverly avoided the criticism that he was bypassing the Constitution by characterizing administration and constitutional law as two separate fields.[87] This allowed him to defend his reliance on the "dominant knowledge class" without appearing to disregard the Constitution.[88] It also made it possible to assume, as Hegel had, that administrators could remove themselves from the political fray in order to objectively pursue the highest ends for humanity.[89]

The result of the rise of administration was that the process costs of blending two of the powers of government – something the framers and Locke had warned vehemently against – were ignored because of what was believed to be the overwhelming importance of efficiently achieving the highest ends for mankind. It was the perceived *necessity* of achieving those ends that offered the strongest justification for the outcome-oriented viewpoint.

The courts soon began utilizing the outcome-oriented viewpoint to justify the administrative state. Just as Wilson and Landis had used the language of "necessity," "efficiency," and "practicality" to justify giving power to agencies, the courts began to use those same terms to justify upholding that kind of power redistribution. In *J.W. Hampton, Jr., & Co. v. United States*, the Supreme Court upheld a delegation of Congress' authority to the United States Tariff Commission the authority to set import tariffs under the Tariff Act of 1922 because Congress had provided an "intelligible principle" to guide the agency's discretion.[90] The Court noted that the "inherent necessities" of the complex modern age justified this delegation.[91] In fact, since 1935, there has not been a single case in which the Supreme Court has invalidated a

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[83] *See* Marini, *supra* note 46, at 58 (noting that Wilson and his colleagues "viewed separation of powers as an antiquated relic guaranteed to ensure deadlock").

[84] *See* Aaron L. Nielson, *Visualizing Change in Administrative Law*, 49 GA. L. REV. 757, 766 (2015) [hereinafter Neilson].

[85] *See* Pestritto, *supra* note 79, at 8.

[86] *See* City Journal, *supra* note 70 ("Late-nineteenth-century American progressives had an elitist disdain for representative government and individual claims of rights, and they adopted German ideas about administrative power to avoid republican institutions and the procedural rights protected in the courts."). Wilson of course failed to recognize that the separated-powers framework of the U.S. Constitution does not include administrators or an "administrative branch."

[87] *See* Wilson, *supra* note 47, at 210 ("Administrative questions are not political questions. Although politics sets the tasks for administration, it should not be suffered to manipulate its offices. This is distinction of high authority; eminent German writers insist upon it."). *See also* Pestritto, *supra* note 79, at 8 ("Administration cannot wait upon legislation, but must be given leave, or take it, to proceed without specific warrant in giving effect to the characteristic life of the State.").

[88] *See* Hamburger, *supra* note 9, at 496.

[89] *See* Hegel, *supra* note 40. *See also* Condorcet, *supra* note 37, at 109 (noting that Voltaire wrote that administrators were "truly enlightened philosophers" who were "strangers to ambition.").

[90] *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

[91] *Id.* at 406.

delegation of legislative power to an agency.[92] These decisions have been based on the Wilsonian justification that Congress' lack of sufficient expertise means that it must, out of necessity, delegate its authority to agencies.[93] The Court's language clearly reflects this:

> Our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do is job absent an ability to delegate power under broad general directives.[94]

The existence of such a necessity was often premised on the Hegelian argument that administrative actors were better suited than the political process to create preferable outcomes. Take, for example, *Yakus v. United States*, in which the Supreme Court upheld Congress' delegation of the authority to the Price Administrator.[95] The Court reasoned that this was acceptable because Congress should be free to avoid the "rigidity" of the political process in its search for the best result.[96] It would be difficult to imagine a statement more removed from the framers' Lockean sense of the government's fiduciary responsibility to the people through the political process.[97]

3. The Ultimate Justification

Until the Great Depression in 1929, Woodrow Wilson's administrative musings were largely an academic exercise. However, the Great Depression catapulted administrative solution-making to the forefront of American government. As it turned out, the Great Depression was the ultimate justification for the expansion of the outcome-oriented viewpoint through administrative agencies.

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[92] *See, e.g,* Lichter v. United States, 334 U.S. 742, 783 (1948) (upholding Congressional delegation of authority to recapture "excessive profits"); Whitman v. American Trucking Associations, 531 U.S. 457 (2001) (holding that Congress' delegation to the Environmental Protection Agency (EPA) Administrator the authority to set air quality standards under the Clean Air Act in the interest of "public health" was not unconstitutional under the non-delegation doctrine because Congress' provided an "intelligible principle" by which the Administrator could exercise his or her delegated authority); American Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946) (upholding the validity of Congress' delegation to the Securities and Exchange Commission (SEC) the authority to modify the structure of holding companies and stating that Congressional delegations of authority are acceptable where it would be "unreasonable and impracticable to compel Congress to prescribe detailed rules"); National Broadcasting Co. v. United States, 319 U.S. 190, 225-26 (1943) (upholding Congress' delegation to the Federal Communications Commission of the authority to regulate airwaves due to the existence of an "intelligible principle"); Touby v. U.S., 500 U.S. 160, 167 (1991) (holding that Congressional delegation of the authority to add new drugs to the list of controlled substances to the Attorney General did not violate the non-delegation doctrine because it provided an "intelligible principle" to guide the agency's discretion); Michigan Gambling Opposition v. Kempthorne, 525 F.3d 23, 32-33 (2008) (holding that Congressional delegation to the Secretary of Interior the responsibility to acquire land for Indian tribes under the Indian Reorganization Act did not violate the non-delegation doctrine because it contained an intelligible principle).

[93] *See* Industrial Union, 448 U.S. at 427.

[94] *See* Mistretta v. United States, 488 U.S. 361, 372 (1989).

[95] *See* Yakus v. United States, 321 U.S. 414, 420 (1944).

[96] *Id.* at 426.

[97] *See* Seidman, *supra* note 5, at 113. ("[A]gents do not have authorization to subdelegate authority simply because it is useful or helpful to do so.").

The Great Depression hit hard. The unemployment rate dropped from 3.2% in 1929 to 25% in 1933. Thousands of workers were laid off. Nearly half of America's banks closed. In response to these circumstances, the American people looked to the government to provide a solution.[98] President Franklin Delano Roosevelt (FDR) responded with the New Deal, a monumental government effort to recover from the Great Depression that included a plethora of agencies and commissions aimed at restoring the economic health of the country.[99] It is telling that when he found out about FDR's wave of new agencies, the fascist Italian dictator Benito Mussolini exclaimed, "Behold, a dictator!"[100]

However, the procedural guarantees of the Constitution suffered at the hands of the New Deal. The New Deal's agencies created (and continue to create) binding regulations that apply to millions of Americans but never go through bicameralism and presentment.[101] This contradicts the framers' Lockean system of separated powers,[102] which granted "all" legislative power to Congress.[103] In short, the New Deal's explosion of agencies cast aside constitutional structure for the sake of achieving economic results through the work of experts.[104] The end justified the means.

The outcome-oriented viewpoint also underpins FDR's "court-packing" plan, in which he proposed both an enlargement of the size of the Supreme Court and a retirement age for federal judges.[105] The retirement age in particular would enable him to appoint more of his preferred judges to the bench and therefore make it more likely for his preferred social outcomes to be

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[98] *See* Nielson, *supra* note 84 at 768 ("The nation, confronted with massive poverty, empowered President Franklin Roosevelt to try new things.").

[99] *See* Calabresi, *supra* note 10, at 829 (noting that FDR's agencies "involved the national government in matters that had previously been left to the states, ranging from securities regulation to labor law to agricultural production quotas. These agencies, controlled neither by the President nor by Congress, made life-altering decisions of both fact and law subject only to deferential judicial review, often without the involvement of juries.").

[100] *See* James Q. Whitman, *Of Corporatism, Fascism, and the First New Deal*, 39 AM. J. COMP. L. 747, 766 (1991). It is also worth noting that FDR referred to Mussolini as "that admirable Italian gentleman." *See* J.P. DIGGINS, MUSSOLINI AND FASCISM: THE VIEW FROM AMERICA 279 (1972).

[101] *See* Alexander Hamilton, The Federalist 73 ("The oftener a measure is brought under examination the greater the diversity in the situations of those who are to examine it [and] . . . the less must be the danger of those errors which flow from want of due deliberation."). Hamilton also stated in that "[t]he injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones." *Id.*

[102] *See* U.S. CONST. art. I, § 1 (separating the legislative, executive, and judicial functions of government).

[103] *Id. See also* Department of Transp. v. Assoc. of Am. Railroads, 575 U.S. 43, 67 (2015) (Thomas, J., dissenting) ("The Constitution does not vest the Federal Government with an undifferentiated 'governmental power.' Instead, the Constitution identifies three types of governmental power and, in the Vesting Clauses, commits them to three branches of Government . . . . These grants are exclusive."). *See also* James Madison, Federalist 47 ("The accumulation of all powers legislative, executive and judiciary in the same hands…may justly be pronounced the very definition of tyranny."). *See also* Hamburger, *supra* note 9, at 401-02 ("[W]ith the word *all*, the Constitution expressly bars the subdelegation of legislative powers."). Indeed, it would be contradictory for the framers to have limited the powers of each branch if "these limits may, at any time, be passed by those intended to be restrained." *See* Delegation and Original Meaning, *supra* note 81, at 340 ("If Congress could pass off its legislative power to the executive branch, the 'vesting [c]lauses, and indeed the entire structure of the Constitution,' would 'make no sense.'").

[104] *See* Calabresi, *supra* note 10, at 830 ("It is fair to say that the New Deal fundamentally transformed both the scope and the form of modern government by largely replacing representative democracy with a government of 'experts.'").

[105] *See* President Franklin D. Roosevelt, *Fireside Chat on Reorganization of the Judiciary*, March 9, 1937.

created.[106] He admitted that his goal was to implement what he felt was "sound public policy," and he also admitted that he was trying to do so through the courts, rather than through the legislative process designed for that very purpose.[107] FDR even used Wilson's favorite justification – necessity: "I regret the *necessity* of this controversy . . . . But we cannot yield our constitutional destiny to [those who] would deny us the *necessary* means of dealing with the present."[108] In other words, FDR's vision of the ultimate American society couldn't wait for the political process.

These developments make sense in light of FDR's political philosophy, which was entirely outcome-oriented. Like Wilson, he believed that the Lockean social compact had to be reinterpreted "in response to modern conditions."[109] He stated that "rulers were accorded power, and the people consented to that power on the consideration that they be accorded certain rights."[110] This is the exact inverse of the Lockean social contract that underpinned the Constitution, in which the people granted their power to the government in return for the government's protection of the peoples' existing rights.[111] FDR's words assume that the people will look to the government for their rights, which necessarily makes the government the provider of the citizens' preferred social outcomes. In such a system, the political process has no choice but to give way to administration.

4. Necessity, Continued

The Great Depression offered the perfect justification for the implementation of the outcome-oriented viewpoint. This justification was an economic one: the fiscal circumstances of the country justified the use of administrative agencies to create economic outcomes. It was not long, however, before the outcome-oriented viewpoint was applied to more than just economic issues.

In 1964, President Lyndon B. Johnson (LBJ) gave a speech at Ohio University in which he promised to "build a Great Society" where "no child will go unfed, and no youngster will go unschooled."[112] Later that same year in a speech at the University of Michigan, he promised to work "on the cities, on natural beauty, on the quality of education, and on other emerging challenges. From these studies, we will begin to set our course toward the Great Society."[113] In his 1965 State of the Union Address, LBJ cast a utopian vision for a "city of promise" atop "a summit where freedom from the wants of the body can help fulfill the needs of the spirit."[114] The achievement of such lofty (and pitifully undefined) goals would require a government that is

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[106] *Id.* FDR stated in his Fireside Chat on Reorganization of the Judiciary that his goal was "to bring to the decision of social and economic problems younger men who have had personal experience and contact with modern facts and circumstances." In other words, he wanted more judges who agreed with what he felt were the best outcomes.
[107] *Id.*
[108] *Id.* (emphasis added).
[109] *See* Marini, *supra* note 46, at 15
[110] *See* Ted Hirt, *Have the American People Irrevocably Ceded Control of Their Government to the Modern Administrative State?* (https://fedsoc.org/commentary/publications/have-the-american-people-irrevocably-ceded-control-of-their-government-to-the-modern-administrative-state).
[111] *Id.*
[112] "President Johnson's speech at the University of Michigan from the LBJ Library". Lbjlib.utexas.edu. Archived from the original on June 2, 2002. Retrieved August 26, 2013.
[113] "President Johnson's speech at the University of Michigan from the LBJ Library". Archived from the original on June 2, 2002. Retrieved August 26, 2013.
[114] *See* President Lyndon B. Johnson, 1965 State of the Union Address.

"efficient" in meeting "more effectively the tasks of the 20th century."[115] Like Wilson and FDR, LBJ believed that the urgency of modern problems required something beyond the capability of the current government. LBJ's speeches reveal the rationalist assumption that drove the Great Society: there were certain societal outcomes that were not in existence that should be in existence, and it is the government's responsibility to create them. In order to do so, the government must be managed by "the best thought" – otherwise known as Hegel and Wilson's intellectual class.

Rather than being justified by the Great Depression, the Great Society was justified by the social concerns of the day. Rather than seeking to create only economic outcomes like the New Deal, the Great Society sought to create economic *and* social outcomes. In the process, the Great Society repeated the New Deal's error. It pushed aside the structural framework of the Constitution in order to create its preferred social outcomes more efficiently through administrative oversight. Yet again, the end justified the means.

The Great Society was largely a failure. Although some economic growth was seen, poverty and racism remained unchanged. The one significant difference was that all of the agencies LBJ had implemented on behalf of the Great Society were now entrenched components of American society. "After LBJ's Great Society was launched, Congress faced a dilemma: whether to continue its constitutional function or adapt to its new function as guardian of the administrative state. It gladly acquiesced to the latter, easier course."[116] They "shackled Americans into dependence" on the government.[117] Hegel's viewpoint had become firmly embedded in the cultural subconscious: it was the government's responsibility to create ultimate societal outcomes.

In sum, FDR's New Deal and LBJ's Great Society were noble (if unrealistic) efforts on behalf of the American people. But good intentions toward the achievement of pleasant-sounding outcomes, when pursued at the expense of the process that protects the individual from arbitrary governmental power, are mirages.[118] Delegation to the administrative state has made American society dependent on a bureaucracy that is convinced that experts can solve the country's problems and create ultimate social outcomes.[119] This degradation of process, while "enshrouded in the humane purposes of the New Deal and the Great Society, ha[s] obstructed an essential element of democracy – the responsiveness of government to the people."[120] Both the New Deal and the Great Society pursued lofty outcomes based on the rationalist assumption that such outcomes are achievable by human efforts. Both the New Deal and the Great Society embody Wilson's Hegelian belief that the purpose of government was to achieve the ultimate ends of mankind.[121] Both the New Deal and the Great Society, by creating a massive conglomeration of unelected administrative agencies, sought those ultimate outcomes by sidestepping the citizens and the process that protected their representation. In this way, both the New Deal and the Great

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[115] *Id.*
[116] *See* Marini, *supra* note 46, at 132.
[117] *See The Great Society, Reconsidered*, 10 BLOCKS PODCAST, CITY JOURNAL (December 11, 2019) (https://www.city-journal.org/economic-history-1960s).
[118] This is particularly true in a country like the United States, where a Lockean notion of freedom as protection from arbitrary power is one of the cornerstones of government.
[119] *See* Marini, *supra* note 46, at 8-9, 13 (arguing that this development has replaced the "sovereignty of the people" with the "sovereignty of the government").
[120] *See* Marini, *supra* note 46, at 132.
[121] *See* Gomorrah, *supra* note 13, at 67 ("[T]he message was that inequality must be cured by the government . . . . Lyndon Johnson's Great Society carried forward what Roosevelt . . . had begun.").

Society built the outcome-oriented viewpoint into the American subconscious. It was now not only a reactionary force but an active one as well.

B. Substantive Due Process

Article III of the Constitution establishes and defines the judicial branch of the federal government. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and . . . to Controversies."[122] In other words, the judicial branch decides cases and controversies. It does not have the power to make or enforce laws, which makes sense in light of the framers' wariness of any combination of the powers of government.[123] Judges should exercise "neither force nor will but merely judgment" and are to show "inflexible and uniform adherence to the rights of the Constitution."[124] Alexander Hamilton was clear about this in a 1787 speech to the New York Assembly: "The words due process of law have a precise technical import, and are only applicable to the process and proceedings of the courts of justice."[125] As former Supreme Court Chief Justice John Marshall noted, "[j]udicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect . . . to the will of the law."[126]

In *Marbury v. Madison*, the Supreme Court reaffirmed the proper role of the judiciary as an applicator and interpreter of the law, not a creator of the law: "It is emphatically the province and duty of the judicial department to say what the law is."[127] In other words, judges are supposed "to say what the law *is*, not what it *should be*."[128] They are not the creators of outcomes – they are the guardians of a process.

1. Due Process…Kind-Of

The Fifth Amendment's Due Process Clause states that the federal government cannot deprive anyone of "life, liberty or property without due process of law."[129] The meaning of this provision is clear. It doesn't guarantee any particular substantive outcomes; it guarantees fair legal process. This meaning goes all the way back to the Magna Carta.[130] The English common law background of the American Constitution saw due process as a solely procedural protection: "[N]o man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken nor imprisoned, nor disinherited, nor put to Death, without being *brought in Answer by due Process of the Law*."[131]

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[122] *See* U.S. CONST., art. III, sec. 2.
[123] *See also* James Madison, Federalist 47 ("The accumulation of all powers legislative, executive and judiciary in the same hands…may justly be pronounced the very definition of tyranny.").
[124] *See* James Madison, The Federalist 78.
[125] *See* THE PAPERS OF ALEXANDER HAMILTON, IV:35 (Columbia University Press, 1961-1979).
[126] *See* Osborn v. Bank of the U.S., 22 U.S. 738, 866 (1824)
[127] *See* Marbury v. Madison, 5 U.S. 137, 177 (1803).
[128] *See* Obergefell v. Hodges, 576 U.S. 644, 686 (2015) (Roberts, C.J., dissenting) (emphasis added).
[129] *See* U.S. CONST., amend. V.
[130] *See* WILLIAM MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN § 39, 375 (19194) ("No free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any other way ruined, nor will we go against him or send against him, *except by the lawful judgment of his peers or by the law of the land*.").
[131] *See* 28 Edw. 3, c. 3, 1 STATUTES OF THE REALM 345 (1354) (emphasis added).

However, a crack appeared in the molding of this procedural guarantee in the 1857 case of *Dred Scott v. Sandford*. Dred Scott was a slave in Missouri.[132] In 1833, he was taken to the free state of Illinois for ten years.[133] Upon his return to Missouri, his master claimed that Scott was still his slave.[134] When Scott sued for his freedom, the Supreme Court held that Scott was still a slave because black men could not be free American citizens.[135] Chief Justice Taney reasoned that since the Fifth Amendment's Due Process Clause prohibited the government from depriving a citizen of his or her property without due process of law, slaves – which were considered property at the time – could not be taken from their owners without due process of law.[136] Despite the fact that the Fifth Amendment's Due Process Clause guarantees due *process* – the procedures that must be used before the government can deprive anyone of their life, liberty, or property – Chief Justice Taney had used it to guarantee his preferred substantive *outcome* – in this case, the perpetuation of slavery.[137]

Justice Benjamin Curtis' dissenting opinion lamented Chief Justice Taney's substitution of "the theoretical opinions of individuals" in place of the Constitution's original meaning.[138] The consequence of this, he warned, was that "we are now under the government of individual men, who . . . declare what the Constitution is, according to their own views of what it ought to mean."[139] This was the beginning of "substantive" due process.[140]

In the wake of the Civil War, Congress passed the Fourteenth Amendment in order to grant full equality to former slaves and protect their rights as citizens.[141] The Fourteenth Amendment included, among other things, a Due Process Clause that mirrored the Fifth Amendment's Due Process Clause but applied to the states rather than the federal government.[142] Over time, the Supreme Court began to use the Fourteenth Amendment's Due Process Clause to

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[132] *See* Dred Scott v. Sandford, 60 U.S. 393, 396 (1857).
[133] *Id.* at 397.
[134] *Id.* at 398.
[135] *Id.* at 404.
[136] *Id.* at 450 ("Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.")
[137] *See* ROBERT BORK, THE TEMPTING OF AMERICA 31 (Free Press 1990) [hereinafter Tempting] ("Taney created [this] right by changing the plain meaning of the due process clause of the fifth amendment . . . . How did Taney know that slave ownership was a constitutional right? . . . He knew it because he was passionately convinced that it *must* be a constitutional right.").
[138] *See Dred Scott*, 60 U.S. at 621.
[139] *Id.*
[140] It is worth noting here that President Abraham Lincoln did not view due process as Chief Justice Taney did. He believed that the Fifth Amendment's due process clause protected life, liberty, and property only as a guarantee of lawfulness, not substantive outcomes. *See* Abraham Lincoln, *Notes for Speeches*, in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 101 (Basler ed., 1953).
[141] *See* U.S. CONST., amend. XIV. *See also* McDonald v. City of Chicago, Ill., 561 U.S. 742, 807 (2010) (Thomas, J., dissenting) ("As was evident to many throughout our Nation's early history, slavery, and the measures designed to protect it, were irreconcilable with the principles of equality, government by consent, and inalienable rights proclaimed by the Declaration of Independence and embedded in our constitutional structure."). *See also* Tempting, *supra* note 137, at 38 ("[T]he history of the fourteenth amendment gave judges no guidance on any subject other than the protection of blacks.").
[142] *See* U.S. CONST., amend. XIV.

guarantee substantive outcomes – not just procedural fairness – in the same way it had used the Fifth Amendment's Due Process Clause.

This shift was forecasted in *The Slaughterhouse Cases*, in which the Supreme Court upheld a monopoly granted to a slaughterhouse in New Orleans, Louisiana under the Fourteenth Amendment's Due Process Clause.[143] The Court reiterated that the original meaning of the Fourteenth Amendment was to grant full equality to former slaves.[144] However, Justice Stephen J. Field wrote in dissent that the Fourteenth Amendment was not limited to protecting the equal rights of former slaves.[145] In his view, it was a much broader vehicle for individual rights.[146] Justice Field's dissent forecasted the adoption of substantive due process theory in the Fourteenth Amendment context.

2. Fundamental for Who?

The Court gradually warmed up to substantive due process theory by characterizing certain rights as part of the "liberty" protected by the amendment.[147] Therefore, certain rights were designated as "implicit in the concept of ordered liberty"[148] and "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[149] The difficulty with this formula was that it depended entirely on what individual judges *thought* were "fundamental" rights.[150] Justice Antonin Scalia wondered whether "the 'fundamental values' that replace original meaning . . . [were] derived from the philosophy of Plato, or of Locke, or Mills, or Rawls, or perhaps from the latest Gallup poll?"[151] The uncomfortable reality is that the judge's preferred societal outcomes are the determining factor behind which rights he deems "fundamental."[152]

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[143] *See* Slaughter-House Cases, 83 U.S. 36, 83 (1872).

[144] *Id.* at 37 (The first clause of the fourteenth article was primarily intended to confer citizenship on the negro race, and secondly to give definitions of citizenship of the United States, and citizenship of the States, and it recognizes the distinction between citizenship of a State and citizenship of the United States by those definitions.)

[145] *Id.* at 100-101 ("What the clause in question did for the protection of the citizens of one State against hostile and discriminating legislation of other States, the fourteenth amendment does for the protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different States.")

[146] *Id.* at 54 (In my judgment, it was the intention of the people of this country in adopting that amendment to provide National security against violation by the States of the fundamental rights of the citizen.)

[147] *See* U.S. CONST., amend. XIV ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

[148] *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[149] *See* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) ("The Clause . . . provides heightened protection against government interference with certain fundamental rights and liberty interests.").

[150] *See* McDonald v. City of Chicago, Ill., 561 U.S. 742, 810 (2010) (Thomas, J., dissenting) (noting that "the Court has long struggled to define" what constitutes a "fundamental" right)

[151] *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 855 (1989).

[152] The renowned Judge Learned Hand warned in his 1958 book *The Bill of Rights* about both the dangers of this methodology as well as the ways that judges often conceal its operation: "(J)udges . . . do not . . . say that . . . the legislators' solution is too strong for the judicial stomach. On the contrary they wrap up their veto in a protective veil of adjectives such as 'arbitrary,' 'artificial,' 'normal,' 'reasonable,' 'inherent,' "*fundamental*,' or '*essential*,' whose office usually, though quite innocently, is to disguise what they are doing and impute to it a derivation far more impressive than their personal preferences, which are all that in fact lie behind the decision."[152] (emphasis added).

And since the judge comes from the intellectual class, his ideas – in true Hegelian form – are likely representative of that class.[153]

After *The Slaughterhouse Cases*, the outcome-oriented method of judging began to make increasingly regular appearances. In 1905, the Supreme Court held in *Lochner v. New York* that a New York law regulating the working hours of bakers in the interest of public health was unconstitutional.[154] Justice Peckham wrote for the majority that the Fourteenth Amendment's Due Process Clause guaranteed a "right of contract," and the New York law violated that right.[155] Without addressing the history of the clause or providing any supporting evidence for his claim, Justice Peckham simply declared that "[t]he right to purchase or to sell labor is part of the liberty protected by this amendment."[156] His only reasoning was that he did "not believe in the soundness of the views which uphold this law."[157] In other words, he didn't agree with the outcome contemplated by the New York legislature. To solve this predicament, he "invented a right to make contracts, a right found nowhere in the Constitution."[158] *Lochner* represents the outcome-oriented viewpoint in full bloom, substantive due process-variety.

Justice Holmes' dissent criticized Justice Peckham's warping of due process into a vehicle for a particular social outcome. "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics."[159] Warning of the consequences of Justice Peckham's outcome-oriented use of substantive due process theory, Justice Harlan wrote in his dissent that there was "no evil" as "far reaching" as that in which the judiciary "abandon[s] the sphere assigned to it by the fundamental law" and "enter[s] the domain of legislation."[160]

3. The Zenith of Outcome-Oriented Judging

The 1961 case of *Poe v. Ullman* hinted at the extent to which substantive due process theory would eventually be taken. The case, which involved a Connecticut ban on contraception use, was ultimately dismissed by the Supreme Court because it lacked a justiciable question,[161] but Justice Harlan's dissent from this dismissal endorsed the idea of substantive due process theory as a broad source of fundamental rights. Justice Harlan began by explicitly tossing aside the original meaning and inherently procedural nature of the due process guarantee: "Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation."[162] In other words, if

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[153] *See* Robert H. Bork, *The Judge's Role in Law and Culture*, 1 AVE MARIA L. REV. 19 (2003) [hereinafter Bork] ("Activist courts – courts that announce principles and reach decisions not plausibly derived from the Constitution – tend to enact the values of the dominant social class.").
[154] *See* Lochner v. New York, 198 U.S. 45, 64-65 (1905).
[155] *Id.* at 53 ("The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution. Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right."). (internal citations omitted)
[156] *Id.*
[157] *Id.* at 61.
[158] *See* Bork, *supra* note 153, at 21.
[159] *See Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).
[160] *Id*. at 74.
[161] *See* Poe v. Ullman, 367 U.S. 497, 509 (1961).
[162] *Id.* at 541.

"due process" actually meant what it said, it would be difficult for judges to implement their own personal views of liberty. Justice Harlan then stated that the Fourteenth Amendment's Due Process Clause included a broad, undefined range of conceptual rights that were part of a "continuum which . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints."[163] A more subjective and amorphous definition could hardly be concocted.[164]

Having set up the due process guarantee as being ripe for the inclusion of whatever liberties he preferred, Justice Harlan was then able to simply claim that this undefined continuum of the Fourteenth Amendment's Due Process Clause guaranteed not just process but also "privacy of the home."[165] The only legal authority cited by Justice Harlan for this proposition was a passage in *Skinner v. Oklahoma* that does not once mention Justice Harlan's "privacy" interest.[166] Without the support of precedent, Justice Harlan claimed that his newly-discovered liberty was supported by the Third and Fourth Amendments.[167] He admitted that they applied only to the federal government, but he argued that "the concept of 'privacy' embodied in the Fourth Amendment is part of the 'ordered liberty' assured against state action by the Fourteenth Amendment."[168] In other words, the fact that the only constitutional provisions that even remotely supported his newfound privacy right did not apply to the states was solved by the use of the Fourteenth Amendment's Due Process Clause as a *substantive* guarantee of the *outcome* of "liberty," as defined by *one* Supreme Court justice.[169]

This is the outcome-oriented viewpoint at its finest.[170] The only way Justice Harlan could achieve the outcome he wanted – legalized contraception – was to warp a procedural guarantee into an outcome guarantee. The guarantee of due *process* was morphed into a guarantee of Justice Harlan's preferred *outcome*, and it was made possible by the judicial tool of substantive due process theory. The end justified the means.

As it turned out, Justice Harlan was just getting started. In 1965, the Supreme Court in *Griswold v. Connecticut* struck down a Connecticut contraception ban.[171] Citing Justice Harlan's development of the privacy concept in *Poe v. Ullman*, the Court based its decision on a "right of marital privacy."[172] However, rather than rooting that right in the Fourteenth Amendment's Due Process Clause like Justice Harlan did in *Poe*, the Court located it in the several amendments that

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[163] *Id.* at 543.
[164] It is worth noting that Justice Harlan (conveniently) failed to mention whose view of "purposeless" or "arbitrary" counts for purposes of his definition.
[165] *Id.* at 548
[166] *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
[167] *See Poe*, 367 U.S. at 549.
[168] *Id.*
[169] *See* Judge Anthony Kennedy, *Unenumerated Rights and the Dictates of Judicial Restraint*, CANADIAN INSTITUTE FOR ADVANCED LEGAL STUDIES, THE STANFORD LECTURES (August 1, 1986) ("Neither the right, nor the word, is mentioned in the text of the United States Constitution."). *See also* Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, SUP. CT. REV., Vol. 1973, 170 (1973) ("It takes an astute mind to see how the disposition of a search-and-seizure case could guide the Court when the state wants to regulate procreation.").
[170] Again, I take no issue with any particular holding. The outcome of these cases does not concern me. The Court's reasoning (or lack thereof), on the other hand, very much concerns me.
[171] *See* Griswold v. Connecticut, 381 U.S. 479, 486 (1965). Whether the use of contraception is a good idea or not is irrelevant to this discussion; the reasoning used by the court, however, is cause for concern.
[172] *Id.*

make up the Bill of Rights.[173] The Court seemed to be unable to decide where its new favorite right had come from.[174]

To explain how the Bill of Rights contained the same right that Justice Harlan had excavated from the Fourteenth Amendment's Due Process Clause, the majority wrote that the amendments in the Bill of Rights have "penumbras," or "zones," that surround them.[175] These "penumbras" are formed by "emanations" from the Bill of Rights "that help give them life and substance."[176] It was in these ephemeral "emanations" from the imaginary "penumbras" of the Bill of Rights that the right of privacy was located.[177] While it was clearly nowhere in the Constitution,[178] this right of privacy – which was apparently "older than the Bill of Rights" – supposedly prevented states from banning contraception use.[179]

Justice Stewart and Justice Black wrote in their dissenting opinion that this use of substantive due process theory to create the majority's preferred outcome was contrary to the Article III role of the judge.[180] "Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them."[181] "It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not."[182] They warned that the judicial use of substantive due process theory to create preferred outcomes endangers the separation of powers in much the same way as the outcome-oriented administrative state.[183]

The *Griswold* Court's use of Substantive Due Process to create an extra-constitutional right in order to secure a particular societal outcome[184] set the stage for one of the most prolific

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[173] *Id.* at 483 ("In NAACP v. State of Alabama, we protected the 'freedom to associate and privacy in one's associations,' noting that freedom of association was a peripheral First Amendment right.") (internal citations omitted).

[174] *Id.* at 508 (Black, J., dissenting) ("The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' of individuals. But there is not.").

[175] *Id.* at 484. This is particularly ironic in light of the majority's earlier statement that "[w]e do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." *Id.* at 482.

[176] *Id.* at 484.

[177] *Id.* at 499.

[178] *Id.* at 530 (Stewart, J., dissenting) ("I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.").

[179] *See* Tempting, *supra* note 137, at 262 ("In *Griswold*, the Court wished to strike down a law forbidding the use of contraceptives and so fabricated a right of privacy.").

[180] *See Griswold*, 381 U.S. at 512 (Black, J., dissenting) ("Surely it has to be admitted that no provision of the Constitution specifically gives such blanket power to courts to exercise such a supervisory veto over the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous.").

[181] *Id.* at 513 ("The use by federal courts of such a formula or doctrine or whatnot to veto federal or state laws simply takes away from Congress and States the power to make laws based on their own judgment of fairness and wisdom and transfers that power to this Court for ultimate determination—a power which was specifically denied to federal courts by the convention that framed the Constitution.")

[182] *Id.* at 530-31 (Stewart, J., dissenting).

[183] *Id.* at 521 (Black, J., dissenting) (warning that such judicial invention "will be bad for the courts and worse for the country" because it will "subject[] federal and state laws to . . . an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments [that] would . . . jeopardize the separation of governmental powers that the Framers set up").

[184] *See* Roe v. Wade, 410 U.S. 113, 168 (1973) (Stewart, J., concurring) ("As so understood, Griswold . . . [was] decided under the doctrine of substantive due process.").

outcome-oriented cases in American legal jurisprudence: *Roe v. Wade*.[185] In *Roe v. Wade*, the Supreme Court utilized substantive due process theory to invalidate a Texas law that banned abortions.[186] Having apparently gotten cold feet about *Griswold*'s "penumbras," the Court jumped onto Justice Harlan's *Poe* bandwagon, saying that the right of privacy was located in the Fourteenth Amendment's Due Process Clause.[187] Then, after going through an entirely irrelevant summary of the history of attitudes toward abortion, the Court simply declared that the right of privacy "is broad enough to encompass" abortion.[188] It is noteworthy that this claim was only possible under the expansive view of the Fourteenth Amendment's Due Process Clause articulated by Justice Field in *The Slaughterhouse Cases*.[189]

The Court admitted that "[t]he Constitution does not explicitly mention any right of privacy,"[190] but it nonetheless attempted to justify its creation by stating that "*individual justices* have"[191] found that "a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[192] The Court then proceeded through the now-familiar list of Bill of Rights provisions that were used to justify the creation of this right in *Poe* and *Ullman*, concluding that "personal rights" that are deemed "fundamental" are "included in this guarantee of personal privacy."[193] "Fundamental" for who?

The Court even admitted that it didn't know where the right of privacy came from. It postulated that it could have come from the Bill of Rights, its "emanations," the "penumbras" of its "emanations," or even the Ninth Amendment. "[H]owever based," the right of privacy is apparently "broad enough to cover the abortion decision."[194] It simply *is* broad enough.[195]

In this moment, the Court reached the zenith of the outcome-oriented viewpoint.[196] No longer did it rely on the original meaning of the Constitution. No longer did it respect its

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[185] This article makes no claims about whether or not abortion is good policy. It merely seeks to point out analytical parallels between several cases in a line of jurisprudence.

[186] *See generally* Roe v. Wade, 410 U.S. 113 (1973).

[187] *Id.* at 168 ("The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights.").

[188] *Id.* at 153 ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."). *See also* Bork, *supra* note 153, 23 ("After being subjected to a lengthy and irrelevant survey of past and present attitudes and practices about abortion in various nations and historical eras, the reader is simply told that there is a constitutional right of privacy, whose rationale and limits are not even sketchily outlined, and then informed that this right covers a woman's right to abort.").

[189] *See* The Slaughter-House Cases, 83 U.S. 36, 54 (1872) ("In my judgment, it was the intention of the people of this country in adopting that amendment to provide National security against violation by the States of the fundamental rights of the citizen.").

[190] *Id.* at 152.

[191] *Id.*

[192] *Id.* (emphasis added).

[193] *Id.* at 153.

[194] *Id.* at 155.

[195] Exactly what authority led to this conclusory statement remains unclear. Of course, when the right is one that the judge has created, it makes sense that the judge can also define what is included in that right. So much for Article III, the separation of powers, the legitimacy of the people's rule through their elected representatives, or the validity of the rule of law.

[196] It is interesting to note that in the 1997 case of *Washington v. Glucksberg*, the Court upheld a Washington state ban on physician-assisted suicide after going through a nearly identical substantive due process analysis. *See* Washington v. Glucksberg, 521 U.S. 702, 736 (1997). The contrast between that case and *Roe* suggests that the

"province and duty," which was to "say what the law *is*,"[197] not what it *should be*.[198] As long as the desired outcome was put in place, any process costs were worth it.[199] In fact, the Court did not even rely on the ethereal "emanations" stemming from the imagined "penumbras" of *some* of the Constitution's provisions that had inspired the right of privacy in the first place – even though that right of privacy was the linchpin upon which *Roe v. Wade* stands. In the tradition of *Dred Scott* and *Lochner*,[200] the Court simply declared an outcome.[201]

Justice William Rehnquist's dissent tied all of this substantive due process-style theorizing back to the fundamental conflict between the process-oriented viewpoint of the Constitution and the outcome-oriented viewpoint of post-Enlightenment rationalism. He argued that the majority had warped the notion of due process to encompass its preferred social outcome. He reiterated that the "liberty" in the due process guarantee "is not guaranteed absolutely against deprivation, only against deprivation without due process of law."[202]

After *Roe*, the use of substantive due process theory continued to permeate the Supreme Court's jurisprudence. In 2015, the Court held in *Obergefell v. Hodges* that the word "liberty" in the Fourteenth Amendment's guarantee of due process guaranteed same-sex couples the right to marry.[203] The majority reasoned that "individuals need not await legislative action before asserting a fundamental right."[204] Like FDR's court-packing plan, this particular right was apparently too socially urgent to wait for the political process. As in *Roe*, the Court spent an inordinate amount of time analyzing the changing of social views regarding same-sex marriage,[205] bringing to mind Justice Holmes' statement in *Lochner* that "[t]he 14th Amendment does not enact Mr. Herbert Spencer's Social Statics."[206] The Court followed the now-predictable pattern of stating that "liberty" of the Fourteenth Amendment included the protections of the Bill of Rights, but this time it added that it also included "personal choices central to individual dignity and autonomy"[207] and the right to "define and express their identity."[208] Based not on any legal authority but rather on the majority's self-proclaimed "better informed understanding" of "a liberty that remains urgent in our own era,"[209] the Court simply declared an outcome.[210]

"fundamental" right in *Roe* was higher on the majority's list of preferred social outcomes than the "fundamental" right in *Glucksberg*.

[197] *See* Marbury v. Madison, 5 U.S. 137, 177 (1803).

[198] *See* Obergefell v. Hodges, 576 U.S. 644, 686 (2015) (Roberts, C.J., dissenting) (emphasis added).

[199] *See* Bork, *supra* note 153, at 23 ("The pro-abortion forces . . . care nothing about . . . the legitimacy of process; they want abortion and they do not care how they get it.").

[200] *See* Tempting, *supra* note ___, at 32 ("Who says *Roe* must say *Lochner* and *Scott*.").

[201] *Id.* at 114 ("This is not legal reasoning but fiat.").

[202] *See* Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, C.J., dissenting).

[203] *See* Obergefell v. Hodges, 576 U.S. 644, 681 (2015). Again, this article makes no claims about the moral correctness or policy wisdom of this ruling. It simply seeks to point out analytical parallels that have reappeared consistently throughout the history of the Supreme Court.

[204] *Id.* at 24. The majority did not, however, address what happened when that fundamental right was based on a judicially-invented right based on a judicially-invented scrutiny standard rooted in the use of an unavoidably procedural guarantee.

[205] *Id.* at 3 ("Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together.")

[206] *See* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[207] *See* Obergefell, 576 U.S. at 663.

[208] *Id.*

[209] *Id.* at 672.

[210] *Id.* at 686 (Roberts, C.J., dissenting) ("Neither petitioners nor the majority cites a single case or other legal source providing any basis for such a constitutional right. None exists, and that is enough to foreclose their claim.").

Chief Justice Roberts' dissent was blunt. "[T]his Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be."[211] Referring to the justices of the Supreme Court, Chief Justice Roberts wondered, "[j]ust who do we think we are?"[212] He pointed out that "[t]he majority['s] . . . aggressive application of substantive due process breaks sharply with decades of precedent and returns the Court to the unprincipled approach of *Lochner*."[213] Chief Justice Roberts identified the outcome-oriented underpinnings of *Obergefell*'s holding, noting that it is based on the majority's "understanding of what freedom is *and must become*."[214] "[A] Justice's commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of 'due process.'"[215]

4. An Outcome-Oriented Tradition of Judging

It is puzzling that "process" can also mean "substance."[216] Indeed, it is puzzling that "process" can mean anything other than "process" at all.[217] "The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words."[218] The reality is that the guarantee of due process in the Fifth and Fourteenth Amendments remains an unflinchingly procedural guarantee.[219] "[I]t does nothing more than impose the condition that government may deprive an individual of any or all of these valuable interests only if certain procedural requirements have first been satisfied."[220] All of the "penumbras" in the world (or the imaginary "emanations" of those "penumbras") cannot change

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[211] *Id.* ("It can be tempting for judges to confuse our own preferences with the requirements of the law."). Later on in his dissent, Chief Justice Roberts reiterated this point in more detail: "Stripped of its shiny rhetorical gloss, the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society. If I were a legislator, I would certainly consider that view as a matter of social policy. But as a judge, I find the majority's position indefensible as a matter of constitutional law." *Id*. at 686.

[212] *Id*. at 687 (internal citations omitted) ("The truth is that today's decision rests on nothing more than the majority's own conviction that same-sex couples should be allowed to marry because they want to, and that "it would disparage their choices and diminish their personhood to deny them this right. Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences adopted in *Lochner*.").

[213] *Id.* at 699.

[214] *Id.* at 688 (emphasis added) ("Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.").

[215] *Id.* at 705.

[216] As one particularly cheeky law professor put it, "There is simply no avoiding the fact that the word that follows 'due' is 'process.'" *See* Tempting, *supra* note 137, at 32.

[217] *See* McDonald v. City of Chicago, Ill., 561 U.S. 742, 806 (2010) (Thomas, J., dissenting) (referring to the Due Process Clause as a provision "that speaks only to 'process'").

[218] *Id.*

[219] *See* Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, C.J., dissenting) (noting that the "liberty" in the due process guarantee "is not guaranteed absolutely against deprivation, only against deprivation without due process of law.")

[220] *See* Martin Redish & Kristin McCall, *Due Process, Free Expression, and the Administrative State*, 94 NOTRE DAME L. REV. 297, 297 (2018).

the fact that due process "is not a secret repository of substantive guarantees against unfairness."[221]

> [Substantive due process theory] distorts the constitutional text, which guarantees only whatever "process" is "due" before a person is deprived of life, liberty, and property. Worse, it invites judges to . . . roa[m] at large in the constitutional field' guided only by their personal views" as to the "'fundamental rights'" protected by that document. By straying from the text of the Constitution, substantive due process exalts judges at the expense of the People from whom they derive their authority.[222]

The framework of "fundamental" rights underlying substantive due process theory is even more cause for concern. This framework allows judges to create "fundamental" rights based on their own personal policy preferences despite the fact that "[j]udges are no better qualified than any of the rest of us to identify transcendent principles of right and wrong."[223] The risk is that the "liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of th[e] Court."[224] As then-Judge Anthony Kennedy had said during a speech at Stanford University, "[t]he Due Process Clause is not a guarantee of every right that should inhere in an ideal system."[225] (The irony, of course, is that Kennedy wrote the *Obergefell* majority opinion. The desire for certain outcomes was apparently too strong for even a vocal critic of substantive due process theory). The practical result is that substantive due process theory stands for "those freedoms and entitlements that th[e] Court *really* likes."[226]

In sum, substantive due process theory is an outcome-oriented license for judicial invention.[227] Judges aren't legislators in robes, but substantive due process theory has enabled them to legislate under the guise of constitutional interpretation.[228] The original understanding of neither clause suggests that "process" can also mean "outcomes." Therefore, "a judge who insists on giving the due process clause such content must make it up."[229] When federal courts are unmoored from the procedural pillars that guide the judiciary's discretion, they become legislators. This is particularly ironic given the framers' belief that the judicial branch was

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[221] *See* Perry v. New Hampshire, 565 U.S. 228, 249 (2012) (Thomas, J., concurring)
[222] *See* Obergefell v. Hodges, 576 U.S. 644, 721-22 (2015) (Thomas, J., dissenting).
[223] *See* Bork, *supra* note 153, at 22.
[224] *See Washington* v. *Glucksberg*, 521 U.S. 702, 720 (1997).
[225] *See* Judge Anthony Kennedy, *Unenumerated Rights and the Dictates of Judicial Restraint*, CANADIAN INSTITUTE FOR ADVANCED LEGAL STUDIES, THE STANFORD LECTURES (August 1, 1986).
[226] *See Obergefell*, 576 U.S. at 720 (Scalia, J., dissenting).
[227] *See* Justice Stephen J. Markman, *The Coming Constitutional Debate: A Citizen's Guide*, White Paper No. 1, p 2 (April 2010) [hereinafter Markman] ("Rather than merely defining broad 'rules of the game' for the three branches of federal and state government, the new Constitution [now] compel specific substantive outcomes.").
[228] *See* McDonald v. City of Chicago, Ill., 561 U.S. 742, 812 (2010) (Thomas, J., dissenting) ("But any serious argument over the scope of the Due Process Clause must acknowledge that neither its text nor its history suggests that it protects the many substantive rights this Court's cases now claim it does.") *See also* William Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS L. REV. 693, 700 (1976) ("Surely the Constitution does not put either the legislative branch or the executive branch in the position of a television quiz show contestant so that when a given period of time has elapsed and problem remains unresolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution.").
[229] *See* Tempting, *supra* note 137, at 43.

actually the weakest of the three branches of government.[230] The temptation to solve what the judge perceives as "an urgent human problem" – just "this one time" – is strong.[231] And if it is acquiesced to, "[the] judge has begun to rule where a legislator should."[232] Rather than saying what the law *is*, judges are enabled to say what the law *should be*. And saying what the law should be is indistinguishable from saying what that particular judge would like it to be. This is the judicial manifestation of Hegel's outcome-oriented viewpoint, and it roars – as it tears down the procedural protections of the Constitution – that the end justifies the means.

IV. CONSEQUENCES

With the emergence of substantive due process theory, the American judicial branch arrived at the same place as the administrative state. Just as Woodrow Wilson advocated for a Hegelian class of administrative experts who could see above the political realm to create preferred social outcomes, the American judiciary now created its preferred social outcomes for millions of Americans based on imaginary "emanations" that decades of brilliant Supreme Court jurists had apparently failed to notice. Just as the administrative state casts aside the separated-powers framework of the Constitution in the name of "necessity," the judiciary's use of substantive due theory process bypasses the autonomy of the states in order to create outcomes that five elite lawyers feel are too socially important to wait for the political process.[233] Just as the administrative state was initially justified by the economic downturn of the Great Depression but eventually was also applied to social concerns through the Great Society, substantive due process theory emerged through the economic issues in *Lochner* but was eventually applied to the social issues in *Roe* and *Obergefell*. The outcome-oriented viewpoint has become so ingrained in the American subconscious that it has now birthed anew from within its institutions.

The sections that follow summarize three commonalities between these two examples and their relationship to the outcome-oriented viewpoint.

A. Disregard for the People

Political participation is the cornerstone on which the American republic was built.[234] "Election day . . . is what links the people to their representatives[] and gives the people their sovereign power. That day is the foundation of democratic governance."[235] Delegation to the administrative state bypasses this link and creates outcomes without political participation.[236] The rise of the monolithic[237] administrative state has ignored the consent of the governed that is necessary for binding laws to have legitimacy.[238]

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[230] *See* James Madison, The Federalist 78.
[231] *See* Tempting, *supra* note 137, at 1.
[232] *Id.*
[233] *Id.* at 24 (reasoning that "individuals need not await legislative action before asserting a fundamental right.").
[234] *See* James Madison, The Federalist 51 ("A dependence on the people is, no doubt, the primary control on the government.").
[235] *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2512 (2019) (Kagan, J., dissenting).
[236] *See* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY 12 (Yale U. Press 1995) [hereinafter Schoenbrod] ("[D]elegation renders them less responsible to the people and less responsive to their interests.").
[237] See Philip K. Howard, *A Radical Centrist Platform for 2020*, THE HILL (Apr. 13, 2019, 3:00 PM EDT), https://thehill.com/opinion/campaign/437963-a-radical-centrist-platform-for-2020 (noting that the federal register contains over 150 million words).
[238] *See* Marini, *supra* note 46, at 127.

It is Congress' responsibility to make the laws that regulate conduct *precisely because* the members of Congress are elected and accountable to the people. Agencies make laws that regulate the millions of Americans every day, but the people do not vote for their agency officials. The people also do not have any control over those officials' use of their discretion because those officials "are shielded from the popular control that might be exercised through elections."[239] The administrative state is composed of intellectual elites who believe that they "enjoy[] superior enlightenment and that [their] business is to spread this benefit to those living on the lower slopes of human achievement."[240] This is a verbatim manifestation of Hegel's belief in the intellectual class' ability to guide the unenlightened masses toward the best outcomes.

Administrative agencies also prioritize the outcomes of only certain interest groups.[241] "[A]gencies resolve issues of immediate concern to only a small segment of the population, ignoring the interests of many others. Many agency rules could not survive a vote in a representative legislature."[242] Through delegation to agencies, Congress has been allowed to "pass purposely unfinished laws, which are not really laws" and which "facilitate an arrangement that allows the bureaucracy and the special interests a bargaining arena for establishing the rules that govern society."[243]

Agencies toss aside the people's political process in another way as well: through their internal adjudicatory function. Whereas the usual adjudicatory setting involves independent judges and occasionally a jury, the administrative adjudicatory setting involves administrative law judges (ALJs) who are selected by the very agencies whose cases they decide.[244] Not only that, but ALJ decisions are subject to review by agency heads.[245] This results in the unification of "three functions under the same roof: the ability to engage in rulemaking, the ability to prosecute individual cases, and the ability to adjudicate the case in question."[246] The level of potential bias is administrative adjudication is therefore impossible to ignore, particularly since agency employees are employed for the very purpose of pursuing the agency's explicitly stated policy goals. "Such potential sources of threat to adjudicatory neutrality and independence would never be tolerated in the judicial system," yet they are a daily norm in the administrative state.[247] In this way, administrative adjudications "evade[] the Constitution's procedural rights."[248]

The judiciary's use of Substantive Due Process also disregards the people and the constitutional framework that was designed to protect their political participation. It enables judges to engage in "aristocratic judicial Constitution-writing" in order to create whatever outcomes they think are best while hiding behind a guise of constitutionality.[249] "The people are excluded from the lawmaking process, replaced by a handful of unelected judges who are unresponsive to electoral will."[250] This exclusion scoffs at the reality that "a Justice's

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[239] *See* SCHOENBROD, *supra* note 236, at 170 (noting that voters "do not even know when Congress delegates").
[240] *See* Kenneth Minogue, *'Christophobia' and the west*, THE NEW CRITERION, June 2003.
[241] *See* SCHOENBROD, *supra* note 236, at 13 (noting that "concentrated interests often prevail more easily in an agency than they can in Congress").
[242] *See* Christopher DeMuth, *Presidential Reform of the Regulatory State*, 6, HOOVER INSTITUTION (February 2019).
[243] *See* Marini, *supra* note 46, at 76.
[244] *See* Evasion, *supra* note 11, at 931.
[245] *Id.*
[246] *See* RICHARD EPSTEIN, THE DUBIOUS MORALITY OF ADMINISTRATIVE LAW 59-60 (2020).
[247] *See* Redish & McCall, *supra* note 220, at 298.
[248] *See* Evasion, *supra* note 11.
[249] *See* Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WAS. L. REV. 1119, 1123 (1998) ("The largest threat to modem law for an evolving world is a judiciary claiming to act in the name of the Constitution.").
[250] *See* Gorsuch, *supra* note 4, at 44.

commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of 'due process.'"[251]

President Abraham Lincoln warned of the dangers of departing from the proper Article III role of the judge in his First Inaugural Address. Lincoln was speaking in reference to the Court's recent decision in *Dred Scott*, but he may just as well have been talking about *Lochner*, *Poe*, or *Obergefell*.

> The candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.[252]

The result is that the rule of law is disregarded – the same rule of law that the people created through their elected representatives through the hard work of compromise in the legislative forge. "[O]ften lost in the process of judicial efforts to rationalize the law more perfectly are the compromise bargains that are the hallmark virtues of the legislative process."[253] The people's political participation in the process of self-government is rendered meaningless. The Court has explicitly recognized this: "By extending constitutional protection to an asserted right or liberty interest, we . . . place the matter outside the arena of public debate and legislative action."[254] "Why the people are not up to the task of deciding what new rights to protect, even though it is they who are authorized to make changes,"[255] has never been explained by the proponents of substantive due process theory.[256] *Roe v. Wade* is a perfect example. It essentially overruled the process of federalism, which had enabled a serious nationwide discussion about abortion.[257] Chief Justice Rehnquist noted that "the very existence of the debate is evidence that the 'right' to an abortion is not so universally accepted as the appellant would have us believe."[258] The reality is that the majority opinion decided to enlist on one side of a current social controversy without letting the people decide for themselves.[259] "Just as *Dred Scott* forced a southern pro-slavery position on the nation, *Roe* is nothing more than the Supreme Court's imposition on us of the morality of our cultural elites."[260] The people – and the political process through which they participate in self-government – was disregarded in order to achieve a particular outcome. How very Wilsonian.

What, then, is the point of participating in the process? What is the point of electing representatives if the process by which those representatives could act on behalf of their electorates is nullified by delegation to an unelected fourth branch? What is the point of electing

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[251] *See* Obergefell v. Hodges, 576 U.S. 644, 705 (2015) (Roberts, C.J., dissenting).
[252] See President Abraham Lincoln, First Inaugural Address (1861) https://avalon.law.yale.edu/19th_century/lincoln1.asp.
[253] *See* Gorsuch, *supra* note 4, at 138.
[254] *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997).
[255] *See* U.S. CONST. art. V.
[256] *See* McDonald v. City of Chicago, Ill., 561 U.S. 742, 793-94 (2010) (Thomas, J., dissenting).
[257] *See* Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist, C.J., dissenting) ("Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the 'right' to an abortion is not so universally accepted as the appellant would have us believe.").
[258] *Id.*
[259] *See* Gomorrah, *supra* note 13, at 103.
[260] *Id.* at 173-74.

a legislator to make laws if they can instead be made by a judge who has no qualms about disregarding the original meaning of the law in the search for his preferred social outcome?

It is worth mentioning that this consequence is made possible by the same rationalism that animated Hegel's political theory. The government that believes it is within human ability to rationally create solutions to society's problems will be much less likely to leave the resolution of those problems to the voters. Likewise, the judge who believes it is within his power to create the best, most rational outcome will be much less likely to stick to the original meaning of the law, particularly when it doesn't lead to what he believes is the best outcome.

B. The End of Fair Notice

Fair notice is central to the idea of a rule of law. Having a rule of law that the people can know and understand provides fair notice of what conduct is permissible.[261] Having a government that the people periodically elect provides fair notice of the government's responsibility to the people. Having a system of separated powers provides fair notice of the reach of the government's power. Having a judiciary that abides by the law rather than creating it anew provides fair notice of what consequences may flow from one's actions.[262] Indeed, fair notice is the point of having a rule of law at all.

The administrative state, however, scoffs at fair notice. Unlike elected representatives, agencies are unaccountable to the people.[263] While the people can remove representatives they are displeased with, they are powerless to remove agency officials, who are unknown to them.[264] Agencies have created regulations at such a rate that it is often no longer possible for the agencies themselves to know what their regulations say.[265] In addition, since most agency rules are meant to create a particular outcome, they are largely based on immediate concerns, not long-term values. When these short-term concerns change, the rules instantly become obsolete.[266] Finally, since most agencies are composed of presidentially-appointed officials, every change in

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[261] *See* Locke, *supra* note 6 at § 141 (stating that liberty requires having a "standing rule to live by," rather than the "inconstant, uncertain, unknown, arbitrary will of another man").

[262] *See* Gorsuch, *supra* note 4 at 106 ("[W]hen judges abandon the original meaning of a law to pursue some other goal they find worthy, they . . . threaten the . . . right of the people to fair notice of the law's demands.")

[263] *See* Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 55 (2010) (noting that delegation fails to "provide[] fair notice to affected citizens").

[264] This violates what Locke said was the key requirement for lawmakers and adjudicators: that they be known and knowable. *See* Locke, *supra* note 6 at § 136.

[265] *See* GORSUCH, *supra* note 4 at 84 (noting that the Code of Federal Regulations contains well over 175,000 pages – and counting. Justice Gorsuch also describes how agencies are now promulgating regulations at a rate exceeding their ability to actually know what those regulations are). *See also* PHILIP HOWARD, THE RULE OF NOBODY: SAVING AMERICA FROM DEAD LAWS AND BROKEN GOVERNMENT, 143 (citing Clyde Wayne Crews Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, COMPETITIVE ENTERPRISE INSTITUTE, 80-81 (2019), https://cei.org/sites/default/files/10KC2019.pdf ("Between 1969 and 1979 the Federal Register nearly quadrupled in length, expanding not just the scope of regulation, but the granularity of its mandates.").

[266] *See* David Schoenbrod, *Consent of the Governed: A Constitutional Norm that the Court Should Substantially Enforce*, 43 HARV. J. LAW & PUB. POLICY 213, 251 (2020) [hereinafter Consent] (noting that agency actions "grow obsolete quickly because they are based upon circumstances and understandings that change.").

presidential administration creates "a huge change in the law without a single member of Congress casting a vote."[267] This kind of unpredictability is the opposite of fair notice.[268]

Some may argue that the Notice & Comment process provides fair notice. Notice & Comment provides an opportunity for interested parties to submit written comments to agencies regarding proposed regulations. However, the agency is free to completely disregard the comments. There are no compromises that must be made between the public sentiment and the agency's desires, such as would be common in the legislative process. Notice & Comment therefore does not solve the fair notice problems embedded in the administrative state.

The same is true of the judiciary's use of Substantive Due Process. What is the point of life-tenured judges whose Article I role is to simply apply the law if every time you stand in front of them you are the mercy of their personal whim? "Come to [the judiciary] with arguments from text, structure, and history and [they] are bound to . . . do [their] best to reason through them. Allow [them] to reign over the country [according to their preferences] and you have no idea how [they] will exercise that fickle power."[269] There is no fair notice there. That is the same kind of arbitrary, concentrated power the framers were trying to avoid.

C. Passing the Buck

The rise of the administrative state has also led to a decrease in Congressional legitimacy and efficacy. This decrease stems from the incentive that delegation provides for legislators to pass the hard work of legislating off to agencies.[270] This "passing the buck" enables legislators to claim credit for successful legislation and push the blame for unsuccessful legislation on to the bureaucracy.[271] They doubly benefit because they can sidestep the compromises that the legislative process necessarily requires and avoid having to talk about the costs that are inherent in any governmental decision.[272] The result is that the government is no longer exercising its fiduciary duty to the people.

By enabling legislators to avoid making compromises, the administrative state has "undermined the most important practical safeguard of constitutionalism: the political cooperation necessary for the separation of powers to work."[273] The legislative branch, rather than fulfilling its constitutional responsibility to make laws,[274] now merely "delineates the general policy" and leaves the rest to agencies that they can hide behind if the result is less than satisfactory.[275] Locke predicted that this would be a constant temptation for legislators and he

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[267] *See* Calabresi, *supra* note 10 at 853.
[268] *Id.* at 856 ("Regulatory law lurches sharply in one direction under President Obama and sharply in another direction under President Trump. These sudden lurches are not good for individuals or for people trying to start or run a business and who are eager to know 'what the law is.'").
[269] *See* Gorsuch, *supra* note 4 at 112
[270] *See* Consent, *supra* note 266 at 218 (noting that delegation allows legislators to "avoid the hard choices").
[271] *Id.* at 248 ("Most current regulatory statutes order agencies to deliver popular promises, such as health protection, but nonetheless sidestep the hard choices. That way, the members of Congress get much of the credit for the popular promises, and the agency gets much of the blame for the burdens needed to deliver on the promises and the failures to deliver.").
[272] *Id.*
[273] *See* Marini, *supra* note 46 at 58.
[274] *See* Alexander Hamilton, The Federalist 75 ("The essence of the legislative authority is to enact laws.").
[275] *See* American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946).

warned against passing the buck, which would allow legislators to "exempt themselves from obedience to the laws they make" in order to advance "their own private advantage."[276]

Passing the buck contradicts the American Constitution. The framers wrote that the legislature was supposed to make the hard choices.[277] Alexander Hamilton wrote in Federalist 73 that "[t]he oftener a measure is brought under examination the greater the diversity in the situations of those who are to examine it [and] . . . the less must be the danger of those errors which flow from want of due deliberation."[278] The framers were concerned that an "excess of law-making" could be "the disease[] to which our governments are not most liable."[279] This concern stemmed from their recognition that "men are not angels"[280] and is evidenced by the splitting of the legislative branch into two houses so as to enable multiple stages of review for every issue.[281] It would hardly have been logical for them to do so if their primary goal was efficient administration. Delegation, however, allows legislators to avoid the difficult policy choices[282] despite the fact that "[i]t is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people."[283] Rather than making laws, Congress makes legislators.[284] This is a result of Hegelian and Wilsonian rationalist philosophy, which places the expertise of administrators above the political process in an attempt to create outcomes more efficiently.

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If the purpose of the law and the government is to create each citizen's ultimate outcomes for society, the decision of who gets the positions of power in those realms is something worth fighting tooth and nail for. Process costs are irrelevant, as long as the right outcome is achieved. The uselessness of Congress – a result of passing the buck – and the expanding power of the judiciary – a result of concepts like substantive due process theory – have made it clear to the American people that their political participation is no longer valuable.

V. TODAY'S AMERICA: THE PANDEMONIUM OF POLARIZATION

[276] *See* Locke, *supra* note 6 at § 143.
[277] *See* John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2D 191, 198 (2007) ("Even the quickest look at the constitutional structure reveals that the design of bicameralism and presentment disfavors easygoing, high volume lawmaking."). Manning goes on to say that "the cumbersomeness of the [constitutional] process seems obviously suited to interests that contradict the 'more is better' attitude that has come to be almost an unconscious assumption of public law." *Id.* at 199.
[278] *See* Alexander Hamilton, Federalist 73.
[279] *See* GORSUCH, *supra* note 4 at 84 (noting that the Code of Federal Regulations contains well over 175,000 pages – and counting. Justice Gorsuch also describes how agencies are now promulgating regulations at a rate exceeding their ability to actually know what those regulations are).
[280] *See* James Madison, Federalist 51.
[281] *See* U.S. CONST. art. I, § 1. It stands to reason that if the Framers had been concerned with efficient decision-making without the laborious political process, the division of Congress into two houses would not have been done.
[282] *Id.* at 687 ("It is difficult to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge.").
[283] *See* Industrial Union Dept., AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 686 (1980) ("If we are ever to reshoulder the burden of ensuring that Congress itself make the critical policy decisions, these are surely the cases in which to do it.").
[284] *Id*. at 686.

On Wednesday, March 4, 2020, Senator Chuck Schumer (D-N.Y.) spoke at a rally hosted by the Center for Reproductive Rights.[285] Speaking after the two newest members of the Supreme Court – Justice Neil Gorsuch and Justice Brett Kavanaugh – heard their first abortion-related case, Schumer said the following: "I want to tell you, Gorsuch. I want to tell you, Kavanaugh. You have released the whirlwind and you will pay the price! You won't know what hit you if you go forward with these awful decisions."[286] Chief Justice John Roberts immediately issued a statement condemning this tirade, saying that "[j]ustices know that criticism comes with the territory, but threatening statements of this sort from the highest levels of government are not only inappropriate, they are dangerous. All Members of the Court will continue to do their job, without fear or favor, from whatever quarter."[287]

Roberts was not alone in his criticism of Schumer's remarks. The American Bar Association issued a statement saying that it was "deeply troubled" by Schumer's statements. "Whatever one thinks about the merits of an issue before a court, there is no place for threats . . . . Such comments challenge the reputation of the third, co-equal branch of our government; the independence of the judiciary; and the personal safety of judicial officers."[288] Even Harvard Law School professor Laurence Tribe, a friend of Schumer's, called the Senator's remarks "inexcusable" and said that "Chief Justice Roberts was right to call him on his comments. I hope the Senator, whom I've long admired and consider a friend, apologizes and takes back his implicit threat. It's beneath him and his office."[289]

On November 21, 2018, Chief Justice Roberts criticized President Donald Trump for the same thing. President Trump referred to certain members of the judiciary as "Obama judges," implying that they made decisions based on a particular ideology.[290] Roberts responded that "[w]e do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their best to do equal right to those appearing before them."[291]

Senator Schumer and President Trump's remarks are revealing. They clearly show the polarized positions that have come to define the political realm, but they also reveal a flawed understanding of what the judiciary is and what it is supposed to do. Rather than being perceived as an applicator of existing law, the judiciary is perceived as a politicized weapon that can be wielded for particular social causes.[292] Judges are seen as political actors that "can be installed to

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[285] https://www.foxnews.com/politics/chief-justice-roberts-rare-rebuke-schumer-calling-comments-kavanaugh-gorsuch-dangerous.

[286] https://www.nbcnews.com/politics/supreme-court/rare-rebuke-chief-justice-roberts-slams-schumer-threatening-comments-n1150036.

[287] https://www.washingtonpost.com/politics/2020/03/04/john-roberts-chuck-schumers-extraordinary-war-words/. President Donald Trump supported Chief Justice Roberts' rebuke of Schumer's comments. "There can be few things worse in a civilized, law abiding nation, than a United States Senator openly, and for all to see and hear, threatening the Supreme Court or its Justices. This is what Chuck Schumer just did. He must pay a severe price for this!" https://twitter.com/realDonaldTrump/status/1235370217712300038.

[288] *Id.*

[289] *Id.*

[290] https://www.nbcnews.com/politics/supreme-court/rare-rebuke-chief-justice-roberts-slams-trump-comment-about-obama-n939016.

[291] *Id.*

[292] https://www.washingtonpost.com/politics/2020/03/04/john-roberts-chuck-schumers-extraordinary-war-words/. The balance of power relies upon the perception that the judiciary isn't just an extension of the two political parties in Washington that have the occasions to appoint the judges. At the same time, that perception has clearly worn thin in recent years.

realize certain outcomes."[293] The Schumer and Trump incidents deal with the judiciary specifically, but they are two of a myriad of examples of the polarization that currently pervades the United States in general. This polarization is rooted in the adoption of the Hegelian outcome-oriented viewpoint that was adopted into the American mindset by Woodrow Wilson and others.

The following sections describe how all of this was predicted at the outset of the republic – by a French tourist.

A. Tocqueville's Prophecy

During his visit to the new American republic in 1831, French political theorist Alexis de Tocqueville was impressed by what he saw. He admired the "general equality" of the population,[294] the "virtue" and "intellect of the people,[295] the high value placed on the rule of law,[296] and the pride that every citizen felt in the success of the republic.[297] (Notably, he was surprised by the "limited . . . share of government left to . . . administration").[298] Most of all, he admired "the surpassing liberty which the Americans enjoy."[299]

Tocqueville's admiration for the American experiment, however, did not stop him from offering a warning regarding its future. He observed that American citizens were devoted to their country with an "extension of individual egotism."[300] He warned that such a potent democratic spirit, if combined with the American notions of individual liberty and the rationalist belief in human perfectibility, could create the expectation that the one's definition of liberty must be implemented by the government.[301] In other words, he feared that the core values of American society could foster in citizens the belief that the government should create their preferred outcomes. This could in turn lead to a society that acquiesces to what Tocqueville viewed as the greatest danger to liberty: the centralization of governmental power.[302]

Tocqueville worried that the people would acquiesce to such a consolidation of power for two interrelated reasons: first, because their view of the government as an extension of themselves would make them willing to grant it more power,[303] and second, because a more

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[293] *Id.*
[294] *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA ii (Adlard & Saunders 2000).
[295] *Id.* at 29.
[296] *Id.* at 52
[297] *Id.* at 75. He elsewhere called it the "irritable patriotism of the Americans." *Id.* at 225.
[298] *See id.* Book 1, Chapter IV: The Principle of the Sovereignty of the People in America.
[299] *Id.* at 230.
[300] *See* Bk. I, Chap. V: Political Effects of the System of Local Administration in the United States.
[301] *See* Bk. II, Chap. VIII: The Principle of Equality Suggests to the Americans the Idea of the Indefinite Perfectibility of Man.
[302] *See* Bk. I, Chap. XVIII: What are the Chances in Favor of the Duration of the American Union and What Dangers Threaten It ("Independent nations have therefore a natural tendency to centralization."). *See also generally* Roger Boesche, *Tocqueville and Le Commerce: A Newspaper Expressing His Unusual Liberalism*, J. OF THE HIST. OF IDEAS 44 (1983). *See also* Tocqueville, *supra* note 294, Bk. II, Chap VI: What Sort of Despotism Democratic Nations Have to Fear ("[A] democratic state of society, similar to that of the Americans, might offer singular facilities for the establishment of despotism.").
[303] *See* Tocqueville, *supra* note 294 at Bk. II, Chap. 11: That the Notions of Democratic Nations on Government are Naturally Favorable to the Concentration of Power. ("As the conditions of men become equal amongst a people, individuals seem of less importance, and society of greater dimensions . . . . [Men] are willing to acknowledge that the power which represents the community has far more information and wisdom than any of the members of that

powerful central government would make it more likely for their definitions of liberty to be put in place.[304] In a society where each citizen views the government as extension of themselves, each citizen can still believe that he is not under the rule of any other man. Likewise, in a society where each citizen believes in the rationalist ideal of human perfectibility,[305] each citizen can become convinced that the government can ultimately implement his preferred societal outcomes.

The ultimate consequence of this, Tocqueville feared, would be a fractured and polarized society. This would result because a democratic society requires association in order to achieve political goals,[306] and such groups or associations are "apt to set up some general and certain aim . . . to which all their efforts are directed . . . [and] which they are never weary of pursuing."[307] In this manner, Tocqueville paralleled James Madison's acknowledgement that factionalism is sown into human nature.[308]

Given their view of the government as an extension of personal preferences, these groups will then make it their goal to have the government adopt their policy positions.[309] Such a pursuit will necessarily solidify the views of these groups, who will, if their positions are adopted by the government, place in it a "confidence . . . that knows no bounds."[310] In this manner, the combination of the potent egotism of democracy with the American notions of individual liberty and the rationalist belief in human perfectibility runs the risk of leading to a society in which interest groups steadily become more and more insulated against each other and passionate in their advocacy. This risk is exactly what the framers were alluding to when they said that "[l]iberty is to faction what air is to fire."[311] In sum, Tocqueville foresaw that the American republic would always be at the risk of political and societal polarization.

B. Prophecy Fulfilled

History has proven that Tocqueville had reason to be concerned. As he predicted, combination of democracy, individualism, and the rationalist notion of human perfectibility have led the American people to see the government as an extension of themselves and the "alleviator

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community; and that it is the duty, as well as the right, of that power to guide as well as govern each private citizen.")

[304] *Id.* "I am convinced that democratic nations are most exposed to fall beneath the yoke of a central administration . . . . [This is because] [t]he constant tendency of these nations is to concentrate all the strength of the Government in the hands of the only power which directly represents the people."

[305] *Id.* at Bk. II, Chap. VIII: The Principle of Equality Suggests to the Americans the Idea of the Indefinite Perfectibility of Man.

[306] *Id.* at Bk. II, Chap. XIII: That the Principle of Equality Naturally Divides the Americans Into a Number of Small Private Circles. (noting that in democratic society, the equality of all men will cause interest groups to form along the lines of beliefs, views, and more).

[307] *Id.* at Bk. II, Chap. XVII: That in Times Marked by Equality of Conditions and Skeptical Opinions, it is Important to Remove to a Distance the Objects of Human Actions.

[308] *See* James Madison, The Federalist 10 ("The latent causes of faction are thus sown in the nature of man").

[309] *See* Tocqueville, *supra* note 294 at Bk. II, Chap. IV: Of Certain Peculiar and Accidental Causes Which Either Lead a People to Complete Centralization of Government, or Which Divert Them From It (noting that they will do this because they know that "if it happens that this same power faithfully represents their own interests, and exactly copies their own inclinations," the ultimate benefit of their preferred society will be created).

[310] *Id.* at Bk. II, Chap. IV: Of Certain Peculiar and Accidental Causes Which Either Lead a People to Complete Centralization of Government, or Which Divert Them From It.

[311] See James Madison, The Federalist 10.

of bad consequences."[312] The purpose of government is to push aside anything "that stands in the way of the 'correct' political outcome."[313]

The link between Hegelian thought and Tocqueville's prophecy is hard to miss. Hegel, it will be remembered, argued that human value is only legitimate insofar as it is a reflection of the state. The state is an extension of individual and acts as the creator of the individual's preferred outcomes. These ideas perfectly encapsulate the very thing Tocqueville warned about: a society whose citizens and interest groups view the government as an extension of their preferred social outcomes. It is a very dangerous belief, for it can lead "to the politicization of all areas of life and culture."[314] And the politicization of everything leads to a society that "assault[s] one's opponents as not merely wrong but morally evil."[315]

The writings of the early-20th century intellectuals who adopted Hegel's outcome-oriented viewpoint provide further evidence for the correctness of Tocqueville's prophecy. For instance, Mary Parker Follett wrote that society's goal should to be "creat[e] all the rights [they] shall ever have."[316] She mused with Hegel:

> I have no liberty except as an essential member of a group . . . [T]o obey the group which we have helped to make and of which we are an integral part is to be free because we are then obeying ourself. Ideally the state is such a group . . . . The state must be . . . myself acting as the state in every smallest details of life.[317]

Follett may as well have quoted Tocqueville directly, for her words exemplify nearly every one of his concerns. The outcome-oriented nature of her comments is immediately apparent in her belief that the point of society is to create one's preferred outcomes. Just as Tocqueville feared, Follett viewed the state as extension of the individual self (down to the "smallest details of life"), even saying that citizens should obey the state because they could still imagine that they were obeying themselves. Most importantly, Follett's belief that liberty consists of being an essential member of a group that is an extension of ourselves ties directly into the kind of herd mentality that has led to the polarization that Tocqueville feared.

Tocqueville was also right about the consolidation and centralization of governmental power. For instance, the modern administrative state consolidates two of the branches of American government in the name of creating outcomes more easily. Wilson in fact admitted that Tocqueville's much-feared centralization would result from the emergence of the administrative state, saying that what was needed in America was "concentration, both in political leadership and in administrative organization."[318] The centralization that Tocqueville predicted would erode the republic was therefore the very same centralization that Wilson believed would enable the government to create outcomes more efficiently. It was also the very same centralization that the framers warned against when they said that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced

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[312] *See* Attorney General William P. Barr, *Remarks to the Law School and the de Nicola Center for Ethics and Culture at the University of Notre Dame*, Oct. 11, 2019.
[313] *See* Tempting, *supra* note 137 at 1.
[314] *See* Gomorrah, *supra* note 13 at 29.
[315] *Id.* at 54.
[316] *See* MARK PARKER FOLLETT, THE NEW STATE: GROUP ORGANIZATION THE SOLUTION OF POPULAR GOVERNMENT 137-38 (Longmans 1916).
[317] *Id.*
[318] *See* Democracy and Efficiency, *supra* note 45.

the very definition of tyranny."[319] Substantive due process theory is another example of this centralization because it consolidates power in the judiciary. In sum, these two trends have sent a message to the American people that their political participation through the legislative process is no longer needed. The American people have responded by putting their hopes in the President and the judiciary, thereby turning elections and appointments into increasingly heated battlegrounds.

The consequences of centralization that Tocqueville feared have not only permeated the people's view of the government but also the government's view of the people. For instance, during the debates over the Affordable Care Act, former President Barack Obama made clear that the ACA "will not wait."[320] Process costs didn't matter, as long as the ACA was put in place. The end justified the means. Similarly, the election process has begun to act just as Tocqueville predicted – based on the relative clout of interest groups. Campaigns now divide people into groups and mobilize them based on the outcomes that each group wants.[321] The government has essentially begun to believe of itself what the people believe of it. It is "attempting to guarantee every right . . . people think they ought ideally to possess."[322] Tocqueville's prophecy could not have been more accurate.

Even if the people still believed in political participation, it would be difficult for them to make use of it. The ability of the people to debate and work toward a compromise through the legislative process is nullified by both the use of substantive due process theory and the administrative state. The framers designed Article I to "force legislators to explain to constituents why the national government could not meet their every demand, which would in turn lead to a more mature public opinion."[323] Whereas the framers believed that meeting the citizens' "every demand" was impossible – and Tocqueville argued that it would lead to centralization and polarization – Hegel and Wilson believed that the rational achievement of the citizens' "every demand" was the *primary goal* of government. The practical effect of this philosophical divide is that "delegation prevents the lawmaking process from educating voters about the need to compromise on regulation by allowing Congress to promise everything to everyone." [324] In other words, both Congress and the people believe that compromises are both impossible and unnecessary, and delegation justifies that belief. "Because by means of delegation politicians promise every interest group that it will get its way, groups are encouraged to insist on what they then see as their 'rights' rather than to compromise."[325] Therefore, the solutions to current issues have to be judicially-created winner-take-all outcomes. And when the ability of the legislative *process* to find a compromise is taken away in the name of creating a winner-take-all *outcome* more easily, the stakes are raised to their maximum height. At that point, polarization is inescapable.

The result is an extreme lack of civility. As the framers predicted, the power of factionalism can turn even the most "frivolous and fanciful distinctions" into "violent conflicts."[326] Disagreement is no longer seen as a valuable part of the public debate that is

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[319] See James Madison, Federalist 47.
[320] https://www.politico.com/story/2014/02/joe-biden-to-dems-im-optmisitic-103525.
[321] *See* Marini, *supra* note 46 at 280.
[322] *See* Gomorrah, *supra* note 13 at 323.
[323] *See* SCHOENBROD, *supra* note 236 at 130-31.
[324] *Id.*
[325] *Id.* at 19.
[326] See James Madison, The Federalist 10.

essential to the political process – it is seen as a personal attack.[327] Dissent is a threat to the outcomes that each person feels is best. Opposing voices will stop at nothing to "drown out and silence opposing voices[] and . . . attack viciously and hold up to ridicule any dissenters."[328] Political and social dissenters are attacked with "ostracism and exclusion waged through lawsuits and savage social media campaigns."[329] The polarization is heightened "[i]n our age, when social media can instantly spread rumor and false information on a grand scale."[330] This is particularly ironic in a country like the United States, which was founded in large part on the idea that free expression was valuable regardless of the viewpoint.[331] If nothing else, history has shown us the dangers of believing that "the stakes of the day [a]re too high to tolerate discourse and dissent."[332] Civilizations that did so – including many European nations during the twentieth century – "believed the ends justified the means, and it didn't end well."[333]

C. From Outcomes to Polarization: The Administrative State

Delegation to administrative agencies leads to polarization because it neuters Congress. As discussed above, delegation to agencies incentivizes Congress to abdicate its constitutional responsibility to make laws. Congress now makes only general statements of intent and then passes the hard work of legislating off to unelected agencies, despite the fact that the hard work of legislating is exactly what the Constitution requires of the legislature. As a result, Congress has become unable to achieve results, and the people have responded by looking elsewhere for the resolution of the pressing issues they care about.[334]

As a result, the rules that regulate the lives of millions of Americans are increasingly based on largely temporary concerns. Every presidential administration change leads to a massive legal lurch in one direction or another, eroding the people's confidence in the law and reducing fair notice.[335]

If Congress can pass its fiduciary responsibility for legislation onto administrators, the primary location for nationally relevant decisions becomes the courts, who are faced with trying to resolve the problems stemming from the resultant rules. "Congress passing the buck does not stop . . . fights but rather displaces them to other venues, such as hearings over the confirmation of judicial nominees."[336] And "[w]hen courts are viewed as political bodies, we may expect judicial confirmations that are increasingly bitter."[337] The practical consequence is that the election of the President – who appoints both federal judges and agency officials – and the appointment of federal judges have become a polarized pandemonium. Delegation not only

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[327] *See* Barr, *supra* note 312.
[328] *Id.*
[329] *Id.*
[330] *See* Chief Justice John G. Roberts, Jr., *2019 Year-End Report on the Federal Judiciary* (Dec. 31, 2019).
[331] *See* West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").
[332] *See* Gorsuch, *supra* note 4 at 20.
[333] *Id.*
[334] This negative (and unfortunately realistic) view of Congress is reflected in the commonality of references to Congressional "gridlock."
[335] *See* Calabresi, *supra* note 10 at 856 ("These sudden lurches are not good for individuals or for people trying to start or run a business and who are eager to know 'what the law is.'").
[336] *See* Consent, *supra* note 266 at 243.
[337] *See* TEMPTING, *Supra* note 137 at 11.

neuters Congress but also "leads to a kind of hyper-presidentialism . . . [that] raises the stakes in presidential elections to levels that the original constitutional design never contemplated."[338]

The furious passions surrounding recent presidential elections and judicial nominations therefore cannot come as a surprise.[339] Americans have recognized that the true creator of laws is no longer Congress but the Executive and the courts, and they have responded by placing their hopes in the judges who sit on those courts and the President who appoints both federal judges and administrative officials. Since delegation means that the President essentially "makes" policy through the judges he appoints and the agency officials he puts in place, it is no surprise that presidential elections are as polarized as they have become.

D. From Outcomes to Polarization: Substantive Due Process

The judiciary's use of Substantive Due Process leads to polarization because it turns judges into super-legislators.[340] This is evidenced by the fact that protestors gather outside the Supreme Court, not the offices of their representatives. Society not only views judges as super-legislators but in fact *seeks* judges who "are willing to pick and choose winners and losers based on their favorite policy results."[341] Some commentators even openly bemoan the "inordinate respect for procedure" that some members of the judicial still retain.[342] But the reality is that when judges become unmoored from the procedural framework of the Constitution and warp the notion of due process into a repository for whatever rights they prefer, they cut off public debate and de-legitimize the judicial branch. The ability to debate and work toward a compromise is nullified, so the solution has to be a judicially-created winner-take-all outcome.

This contradicts the legislative reality that a concept "must be content to lag behind the best inspiration of its time until it feels behind it the weight of such general acceptance as will sanction its pretension to unquestioned dictation."[343] As Chief Justice Roberts warned in *Obergefell*, "[c]losing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide."[344] And a people who do not want to accept certain rulings of the Court are more likely to view the Court – and the rule of law – as illegitimate.[345]

With the Court's decisions now being reported as "victories for attitudes or moral positions rather than as legal determinations," the public view of the Court regressed to being dependent on their agreement with the substantive outcomes that emerge on limited and

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[338] *See* Calabresi, *supra* note 10 at 856.
[339] *See* GORSUCH, *supra* note 4 at 31.
[340] *Id.* at 6 ("[S]ome today perceive a judge to be just like a politician who can and must promise (and then deliver) policy outcomes that favor certain groups. They see the job of a judge as less about following the law and facts wherever they lead and more about doing what it takes to 'help' this group or 'stop' that policy.").
[341] *Id.* at 188
[342] *See* ELIJAH JORDAN, THEORY OF LEGISLATION: AN ESSAY ON THE DYNAMICS OF PUBLIC MIND 442 (1930).
[343] *See* Judge Learned Hand, *The Speech of Justice*, Spirit of Liberty 15-16 (2d. ed. 1953).
[344] *Id.*
[345] *See* Gomorrah, *supra* note 13 at 320. This explains Chief Justice Roberts' recent efforts to defend the legitimacy of the courts as neutral arbiters of law. *See* https://www.washingtonpost.com/politics/2020/03/04/john-roberts-chuck-schumers-extraordinary-war-words/ ("All Members of the Court will continue to do their job, without fear or favor, from whatever quarter.").

culturally-heated issues.[346] When the Constitution is "understood to be changeable," the people look to the government to "determine the terms of the social compact."[347] And when the people view the government as the arbiter of their vision for society, the decisions regarding who will run the government are guaranteed to become increasingly fraught and polarized. Every disagreement becomes "little more than a prelude for final judicial resolution."[348]

> Candidates for an office whose function is to change the law *will be* selected, as legislators are, on the basis of what changes they promise to or are likely to bring about . . . . The selection of judges – even appointed judges – thus becomes an eminently political, results oriented process. People want judges who will change (or not change) the law *their* way.[349]

There is no better example of this than the 2018 confirmation hearings for Supreme Court Justice Brett Kavanaugh. The hearing testimonies, as well as the public reactions to the hearings on both sides of the isle, were incredibly heated.[350] Interest groups and political advocacy organizations on both sides capitalized on the tense atmosphere to roil society's waters with incendiary statements that only furthered the pandemonium.[351] The polarization of modern America could not have been given a more prescient exhibition.

As Tocqueville predicted, American citizens are becoming "incapable of exercising the great, unique privilege" of self-government.[352] They have responded by banding together in groups that have steadily become more and more opposed to each other in their quest for the consolidated governmental power that is necessary to implement their preferred outcomes.[353] As a result, "[t]hey seek judges who care not about fair process, but who are instead all about ensuring certain favored policy outcomes."[354] In a context where those judges are viewed as the givers of ultimate social results and the law is "seen as too crucial a political weapon to be left to nonpolitical judges,"[355] the importance of securing their appointment justifies any erosion of process.

Tocqueville, it turns out, hit the nail on the head.

VI. THE (UNLIKELY TO BE UTILIZED) WAY FORWARD

The polarization in American society does not appear to be dissipating. The forces that led to it – from post-Enlightenment rationalism to Wilsonian elitism to Justice Peckham's preferred economic theory – are also unlikely to disperse. They have grounded the outcome-

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[346] *See* ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS xxviii (2012) [hereinafter Garner] ("The consequence is the politicizing of judges (and hence the process of selecting them) and a decline of faith in democratic institutions.").
[347] *See* Marini, *supra* note 46 at 51.
[348] Markman, *supra* note 234, at 14.
[349] *See* GARNER, *supra* note 346 at 84.
[350] https://time.com/5409246/christine-ford-brett-kavanaugh-politics/.
[351] https://www.washingtonpost.com/politics/2018/09/26/kavanaugh-may-be-most-polarizing-issue-trumps-presidency/.
[352] *See* Marini, *supra* note 46 at 6.
[353] It is worth mentioning here that all of this is magnified by social media, which enables Americans to limit what they read to what they *want* to read.
[354] *See* Gomorrah, *supra* note 13 at 188.
[355] *See* TEMPTING, *Supra* note 137 at 11.

oriented viewpoint deep within the American subconscious. While they are unlikely to be utilized, the following three steps offer a way out of the pandemonium of polarization.

A. Process, Not Outcomes

First, and most generally, Americans must recognize that "the democratic integrity of law . . . depends entirely upon the degree to which its processes are legitimate."[356] They must realize that the Constitution is, at its core, a protection of a process that enables the citizens to participate in the historic experiment of self-government. It is true that the process-oriented nature of the Constitution requires a level of patience and maturity that can be difficult to prioritize. It "requires a patient willingness to abide by procedures and rules even when they do not deliver one's own preferred outcome in a given legislative fight."[357] But the framers intentionally designed the legislative process to be difficult, and they did so in order to ensure that "[t]he injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones."[358]

The American people and their elected representatives must also recognize that the philosophical roots of polarization are patently un-American. They are not focused on process – they are focused on outcomes. They are not focused on dividing power to counteract human failures as the framers were[359] – they are focused on concentrating power to maximize the human capacity for outcome creation They rest on the rationalist assumption that humans have the ability to rationally organize progress toward ultimate outcomes. They are premised on the arrogant, rationalist "belief that the world is merely a puzzle to be solved, a machine with instructions for use waiting to be discovered, a body of information to be fed into a computer in the hope that, sooner or later, it will spit out a universal solution."[360] The American people must also grasp the dangers of viewing the law as guarantee of particular outcomes: unaccountability, lack of political representation, legislative gridlock, and societal polarization.

Returning to the process-oriented viewpoint of the Constitution will not be easy, but it is necessary if we are to weather the storm of polarization. In fact, the process-oriented viewpoint of the Constitution could help alleviate the tension of polarization. James Madison, recognizing that politics will always arouse passions, believed that the process and structure of the Constitution would "transform the public's passions into a less impassioned public reason."[361] In sum, Americans can begin to move beyond polarization by recognizing that the Constitution enables them to participate in the process of self-government.

B. Un-Delegation

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[356] *Id.* at 2.
[357] *See* Adam J. White, *A Republic, If We Can Keep It*, The Atlantic (Feb. 4, 2020), https://www.theatlantic.com/ideas/archive/2020/02/a-republic-if-we-can-keep-it/605887/ [hereinafter White].
[358] *See* Alexander Hamilton, Federalist 73. *See also* Manning, *supra* note 277 at 198 ("Even the quickest look at the constitutional structure reveals that the design of bicameralism and presentment disfavors easygoing, high volume lawmaking." Manning goes on to say that "the cumbersomeness of the [constitutional] process seems obviously suited to interests that contradict the 'more is better' attitude that has come to be almost an unconscious assumption of public law." *Id.* at 199.
[359] *See* James Madison, The Federalist 51 ("Ambition must be made to counteract ambition.").
[360] *See* Vaclav Havel, THE ART OF THE IMPOSSIBLE: POLITICS AS MORALITY IN PRACTICE–SPEECHES AND WRITINGS, 1990-1996, 91 (Alfred A. Knopf 1997).
[361] *See* White, *supra* note 357 (citing James Madison, The Federalist 49).

Second, Congress must take back the power that it has been giving away to administrative agencies. Doing away with delegation will send a message that Congress can and will do its job. It will ensure that legislators "bear personal responsibility for the exercise of these legislative powers" and it will restore the ability of "the governed [to] withhold consent by refusing to reelect these legislators."[362]

Wilson's adoption of Hegel's administrative theory has led to a Congressional abdication of responsibility because it provides Congress with a way to avoid executing its fiduciary responsibility to the people.[363] By embracing this notion, Congress has an excuse for not doing the hard work of legislation[364] and can pass off the hard choices to the convenient administrative "whipping boy."[365] However, it is precisely *those* choices that the Constitution requires Congress to make when it explicitly states that Congress shall have "all" legislative power.[366] In fact, the framers intentionally designed the legislative process to be difficult[367] so that "[t]he injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones."[368] Alexander Hamilton wrote that "[t]he oftener a measure is brought under examination the greater the diversity in the situations of those who are to examine it [and] . . . the less must be the danger of those errors which flow from want of due deliberation."[369] The framers therefore split the legislative branch into two houses to enable

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[362] *See* Consent, *supra* note 266 at 214.

[363] *See* Sunstein, *supra* note 20 at 320 (noting that "the nondelegation principle seems to raise the burdens and costs associated with the enactment of federal law"). *See also* FEDERALIST SOCIETY, ARTICLE I INITIATIVE, *Necessary and Proper Podcast Episode 45: Agency Rulemaking: Unnecessary Delegation or Indispensable Assistance?*, https://articleiinitiative.org/podcast/necessary-proper-episode-45-agency-rulemaking-unnecessary-delegation-or-indispensable-assistance/ (noting that delegation incentivizes Congress to pass vague legislation, let agencies work out the practical points, and blame bureaucrats for any negative results).

[364] *See* Donald J. Kochan, *Strategic Institutional Positioning: How We Have Come to Generate Environmental Law Without Congress*, 6 TEX. A&M L. REV. 323, 329 (2019) [hereinafter Kochan] ("[When] Congress is shielded from particularized accountability[,] . . . [it] is not forced . . . to overcome gridlock and other barriers to legislation.").

[365] *See* SCHOENBROD, *supra* note 236 at 82 ("Statutes that purport to give lawmaking power to an agency actually entail a sharing of lawmaking power among several groups, including the agency, the most powerful members of the legislative committees with jurisdiction over the agency, their counterparts in the White House, and concentrated interests [such as regulated industries]. Concurrently, political benefits accrue to legislators and the president. First, they can claim credit for the promised benefits of a regulatory program, yet shift blame for the disappointments and costs of the program to the agency. Second, with delegation they increase their opportunities to obtain campaign contributions and other favors from concentrated interests . . . . As former EPA Administrator Lee Thomas put it, 'Everybody is accountable and nobody is accountable under the way [Congress] is setting it up, but [the legislators] have got a designated whipping boy.'").

[366] *See* U.S. CONST. art. I, § 1 (giving "all" legislative power to Congress). *See also* Industrial Union Dept., AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 687 (1980) (Rehnquist, J., dissenting) ("It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people."). It is telling that even the absolute term "all" has been explicitly ignored, so powerful is the Hegelian necessity justification.

[367] *See* Manning, *supra* note 277 at 202 ("Madison and Hamilton . . . explicitly recognized . . . [what] the structure makes obvious: bicameralism and presentment make lawmaking difficult by design."). *See also* Aaron Nielson, *Erie as Nondelegation*, 72 OHIO ST. L.J. 239, 264 (2011) (noting that "Congress . . . is built to encourage unrestrained debate").

[368] *See* Alexander Hamilton, Federalist 73. *See also* Manning, *supra* note 277 at 198. ("Even the quickest look at the constitutional structure reveals that the design of bicameralism and presentment disfavors easygoing, high volume lawmaking.").

[369] *See* Alexander Hamilton, Federalist 73. *See also* Alexander Hamilton, The Federalist 70 ("The differences of opinion, and the jarrings of parties in [the legislative] department of the government . . . often promote deliberation and circumspection; and serve to check the excesses of the majority.").

multiple stages of review for every issue.[370] It would hardly have been logical for them to do so if their primary goal was an efficient administrative government. They recognized that "men are not angels"[371] and that it is unrealistic to "imagine that [one] can arrange the different members of a great society."[372] It is worth noting that this sentiment is the exact opposite of the rationalism that underpins the Hegelian elitism of the administrative state.

Congress must "reshoulder" its constitutional burden.[373] Its members must face the fact that delegation is based on a Hegelian notion of administrative superiority and Wilsonian elitist disdain for the voting public.[374] It must come to terms with the fact that the administrative state, "by combining the making of laws with their execution, enforcement, and adjudication, violates the canonical liberal principle of separation-of-powers within government."[375] It must accept that the administrative state "was meant to replace constitutionalism or limited government."[376] If Congress truly values its fiduciary responsibility to the people and desires to function more effectively, it will take back its constitutional task of making laws, not legislators.[377] Coming face to face with the fact that its delegation of authority is based on a school of thought that contradicts the philosophical foundation of the American Constitution may provide the initial spark for such a re-shouldering. And the potential result is eminently worth it, for it "would make Congress a more functional, less polarized legislature . . . [that would] face hard choices about trade-offs instead of simply spouting slogans about polarizing positions."[378]

The response from proponents of delegation is that delegation is "necessary" because the complexities of modern society make it impossible for Congress to make the pressing decisions of today.[379] This argument is premised on the assumption that "the rule of law, separation of powers, and nondelegation . . . can and should be modified to bring [them] into accord with the realities of modern government."[380] But this argument falls short for several reasons.

First, Wilson and his cohort have been chanting this refrain since the early twentieth century, an era in which no one could have possibly imagined the complexity of today's technical problems. Is it possible that the same delegation framework that is necessary today was

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[370] *See* U.S. CONST. art. I, § 1. It stands to reason that if the Framers had been concerned with efficient decision-making without the laborious political process, the division of Congress into two houses would not have been done.
[371] *See* James Madison, Federalist 51.
[372] *See* ADAM SMITH, THEORY OF MORAL SENTIMENTS 380-81 (1759).
[373] *See also* Industrial Union Dept., AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 687 (1980) (Rehnquist, J., dissenting).
[374] *See* Wilson, *supra* note 47, at 208-09 ("The bulk of mankind is rigidly unphilosophical, and nowadays the bulk of mankind votes.").
[375] *See* DeMuth, *supra* note 242.
[376] *See* Marini, *supra* note 46 at 8.
[377] *See* Industrial Union, 448 U.S. at 687 (Rehnquist, J., dissenting).
[378] *See* Consent, *supra* note 266 at 246.
[379] *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928) ("The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently necessary to use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations."). This argument has maintained since the early twentieth century that most of today's problems are "technical . . . [and] administrative problems" requiring "very sophisticated judgments which do not lend themselves to the great sort of 'passionate movements' which have stirred this country so often in the past." *See also* Remarks to Members of the White House Conference on National Economic Issues, 1962 Pub. Papers 420, 422 (May 21, 1962).
[380] *See* KENNETH CULP DAVIS, ADMINISTRATIVE LAW: CASES, TEXTS, PROBLEMS, 20 (St. Paul: West Publishing, 1977). Landis unabashedly maintained that the necessity argument is a way to avoid the separation of powers.

also necessary in 1903?[381] Wouldn't a *truly* progressive agenda see delegation as an outmoded relic of the past that should be discarded?

Second, James Madison suggested in Federalist 44 that even a necessity argument based on emergency circumstances is not enough to establish a legitimate claim of rights.[382] This concept was reflected in the Supreme Court's decision in *A.L.A. Schechter Poultry Corporation v. U.S.*,[383] in which the court was urged to view the statute "in light of the grave national crisis" of the Great Depression.[384] However, the Court quickly dismissed this argument as "an attempt to justify action which lies outside the sphere of constitutional authority" because "[e]xtraordinary conditions do not create or enlarge constitutional power."[385] If an emergency therefore cannot justify using the necessity argument, how is it possible for today's delegation framework to exist indefinitely, regardless of whether there is an emergency or not?[386]

Third, it is not at all clear that the administrative state handles these supposedly necessary complexities any better than the political branches would. As it turns out, Tocqueville predicted this, too. In what almost seems like a direct response to Hegel, he wrote that a centralized administrative power, "however enlightened and wise one imagines it to be, can never alone see to all of the details of the life of a great nation."[387] Perhaps Hegel was a bit too optimistic.

Fourth, the necessity argument sounds concerningly familiar to the sixteenth-century calls for the necessity of consolidated monarchial power,[388] particularly since consolidation *necessarily* occurs when the powers of Congress are delegated to another branch. However, unlike the brazen monarchial wolf that "comes as a wolf" by openly consolidating power, the subversive administrative wolf that "gradual[ly] concentrat[es] . . . the several powers"[389] comes disguised in very convenient "sheep's clothing" from which "the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident."[390]

"Un-delegation" will not be easy. In many ways, the administrative state has become so entrenched that it will be impossible to remove it.[391] Legislators have become accustomed to passing the buck to agencies, avoiding the hard choices of legislative compromise,[392] and blaming agencies for unsatisfactory outcomes while preserving their chances at re-election.[393] As

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[381] *See* Hamburger, *supra* note 9 at 439 ("[O]bviously, the proof of a necessity in the 1880s would not be proof of any such necessity in the 1890s, let alone more than [a] century later.").
[382] *See* James Madison, Federalist 44.
[383] *See* A.L.A. Schechter Poultry Corporation v. U.S., 295 U.S. 495, 538 (1935) (holding that Congress' delegation of authority to the President to regulate industrial codes of conduct under the National Industrial Recovery Act was unconstitutional under the non-delegation doctrine because the delegation provided no standards for the President to use in doing so.
[384] *Id.* at 528. This "necessity" argument was also used – on a much larger scale and with much more success – to justify the New Deal's massive expansion of administrative power. *See* Nielson, *supra* note 84 at 768.
[385] *Id.*
[386] *See* Hamburger, *supra* note 9 at 422.
[387] *See* TOCQUEVILLE, *supra* note 294 at 69.
[388] *See* Hamburger, *supra* note 9, at 141 (noting that administrative power harkens back to "the prerogative era – the period prior to constitutional law").
[389] *See* James Madison, The Federalist 51.
[390] *See* Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).
[391] *See* Consent, *supra* note 266 at 237 ("The reliance is massive.").
[392] *See* Schoenbrod, *supra* note 236 at 10 (noting that delegation allows legislators "to appear to deliver regulatory benefits without imposing regulatory costs"). *See also id.* at 75 ("[D]elegation offers [legislators] a way to appear to make [the hard choices] without actually doing so.").
[393] *Id.* at 17 ("Enacting laws . . . forces legislators to take political responsibility for imposing regulatory costs and benefits. In contrast, delegation allows Congress to stay silent about what the agency will prohibit, so it severs the

former President Ronald Reagan said, the American people "have been tempted to believe that society has become too complex to be managed by self-rule, that government by an elite group is superior to government for, by, and of the people."[394] But the fact remains that the administrative state is premised on philosophical tenants that are absolutely antithetical to the Constitution. "The progressive dream of neutral administration, untainted by partisan goals and human fallibility, was always doomed to failure."[395] More and more people are recognizing the unconstitutionality of the administrative state, and the 2016 presidential election was in many ways a repudiation of governance by experts.[396] While a largescale overturning of the administrative state remains unrealistic, a revival of congressional legitimacy and a concerted effort to decentralize power at the federal level is not.

C. The Article III Standard

Third, the judiciary must return to the proper role of the judge under Article III of the Constitution. Rather than using tools like substantive due process theory to read their personal predilections into the law,[397] judges must remember that they are to exercise "neither force nor will but merely judgment."[398] Judges are to show "inflexible and uniform adherence to the rights of the Constitution."[399] It is the "province and duty of the judicial department to say what the law is,"[400] not what it *should be*."[401] This is why the Constitution gives judges have life tenure and salary protections; if they were elected and responsive to the people, they would not uphold the law impartially.[402]

The best way to achieve the proper judicial role is to adopt an originalist method of constitutional interpretation. Originalism is the idea that when interpreting the Constitution, one should look to the text and history in order to understand the original public meaning of the document at the time of its ratification.[403] It is the most common-sense way of thinking about the law; in fact, nearly everything about the way law works is originalist. The very idea of adhering to precedent, the principle of stare decisis, and the fact that lawyers must support their contentions with previously enacted law are all inherently originalist exercises.

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link between the legislator's vote and the law, upon which depend both democratic accountability and the safeguards of liberty provided by Article I.").

[394] *See* President Ronald Reagan, "A Time for Choosing" (Oct. 27, 1964), http://www.americanrhetoric.com/speeches/ronaldreaganatimeforchoosing.htm.

[395] *See* Philip Howard, *From Progressivism to Paralysis*, YALE L. J. FORUM, 18 (2021).

[396] *See* Marini, *supra* note 46, at 39.

[397] The outcome-oriented approach has a comfortable tenured position in academia. Here is a particularly honest and horrifying sample: "[T]he project of constitutional interpretation involves the pragmatic pursuit of political justice, not the positivist recovery of fixed historical meaning." *See* Christopher L. Eisgruber and Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHICAGO L. REV 1245, 1270 (1994).

[398] *See* James Madison, The Federalist 78.

[399] *Id.*

[400] *See* Marbury v. Madison, 5 U.S. 137, 177 (1803).

[401] *See* Obergefell v. Hodges, 576 U.S. 644, 686 (2015) (Roberts, C.J., dissenting) (emphasis added).

[402] *See* Gorusch, *supra* note 4, at 41 ("[I]f the founders really thought . . . judges free to legislate, why would they have gone to such trouble to limit the sweep of legislative authority . . . if judges could perform the same essential function without similar safeguards?.").

[403] *See* Origins, *supra* note 6 at 84 (noting that originalism "seek[s] the meaning of the document that a reasonably well-informed hypothetical rotifer would have ascribed to it ('original meaning' or 'original public meaning')."

Originalism grounds the judge in something that is known and knowable. It is animated by the belief that "the rule of law requires judges to follow externally imposed rules."[404] Originalism remembers that "[l]aw is a public act" and that what matters are not "secret reservations or intentions" but "how the words used in the Constitution would have been understood at the time."[405] "[S]ticking to the law's terms is the very reason we have independent judges: not to . . . guarantee particular outcomes, but to ensure that *all* persons enjoy the benefit of equal treatment under existing law."[406] In fact, originalism supports the purpose of having a rule of law in the first place – so that the core rights and privileges of citizens are maintained regardless of the circumstances.[407] Originalism is the best method of constitutional interpretation precisely because of this level of neutrality in application, something that no other theory can offer.[408] Originalism doesn't mandate an outcome – it simply grounds the judge's starting point in the most logical, common-sense, and observable source we have. Justice Neil Gorsuch stated this explicitly: "Originalism is a theory focused on *process*, not on *substance*."[409]

Other methods of constitutional interpretation inevitably lend themselves to arbitrary judicial invention that the people can only hope to agree with. These theories can be summarized in Judge Richard Posner's statement that judges are "councils of wise elders" who should be trusted to "resolving . . . disputes in a way that will produce the best results . . . rather than resolving purely on the basis of rules created by . . . government."[410] In general, theories other than originalism essentially boil down to whatever that particular judge's preferred outcome is.[411] They offer no standards by which to determine which interests are more valuable than others and urge judges to "use their authority to make the Constitution relevant and useful in solving the problems of modern society."[412] Their only guidepost is the desire to "adapt[] statutes to new circumstances and responding to new political preferences . . . even when the interpretation goes against as well as beyond original legislative expectations."[413] But as Justice Holmes warned in *Adkins v. Children's Hospital of the District of Columbia*, "The criterion of constitutionality is not whether we believe the law to be for the public good."[414]

> Virtually the entire anticanon of constitutional law we look back upon today with regret came about when judges chose to follow their own impulses rather than follow the Constitution's original meaning . . . . [E]ach depended on serious

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[404] See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 856 (1995).
[405] *See* Tempting, *supra* note 137 at 144.
[406] *See* Gorsuch, *supra* note 4, at 10.
[407] *See* DANIEL WEBSTER, THE WORKS OF DANIEL WEBSTER 164 (1851) ("Will [our successors] think that what was thought by our fathers and grandfathers, who formed the Constitution and established the government, was wholly wrong? I suspect not. We must take the meaning of the Constitution as it has been solemnly fixed.")
[408] *See* Tempting, *supra* note 137 at 146 (noting that originalism is neutral "in deriving, defining, and applying principle."
[409] *See* Gorsuch, *supra* note 4, at 114-15. *See also* Stephen Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J. LAW & PUB. POLICY 817, 820-21 (2015) (stating that originalism is "a requirement of procedure, not substance").
[410] *See* Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 12 (1996).
[411] *See* Gorsuch, *supra* note 4, at 225 ("Indeed, a judge who likes every result he reaches is very likely a bad judge, reaching for results he prefers rather than those the law compels.").
[412] *See* William H. Rehnquist, *The Notion of the Living Constitution*, 54 TEX. L. REV. 693, 698-99 (1976).
[413] *See* WILLIAM ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 108 (1994).
[414] *See Adkins v. Children's Hospital of the District of Columbia*, 261 U.S. 525, 570 (1923) (Holmes, J., dissenting).

> judicial invention by judges who misguidedly thought they were providing a "good" answer to a pressing social problem of the day.[415]

Substantive due process theory is Exhibit A for this risk. A judge's predilections about what constitutes a "fundamental" right inevitably come down to "those political values [the judge] personally thinks most important."[416] The entire "fundamental" rights framework underpinning substantive due process theory is therefore essentially contradictory to the role and purpose of the Article III judge.

In addition, why should the predilections of nine lawyers be the methodology for deciding pressing national issues?[417] The fact is that the framers did not intend for judges to be able to make such decisions. "[T]he Supreme Court is drawn from a very narrow class of society, . . . [but] constitutional lawmaking includes diverse citizens with a wide variety of attachments and interests."[418] The practical result of this arrangement is that "contemporary elites – or leading intellectuals – will determine the meaning of the Constitution."[419] Nonoriginalism places the social preferences of a handful of elite lawyers above the political participation of the people.[420] (In this way, it embodies the hubristic superiority of the "intellectual class" proposed by Hegel and Wilson). On the other hand, "[o]riginalism prevents this sort of nine-person (or indeed five-person) constitutional revision."[421]

Nonoriginalism disregards the process-oriented viewpoint of the rule of law, as made through the people's elected representatives through the political process.[422] "The people are excluded from the lawmaking process, replaced by a handful of unelected judges who are unresponsive to electoral will."[423] As former Chief Justice William Rehnquist put it, "[t]he . . . living Constitution . . . is a formula for an end run around popular government."[424] It nullifies the point of protecting the people's political participation through a written Constitution in the first place.[425] The consequences of such an approach are grave:[426]

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[415] *See* Gorsuch, *supra* note 4, at 115.
[416] *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 863 (1989).
[417] *Id.* at 854 ("[W]hat reason would there be to believe that the invitation [for such decision-making] was addressed to the courts rather than to the legislature?").
[418] *See* Rappaport, *supra* note 15 at 390.
[419] *See* Marini, *supra* note 46 at 296. *See also* Gomorrah, *supra* note 13 at 108 (noting that such judicial invention has meant that the "counter-majoritarian" preferences of "society's law-trained elite" have become the law).
[420] *See* Gorsuch, *supra* note 4, at 120 ("All these promises of self-government and safeguards for minority interests go out the window when the job is assumed by a committee of nine lawyers who feel free to do as they wish. And if constitutional amendment can be accomplished so easily now through judges, why bother with the real amendment process?").
[421] *See* Garner, *supra* note 346, at 85.
[422] *See* Rehnquist, *supra* note 412, at 704 ("The . . . living Constitution . . . seems to ignore totally the nature of political value judgments in a democratic society.").
[423] *See* Gorsuch, *supra* note 4, at 44.
[424] *See* Rehnquist, *supra* note 412 at 706.
[425] *See* Jeffrey S. Sutton, *The Role of History in Judging Disputes about the Meaning of the Constitution*, 41 TEX. TECH L. REV. 1173, 1180 (2009) ("The whole point of a written constitution, they insist, is that it does not change unless the people agreed that it should change through the one means they authorized for its alteration: the amendment process.").
[426] *See* Rehnquist, *supra* note 412 at 698 ("Once we have abandoned the idea that the authority of the courts to declare laws unconstitutional is somehow tied to the language of the Constitution that the people adopted, . . . [j]udges then are no longer the keepers of the covenant; instead they are a small group of fortunately situated people with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country.").

> [W]hen a strict interpretation of the Constitution . . . is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men who . . . declare what the Constitution is according to their own views of what it ought to mean.[427]

A common objection to originalism is that it will create a society ruled by the "dead hand" of the past. However, this is less of an objection to originalism than it is an objection to the rule of law as a whole.[428] "If the dead hand objection is correct, why should we ever pay attention to the constitutional text, formulated long ago, regardless of whether it is to be given its original meaning?"[429] "[W]hat's the point of writing down laws anyway if they are but jumping-off points for the judicial imagination?"[430] The point of having a rule of law in the first place is to "govern things to come, not things as they are."[431] As United States Court of Appeals for the Seventh Circuit Judge Frank Easterbrook says, originalism "isn't a theory of interpretation but of political legitimacy."[432] This "dead hand" objection also invalidates the Supreme Court, since there would be no reason to adhere to past Supreme Court decisions if the "dead hand" of the past is seen as an insufferable burden.[433] At the end of the day, the true issue for those who use the "dead hand" objection is usually just a dissatisfaction with the reality that "the burning social and political questions they care about" will be resolved by the political process rather than by progressive-minded elites.[434]

Another common objection to originalism is the "necessity" argument Wilson used to justify administrative rule. This argument posits that the Constitution must evolve through the work of enlightened judges in order to keep up with the practicalities of a modern society. However, originalism "teaches only that the Constitution's original *meaning* is fixed."[435] This does not rule out the possibility of new applications of that meaning over time.[436] And even if new applications are acceptable, that doesn't mean that judges are the ones who must create them. However much one may dislike a particular law, changing it is for the voters, not judges.[437]

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[427] *See* Dred Scott v. Sandford, 60 U.S. 393, 424 (1857) (Curtis, J., dissenting).
[428] *See* Gorsuch, *supra* note 4, at 113 ("If laws enacted by the dead hand are presumptively problematic, then what about the Civil Rights Act of 1964 and the Voting Rights Act of 1965?"). In fact, one could say that this is much more than just an objection to the rule of law. If the dead hand objection is applied more broadly, then Shakespeare, Tolstoy, and Dickens are all invalid.
[429] *See* Rappaport, *supra* note 15 at 392.
[430] *See* Gorsuch, *supra* note 4, at 138-39.
[431] *See* Stephen Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J. LAW & PUB. POLICY 817, 841 (2015).
[432] *See* Easterbrook, *supra* note 249 at 1120 ("Old laws are enforced not because their authors want, but because the living want."). *See id.* at 1126 ("For one branch, the judiciary, to claim the final word about debatable propositions is not only un-originalist but also contra-constitutionalist.").
[433] *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 861 (1989) ("If the most solemnly and democratically adopted text of the Constitution and its Amendments can be ignored on the basis of current values, what possible basis could there be for enforced adherence to a legal decision of the Supreme Court?")
[434] *See* Gorsuch, *supra* note 4, at 113 ("You could even say the real complaint here is with our democracy.").
[435] *Id.* at 11.
[436] *See* GARNER, *supra* note 346 at 86 ("The meaning of rules is constant. Only their application to new situations presents a novelty.").
[437] *See* Tempting, *supra* note 137 at 86.

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The rather uncomfortable truth is that the possibility of this article's proposed reforms is unavoidably linked to the personal character of the legislators and judges who are holding office. The moral element is undeniable. The framers warned us of this: "Only a virtuous people are capable of freedom."[438] The framers, knowing that "men are not angels," designed the American Constitution to counteract this reality.[439] "Those who made and endorsed our Constitution knew man's nature, and it is to their ideas, rather than to the temptations of utopia, that we must ask that our judges adhere."[440] They understood that utopia was not something that human efforts could rationally create. Working through the laborious and sometimes unfruitful legislative process requires (and was designed to require) humility, patience, and accountability. But the administrative state and the judiciary's use of substantive due process theory bypass these requirements in the name of efficient outcomes. They are based on the prideful rationalist view that mankind has the ability to solve all of society's problems.

If it is to reclaim its legitimacy, Congress will need the maturity to embrace the legislative task despite its difficulty, the humility to embrace the accountability it has long evaded, and the foresight to uphold the Constitution's Lockean structure despite the siren calls of Hegelian administrative elitism and Wilsonian delegatory ease. Likewise, the judiciary must remember that departing from the original meaning of the Constitution in order to solve what the judge perceives as an urgent problem risks creating a situation in which "[a] judge has begun to rule where a legislator should."[441]

CONCLUSION

Political scientist Thomas Sowell, in his seminal book *A Conflict of Visions*, draws a contrast between what he calls the "constrained vision" and the "unconstrained vision."[442] The constrained vision assumes that since humans are unable to manage society, the best thing they can do is create a process that can manage their mistakes as neatly as possible.[443] In other words, the constrained vision is wary of "intellectuals' narrow conception of what constitutes . . . wisdom."[444] Most importantly, for those with the constrained vision, "freedom is defined in terms of process characteristics."[445] "Results do not define justice in the constrained vision."[446] The constrained vision is all about process, not outcomes.

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[438] *See* JARED SPARKS, THE WRITINGS OF BENJAMIN FRANKLIN, 297 (Tappan, Whittemore and Mason, Boston, 1840) (noting that George Washington said that "[v]irtue or morality is a necessary spring of popular government").
[439] *See* James Madison, Federalist 51.
[440] *See* Tempting, *supra* note 137 at 355.
[441] *Id.* at 1.
[442] *See generally* THOMAS SOWELL, A CONFLICT OF VISIONS (1987).
[443] *See* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE, 84 ("We are afraid to put men to live and trade each on his own private stock of reason; because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages.").
[444] *Id.* at 45. *See also id.* at 38 (noting that the constrained vision sees knowledge as "the social experience of the many, . . . rather than the specially articulated reason of the few, however talented or gifted those few might be.").
[445] *Id.* at 95.
[446] *Id.* ("Justice is likewise a process characteristic in the constrained vision: If a foot race is conducted under fair conditions, then the result is just, whether that result is the same person winning again and again or a different winner each time.").

On the other hand, the unconstrained vision believes in the ability of enlightened experts to rationally achieve the best outcome for society.[447] "In the unconstrained vision, something is just or unjust according to what end results occur."[448] Checks and balances on power are meaningless; they serve only as "needless complication[s] and impediments[s]."[449] Societal issues are reduced to technicalities for experts to sort out.[450] Outcomes are what matter to the unconstrained vision, and "[p]rocesses are condemned because their actual results are deemed unsatisfactory, whatever their abstract merits as a process."[451] In other words, the unconstrained vision is all about outcomes, not process.[452]

The two viewpoints described in this article parallel Sowell's visions. The outcome-oriented viewpoint of Voltaire, Hegel, and Wilson sees the separation of powers and other procedural protections as needless complications that get in the way of efficient achievement of the best outcomes, whether through administrative expertise or judicial activism.[453] In order to more effectively accomplish these preferred outcomes, those with the outcome-oriented viewpoint maintain that the intellectual class should be delegated the authority to manage society toward what they see as the best ends for society.[454] The process-oriented viewpoint, on the other hand, relies on procedural frameworks such as the separation of powers and the legislative requirements of bicameralism and presentment to protect the ability of the people to self-govern.

These two viewpoints underpin the polarization that permeates American society today. Today's level of polarization has emerged because of the slow yet powerful influx of the outcome-oriented viewpoint in the form of rationalism, the idea that mankind can rationally create the best outcomes for humanity. These ideas were exemplified by thinkers such as Voltaire, Rosseau, and Hegel, who argued that the political participation of the people should be bypassed in order to create these results more easily.

The outcome-oriented viewpoint is the opposite of the American constitutional order, which was designed to avoid arbitrary power and provide fair process to the people. In the framers' Constitution, the people granted power to the government to protect their existing rights, and the government's responsibility was to act as the fiduciary agent of the people. Its power was limited and divided in order to prevent consolidation of power and protect the political process by which the people participated in self-government. The framers' Constitution embodied Thomas Sowell's "constrained" vision, which speaks in terms of *process* characteristics."[455]

The modern manifestations of the outcome-oriented viewpoint disregard the framers' process-oriented framework. The administrative state tosses aside procedural protections in order to more easily create outcomes. The judicial doctrine of substantive due process theory enables judges to create their preferred social outcomes while disregarding the original meaning of the law. It allows legislators to abdicate their responsibility of making laws and "avoid responsibility

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[447] *Id.* at 60 (describing human rationality as "paramount" for the unconstrained visionary).
[448] *Id.* at 97.
[449] *Id.* at 27.
[450] *Id*. at 74-75.
[451] *Id*. at 94.
[452] *Id.* at 27 ("The unconstrained vision speaks directly in terms of desired results, the constrained vision in terms of process characteristics.").
[453] *Id.* at 56 (noting that the "unconstrained vision urges judicial activism on judges").
[454] *Id.* at 41. This kind of elitism asserts "a superiority competent to override a democratic majority.".
[455] *Id.* at 32 (emphasis added).

for the obtrusive regulations foisted upon society."[456] "[T]his arrangement has prevented the true sovereign – the American people – from exercising its decisive political role."[457]

Over time, the people have realized that the constitutional process by which they exercise the privilege of self-government is no longer valued. Electing one's representatives means very little if laws enacted by those representatives can be disregarded by a judge seeking his preferred social outcome or if those representatives can pass their legislative responsibilities off to unelected agencies. The people have responded by putting their hope in the president, who appoints federal judges and agency officials, and the federal courts. Their efforts have shifted from the legislative process they have lost faith in to the increasingly polarized battles around presidential elections and judicial nominations. As society becomes more polarized, the political pendulum will swing ever wider, reaching greater extremes on both sides. These pendulum swings will further erode fair notice because each election or appointment will lead to sudden and massive changes in the law. Citizens will only be able to hope that their personal views will be the same as those of the particular judge they happen to get.[458]

The outcome-oriented viewpoint has been so thoroughly ingrained in the cultural subconscious that it is now the normal way to think about American governance. In today's America, "America[ns] can't wait anymore for the ordinary democratic process to take its course."[459] The political process isn't worth bothering with because a particular social outcome is too important to entrust to self-government. (Note the similarities between this sentiment and Wilson's elitist disdain for the political "tinkering" associated with a constitutional republic[460]). This viewpoint parallels Thomas Sowell's "unconstrained vision," which speaks directly in terms of desired *results*."[461] "If public discussion no longer cultimate[s] in . . . legislation, the primary function of the legislative body is not legislation or deliberation, but the representation of interests."[462] And an interest-driven society – particularly one that sees government as an extension of those interests that is beholden to implement them regardless of the procedural safeguards – is a polarized society.

Alexis de Tocqueville predicted all of this. He feared that the combination of the potent egotism of democracy with the American notions of individual liberty and the rationalist belief in human perfectibility would create a society in which the citizens saw the government as an extension of themselves and therefore the creator of their personal preferences. Tocqueville saw that the tendency to band together for political causes, when combined with this democratic egotism, would lead interest groups to become increasingly insulated against one another. The inevitable consequence is polarization. Time has shown Tocqueville's prophecy to be true. The outcome-oriented viewpoint has created exactly what he predicted.

And the result is polarized pandemonium.

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[456] *See* Marini, *supra* note 46 at 205.
[457] *Id.* at 294.
[458] *See* Gorsuch, *supra* note 4 at 112 "Come to [the judiciary] with arguments from text, structure, and history and we are bound to . . . do our best to reason through them. Allow me to reign over the country [according to my preferences] and you have no idea how I will exercise that fickle power."
[459] *See* Christopher Caldwell, *The Roots of Our Partisan Divide*, 6, IMPRIMIS, Vol. 49, No. 2, (February 2020).
[460] *See* Wilson, *supra* note 47, at 214. Wilson argued that constitutions are concerned with "who shall make the law, and what shall the law be?", while administration is concerned with "how law should be administered with enlightenment, with equity, with speed, and without friction." *Id.* at 198-99.
[461] *See* Sowell, *supra* note 442 at 32 (emphasis added)
[462] *See* Marini, *supra* note 46 at 212.