

LECTURE

THE RULE OF LAW AND THE JUDICIAL FUNCTION IN THE WORLD TODAY

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INTRODUCTION

Good evening.¹ It is a pleasure to be here at the University of Notre Dame London Law Centre, and I am deeply honored to have been asked to speak from the “Judge James J. Clynes, Jr., Visiting Chair in the Ethics of Litigation within the Judicial Process.” The ethics of litigation, of course, is not just for practitioners. It is also for judges. It is for that reason that the Clynes Chair has, as one of its concerns, the “practice of handling and resolving cases, both at the trial and appellate levels.” While I wish to offer today some observations on that practice, I will not address it directly and at once, as would be my tendency as a judge. Rather—this being a scholarly affair—I will do my best to proceed as would an academic, taking up the question obliquely, incrementally, and only after addressing a more abstract subject to which I have lately been giving much thought: namely, that universally invoked term the Rule of Law.

I

The world’s oldest written constitution still in effect has many inspiring lines, but perhaps the one that most stirs the souls of the patriotic appears in

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1 The views expressed herein are my own and do not necessarily reflect the view of my colleagues, the United States Court of Appeals for the Ninth Circuit, or the Judicial Conference of the United States. I wish to acknowledge, with thanks, the assistance of Ryan Walsh, my law clerk, in preparing these remarks.

Article 30.² Delineating a familiar separation of powers, that Article forbids the legislative, executive, and judicial branches from swapping or mixing functions. “[T]o that end”—and here’s the line—“it may be *a government of laws and not of men.*”³ John Adams, the author of that line and most of the rest of the Constitution of the Commonwealth of Massachusetts, penned those words in 1779, eight years before the adoption of the second oldest written constitution still in effect. Writing just over twenty years later, the great Chief Justice John Marshall would affirm, in *Marbury v. Madison*, that “[t]he government of the United States has been emphatically termed a government of laws, and not of men.”⁴ Of course, neither Adams nor Marshall was on to something new with this “government of laws” notion. The idea that law, rather than certain men, ought to govern men—or, put differently, that men ought to self-govern through law—is quite old. In Western civilization, it is as old as political philosophy itself.

We invoke it still today, perhaps more vociferously than ever before. From the lips of Socrates and the quill of Chief Justice Marshall, the principle of the Rule of Law now takes center stage in the theater of international relations. This is no doubt because, as a global community, we are painfully aware that the Rule of Law has had some bad years of late—indeed, a bad century. In the concentration camps of Nazi Germany, the gulags of Soviet Russia, the killing fields of Cambodia, and the genocidal wastelands of Kosovo, the Rule of Law was nowhere to be found (though perhaps, with enough searching, one could uncover its remains—it has a way, after all, of being tyranny’s first victim). The nightmare of the twentieth century having passed, we naturally wish to do all that we can to ensure that such tragedies never happen again. As most recognize, that project begins and ends with understanding, spreading, and strengthening the Rule of Law in every corner of the globe.

A

Spearheading the rhetorical effort on this front lately has been, perhaps surprisingly to some, the United Nations itself. Last September, I had the fortune of attending the historic High Level Meeting on the Rule of Law of the 67th Session of the U.N. General Assembly. At that session, leaders from more than eighty countries gathered to reiterate not only their own commitments to the Rule of Law but to reaffirm our commitment as a global community to that principle. To that end, the General Assembly adopted a declaration.⁵ “[T]he rule of law,” it reads in part, “applies to all States equally” and ought to “accord predictability and legitimacy to their actions.”⁶

2 MASS. CONST. pt. 1, art. XXX.

3 *Id.* (emphasis added).

4 5 U.S. (1 Cranch) 137, 163 (1803).

5 G.A. Res. 67/1, U.N. Doc. A/RES/67/1 (Nov. 30, 2012).

6 *Id.* ¶ 2.

The Rule of Law, it also says, entails democracy, independent judiciaries, and the securing of human rights.⁷

This is heartening language. Still, it is just language. And perhaps, given the events surrounding the meeting, we ought not to be all that encouraged by it. After all, while diplomats in New York were busy reading listlessly from their prepared statements, the death toll in Syria climbed to 25,000⁸ and, just a week before, terrorists in Benghazi, Libya destroyed an American diplomatic mission.⁹ In addition, Iranian President Mahmoud Ahmadinejad, billed to speak at the U.N. that day on the very subject of the Rule of Law, took the opportunity instead to condemn the West and repeatedly to insult Israel.¹⁰ To many commentators, these were indications that, indeed, something more than high-soaring language was necessary to edify the Rule of Law worldwide. As a writer for *The Guardian* newspaper put it, “in the end, world leaders fell short. After more than a year of planning, all they could muster was another day of talk.”¹¹ He continued, “It did not have to be this way. Back in March, [U.N. Secretary General] Ban Ki-moon had proposed much more. . . . The secretary general [had] called for clear goals, with benchmarks to measure progress.”¹² Instead, all we got was a flimsy, content-light “declaration.”¹³

Louise Arbour, former U.N. High Commissioner for Human Rights, also expressed bewilderment, but she offered a different diagnosis.¹⁴ The problem, she wrote, was *not* that the U.N. or the Secretary General had lacked the spine to take concrete action toward the advancement of the Rule of Law. It was, instead, that the whole idea of the Rule of Law, framed so abstractly and described so generically, is a non-starter.¹⁵ “*Everyone* believes in [the Rule of Law] and wants to promote it. But . . . it is doubtful that states even agree what the term really means,” she argues.¹⁶ “Do-gooders and democrats try to convince dictators to improve [the] rule of law,” she continues, “while repressive regimes are more than happy to refer to ‘rule of law’ as they crack down on dissent at home.”¹⁷ In this critique, the Rule of Law is nothing more than an ideological Rorschach Test. A totalitarian looks at it and sees the need for

7 *Id.* ¶¶ 5, 13.

8 James A. Goldston, *UN Meeting on the Rule of Law Was Just Another Day of Talk*, THE GUARDIAN (Sept. 26, 2012), <http://www.theguardian.com/law/2012/sep/26/united-nations-rule-of-law-talk>.

9 Greg Miller & Michael Birnbaum, *Chaos at U.S. Consulate in Libya*, WASH. POST, Sept. 13, 2012, at A1.

10 Rick Gladstone & Neil MacFarquhar, *Iran’s President Spreads the Outrage in New York*, N.Y. TIMES, Sept. 25, 2012, at A9.

11 Goldston, *supra* note 8.

12 *Id.*

13 *Id.*

14 Louise Arbour, *The Rule of Law*, N.Y. TIMES (Sept. 26, 2012), <http://www.nytimes.com/2012/09/27/opinion/UN-general-assembly-on-the-rule-of-law.html>.

15 *Id.*

16 *Id.* (emphasis added).

17 *Id.*

severe laws, uniformly enforced. An egalitarian, by contrast, reads it to call for the universal provision and enforcement of all manner of “human rights”—rights to health care, rights to education, and all the rest.¹⁸

B

I have witnessed this confusion first hand through my work as chairman of the Committee on International Judicial Relations of the Judicial Branch of the United States Government. Established in 1992 by the Judicial Conference of the United States, the Committee endeavors to foster the Rule of Law throughout the world.¹⁹ In fact, our panel of federal judges was formed for the express purpose of “respond[ing] to the growing number of requests for judicial assistance in newly emerging democracies and developing countries.”²⁰ In my conversations with judges and political officials in these nations, though, I have encountered mixed conceptions of precisely what the Rule of Law is. I recall one gentleman positing that the Rule of Law was a negative thing, an authoritarian principle by which, through the trappings of legality, dictators carry out their evil fiats—call it “Rule of Law, heavy on the ‘rule.’” To others, it represents nothing more than Americanism in the worst sense of the word: an effort by our country to re-create other societies in our own image, with something like our Constitution, our Bill of Rights, our division of powers, and all the rest. If this is the Rule of Law, some would rather do without it.

But these, of course, are misconceptions. The Rule of Law is *not* a license for tyranny, be it an out-and-out tyranny or even a tyranny conferring myriad procedural rights and safeguards. Nor is it simply repackaged Americanism.

C

But then, what exactly do we mean by the Rule of Law? Let’s briefly survey two accounts of the concept. The first is perhaps as close to an international, twenty-first-century consensus as we have managed to achieve: The World Justice Project’s *Rule of Law Index*.²¹ The second—and, here, I must beg the pardon of the philosophers and historians in the audience—is my own boiled-down account of the Rule-of-Law principle as developed through our civilization’s intellectual history, particularly as that concept relates to the judicial function.

18 *See id.*

19 INT’L JUDICIAL REL. OFFICE, FED. JUDICIAL CTR., FEDERAL JUDICIAL CENTER ASSISTANCE TO OTHER NATIONS TO IMPROVE THE ADMINISTRATION OF JUSTICE (n.d.).

20 *Id.*

21 MARK DAVID AGRAST ET AL., THE WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2012–2013 (2013).

II. MEASURING THE RULE OF LAW TODAY: THE WORLD JUSTICE PROJECT'S *RULE OF LAW INDEX*

The World Justice Project, founded in 2006 as an independent, non-profit organization, has as its sole mission the “advance[ment of] the rule of law around the world.”²² The Rule of Law, as the Project understands it, is important not because it has any inherent moral worth, but because history has proven it so often to be instrumentally useful: “Without the rule of law, medicines do not reach health facilities due to corruption; women in rural areas remain unaware of their rights; people are killed in criminal violence; and firms’ costs increase because of expropriation risk,” it tells us.²³ Consequently, “[s]trengthening the rule of law is a major goal of governments, donors, businesses, and civil society organizations around the world.”²⁴

Capable of being realized, the Rule of Law as applied must in some sense also be measurable. And, if that’s so, the *Index* reasons, we would do well to measure it, if only to determine how various regimes stack up and to encourage them all to do better: “[R]ule of law development requires clarity about the fundamental features of the rule of law as well as an adequate basis for its evaluation and measurement.”²⁵ In an effort to furnish such clarity and to provide such a basis, the World Justice Project has set out—now for the third time—to provide the world with a “quantitative assessment tool designed to offer a comprehensive picture of the extent to which countries adhere to the rule of law in practice.”²⁶ Armed with data collected through extensive general-population polling and expert questionnaires, the *Index* scores ninety-seven countries on forty-eight different “rule of law indicators organized around nine conceptual dimensions.”²⁷

A

Before examining those dimensions and indicators, I should first highlight the *Index*’s four “universal principles” of the Rule of Law from which the numerous dimensions and indicators are derived. First, “[t]he government and its officials and agents . . . are accountable under the law.”²⁸ Second, “[t]he laws are clear, publicized, stable, and just, . . . and protect fundamental rights.”²⁹ Third, “[t]he process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.”³⁰ Finally, “[j]ustice is delivered timely by competent, ethical, and independent representatives and

22 *Id.* at 1.

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.* at 3.

29 *Id.*

30 *Id.*

neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.”³¹

From these rudiments, the *Index* derives the following specific principles. First, the Rule of Law means limited government powers.³² Those powers must be “defined in the fundamental law” and limited by both the legislature and the judiciary.³³ Officials “are sanctioned for misconduct,” and transitions of power are “subject to the law.”³⁴ Second, the Rule of Law requires an “absence of corruption”; public office must not be used for private gain of any sort.³⁵ Third, the Rule of Law entails “order and security.”³⁶ Fourth, it requires the recognition and protection of “fundamental rights,” such as equal protection, the right to life and security, due process, freedom of expression, religion, assembly, privacy, and labor.³⁷ Fifth, the Rule of Law requires an “open government” whose laws are publicized, accessible, and stable.³⁸ Sixth, the Rule of Law calls for effective “regulatory enforcement,” unaccompanied by “unreasonably” delayed administrative processes.³⁹ Seventh, the Rule of Law must provide “civil justice” and, eighth, criminal justice, both of which must be non-discriminatory, corruption-free, accessible, impartial, timely, and effective.⁴⁰ Ninth and finally, the Rule of Law means the availability of “informal justice,” which, like formal justice, also must be timely, effective, impartial, free of corruption, and must “respect[] and protect[] fundamental rights.”⁴¹

B

This is an impressive list—impressive in its breadth, impressive in its ecumenism, and impressive as an intuitively sensible set of metrics against which to measure the political systems of the world. Still, parts of it perhaps ought to give us pause, triggering our curiosity and even our skepticism. In that spirit, I offer the following observations. First, note that, though the first factor requires a “fundamental” law, it does not explicitly call for a *written* fundamental law—and it avoids the term “constitution” altogether.⁴² Second, it calls for the recognition of *not only* a set of process-based rights (such as due process of law) but also a handful of individual, *substantive* entitlements—the right to privacy, the right to opinion, and “labor rights.”⁴³

31 *Id.*

32 *Id.* at 11.

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.*

Third, although it calls for *laws* that are known, accessible, and stable, it does not demand the same degree of openness and certainty from *regulations*. Instead, regulations need only be fairly made, effectively enforced, and properly applied.⁴⁴ Fourth, note that civil justice, in this account, must not only be available to all—it also must be *financially affordable* for all.⁴⁵ Fifth, and perhaps most striking to the American eye, the *Index's* Rule of Law need not go hand in hand with one particular *form* of government. Indeed, on the issue whether the “laws” it repeatedly describes are to be enacted by democratically elected representatives, the *Index* explicitly punts.⁴⁶ Between aristocracy and republicanism, oligarchy and monarchy, the *Index* is neutral. These points are worth keeping in mind as we turn in a few moments to the historical conception of the Rule of Law. Near the end of my lecture, I hope to circle back to a couple of these points and evaluate them in light of the Rule-of-Law principle as traditionally understood.

C

By the way, how did the United States fare under the *Index's* standard? Surprisingly, not exceptionally well. On “limited government powers,” the United States comes in at seventeenth place,⁴⁷ trailing Denmark (at first place),⁴⁸ Sweden (at second),⁴⁹ Germany (at ninth),⁵⁰ France (at eleventh),⁵¹ and the United Kingdom (at thirteenth).⁵² On “absence of corruption,” we come in one place worse,⁵³ again trailing Sweden,⁵⁴ Denmark,⁵⁵ Norway⁵⁶—the gold, silver, and bronze on this factor—as well as Singapore,⁵⁷ Japan,⁵⁸ the United Kingdom,⁵⁹ and others.⁶⁰ On “fundamental rights,” the United States ranks twenty-fifth.⁶¹ On “open government,” the United States clinches thirteenth—our highest mark.⁶² On regulatory enforcement, civil justice, and criminal justice, the United States falls some-

44 *Id.*

45 *Id.*

46 *Id.* at 12.

47 *Id.* at 150.

48 *Id.* at 82.

49 *Id.* at 141.

50 *Id.* at 92.

51 *Id.* at 90.

52 *Id.* at 149–50.

53 *Id.* at 150.

54 *Id.* at 141.

55 *Id.* at 82.

56 *Id.* at 123.

57 *Id.* at 136.

58 *Id.* at 103.

59 *Id.* at 149.

60 *Id.* at 150.

61 *Id.*

62 *Id.*

where between nineteenth and twenty-sixth.⁶³ Summing all this up, the *Index* concludes that America scores well on limited government, because of our “well-functioning system of checks and balances,” as well as on fundamental rights.⁶⁴ Still, we “lag[] behind” for failing to provide disadvantaged persons access to the legal system: “[T]he gap between rich and poor individuals in terms of both actual use of and satisfaction with the civil court system is significant,” according to the *Index*.⁶⁵ Finally, “there is a perception that ethnic minorities and foreigners receive unequal treatment.”⁶⁶ Although we Americans would like to think that we deserve better marks, it is obvious that, by the *Index*’s yardstick, there is much room for improvement.

III. THE RULE OF LAW IN WESTERN THOUGHT: FROM PLATO TO THE MAGNA CARTA

But then, is the World Justice Project’s standard the right one? Having put the question on the table, let’s now briefly overview the distinctly Western conception of the Rule of Law. In the course of doing so, we ought to highlight in particular those characteristics of the Rule of Law that relate especially to courts and the role of the judge in civil society. Before beginning, I should note that I focus on the principle of the Rule of Law in Western history both because I am a Westerner and because the tradition of the West has a good deal to say on the subject. But that, of course, is not to say that the East and its history bear no relevance here. Given my limited time, I think it best to leave the subject of comparable Asian insights on the Rule of Law for another lecture.

A

It was “once said that all philosophy is but a footnote to Plato.”⁶⁷ The philosophy of the Rule of Law is no exception. What is perhaps most surprising about Plato’s account is his argument that the Rule of Law, as a theoretical matter, is a mere second-best political system.⁶⁸ Better to be ruled not by a mechanical, impersonal code, but by the virtuous and wise. “Rule of law [per Plato] is inferior to the rule of living intelligence,” the philosopher Leo Strauss explained, “because laws, owing to their generality, cannot determine wisely what is right and proper in all circumstances given the infinite variety of circumstances.”⁶⁹ Nonetheless, laws are necessary. This is not simply

63 *Id.* For the raw scores of the United States and comparative nations, see *id.* at 162–77.

64 *Id.* at 28–29.

65 *Id.* at 29.

66 *Id.*

67 2 THE DICTIONARY OF MODERN AMERICAN PHILOSOPHERS 613 (John R. Shook ed., 2005) (quoting Alfred North Whitehead).

68 See generally PLATO, THE LAWS OF PLATO (Thomas L. Pangle trans., 1988) (1980) (translating Plato’s work on law).

69 Leo Strauss, *Plato*, in HISTORY OF POLITICAL PHILOSOPHY 33, 74–75 (Leo Strauss & Joseph Cropsey eds., 3d ed. 1987).

because, in Plato's account, polities will always be lacking in wise men, but rather because "[t]he few wise men cannot sit beside each of the many unwise men and tell him exactly what it is becoming for him to do."⁷⁰ In any event, the wise men are often hard to find, and, when found, they often prefer not to rule.⁷¹ The unwise, for their part, are disinclined to believe that a wise man deserving to rule over them would in fact be willing and able to do so.⁷² Thus, where the only other alternative is the "lawless rule of selfish men,"⁷³ they instead settle on the Rule of Law, which—even though inferior to the wise man's intelligence—commands his respect.⁷⁴

So, too, we find in Aristotle the argument that the Rule of Law, like politics generally, is a reflection of the nature of things and the nature of man in particular. Man is made for the "polis" or the city because he, unique among the animals, possesses reason.⁷⁵

"It is the peculiarity of man . . . in comparison with the rest of the animal world, that he alone possesses a perception of good and evil, of the just and the unjust; . . . and it is association in [a common perception] of these things which makes a family and a polis."⁷⁶

Understood this way, writes the incomparable Oxford (and Notre Dame) Professor John Finnis,

[T]he Rule of Law is a virtue of human interaction and community. . . . Individuals can only be selves—i.e. have the "dignity" of being "responsible agents"—if they are not made to live their lives for the convenience of others but are allowed and assisted to create a subsisting identity across a "lifetime."⁷⁷

It is in this sense that, perhaps contrary to the World Justice Project's understanding,⁷⁸ the Rule of Law has a moral worth in its own right, not simply as a means to some other desired end.⁷⁹ Taking the point further, Aristotle

70 *Id.* at 75.

71 *Id.*

72 *Id.*

73 *Id.*

74 This is to avoid the risk that the less wise, imitating their betters, will also think it permissible to disobey the law. Plato goes on to note that because there is always a risk that the laws, as handed down and enforced, will reflect the sectional interests of their authors or enforcers, it is best that there be not a pure monarchy, aristocracy, or democracy, but instead a "regime must be mixed." *Id.* at 83.

75 HADLEY ARKES, *FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE* 12–14 (1986).

76 *Id.* at 14 (second and third alterations in original) (quoting Aristotle).

77 JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 272 (2d ed. 2011).

78 See *supra* notes 22–24 and accompanying text.

79 Following Aristotle, Princeton University Professor Robert P. George writes,

[T]he dignity that calls forth the respect due to rational agents in the form of . . . governance in accordance with the rule of law flows from our nature as . . . beings whose nature is to understand and act on more-than-merely-instrumental reasons. The capacity to understand and act on such reasons stands in a relationship of mutual entailment with the human capacity for free choice, that is, our capacity

argues that it is not only man's capacity for reason, but also the fact that men are *equally* capable of reason, that necessitates the Rule of Law, when he says,

[H]e who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.⁸⁰

In this account, it is especially important what kind of person is applying the law, for the law does not apply itself. He who applies the law—he who, through his art, makes the general principles of the law govern the particular circumstances of a given case—must do so without passion and with reason.

B

Continuing this thread on the Rule of Law and the law “applier,” we turn to the great Roman orator Cicero, who sketches a telling comparison between the despotic king, on the one hand, and the “magistrate,” on the other.⁸¹ In so doing, he highlights the importance of judicial independence to the Rule of Law.⁸² The tyrannical king who frees himself of the strictures of law, Cicero writes, also by that act unravels “every civilized partnership with his own citizens and indeed with the entire human species.”⁸³ Contrast the magistrate, whose “function is to take charge and to issue directives which are right, beneficial, and in accordance with the laws. As magistrates are subject to the laws, the people are subject to the magistrates.”⁸⁴ And here's the most important line: “In fact it is true to say that *a magistrate is a speaking law, and law a silent magistrate.*”⁸⁵ Here, we see the judge as a law-speaker, though not in an *active* sense but a *passive* one. The judge—whose name, personality, or predilections could not for these purposes be any less relevant—opens his mouth and “law” issues forth. Note that, in this account of judicial independence, it doesn't necessarily matter whether a judge comes to serve through appointment, wins his seat in an election, or serves at the pleasure of a minister or cabinet-level secretary. Although those details likely would bear some real-world influence on the ways in which a particular judge carries out his role (namely, whether he does it well or poorly), none is a necessary precondition to the judge's role with respect to maintaining the Rule of Law.

to *deliberate and choose* between or among open possibilities (i.e., options) that are provided by “basic human goods,” i.e., more-than-merely-instrumental reasons.

Robert P. George, *Reason, Freedom, and the Rule of Law: Their Significance in the Natural Law Tradition*, 46 AM. J. JURIS. 249, 255 (2001).

80 ARISTOTLE, *THE POLITICS AND THE CONSTITUTION OF ATHENS* 88 (Stephen Everson ed., Cambridge Univ. Press 1996).

81 CICERO, *THE REPUBLIC*, reprinted in *THE REPUBLIC AND THE LAWS*, bk. 2, §§ 47–49, 53–54, at 50–52 (Niall Rudd trans., 1998).

82 See CICERO, *THE LAWS*, reprinted in *THE REPUBLIC AND THE LAWS*, supra note 81, bk. 3, §§ 2–3, at 4 (discussing the authority of the magistrate with regard to the law).

83 CICERO, supra note 81, bk. 2, § 48, at 50.

84 CICERO, supra note 82, bk. 3, § 2, at 151.

85 *Id.* (emphasis added).

Rather, Cicero's only requirement is that a magistrate's judgments be "right, beneficial, and in accordance with the laws."⁸⁶

And, of course, his decision must *matter*; it must take effect. On this point, I offer a brief aside: in a speech given several years ago, Chief Justice of the United States John Roberts shared a conversation he had had with a foreign judge at a conference.⁸⁷ The judge asked the Chief Justice whether he ever had ruled against the government. The Chief Justice said yes, of course. The foreign judge leaned in, seeming a bit shocked, and asked, "What happened?" The Chief Justice was confused. "Well, nothing happened," he responded. The foreign judge nodded in confirmation: "Yes, that would be the case in our country as well." The Chief Justice picked up on the miscommunication and clarified: "No no, the government, of course, complied with the ruling of the court." "Of course," the Chief said, but the point wasn't at all obvious to the foreign judge.⁸⁸

C

Skipping ahead some 1300 years from the time of Cicero, we reach the next major milestone in the development of the Rule-of-Law principle: the Magna Carta of 1215. That document is notable for three reasons. First, as Professor Brian Tamanaha of St. John's University points out, the Magna Carta codified a principle that had, until then, been relegated mostly to dusty old texts of philosophy: namely, the idea that the law ruled not only men, but the king.⁸⁹ Second, the Magna Carta is significant as an early experiment in constitutionalism. "The English long held a myth about an ancient unwritten constitution based upon customary law and understandings," Tamanaha writes.⁹⁰ "The Magna Carta added a foundational written piece."⁹¹ Third, the Magna Carta provided in its famous Clause 39 the guarantee that "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and *by the law of the land*."⁹² Of course, this phrase, "the law of the land," later came to be synonymous with another legalism more familiar to our ears, and universally regarded as essential to the Rule of Law: "due process of law."⁹³

Another remarkable quality of that monumental document is that it is indeed a *document*. One wonders whether we would be praising the Magna

86 *Id.*

87 John G. Roberts, *Reagan Lecture* (C-SPAN America and the Courts television broadcast Mar. 8, 2006), available at <http://www.c-spanvideo.org/program/ReaganLec>.

88 *Id.*

89 BRIAN Z. TAMANAHA, ON THE RULE OF LAW 27 (2004).

90 *Id.* at 26.

91 *Id.*

92 *Magna Carta of 1215*, cl. 39, reprinted in A.E. DICK HOWARD, *MAGNA CARTA: TEXT & COMMENTARY* 45 (rev. ed. 1998) (emphasis added).

93 See Gary Lawson, *Due Process Clause*, in *THE HERITAGE GUIDE TO THE CONSTITUTION* 337–38 (Edwin Meese III et al. eds., 2005) (internal quotation marks omitted).

Carta's guarantees 800 years later if they hadn't been codified. Would we still count 1215 a watershed year for the development of the Rule of Law had King John's concessions been made orally and enforced through the generations only as a kind of unwritten law?

D

A more abstract question that such a counterfactual raises is this: Can the Rule of Law obtain in either a civil-law or common-law system? The short answer, it seems, is that the Rule of Law is compatible with either regime; still, both pose risks. The advantages of a civil-law system, to our modern democratic sensibilities, seem obvious enough. Once codified, a rule takes on a static, permanent quality. It becomes predictable—we can plan our lives around it. And, of course, we may come to *know it*; it can be “looked up.” It was with at least some of these considerations in mind that the Roman Emperor Justinian had his subordinates collect and systematize the existing customs, rules, decisions, and legal commentaries of Rome into a three-volume legal code.⁹⁴ Fast-forwarding several hundred years, we find the most full-throated defense of the principles underlying the Justinian Code in the political writings of the Enlightenment. The chief virtue of codified law, the philosopher Jeremy Bentham contended, is that it replaces the common law's vagaries with clear directives, appropriately promotes the legislative, political role in law-development, and makes the law accessible to the general public, not just to specialists.⁹⁵ In other words, the argument went, codified law—if not strictly *necessary* to the Rule of Law—is at least extremely important to it.

At the same time, civil-law systems also pose risks to the Rule of Law, threatening to enfeeble it in indirect ways. First, consider that, as a historical matter, the rise of civil law has often gone hand in hand with a systematic demotion of unwritten “fundamental law,” whether natural or constitutional. This is because—to defenders of the civil law, many of whom have been students of the legal positivist school—law is a strictly man-made thing. Moreover, and consequently, the making and unmaking of law falls within the exclusive province of the legislature. As a result, where the legislature's dictates run up against custom, tradition, or even nature herself, there is little question about which prevails. While the positive law, under those conditions, has a way of growing more predictable and understandable, it also has a way of becoming tyrannical, reflecting little more than the arbitrary will of a simple majority, perfectly willing to run roughshod over the desires—and, indeed, the rights—of the unfavored minority.

94 Those volumes were (1) the *Codex*, which contained the rules themselves, (2) the *Digest*, a collection of juristic commentary on the rules, and (3) the famous *Institutes*, which combined the first two volumes in abridged form for those wishing to study the law. See TAMANAHA, *supra* note 89, at 13.

95 See JEREMY BENTHAM, *THE THEORY OF LEGISLATION* (C.K. Ogden ed., Richard Hildreth trans., 1931) (1802).

E

Contrast the common law. Its main advantage lies in its adaptability, its ability to supply the rational, flexible, and just principle appropriate to each case—though not “supply” in the sense of “make out of nothing.” After all, in the old understanding, the common law’s existence was antecedent to any given case.⁹⁶ It was the job of the learned common-law judge simply to identify the governing principle that governs *X* or *Y* case and apply it. A second advantage of the common law is that, as the locus of a polity’s fundamental law, it is at least theoretically capable of containing the tyrannical impulses of bare legislative majorities and government actors generally. As Sir Edward Coke’s celebrated opinion in *Dr. Bonham’s Case* explained,

[I]n many cases, the common law will controul acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such act to be void . . . [for] some statutes are made against law and right . . .⁹⁷

One easily perceives this view’s vulnerability to a Rule-of-Law critique. Indeed, one rightly raises an eyebrow at the suggestion that the Rule of Law does best in a system where eternal, abstract “rules of reason” fall fortuitously from the sky into the laps of judges to be invoked in the service of voiding a statute of the popular government. Civil-law regimes may undermine the Rule of Law by making the legislature supreme, but perhaps common-law systems do just as poorly by creating a kind of black-robed aristocracy, the only “predictable” feature of which is that the judges will have their way in every case.

IV. MODERN EUROPEAN AND AMERICAN CONCEPTIONS OF THE RULE OF LAW

In the interest of time, let’s skip over several important thinkers to say a brief word about the Rule of Law as understood by John Locke, Baron de Montesquieu, and the American Founders.

A

Beginning with Locke, we begin to see the development of the fundamentally liberal conception of the Rule of Law, the version most familiar to us today. In this account, the Rule of Law is the sole condition upon which

96 See generally OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1–38 (1923) (discussing the various origins and development of the modern common law).

97 *Dr. Bonham’s Case*, in 4 *THE REPORTS OF SIR EDWARD COKE, KNT.* 355, 375 (The Lawbook Exch., Ltd. 2002) (1826). As Tamanaha explains,

The basic idea was that the common law, a body of private law reflecting legal principles, established the fundamental legal framework. Legislation, from this standpoint, posed a threat to the integrity and coherence of the common law—enactments in derogation of the common law were therefore strictly construed by judges.

TAMANAHA, *supra* note 89, at 57.

political society depends. To put it in prosaic terms, it is the societal deal-maker, and its neglect, the societal deal-breaker. Emerging from the state of nature, men come together to agree to be bound by a set of rules, and so long as those rules have force and give due regard to natural rights and the public good, the arrangement persists.⁹⁸ Consequently, “[w]herever law ends, tyranny begins.”⁹⁹ The late Lord Thomas Bingham, former Lord Chief Justice of England and Wales, articulated a similar understanding of the Rule-of-Law principle, defining it to mean that “all persons and authorities . . . whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.”¹⁰⁰

For Montesquieu, the limiting function was best accomplished by a formal division of government powers—legislative, executive, and judicial. It is Montesquieu’s rationale for cabining and defining the judicial power that we ought to consider most directly. On that subject, he warns that, should the judicial power ever be mixed with that of the executive, “the judge might behave with violence and oppression.”¹⁰¹ Likewise, were the judicial power to combine with that of the legislature, “the judge would be then the legislator” and there would be “no liberty.”¹⁰² As Professor Judith Shklar once wrote, the reason Montesquieu favors stripping judges of all power save those properly called “judicial” is “not so much to ensure judicial rectitude and public confidence, as to prevent the executive and its many agents from imposing their powers, interests, and persecutive inclinations upon the judiciary.”¹⁰³ Made independent, “[t]he magistrate can then be perceived as the citizen’s most necessary, and also most likely, protector.”¹⁰⁴

This is not to say that a formal separation of powers is a necessary condition of the Rule of Law everywhere. In theory at least, so long as each state actor in a political system carries out his obligations in strict accordance with

98 Thus, as Locke put it,

[T]he community comes to be umpire, by settled standing rules, indifferent, and the same to all parties; and by men having authority from the community, for the execution of those rules, decides all the differences that may happen between any members of that society concerning any matter of right; and punishes . . . offences . . . with such penalties as the law has established . . .

JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 46–47 (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690).

99 *Id.* at 103. For Locke, the Rule-of-Law principle was important not just as a basis of the social contract. It was also essential for ensuring predictability and controlling the governing authorities’ own behavior, so “that both the people may know their duty, and be safe and secure within the limits of the law; and the rulers too kept within their bounds.” *Id.* at 73.

100 TOM BINGHAM, *THE RULE OF LAW* 8 (2010).

101 1 BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 152 (Thomas Nugent trans., Colonial Press rev. ed. 1900) (1748).

102 *Id.*

103 Judith N. Shklar, *Political Theory and the Rule of Law*, in *THE RULE OF LAW* 1, 5 (Allan C. Hutchinson & Patrick Monahan eds., 1987).

104 *Id.*

the law, then whether the fundamental law assigns him some measure of both the executive and the legislative power (as opposed to just one or the other) makes little difference. Still, because the potential for lawlessness in those circumstances is especially acute, prudence dictates that powers be separated. This was the position not only of John Adams, codified in Article 30 of the Massachusetts Constitution,¹⁰⁵ but also of James Madison in *Federalist Papers* 47 and 51. The separation of powers, he argued, acts as a structural safeguard against the natural, wayward inclinations of men—who, Madison reminds us, are not angels, when he writes,

Ambition must be made to counteract ambition. . . . It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.¹⁰⁶

In other words, man being what he is (and this indeed is the foundational premise), “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny” and thus anathema to the Rule of Law.¹⁰⁷

B

Turning our attention to the American Founders generally, inspired in no small part by Locke’s and Montesquieu’s teachings, we find the cleanest expression of the American conception of the Rule of Law in the Declaration of Independence and in the Constitution itself. On its face, of course, the Declaration seems a rather *anti*-Rule-of-Law document. After all, can there be any doubt that at the time that document was authored, the American people were under the rule not only of the British Crown but of the laws of Parliament? True, one could argue that King George III’s excesses bordered on the despotic and therefore lacked legitimacy. But what of the laws of the people’s branch? Passed by a republican body representing the interests of the colonists, how could the validity of those laws have been thrown into doubt? The Declaration supplies the answer. And, here, we begin to tease out the substantive features, if you will, of the Rule of Law, the requirements of which are written in “Nature” by “Nature’s God.” According to the Declaration, nature supplies a fundamental law of its own.¹⁰⁸ Under that law, any man-made provision—however legitimate when first promulgated—that becomes “destructive” of man’s natural rights over time requires either alteration or abolition.¹⁰⁹ That provision, the Declaration suggests, loses its

105 MASS. CONST. pt. 1, art. XXX.

106 THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003).

107 THE FEDERALIST NO. 47, at 298 (James Madison) (Clinton Rossiter ed., 2003).

108 THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

109 *Id.* para. 2.

moral force. Plainly, this is a kind of Rule-of-Law argument: if nature's law by necessity must always rule, then man-made laws running to the contrary are, to use a lawyer's term, "preempted."

Consider the analogous reasoning of the Constitution. Authorized by the rule of Nature and Nature's God, the American people separated themselves from the British polity and established their own regime, the bedrock of which became the Constitution of the United States. For this reason, we often say that the Constitution is our "fundamental law," and, of course, that must be right. It creates the very possibility that power, at the national level anyway, may be exercised. This is true even as a matter of logic—one need not invoke the Supremacy Clause to enhance the point's validity. Alexander Hamilton proved this in *Federalist* 78. There, addressing the province of the judicial branch, he argued that "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution."¹¹⁰ Answering the argument that the power of judicial review would elevate the courts above the legislative branch, Hamilton reminded his readers of the source of the Constitution's power when he wrote,

No legislative act . . . contrary to the Constitution [] can be valid. To deny this, would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.¹¹¹

By this reasoning, "[a] constitution is, in fact, and must be regarded by the judges, as a fundamental law."¹¹²

For Hamilton, Jefferson, and many of their colleagues, then, the Rule of Law meant first the rule of *fundamental* law. That meant, for one thing, rule subject to the traditional, inherited common law rights of Englishmen. Finding myself here in London, I should take this occasion to admit that we Americans often forget the debt we owe to Great Britain for these privileges. The philosopher Russell Kirk helpfully reminds us of their importance when he wrote that the Founders later sought to

110 Limitations in the fundamental law, he argues "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." *THE FEDERALIST* NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

111 *Id.* at 466.

112 Hamilton goes on to write,

It therefore belongs to [the judiciary] to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, *the intention of the people to the intention of their agents.*

Id. (emphasis added).

chiefly put down on paper what already existed and was accepted in public opinion: beliefs and institutions long established in the colonies, and drawn from centuries of English experience with parliaments, the common law and the whole complex social order. Respect for precedent and prescription governed the minds of the founders of this republic. We appealed to the prescriptive liberties of Englishmen.¹¹³

At the same time, though, the Founders also appealed to the rights of man as such—natural rights. To the end of securing those rights, and acting within nature’s authorization, the American people proceeded to set up a fundamental law. But note that the fundamental law “rules” in no meaningful sense when the very government actors it brings into being perform acts forbidden by it. The fundamental law *does* rule, however, when, even though the government has by a certain act trespassed its limits, the judiciary—exercising the duty vested in it by that same document and, by extension, the people—steps in and declares the trespassory act to be what it is: a nullity.

C

Before concluding, let’s tie my all-too-brief overview of the Rule of Law, historically understood, back to the World Justice Project’s *Index*. You’ll recall that we flagged several concerns with that list. Perhaps we ought now to reassess two of them in light of what we’ve said since. First, we observed that the *Index* calls for the recognition of *not only* a set of basic process-based rights (such as due process of law) but also a handful of individual, *substantive* entitlements.¹¹⁴ The contemporary debate over whether the Rule of Law requires only procedure or also substance, as the *Index* notes, ensues. Still, the historical understanding of the Rule of Law supports the *Index*’s general approach, at least in principle—the principle being that the Rule of Law does indeed call for the recognition both of procedural and substantive rights. We saw this idea surface in Aristotle’s account, which traces the necessity of the Rule of Law to man’s rational, non-animalistic nature.¹¹⁵ As a being who gives and demands reasons and acts in accordance with them, man must be treated with a certain baseline level of dignity in any regime that claims to respect the Rule of Law. Consequently, it would be right to say that a political system that lets you contest a parking ticket in three different courts but that, on the same day, rounds up hundreds of citizens of a certain color to put in preventive detention pays only lip service to the Rule of Law. We also saw support for the notion that the Rule of Law has a substantive component in the writings of the Founders and, in particular, the Declaration of Independence. As the American Founders saw it, the Rule of Law means the rule of *fundamental* law, including the rule of nature. Once a regime fails to respect a citizen’s basic rights to life, liberty, and property—

113 Russell Kirk, *The Best Form of Government*, CATHOLIC WORLD, Oct. 1960, at 161.

114 See *supra* Section II.B.

115 See *supra* Section III.A.

the Lockean rights¹¹⁶ reflected in the Declaration—it becomes destructive of the very ends for which it was constituted.¹¹⁷ Consequently, though the higher law should rule, it does not. Still, the hard question remains: Which rights are indeed “natural” or “fundamental,” and who decides? The *Index* wades into this debate, in effect, by identifying a few privileges as essential but neglecting others. But disappointingly, it fails to articulate a theory to account for its choices. Perhaps the next *Index* will provide a more thorough explanation.

Another feature of the *Index* that we highlighted is that it does not link the Rule of Law to any one particular *form* of government.¹¹⁸ Indeed, on the issue whether the “laws” it repeatedly describes are to be enacted by democratically elected representatives, the *Index* takes no side. Once again, I think this position at least in principle finds support in the history of the Western conception of the Rule of Law. Of course, Plato and Aristotle were far from partisans of republican democracy.¹¹⁹ Even Locke and the American Founders stopped short of arguing that the Rule of Law presupposes some form of constitutional republicanism. Rather, their view was more nuanced. They argued that, *given human nature and what history has taught us about it*, the Rule of Law is most likely to thrive where governmental powers are separated, the people hold their leaders accountable in regular elections, and the powers of the government are limited by a fundamental, written charter.¹²⁰ For its part, the *Index* also highlights several of these systemic features—including the existence of a fundamental law, the separation of powers, and provision for orderly transitions of power—as being most conducive to the Rule of Law. Instead of the *particular form* a government takes, what matters under both the traditional and World Justice Project’s understandings of the Rule of Law is that the state’s powers are limited in law and in fact. On this point, I believe the *Index* gets it exactly right.

V. THE RULE OF LAW AND THE UNITED STATES JUDICIARY

I want to conclude now with a reflection on the Rule of Law and the United States judiciary. Recall the words of Hamilton’s *Federalist* 78—that “[a] constitution is, in fact, and must be regarded by the judges as, a fundamental law.”¹²¹ As the foregoing authorities have shown, we judges are indeed essential to the maintenance of the Rule of Law. At the same time, we also pose a threat. There is always the risk that, in our efforts to police the

116 LOCKE, *supra* note 98, at 66.

117 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

118 See *supra* Section II.B.

119 See Fred Miller, *Aristotle’s Political Theory*, STAN. ENCYC. OF PHILO. (Jan. 26, 2011), plato.stanford.edu/entries/aristotle-politics/ (“Aristotle classifies democracy as a deviant constitution . . .”).

120 See Suri Ratnapala, *John Locke’s Doctrine of the Separation of Powers: A Re-evaluation*, 38 AM. J. JURIS. 189, 219–20 (1993) (summarizing Locke’s view of separation of powers and the fundamental requirement that government be subject to laws).

121 THE FEDERALIST NO. 78, *supra* note 110, at 466.

boundaries that the Constitution—and, by extension, the American people—have erected, we will become overzealous, inventing constitutional “rights” or enforcing restrictions existing only in our imaginations. This tendency, I submit, poses two threats to the Rule of Law.

First, and most obviously, it transforms Cicero’s conception of the judge as neutral magistrate¹²² into Aristotle’s feared arbitrary monarch.¹²³ In the guise of upholding the Rule of Law, the legislator-in-robes ignores it and enacts, in its place, his own view of the good. This is all in spite of the plain fact that the Constitution leaves those kinds of judgments to the elected branches.¹²⁴ Though Congress’s authority has limits, those limits do not carve out a correlative policy-making role for the courts. Instead, as the Ninth and Tenth Amendments make clear, all powers not enumerated have been retained by the people or the States.¹²⁵ As Chief Justice Rehnquist once explained, under our constitutional framework “[t]he people are the ultimate source of authority; they have parceled out the authority that originally resided entirely with them by adopting the original Constitution and by later amending it.”¹²⁶ But unless Congress exceeds its limits, judges must uphold and enforce its decisions, their own policy positions to the contrary notwithstanding.¹²⁷ Supposing that “the popular branches of government . . . are operating within the authority granted to them by the Constitution, their judgment and not that of [judges] must . . . prevail.”¹²⁸ Federal judges are, after all, unelected and serve indefinitely. These features are not conducive to a policy-making role.¹²⁹

122 See *supra* notes 81–85 and accompanying text.

123 See *supra* note 80 and accompanying text.

124 Under Article I’s broad grant of authority, Congress enjoys the power to (among other things) “lay and collect Taxes,” “borrow Money on the credit of the United States,” “regulate Commerce with foreign Nations, and among the several States,” and to do anything “necessary and proper for carrying into Execution” the enumerated powers. U.S. CONST. art. I, § 8.

125 *Id.* amends. IX–X.

126 William H. Rehnquist, *The Notion of a Living Constitution*, 29 HARV. J.L. & PUB. POL’Y 401, 404 (2006) (summarizing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

127 Article III, after all, confers on federal courts nothing more than the “judicial Power.” U.S. CONST. art. III. And, as *Federalist No. 78* makes clear, that is a limited and specific charge. THE FEDERALIST NO. 78, *supra* note 110, at 466. The “judicial Power,” as Professor Philip Hamburger has explained, “was originally understood to mean essentially what it had meant in England: the power of courts to decide cases ‘in accord with the law of the land.’” Diarmuid F. O’Sannlain, *The Role of the Federal Judge Under the Constitution: Some Perspectives from the Ninth Circuit*, 33 HARV. J.L. & PUB. POL’Y 963, 964 (2010) (quoting PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 17 (2008)). It was not the power of courts to resolve cases “according to [a judge’s] personal values or individual notions of justice.” *Id.*

128 Rehnquist, *supra* note 126, at 404.

129 As Judge Frank Easterbrook of the Seventh Circuit has put it, “our Constitution’s design is to keep policymakers on short temporal leashes. Judges don’t stand for election, and it follows that they can’t adopt their own legislative proposals.” Frank H. Easterbrook, *Judges as Honest Agents*, 33 HARV. J.L. & PUB. POL’Y 915, 919 (2010). Those who make

The second problem with such judicial adventurism, as it pertains to this topic, is that it undermines the predictability of law. This is in no small part because, often, when we judges are behaving as legislators, our proclamations—heavy on general, ostentatious flights of rhetoric instead of only those narrow, tightly written sentences necessary to resolve the case before us—tend to create more questions than answers. Justice Scalia described this problem well in his 1989 article aptly titled *The Rule of Law as a Law of Rules*. “Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law,” he notes.¹³⁰ “Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes. It is said that one of emperor Nero’s nasty practices was to post his edicts high on the columns so that they would be harder to read and easier to transgress.”¹³¹ We behave little better than Nero when it happens that, as a consequence of our applying the latest theory of constitutional evolutionism hot off the academic presses, the only parties aware of what of our next ruling will spell are the enlightened judges themselves. As Justice Scalia writes,

What is it that the judge must consult to determine when, and in what direction, evolution has occurred? . . . As soon as the discussion goes beyond the issue of whether the Constitution is static, the evolutionists divide into as many camps as there are individual views of the good, the true, and the beautiful. I think that is inevitably so, which means that evolutionism is simply not a practicable constitutional philosophy.¹³²

I close now with this thought. Perhaps the best that we judges can do to edify the Rule of Law in the United States—and in the world—is to carry out our constitutional duty with precision, with impartiality, and with humility. Let us do this so that, in words of Thomas Paine, “the world may know . . . that *The Law is King*.”¹³³

Thank you.

policy, moreover, “ought to have at least some connection with popular feeling.” Rehnquist, *supra* note 126, at 406.

130 Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

131 *Id.*

132 ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 45 (Amy Gutmann ed., 1997).

133 THOMAS PAINE, *COMMON SENSE* 20 (H.D. Symonds 1793) (emphasis added).