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

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I. DISCUSSION

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

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

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1. *See generally* PETER HEATHER & JOHN RAPLEY, WHY EMPIRES FALL (2023) (comparing U.S. politics and government of 1999 to those of Rome in 399); CULLEN MURPHY, ARE WE ROME? (2007); Cullen Murphy, *No, Really, Are We Rome?*, ATLANTIC (Mar. 11, 2021), https://www.theatlantic.com/magazine/archive/2021/04/no-really-are-we-rome/618075/ [https://perma.cc/4PEY-HBN4].

2. *See, e.g.*, HAROLD J. BERMAN, LAW AND REVOLUTION 32-37 (1985) (describing growing skepticism toward Western legal tradition and descent of law into "a hodgepodge, a fragmented mass of ad hoc decisions and conflicting rules"); Steven D. Smith, *The Mindlessness of Bostock*, L. & LIBERTY (July 9, 2020), https://lawliberty.org/bostock-mindlessness/ [https://perma.cc/2AM9-VXTC] (describing a "descent into mindlessness" afflicting legal interpretation, driven by a wooden application of textualism); WILLIAM N. ESKRIDGE JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 371 (3d ed. 2022) (describing the "increasingly twisted and decreasingly relevant" doctrines developed to determine whether courts should defer to administrative agencies).

3. *Compare* Jacob Giltaij, *Greek Philosophy and Classical Roman Law: A Brief Overview*, *in* THE OXFORD HANDBOOK OF ROMAN LAW AND SOCIETY 188, 188-97 (Paul J. du Plessis et al. eds., 2016) (discussing role of logic and dialectic in classical Roman law), *with* DIG. 1.4.1 (Ulpianus, Institutes 1) (declaring in the sixth century that "[w]hatever the Emperor has decreed has the force of law"); *see also* CHARLES FREEMAN, THE CLOSING OF THE WESTERN MIND 79-88 (2005) (describing Roman transition in imperial period from culture of reason to one of authority).

4. *See, e.g.*, NEIL GORSUCH & JANIE NITZE, OVER RULED: THE HUMAN TOLL OF TOO MUCH LAW 13-18 (2024) (describing explosive growth of statutes and regulations in twentieth century); Thomas E. Baker, *Tyrannous Lex*, 82 IOWA L. REV. 689, 691 (1997) (describing growth of lawyers and output of courts); *see also* A.J. B. Sirks, *Public Law*, *in* THE CAMBRIDGE COMPANION TO ROMAN LAW 332, 336 (David Johnston ed., 2015) (describing profusion of new forms of imperial legislation); Wolfgang Kaiser, *Justinian and the Corpus Iuris Civilis*, *in* THE CAMBRIDGE COMPANION TO ROMAN LAW 119, 120-21 (David Johnston, ed., 2015).

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

courts as a matter of common law; but now, they have become the subject of an ever-more multivarious public law.[6]

The transition to public law regulation has been well documented. Less well documented has been the transition's effect on legal methodology. Like their Roman forebears,[7] American lawyers once embraced a "scientific" view of the law.[8] They saw the law as less as a collection of rules than as the product of applied reason.[9] They looked to custom, experience, and formal rationality: the law was not just what was commanded; it was what was right.[10] But that kind of analysis requires flexibility, training, and time—things we might today dismiss as "decision[al] costs."[11] And as lawyers wrestle with an ever-growing legal corpus, those costs become too much for them to bear. They reach for shortcuts and bright-line rules of thumb—heuristics to help them

6. *See, e.g.*, BERMAN, *supra* note 2, at 32-38 (describing migration of law from private- to public-law ordering); Edward L. Glaeser & Andrei Shleifer, *The Rise of the Regulatory State*, 51 J. ECON. LITERATURE 401, 401 (2003) (describing expansion of regulation into new spheres in the early nineteenth century).

7. *See, e.g.*, Laurent Mayali, *The Legacy of Roman Law*, *in* THE CAMBRIDGE COMPANION TO ROMAN LAW 374, 376 (David Johnston ed., 2015) ("[T]o know the law meant to know everything, since there was nothing outside the *corpus* of the law."); David Ibbetson, *Sources of the Law from the Republic to the Dominate*, *in* THE CAMBRIDGE COMPANION TO ROMAN LAW 25, 35 (David Johnston ed., 2015) (describing role of jurists in developing that system through reasoned opinion and advice to judges); CICERO, DE LEGIBUS § 1.17 (describing law as the "highest reason, implanted in nature, which prescribes those things that ought to be done, and forbids the contrary"); HANS JULIUS WOLFF, ROMAN LAW 5 (1951) (describing development of Roman general law and contribution to later conception of natural or universal law).

8. *See* STUART BANNER, THE DECLINE OF NATURAL LAW 53 (2021) ("Like their English predecessors, early American lawyers understood the common law as consisting of judges' efforts to use customary practices as a guide to resolving disputes."); *see also* CAROLINE WINTERER, THE CULTURE OF CLASSICISM 4-5, 17, 25 (2002) (observing that Americans in the antebellum period turned to Roman thinkers like Cicero for political and legal philosophy, including "general principles of Universal Law"); CHRISTOPHER G. TIEDMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES 67 (Roy M. Mersky & J. Myron Jacobstein eds., William S. Hein & Co. 1974) (1890) ("Perhaps no product of the Roman law has exerted so potent an influence upon the development of modern jurisprudence as the Roman doctrine of *jus naturale* [natural law]."); WOLFF, *supra* note 7, at 82-83 nn.27-28 (explaining that Cicero and other classical jurists conceived a "natural" law "of higher authority than all positive customs and statutes").

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

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

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

cut through the underbrush.[12] Their approach becomes less flexible and more mechanical.[13]

That trend is more than just a professional curiosity. In Rome, a similar change not only drained the law of its intellectual sheen; it robbed the law of its moral force.[14] When law is binding because it is right, it commands its own respect.[15] It is followed because it should be—because it reflects the best possible rule.[16] But when law is binding only because it is declared by the right person, its authority depends on that person.[17] It relies on the power of the lawmaker to command.[18]

The Romans learned that lesson the hard way. Even as their laws became more numerous, the laws were applied more sporadically.[19] In large parts of

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

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

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

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

16. *See id.*

17. *See id.* at 18-19, 36, 165 (arguing that law stripped of moral significance loses meaning and that it is a mistake to treat the Constitution as a mere artifact of positive law); *see also* Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 531 (2019) (arguing that some legal principles can be discovered without resort to positive enactment of a lawgiver), 531 ("These norms are addressed to society as a whole, and they're generally perceived as binding, without anyone in authority having formally enacted them or laid them down."); *cf.* Werner Eck, *The Emperor, the Law and Imperial Administration*, *in* THE OXFORD HANDBOOK OF ROMAN LAW AND SOCIETY 98, 106 (Paul J. du Plessis et al. eds., 2016) (discussing unilateral lawmaking power of emperors in late empire), 107 ("[T]he assent of the emperor was necessary for every single constitution [i.e., imperial legislative act].").

18. *See* ARKES, *supra* note 15, at 9, 160-63, 168 (criticizing modern constitutional doctrine as "moral relativism"); *cf.* Sachs, *supra* note 17, at 529 (noting broad acceptance in modern legal culture of law as the product of an authoritative lawgiver), 529 ("To modern scholars, law is always made by somebody: written law is made by legislators, and unwritten law is made by judges.").

19. *See* FREEMAN, *supra* note 3, at 253-54 (noting doubt among historians about how precisely imperial laws were implemented in provinces away from imperial supervision); Bernard H. Stolte, *The Law of New Rome: Byzantine Law*, *in* THE CAMBRIDGE COMPANION TO ROMAN LAW 355, 363 (David Johnston, ed. 2015) (noting similar doubt); *cf.* Dario Mantovani, *More Than Codes: Roman Ways of Organizing and Giving Access to Legal Information*, *in* THE OXFORD HANDBOOK OF ROMAN LAW AND SOCIETY 23, 32 (Paul J. du Plessis et al. eds., Thomas Roberts trans., 2016)

the empire, the laws were simply ignored.[20] They failed, in short, to gain the respect and adherence of the people whose lives they were supposed to govern.[21] And that failure left a gap in the law as written and the law as applied—a gap that eventually widened into an age of legal stagnation.[22]

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

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(noting that law schools were established in part to help spread Roman law through provinces, suggesting difficulty in ensuring adherence).

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

21. *See* FREEMAN, *supra* note 3, at 313-14; Eck, *supra* note 17, at 103 (describing controversy over and resistance to certain imperial laws, including the *lex iulia*, a law imposing certain marriage and procreation requirements on citizens).

22. *See* Mayali, *supra* note 7, at 387-89 (explaining that statement of imperial power—the *lex regia*—was used by emperors and medieval kings to justify unilateral lawgiving power for centuries after the fall of Rome); *see also* WOLFF, *supra* note 7, at 111-14 (describing how juristic creativity and flexibility declined with advent of imperial legislation and transformation of jurists into imperial servants); Kaiser, *supra* note 4, at 119-21 (describing simultaneous rise of imperial *constitutiones* and decline in juristic writings).

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

24. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 167-71 (3d ed. 2012) (denying that morals are natural to society or that there is any such thing as moral law); Troxel v. Granville, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting) (denying that judges could enforce unwritten fundamental norms through the Ninth Amendment or any other provision of the Constitution); *see also* James Murphy, *Legal Positivism and Natural Law Theory*, NAT. L., NAT. RTS., & AM. CONSTITUTIONALISM (2011), https://www.nlnrac.org/critics/legal-positivism html [https:// perma.cc/K9WS-M97C] (explaining that dominant modern theory of law, legal positivism, denies moral component to law); William C. Starr, *Law and Morality in H.L.A. Hart's Legal Philosophy*, 67 MARQ. L. REV. 673, 674 (1984) (quoting R. BEGIN, NATURAL LAW AND POSITIVE LAW 49 (1959)) ("[P]ositivism, in theory, does not recognize as scientific any knowledge beyond that which can be acquired through the senses. It can never, therefore, assert what men should do; but only what they actually do.").

25. *See, e.g.*, Jedediah Britton-Purdy, *No Law Without Politics (No Politics Without Law)*, LPE PROJECT (Oct. 2, 2018), https://lpeproject.org/blog/no-law-without-politics-no-politics-without-law/ [https:// perma.cc/V6PJ-PEZ5] (arguing that law is not a separate institution, but instead, only a subset of politics), *id.* ("I think we have to look into the abyss and admit the possibility that politics really does come first, that the question is not for or against politicization, but what kind of politicization.").

26. *See* ERWIN CHEMERINSKY, NO DEMOCRACY LASTS FOREVER 165-66 (2024) (arguing that the U.S. Constitution is so riddled with flaws and difficult to amend that it would be "better to start over and adopt a new constitution").

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

A. A PROFUSION OF AUTHORITIES

Modern America is awash in law.[29] In the last century, the United States Code has swollen from 1 to 54 volumes.[30] It now stretches to more than 60,000 pages, about fifty times the length of the Bible.[31] At the same time, even more "law" has sprouted from administrative agencies, as shown by the growth of the Federal Register. Established in 1936, the Federal Register was designed to notify the public about new agency rules. The first issue was modest—a mere 16 pages.[32] But ninety years later, it now regularly tops 70,000 pages a year.[33] The Code of Federal Regulations has also grown apace, now spanning more than 200 volumes.[34]

Large as those numbers are, they do not even begin to capture agencies' full output. Besides formal rules, agencies publish a daily stream of sub-

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27. *See* David M. Crane, *The Erosion of Respect for the Rule of Law in America*, JURISTNEWS (Oct. 29, 2024, 4:55 PM), https://www.jurist.org/commentary/2024/10/the-erosion-of-respect-for-the-rule-of-law-in-america/ [https:// perma.cc/2D7D-87AQ] (arguing that American institutions show a declining respect for rule of law in part because of courts and partisans in Congress).

28. *See generally* EDWARD GIBBON, THE DECLINE AND FALL OF THE ROMAN EMPIRE (Hans-Friedrich Mueller ed., 2003).

29. *See, e.g.*, *About Classification of Laws to the United States Code*, OFF. L. REVISION COUNCIL: U.S.C., https://uscode house.gov/about_classification xhtml [https:// perma.cc/W2HH-QX9R] (last visited Feb. 22, 2025) ("During the past 20 years, each Congress has enacted an average of over 6,900 pages of new public laws."); *Federal Register Facts*, FED. REG. (July 15, 2010), https://www federalregister.gov/uploads/2011/01/fr_facts.pdf [https://perma.cc/D3Z5-Y7BF] (noting that every annual issue of the Federal Register since 2002 has exceeded 70,000 pages).

30. *See* GORSUCH & NITZE, *supra* note 4, at 17-18.

31. Louise Kruger, *How Many Pages is the Bible?*, MEDIUM (May 8, 2024), https://medium.com/@louiseinternational/how-many-pages-is-the-bible-exploring-its-length-d5b20eb009c1 [https://perma.cc/Q3DU-5J83].

32. *See* GORSUCH & NITZE, *supra* note 4, at 17-18; Lissa N. Snyders, *Federal Register by the Numbers*, FED. REG., https://www federalregister.gov/reader-aids/office-of-the-federal-register-announcements/2015/05/federal-register-by-the-numbers [https://perma.cc/CMW2-QLHJ] (last visited Feb. 22, 2025) (noting that the first issue was published in 1936); *but see* Clyde Wayne Crews, *Tens of Thousands of Pages and Rules in the Federal Register*, COMPETITIVE ENTER. INST. (June 30, 2021), https://cei.org/publication/tens-of-thousands-of-pages-and-rules-in-the-federal-register-2/ [https://perma.cc/8T9X-QW9J] (noting that the proportion of pages in the Federal Register devoted to final regulations dropped during the first three years of the Trump administration, which had implemented a "one-in, two-out" policy for major rules, before spiking again in the 2019-2020 edition).

33. *See Total Pages Published in the Federal Register*, REGUL. STUD. CTR. (March 4, 2024), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/202403/federal_register_pages_by_calendar_year.pdf [https://perma.cc/EXT3-4G9L] (tracking growth graphically).

34. GORSUCH & NITZE, *supra* note 4, at 17; *see also Total Pages Published in Code of Federal Regulations*, REGUL. STUD. CTR. (July 2, 2024), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2024-08/cfr_pages_by_calendar_year.pdf [https://perma.cc/7X6S-Z7UE] (tracking growth of C.F.R. in number of pages).

regulatory guidance.[35] This guidance covers topics ranging from overtime pay to bathroom access.[36] But exactly how much guidance is out there is impossible to say. No official repository exists, even at the federal level.[37] In 2019, the White House tried to remedy the problem by ordering the Office of Management and Budget ("OMB") to collect and account for all official guidance.[38] But the task proved so daunting that it was abandoned only two years later.[39] So even the regulators do not know how much they regulate.[40]

The same bloat has affected the output of courts. The Federal Reporter (the official publication of federal judicial decisions) now stretches across five thousand volumes.[41] And each of those volumes runs about a thousand pages.[42] So in total, the Reporter now contains about five million pages of law.[43] No human could possibly absorb it all—much less understand the profusion of "unreported" federal cases and the work of the fifty separate state-court systems.[44]

B. THE ROMAN DELUGE OF LAW

That kind of output would have sounded familiar to lawyers in imperial Rome. For much of Rome's history, the law was dominated by quasi-formal custom and tradition—the *ius civile*.[45] But in the third and fourth centuries,

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35. *See, e.g.*, *Final Rulings and Opinion Letters*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/opinion-letters/request/existing-guidance [https://perma.cc/XJ4F-CZLZ] (last visited Feb. 22. 2025) (collecting various forms of sub-regulatory advice and guidance); *Memos & Research*, NLRB, https://www nlrb.gov/guidance/memos-research [https://perma.cc/JV9G-WM8A] (last visited Feb. 22, 2025) (same); *see also* GORSUCH & NITZE, *supra* note 4, at 13-18 (describing growth of this guidance).

36. *See, e.g.*, *Dear Colleague Letter on Transgender Students*, U.S. DEP'T OF JUST. & U.S. DEP'T OF EDUC. (May 13, 2016), https://www.ed.gov/sites/ed/files/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf [https://perma.cc/HPF6-CSG9] (later rescinded) (discussing treatment of transgender students by schools receiving federal funds); *Opinion Letter*, U.S. DEP'T OF LAB., WAGE & HOUR DIV. (Jan. 8, 2021), https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2021_01_08_01_FLSA.pdf [https://perma.cc/V742-WBUH] (discussing eligibility for administrative exemption to overtime requirements).

37. GORSUCH & NITZE, *supra* note 4, at 17-18.

38. Exec. Order No. 13,891, 84 Fed. Reg. 55235 (Oct. 9, 2019).

39. Exec. Order No. 13,992, 86 Fed. Reg. 7049 (Jan. 20, 2021).

40. *See* GORSUCH & NITZE, *supra* note 4, at 17-18.

41. *See id.* at 18.

42. *Id.*

43. *Id.*

44. *See id.*; *cf.* Adam Feldman, *Empirical SCOTUS: An Opinion Is Worth at Least a Thousand Words*, SCOTUSBLOG (Apr. 3, 2018, 12:03 PM), https://www.scotusblog.com/2018/04/empirical-scotus-an-opinion-is-worth-at-least-a-thousand-words/ [https://perma.cc/Y5P9-JDV7] (noting that opinions have also become lengthier, with the mean majority Supreme Court opinion growing from about 4,000 to 6,000 words from 1951 to 2013).

45. *See generally* GEORGE MOUSOURAKIS, FUNDAMENTALS OF ROMAN PRIVATE LAW (2012) (providing an overview of classic private-law principles); *see also* WOLFF, *supra* note 7, at 103-17 (describing classical-period methods); Reinhard Zimmerman, *Roman Law in the Modern World*, *in*

that system gave way to a wave of imperial legislation.[46] Emperors started issuing new forms of binding commands, or "*constitutiones*," including *rescripta* (answers to written petitions), *edicta* (affirmative commands), and *mandata* (instructions to imperial officials).[47] These commands differed in form but not in foundation. They were "law" not because they were persuasive, well-reasoned, or even fair.[48] They were law because of who issued them: the emperor.[49]

Having a single authoritative lawgiver might seem straightforward, or at least easy to administer. But it quickly led to problems. The emperors were prolific legislators: they made "law" on everything from international trade to family relations.[50] And as these laws accumulated, they became too voluminous to track.[51] In the late third century, a man named Gregorianus (about whom we know little else) tried to distill all extant imperial laws into a code.[52] But the effort was fleeting, as imperial edict piled on top of imperial edict. So, a few years later, the code was updated by the jurist Aurelius Hermogenianus.[53] No one knows how comprehensive these two codes were at

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THE CAMBRIDGE COMPANION TO ROMAN LAW 452, 460 (David Johnston, ed. 2015) (describing flexibility and debate marking classical juristic system). The term *ius civile* has been used to refer to different concepts at different times. It is used here in its widest sense: "the law in all its appearances arising from all recognized sources," including the opinions of jurists, *senatus consulta* (senatorial decrees), and legislation adopted by the popular assemblies. *See ius civile*, OXFORD CLASSICAL DICTIONARY (1949).

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

47. *See Constitutiones Principium*, BRITANNICA, https://www.britannica.com/topic/constitutiones-principum#ref175208 [https://perma.cc/QN2C-KG2D] (last visited Feb. 22, 2025).

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

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

50. *See* Kaiser, *supra* note 4, at 120 (describing adoption of code); Eck, *supra* note 17, at 106 (describing imperial *constitutiones* on subjects ranging from citizen status of children, problems with public transportation, and disputes between local communities); Jean-Jacques Aubert, *Law, Business Ventures and Trade*, *in* THE OXFORD HANDBOOK OF ROMAN LAW AND SOCIETY 621, 621 (Paul J. du Plessis et al., eds. 2016) (explaining that by the late third century mercantile trade was covered almost entirely by edictal law).

51. *See* Peter G. Stein & Maurice Alfred Millner, *The Law of Justinian*, BRITANNICA, https://www.britannica.com/topic/Roman-law/The-law-of-Justinian [https://perma.cc/R22R-2UUC] (Feb. 9, 2025) ("The entire mass of work was so costly to produce that even the public libraries did not contain complete collections.").

52. *Id.*; Kaiser, *supra* note 4, at 120.

53. *See* Kaiser, *supra* note 4, at 120.

the time.[54] But they could not have been current for long, since emperors were making new "law" every time they answered a letter.[55]

Volume was not the only problem; another problem was coherence. The emperors had no duty to be consistent with themselves, much less with their predecessors. Contradictions were endemic.[56] Thus, the Emperor Theodosius adopted yet another code.[57] This *Codex Theodosianus* was a true codification: it collected all official laws and declared everything else obsolete.[58] But of course, it could not cure the confusion on its own.[59] It did not wipe the conflicting laws out of existence. It merely subordinated them to a more authoritative code.[60] In effect, it established a new hierarchy of binding laws.[61]

That process continued.[62] Like the prior codes, the Code of Justinian aimed to reconcile an increasingly convoluted legal corpus.[63] With the passage of time, the law had grown only more unwieldly and self-contradictory—a problem made worse by a scarcity of reliable written sources.[64] It was hard even to find all the laws, much less to know which one controlled a given case.[65] Justinian therefore instructed his editors to survey the extant authorities, extract the best rules, and purge the contradictions.[66] The result was yet another "authoritative" recitation of the law.[67]

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54. *See* Stein & Millner, *supra* note 51 (noting that many authorities "had become scarce or had been lost altogether, and some were of doubtful authenticity").

55. *See* Sirks, *supra* note 4, at 338 (noting that because of the binding effect of imperial *rescripta*, private parties started to compile their own collections); Eck, *supra* note 17, at 107 (describing practice of establishing general legal rules through *epistula*—letters from the emperor).

56. *See, e.g.*, WOLFF, *supra* note 7, at 159 (noting problem of inconsistency in the "vast" corpus of Classical law); Stein & Millner, *supra* note 51 (observing that pre-Corpus civil law was perceived to contain "many inconsistencies").

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

58. *See* CODEX THEODOSIANUS 1.1 ("Si qua posthac edicta sive constitutiones sine die et consule fuerint deprehensae, auctoritate careant"); *see also* Kaiser, *supra* note 4, at 120-21 (explaining preclusive effect of the code).

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

60. *See* CODEX THEODOSIANUS 1.1; Kaiser, *supra* note 4, at 120-21.

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

62. *See* Zimmerman, *supra* note 45, at 461.

63. *See* Kaiser, *supra* note 4, at 123-24.

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

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

66. *See* Zwalve, *supra* note 64 (explaining that Justinian instructed his editors to purge the law of all "contradiction[s]").

67. *See id.*

C. LAW WITHOUT REASON

These codes did more than just tidy up the statute books from time to time. They also fundamentally changed Roman legal methods.[68] They increasingly presented the law not as a product of logic, but as a body of rules.[69] These rules were not law because they were correct; they were correct because they were law.[70] And the legal system they produced ultimately proved more rigid, more brittle, and less adaptable to new conditions.[71]

This new paradigm can be fully appreciated only by considering what came before. In the classical age, Roman law had been dominated by the writings of "jurists." The jurists were essentially private legal experts; rather than represent parties in court, they offered wisdom on difficult questions of doctrine.[72] They even advised public officials, including judges.[73] And importantly, they also wrote legal treatises.[74] These treatises were not "binding" in any formal sense; they did not dictate the result of any given case.[75] Instead, they were what we might call today "persuasive" authority. They persuaded through the strength of their reasoning.[76] And through the power of their reasoning, they helped shape the broader legal system.[77]

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

69. Zimmerman, *supra* note 45, at 461 (describing Justinian's Code, which authoritatively codified the laws, as "alien" to classic juristic methods).

70. *See* CODE JUST. 1.14.1 (Constantine 316) (reserving to the emperor authority to decide all questions of law and equity); *see also* DIG. 1.4.1 (Ulpianus, Institutes, 1) (declaring that what pleases the emperor is law); WOLFF, *supra* note 7 at 109-11 (describing process by which classical jurisprudence was supplanted by imperial prerogative in form of edicta and even direct imperial intervention in lawsuits).

71. *See* WOLFF, *supra* note 7, at 109 (noting that the praetorian edict stopped evolving; became effectively frozen), 111-15 (observing contemporaneous decline in evolution of juristic doctrine and "doctrinaire[e]" approach); Kaiser, *supra* note 4, at 119-20 (describing decline in overall flexibility and originality of legal doctrine).

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

73. *See* WOLFF, *supra* note 7, at 109-11 (describing historical and evolution of role of jurists); *see also The Jurists and the Evolution of the Roman Legal System*, GEO. WASH. L., https://law.gwu.libguides.com/romanlaw/jurists [https://perma.cc/W5VB-A7BR] (Aug. 12, 2024, 4:41 PM) (describing classical role of jurists), *id.* ("The jurists did not participate in administering the law, but rather focused on interpreting and generating formal opinions on the law.").

74. *See, e.g.*, THE INSTITUTES OF GAIUS (W.M. Gordon & O.F. Robinson trans., 2015); *see also* Kaiser, *supra* note 4, at 119 (referring to the publication and influence of treatises in Golden Age Roman law); WOLFF, *supra* note 7, at 104 (same).

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

76. *See id.*; *see also* Kaiser, *supra* note 4, at 128-30 (noting that the Code's compilers systematically removed references to differences of opinion or expressions of doubt in the classical juristic writings).

77. *See* WOLFF, *supra* note 7, at 103-22 (describing classical practice and influence of jurists); *see also The Jurists and the Evolution of the Roman Legal System*, *supra* note 73 (observing that

But that approach sat uneasily within a system based on command. So, as emperors started governing by edict, the jurists took a back seat.[78] Jurists mostly stopped publishing treatises, none of which appear in the historical record from 235 to 284 A.D.[79] And when the jurists reemerged, they did so mostly as servants of the emperor, relegated to drafting the emperor's legal documents.[80]

The old treatises still remained, but they suffered from increasing skepticism from the imperial seat.[81] In 321 A.D., Emperor Constantine I voided certain critical writings by the jurists Ulpian and Paul.[82] In 426, Emperor Valentinian III went further, banning citation to all but a handful of juristic writings.[83] Later, Emperor Justinian completed the process, codifying the opinions he liked and expurgating the ones he did not.[84]

At the same time, Justinian also made clear that the law was not a product of reason or debate. Instead, the law flowed from one true source: Justinian himself. Alongside his code, he published the *Digest* (essentially, a collection of "official" juristic opinions).[85] The *Digest* included a statement that came to be known as the *lex regia*—a principle that whatever pleased the emperor was the law.[86] This *lex regia* was both a cornerstone of Justinian's legal philosophy and its most enduring feature.[87] For centuries afterward, emperors and their lawyers cited the *lex regia* as a universal principle of monarchy.[88]

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jurists drew principles from the "law of nations," which was thought to be a form of universal law applying to all peoples).

78. *See* WOLFF, *supra* note 7, at 109 (describing displacement of jurist-driven law with a system of "imperial law").

79. Kaiser, *supra* note 4, at 119.

80. *See* Ibbetson, *supra* note 7, at 35-38 (describing jurists' new role under the Dominate-era emperors).

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

82. *See* Kaiser, *supra* note 4, at 119-20; WOLFF, *supra* note 7, at 159.

83. *See* CODE THEOD. 1.4.3 (the "lex citandi"); *see also* Zwalve, *supra* note 64 (explaining that the original "Law of Citations" does not survive; we know it only from its restatement in the later Codex Theodosianus); WOLFF, *supra* note 7, at 159-60 (describing the Law of Citations as incorporated in Codex Theodosianus); Kaiser, *supra* note 4, at 120.

84. *See* CODE JUST. 1.17.1.4 (Caesar-Flavius-Justinianus 530) (declaring uncodified juristic opinions "not . . . worthy of our attention"); *see also* Kaiser, *supra* note 4, at 120.

85. *See generally* THE DIGEST OF JUSTINIAN (Alan Watson trans., vol. 1 2009); *see also* Kaiser, *supra* note 4, at 119 (discussing drafting and role of Digest among Justinian's projects).

86. DIG. 1.4.1 (Ulpianus, Institutes 1) ("*Quod principi placuit, legis habet vigorem* . . . .") ("Whatever the Emperor has decreed has the force of law.").

87. *See* Magnus Ryan, *Political Thought*, *in* THE CAMBRIDGE COMPANION TO ROMAN LAW 423, 424-25 (David Johnston ed., 2015) (describing reception and subsequent interpretation of the *lex regia*).

88. *See id.*; *see also* Mayali, *supra* note 7, at 389-90. The Code and *lex regia* was later cited to justify absolute rule of medieval kings; "The subsequent objectification of the will of the sovereign placed law *(lex)* at the heart of the body politic."

They argued that law did not flow from natural right; it was not something to be discovered through natural reason.[89] It was instead a product of sheer will—the will of the emperor.[90] In that way, Justinian's codification project killed off whatever remained of the juristic tradition.[91] It did not just reject the idea of reasoned debate in law; it pretended that the debate had never existed.[92] *Ratio* had fully given way to *auctoritas*.

D. LAW AS PROCESS

A similar change is afoot in American law. Like Roman lawyers before them, American lawyers have increasingly sought refuge from a flood of enactments in rigid analysis.[93] They decreasingly ask whether an enactment is well reasoned, or even right.[94] They instead ask only what the lawmaker (however defined)[95] wants.[96] That is, like their Roman forebears, they have stopped looking for the law's "best" meaning.[97] Dialectic and inquiry have all but vanished from their methods.[98]

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89. *See* Mayali, *supra* note 7, at 388-90.

90. *See* DIG. 1.4.1 (Ulpianus, Institutes 1) ("Whatever the Emperor has decreed has the force of law."); *cf.* Eck, *supra* note 17, at 106 (discussing imperial *edicta*: "The emperor in turn decided legal or administrative questions more and more by himself; others could use these decisions as precedents."); *but see* Ryan, *supra* note 87, at 430-36 (noting that some glossators later interpreted the *lex regia* as a kind of proto-popular sovereignty, reflecting a voluntary surrender of authority from the people to the ruler).

91. *See* Ibbetson, *supra* note 7, at 40-41 (describing decline of juristic influence coinciding with rise of imperial legislation and new role for jurists as the writers of "rescripts").

92. *See* WOLFF, *supra* note 7, at 111-14.

93. *See, e.g.*, WILLIAM N. ESKRIDGE JR., INTERPRETING LAW 33-138 (2016) (describing modern "canons" for interpreting legal texts); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW (2012) (same).

94. *See* ARKES, *supra* note 15, at 33-34 (criticizing positivist approaches for essentially equating might and right).

95. *See* Lawrence B. Solum, *What Is Originalism? The Evolution of Originalist Theory*, GEO. UNIV. L. CTR. 1, 2 (2011), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2362&context=facpub [https://perma.cc/3VHC-MK2L] (describing evolution in originalist thinking about how best to determine original meaning—for example, from the subjective perspective of legislators or from the objective perspective of a person at the time trying to determine what intent the legislator's words conveyed).

96. *See, e.g.*, Niz-Chavez v. Garland, 593 U.S. 155, 171 (2021) (rejecting any role for "raw consequentialist calculation" in interpretation of statutes); Axis Surplus Ins. Co. v. Universal Visions Holdings Corp., 725 F. Supp. 3d 299, 304 (E.D.N.Y. 2024) (refusing to engage in "consequentialist, policy-based reasoning" when interpretating statute); *see also* ESKRIDGE JR. ET AL., *supra* note 2, at 2-11 (introducing contemporary debate among two modes of interpretation, textualism and purposivism, both of which focus ultimately on deriving intended meaning of a law rather than best meaning of the law).

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

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

A dialectical method was once the core of American jurisprudence. Following the British common-law tradition, America lawyers once saw the law as a coherent body—a living, breathing organism that could be developed and discovered through human reason and experience.[99] Jurists like John Marshall, James Wilson, and even Thomas Jefferson were educated in the natural-law tradition.[100] They ascribed to a capacious view of natural rights, including unwritten rights discoverable by the thorough application of first principles.[101] Jefferson, for one, believed in a universal law stretching back to pre-conquest England.[102] While that universal law had been suppressed by the monarchy for centuries, it had survived in the law of nature and traveled with the colonists to the New World.[103] There, it served as the foundation for the new nation and its laws.[104]

Jefferson was hardly alone in that view. Lawyers of his generation were steeped in the classical western tradition.[105] They drew on the classical

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99. *See* BANNER, *supra* note 8, at 53 ("Like their English predecessors, early American lawyers understood the common law as consisting of judges' efforts to use customary practices as a guide to resolving disputes."); Clarence Emmett Manion, *The Founding Fathers and the Natural Law: A Study of the Source of our Legal Institutions*, 35 A.B.A. J. 461, 461 (1949), https://scholarship.law nd.edu/cgi/viewcontent.cgi?article=2005&context=law_faculty_scholarship [https://perma.cc/8MXW-6H2M] (explaining that the founding generation took lessons from Blackstone and Lord Coke, who saw the common law as consisting of "particulars processed reasonably from basic generalities taken from medieval cases and customs").

100. *See, e.g.*, Manion, *supra* note 99, at 463 (explaining that Jefferson and other founding fathers came up in a legal culture infused with natural-law concepts); Morgan D. Dowd, *Justice Joseph Story: A Study of the Legal Philosophy of a Jeffersonian Judge*, 18 VAND. L. REV. 643, 643-44 (1965), https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=3657&context=vlr [https://perma.cc/C6MB-SBYK] (citing Terret v. Taylor, 13 U.S. (9 Cranch) 43 (1815)) (arguing that Story's early decisions ground unwritten legal principles in natural law); Roberta Bayer, *Natural Law and Democracy: The Philosophy of James Wilson*, L. & LIBERTY (Nov. 20, 2018), https://lawliberty.org/natural-law-and-democracy-the-philosophy-of-james-wilson/ [https://perma.cc/4PHJ-2TJS].

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

102. *See* L.K. Caldwell, *The Jurisprudence of Thomas Jefferson*, 18 IND. L.J. 193, 196 (1943); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *69 (describing judges as "the depositary of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land"); *see also* Allan Beever, *The Declaratory Theory of Law*, 33 OXFORD J. LEGAL STUD. 421, 421-44 (2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2486980 [https://perma.cc/3P3U-E9Z6] (describing English theory of law, articulated by Blackstone, whereby judges "found" the law through application of experience and reason).

103. *See* Caldwell, *supra* note 102, at 196.

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

105. *See* BANNER, *supra* note 8, at 58.

Roman jurists and, before them, Greek philosophers like Aristotle.[106] Through the late eighteenth century, they regularly invoked principles of natural right and reason in their arguments.[107] In effect, they treated the law as a coherent body of principles, independent of any single statute or regulation.[108]

But that approach fell out of favor in the late nineteenth century. After the Civil War, American society underwent dramatic changes: industrialization and urbanization transformed a nation of farmers into one of capitalists.[109] As factories sprouted and railroads crisscrossed the countryside, people were drawn into ever more complex economic and social relationships.[110] The law changed as well, adapting to the complexity with new legislative and regulatory schemes.[111] These schemes supplemented or displaced the common law in major spheres of activity, including competition, employment, and tort. Statutes like the Sherman Act,[112] the Interstate Commerce Act,[113]

106. *See* Robert N. Wilkin, *Cicero and the Law of Nature*, *in* ORIGINS OF THE NATURAL LAW TRADITION 1-25 (Arthur L. Harding ed., 1954) (tracing natural-law theory to Greek philosophy and Roman legal thought, in particular to the writings of Cicero); DAVID N. MAYER, LIBERTY OF CONTRACT 14-15 (2011) (tracing doctrine of natural contract rights to seventeenth-century Whig philosophers and even Roman writers such as Cato the Younger); BANNER, *supra* note 8, at 169 (tracing natural-law philosophy to Greek and Roman law).

107. *See, e.g.*, Calder v. Bull, 3 U.S. 386, 388 (1798) (invoking natural rights tradition); R.H. HELMHOLZ, NATURAL LAW IN COURT 142-72 (2015) (describing early American practice).

108. *See, e.g.*, *Calder*, 3 U.S. at 388 (concluding that a law against the "first principles of the social compact" could not be properly considered "rightful exercise of legislative authority"); *see also* BANNER, *supra* note 8, at 63 ("To the extent the common law was understood as based on custom, it followed that the common law was found, not made, by judges."); *but see Calder*, 3 U.S. at 398 (Iredell, J., concurring) (reasoning that a "legislative act against natural justice" might be void, but doubting whether a court had the authority to declare it void).

109. *See* JAMES W. ELY JR., THE CONTRACT CLAUSE 147 (2016) [hereinafter THE CONTRACT CLAUSE] (describing "sweeping" changes of the late nineteenth century, including industrialization and urbanization); JAMES W. ELY JR., THE GUARDIAN OF EVERY OTHER RIGHT 8 (1992) (explaining that by "late nineteenth century, urbanization and industrialization had transformed American society, creating novel pressures" aimed at private property).

110. *See* EDWARD KEYNES, LIBERTY, PROPERTY, AND PRIVACY 117-21 (1996) (tracing new limits on economic liberties to economic boom and social upheaval following the Civil War); *see also* BANNER, *supra* note 8, at 143 (noting that American lawyers started to doubt natural law only in the middle of the nineteenth century).

111. *See* THE CONTRACT CLAUSE *supra* note 109, at 147 (observing that states reacted to economic change by intervening more aggressively in markets with new regulation and legislation); *see also* KEYNES, *supra* note 110, at 117-21 (noting proliferation in late nineteenth century of economic regulation, including wage laws and antitrust laws); TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING 13 (2010) ("Government's primary role was now viewed as *the shaping of society* rather than the protection of individual rights . . . .").

112. Sherman Act, Pub. L. No. 51-647, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1-7).

113. Pub. L. No. 49-104, 24 Stat. 379 (1887).

and state-level workers'-compensation laws[114] supplanted case-by-case development with centralized regulation.[115]

Along with the new statutes came a new attitude about the law. Increasingly, lawyers rejected the idea that law could be "discovered."[116] It could not be found in longstanding traditions or universal truths.[117] There was no "general" or "natural" law.[118] Rather, the law was a product of process and authority. Certain people—legislators, regulators, administrators—had been given the power to make law.[119] Their decisions were law not because the decisions were correct in some empirical sense; they were law because the designated officials followed the prescribed steps.[120] In other words, law was the product not of reason, but of process.[121]

This view came to be called "positivism." At its core, positivism means that the only law is the law posited by a legitimate authority.[122] In the late nineteenth century, positivism was embraced by luminaries such as Oliver Wendel Holmes, who heralded the new regime with his famous dictum: "The

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114. *See* Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States*, 1900–1930, 41 J. L. & ECON. 305, 306-07, 314-319 (1998) (describing adoption of workers' compensation laws, many in the 1910s, and explaining that these statutes displaced common-law negligence suits for workplace injuries).

115. *See* Glaeser & Shleifer, *supra* note 6, at 401 ("During the Progressive Era, regulatory agencies at both the state and the federal level took over social control of competition, anti-trust policy, railroad pricing, food and drug safety, and many other areas."); *see also* Fishback & Kantor, *supra* note 114, at 313 (observing that legislatures could have simply allowed employers and workers to negotiate own benefit levels under workers' compensation schemes, but opted instead for centralized administration).

116. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 535 (1928) (Holmes, J., dissenting)) ("The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word."); *see also* Sachs, *supra* note 17, at 529-30 (tracing end of "general law" approach to *Erie*).

117. *See* Sachs, *supra* note 17, at 530 ("Finding this kind of law is impossible, the modern view argues, because there's nothing out there to find . . . .").

118. *See id.* at 529-30.

119. *See Erie R.R. Co.*, 304 U.S. at 79; *see also Black & White Taxicab & Transfer Co.*, 276 U.S. at 535 (Holmes, J., dissenting).

120. *See* ESKRIDGE JR. ET AL., *supra* note 2, at 21 ("What could be more legitimate than laws adopted by a popular vote?").

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

122. *See, e.g.*, Reginald Parker, *Legal Positivism*, 32 NOTRE DAME L. REV. 31, 31 (1956) ("The legal positivist holds that only positive law is law; and by 'positive law' he means legal norms by authority of the state. Nothing else is 'law to him . . . ."); *see also* SANDEFUR, *supra* note 111, at 45-47 (describing Progressive era rejection of traditional western-law methods for positivist legal philosophy).

life of the law has not been logic; it has been experience."[123] In effect, Holmes was saying that law was not an exercise in empirical discovery. [124] The law could not be deduced through observation, as if it were a natural science.[125] The law was instead a raw political fact: the product of government processes and majority will.[126]

Today, that idea pervades American legal culture.[127] When modern lawyers talk about the "law," what they mean is the words adopted by some designated legal authority.[128] Indeed, they often reject any source but that authority's words.[129] Their main interpretive mode is textualism, a technique that presumes the only source of law is the enactment's plain text.[130] That presumption grows implicitly from Holmesian positivism:[131] if the only law is the enacted law, then naturally, the only source of legal meaning are the enacted law's words.[132] Textualism is therefore a distillation of Holmes'

123. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881); *see also* OLIVER WENDELL HOLMES, *The Path of the Law*, *in* THE ESSENTIAL HOLMES 160, 169-72 (Richard A. Posner ed., 1992) [hereinafter *The Path of the Law*]; *see also* Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 487 (1909).

124. *See The Path of the Law*, *supra* note 123, at 169-72.

125. *See id.*

126. *See id.*; *see also* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting) ("Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it.").

127. *See* Sachs, *supra* note 17, at 529 (explaining that positivism is now seen as the "only conceivable" approach to law); *see also* BERMAN, *supra* note 2, at 37 ("The belief in the growth of the law, its ongoing character over generations and centuries, has . . . been substantially weakened.").

128. *See* CONG. RSCH. SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 4 (2014), https://www.everycrsreport.com/reports/97-589 html#ifn13 [https://perma.cc/HE8N-9AMY] ("More often than before, statutory text is thought to be the ending point as well as the starting point for interpretation.").

129. *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1082 (2017) (alteration in original) (describing the "standard picture" of the judge's job as being to "read the [text] and do what it says"); *see also* Parker, *supra* note 122, at 31 (describing legal positivism as akin to a historian's search of the record for verifiable facts).

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

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

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

philosophy and a terminal end of law as a rational inquiry.[133] It leaves the idea of unwritten law—the law of logic—as an oxymoron.[134]

E. SAFETY IN RULES

Justice Antonin Scalia once described the rule of law as a law of rules.[135] And while the founding generation might have quibbled, modern lawyers have largely agreed.[136] They have gradually discarded dialectical, contextual analysis in favor of mechanistic rules.[137] That shift may owe as much to the sheer volume of authorities as it does to Scalia's influence. But regardless of its source, it has made American law more rigid.[138]

The change is perhaps nowhere better illustrated than in the long-running debate over administrative deference. The basic question is this: when Congress tells an agency to administer a statute, and the agency interprets that statute in some official forum, how much weight should the agency's interpretation have in court?[139] For a generation, the answer was "it depends." Courts respected agency interpretations when the interpretations reflected true expertise and experience.[140] When they did not, courts used their own judgment.[141] But in *Chevron USA, Inc. v. Natural Resources Defense*

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

134. Sachs, *supra* note 17, at 533 (explaining that the idea of "unwritten" law independent of a lawgiver (be it a legislature or court) is now broadly rejected, even ridiculed); *see also* Donald H.J. Hermann, *Max Weber and the Concept of Legitimacy in Contemporary Jurisprudence*, 33 DEPAUL L. REV. 1, 2-4 (1983) (noting the tension between legal positivism (law as an authoritative command) and legal legitimacy (law as an institution deserving of respect)).

135. *See* Scalia, *supra* note 12, at 1187.

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

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

138. *See, e.g.*, Siegel, *supra* note 13, at 144-61, 169-71 (arguing that unlike prior interpretive methods, modern textualism grows increasingly narrow and insular through application because it rejects external interpretive resources); Schiefele, *supra* note 13, at 1105-06 (criticizing interpretation based on "muscular textualism" which "causes the interpreter to adopt the most basic, narrow, and superficial interpretation of the text").

139. *See* ESKRIDGE JR. ET. AL., *supra* note 2, at 269 (describing the basic issue).

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

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

Council, Inc., the Supreme Court adopted a more rule-like approach.[142] It instructed courts to defer to an agency whenever (a) the statute was ambiguous, and (b) the agency's interpretation was reasonable.[143] In effect, *Chevron* replaced dynamic interpretation with a simple, rule-like structure.[144]

Scholars still debate whether the *Chevron* Court meant to create a new deference regime.[145] Some have suggested that the Court was only trying to distill the preexisting law.[146] But there is no debate over how lower courts saw the decision: they adopted *Chevron*'s new test with alacrity, applying the "two-step" in more than eighteen thousand cases.[147] Judges, it seems, were as eager as anyone for rule-like analysis.[148]

Of course, *Chevron* ultimately collapsed under its own weight. As the Supreme Court applied the new test, it developed new subrules and caveats.[149] Sometimes, it said that *Chevron* applied only to certain kinds of agency interpretations.[150] Other times, it said that *Chevron* applied only when a court had not interpreted the statute beforehand.[151] And in still other cases, it said

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142. 467 U.S. 837, 842-43 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

143. *Id.*

144. *See id*.

145. *See generally* THOMAS MERRILL, THE CHEVRON DOCTRINE (2022) (arguing that *Chevron*, properly understood, merely articulated preexisting (and more nuanced) standards of review); ESKRIDGE JR. ET AL., *supra* note 2, at 359 (arguing that *Chevron's* change was, at most, a "gradual" one, but noting that some scholars treat it as a "revolution").

146. *See* Isaiah McKinney, *From Justice Stevens' Papers – Justice Stevens Crafted the* Chevron *Two-Step Test in an Afternoon*, YALE J. ON REGUL. (Feb. 28, 2024), https://www.yalejreg.com/nc/from-justice-stevens-papers-justice-stevens-crafted-the-chevron-two-step-test-in-an-afternoon-by-isaiah-mckinney/ [https://perma.cc/G8WU-B32S] (arguing that Justice Stevens's papers show that he meant to preserve prior standards of review and that any revolution in deference doctrine was unintentional).

147. *See* Amy Howe, *Supreme Court Strikes Down Chevron*, Curtailing Power of Federal Agencies, SCOTUSBLOG (June 28, 2024, 12:37 PM), https://www.scotusblog.com/2024/06/supreme-court-strikes-down-chevron-curtailing-power-of-federal-agencies/ [https://perma.cc/Z9LD-W7MV].

148. *Cf.* MICHAEL JOHN GARGIA & DANIEL T. SHEDD, CONG. RSCH. SERV., LSB11210, CONGRESSIONAL COURT WATCHER: FEDERAL APPELLATE DECISIONS IN RECENT YEARS APPLYING CHEVRON DEFERENCE 2 (2024), https://crsreports.congress.gov/product/pdf/LSB/LSB11210/2 (reporting that even after the Supreme Court stopped relying on *Chevron* for several years, lower courts continued to invoke it "with some regularity"); ESKRIDGE JR. ET AL., *supra* note 2, at 361 (observing that "*Chevron's* impressive citation count might just be evidence of a judicial culture desperate to manage its workload").

149. *See* Isaiah McKinney, *The Many Heads of the Chevron Hydra: Chevron's Revolutionary Evolution Between 1984 and 2023*, 99 N.D. L. REV. 253, 268-318 (observing growing number of exceptions and complexity to the doctrine).

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

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

Chevron did not apply to an agency's interpretation of its own regulations.[152] Ultimately, in 2024, the Court abandoned the whole business and tossed *Chevron* in the jurisprudential trash heap.[153] But even so, the episode betrayed a system-wide distaste for rational inquiry and an abiding preference for black-letter rules.[154]

F. THE ROAD TO AUCTORITAS

In some sense, that preference is understandable. It flows from the simultaneous profusion of legal enactments. As the enactments multiply, they flood the law with competing commands. They force lawyers to grasp for help to navigate the storm. That help often appears in the guise of rule-like heuristics. For example, consider the famous (or infamous) canons of construction. The canons tell lawyers how to apply certain grammatical and linguistic features. They offer stability because they apply uniformly across different statutes.[155] Therefore, they free lawyers from having to decide in each case how an enactment fits within the broader legal system. Indeed, textualism itself can be thought of as just such a tool: its whole goal is to reduce judicial discretion and produce predictable results.[156]

Many would describe that kind of rule-bound approach as a virtue. For example, in his book *Judging Under Uncertainty*, Professor Adrian Vermeule argued that rule-bound analysis helps judges reduce decisional costs.[157] Judges are generalists; they confront swollen dockets filled with complex litigation. They do not have time to sort through the complexity and tease out nuances of statutory meaning in every case. Nor would we want them to; as *post hoc* decision makers, judges lack the institutional expertise and resources available to professional rule makers, like legislators and regulators.[158] Judges are therefore better off applying rigid rules that produce

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

153. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 378-79 (2024).

154. *See* ESKRIDGE JR. ET AL., *supra* note 2, at 359, 361 (explaining that *Chevron* can be understood "to articulate a default rule of statutory construction" that helps the judiciary "manage its workload").

155. *See* SCALIA & GARNER, *supra* note 93, at xxix (defending the canons as a pro-predictability tool).

156. *See* Mary Ann Glendon, *Comment*, *in* A MATTER OF INTERPRETATION 95, 110 (1997) (arguing that a primary virtue of textualism is its ability to "assur[e] predictability and stability").

157. *See* VERMEULE, *supra* note 11, at 166-67.

158. *See id.* at 36-37 (explaining the problem from the vantage point of judges' institutional limitations and capacities).

predictable results.[159] They can both make decisions more efficiently and signal to legislators how certain linguistic features will be treated in court.[160]

But of course, rigid rules also come with a cost: they move the law even further away from rational inquiry.[161] Positivism, textualism, and the preference for rules all push the law toward a centralized, even dictatorial, model.[162] Law no longer needs to justify itself on its own terms; it need not situate itself within longstanding customs or established legal norms. Instead, it need only flow from an authoritative source.[163] We might defend that model as democratic; after all, the people who write our laws are theoretically the people's chosen representatives.[164] But nothing about the model is necessarily democratic. After all, it was the same model taken up by the Romans in the third and fourth centuries. And for them, the model was decidedly imperial.[165]

G. WHEN IN ROME

Ultimately, the Roman turn to authority-based methods proved disastrous. Historians typically track the shift in Roman legal thought from the accession of Diocletian.[166] Diocletian's reign saw the law grow more centralized and monarchical.[167] While he and his predecessors remained subject to

159. *See id.*

160. *See id.* (arguing that rule-bound approach decreases the risks of certain kinds of errors, including "the error that an intellectually ambitious antiformalist court would make by misreading statutory purposes, misidentifying sensible text as absurd, or mispredicting the consequences of its rulings"); *see also* SCALIA & GARNER, *supra* note 93, at xxix ("Textualism will not relieve judges of all doubts and misgivings about their interpretations. . . . But textualism will provide greater certainty in the law, and hence greater predictability and greater respect for the rule of law."); *cf.* Scalia, *supra* note 12, at 1178-79 (arguing that non-textualist models overvalue "perfection" in judicial decisions at expense of predictability and accountability).

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

162. *See* BERMAN, *supra* note 2, at 38 (observing that recent trends centralize power in hands of a few administrators and legislators); *cf.* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 535 (1928) (Holmes, J., dissenting) (arguing that "the authority and only authority is the State").

163. *See* Scalia, *supra* note 12, at 1176 (describing the "rule of law" as a "product" of legislatures).

164. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 25 (1997) (emphasis in original) ("Of all the criticisms leveled against textualism, the most mindless is that it is 'formalistic.' The answer to that is, *of course it's formalistic*! The rule of law is *about* form."); *See* SCALIA & GARNER, *supra* note 93, at xxix (arguing that textualist methods produce results that more accurately represent the judgment of the people).

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

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

167. *See* FREEMAN, *supra* note 3, at 252-53; Eck, *supra* note 17, at 105-06.

the law in theory,[168] they were in fact despots.[169] They faced few real checks on their power. And while they sometimes wielded that power wisely, they often acted with disastrous consequences. For example, in the late third century, the empire was racked with runaway inflation.[170] Diocletian tried to curb it by fixing prices.[171] But the results were predictable—shortages, black markets, and widespread suffering.[172] A more flexible legal system might have been able to mitigate the damage; for example, it might have been able to carve out exceptions for essential goods and services. But the emperor's status made that kind of ad hoc adjustment nigh impossible.[173] The law was the emperor's command; the only way to question the law was to question the emperor himself.[174]

In an imperial system, questioning the emperor is not an option.[175] Not unless you're willing to press the point at the tip of a sword.[176] So instead, many Romans took the path of least resistance: they just ignored the law. Historians think that many imperial *constitutiones* were followed unevenly.[177] The *constitutiones* enjoyed better adherence close to the capital, where the emperor could more closely monitor compliance.[178] But in the provinces, many were simply disregarded.[179] The Roman empire was vast—vaster even than its geography suggests today, given the slower rate of

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168. *See* Sirks, *supra* note 4, at 334-35 (observing that emperors remained theoretically subject to the law even after disappearance of popular assemblies in second century); *see also* U.S. Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 70 (2015) (Thomas, J., concurring) (noting the "ancient" idea, tracing to Greek and Roman times, that the ruler was himself subject to law).

169. *See* GIBBON, *supra* note 28, at 45 ("Every power was derived from their authority, every law was ratified by their sanction."); *see also* Jean Cousin, *Reorganization of the Empire of Diocletian*, BRITANNICA, https://www.britannica.com/biography/Diocletian/Reorganization-of-the-empire [https://perma.cc/L6MW-HRTM] (Feb. 10, 2025) (noting that reforms under Diocletian "led toward a kind of centralized and absolute monarchy").

170. *See also* HEATHER & RAPLEY, *supra* note 1, at 18 (describing the challenge of "hyperinflation" in the late fourth century).

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

172. *Id.*

173. *See* GIBBON, *supra* note 28, at 43-45 (describing absolute authority of the emperors).

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

175. *See* GIBBON, *supra* note 28, at 25 ("The public authority was everywhere exercised by the ministers of the senate and of the emperors, and that authority was absolute and without control.").

176. *See* FREEMAN, *supra* note 3, at 252 ("As leader of the armies, [the emperor] controlle[d] . . . all foreign relations and with absolute power over life and death, an emperor had enormous destructive force at his disposal.").

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

178. *See id.*

179. *See id.*

travel.[180] And again, the law had become simply a product of the emperor's command.[181] So where the emperor's command ran thin, so did the law.[182] The law offered no reason on its own to comply because it had no intrinsic logical or moral force.[183]

II. ALL ROADS LEAD TO AUCTORITAS

In the present time, the law has not fallen quite so far. Many Americans still believe that the law is more than a brute political fact.[184] But even so, the cracks have started to show. It is now common to hear even educated Americans question the law's legitimacy. American writers, politicians, and even lawyers now routinely attack the judiciary.[185] They question not only the motives of individual judges, but also the whole judicial system.[186] In fact, former President Biden considered the question so pressing that in April 2021, he convened a panel of experts to consider "Court reform."[187] The reformation efforts called for, *inter alia*, an end to lifetime tenure for U.S. Supreme Court justices.[188] The idea, it seemed, was that judges should be less

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

181. WOLFF, *supra* note 7, at 109 (noting that in the post-classical period the "creation of law became an imperial prerogative").

182. *See* FREEMAN, *supra* note 3, at 253 (noting gap between imperial legislation and application in the provinces); *see generally* MANTOVANI, *supra* note 19, at 30-31 (describing codification as an effort to close that gap and ensure more compliance in provinces).

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

184. *See* BERMAN, *supra* note 2, at 29-39 (explaining a classical view of Western law); ARKES, *supra* note 15, at 2-3, 11-18 (arguing for a view of law that incorporates principles of natural justice).

185. *See, e.g.*, Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2240-42 (2019) (book review); Jay Willis, *The Supreme Court's Most Important Power Is Its Ability to Bullshit*, BALLS & STRIKES (Oct. 30, 2024), https://ballsandstrikes.org/law-politics/virginia-voter-rolls-supreme-court-election/ [https://perma.cc/4D5V-TZ3H] (accusing the U.S. Supreme Court of meddling in elections to promote goals of the Republican party).

186. *See* Charles Franklin, *New Marquette Law School Poll National Survey Finds Approval of U.S. Supreme Court Rises to Highest Level Since March 2022*, MARQUETTE UNIV. L. SCH. POLL (Dec. 19, 2024), https://law.marquette.edu/poll/2024/12/19/ [https://perma.cc/N988-6C6V] (reporting that U.S. Supreme Court disapproval ratings have risen from 33% to 52% since 2020).

187. *See* Exec. Order No. 14,023, 86 Fed. Reg. 19569 (April 9, 2021) (establishing the Commission); *see also Presidential Commission on the Supreme Court of the United States*, WHITE HOUSE, https://web.archive.org/web/20250120153356/https:/www.whitehouse.gov/pcscotus/ (last visited Feb. 25, 2025).

188. *See Fact Sheet: President Biden Announces Bold Plan to Reform the Supreme Court and Ensure No President Is Above the Law*, WHITE HOUSE (July 29, 2024), https://web.archive.org/web/20250120121921/https:/www.whitehouse.gov/briefing-room/statements-releases/2024/07/29/fact-sheet-president-biden-announces-bold-plan-to-reform-the-supreme-court-and-ensure-no-president-is-above-the-law/.

insulated from electoral pressures so they would produce decisions the electorate liked.[189]

These "reform" proposals reflected an intellectual shift. For their proponents, it did not matter whether the Courts' decisions were correct in a legal sense. Nor did it matter that the founding generation gave judges life tenure to insulate them against precisely this kind of pressure.[190] Instead, all that mattered was whether the Court produced decisions that the proponents liked.[191] And that attitude makes sense if we accept Holmesian positivism and all its implications. After all, if law is merely a political fact, why not treat Justices like politicians in robes?[192]

Nor are Justices the only casualties. The commentariat has also taken aim at the Constitution itself. Reporters, lawyers, and even prominent constitutional scholars have called the Constitution "broken" and "dangerous."[193] They have described it as a document written by a past generation with no claim on the current one.[194] These arguments are not new; they once went

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189. *See* Keith E. Whittington, *Did the President Forget About Judicial Independence?*, DISPATCH (July 31, 2024), https://thedispatch.com/article/what-ever-happened-to-judicial-independence/ [https://perma.cc/4CJU-HDM7] (comparing President Biden's proposal to a prior effort by President Franklin Delano Roosevelt in the 1930s to influence Supreme Court decisions), *id.* ("The current White House is not shying away from saying that it wants to shuffle justices off the court because it is unhappy with the substance of its decisions.").

190. *See* U.S. CONST. art. III, § 1; THE FEDERALIST NO. 78 (Alexander Hamilton).

191. *See, e.g.*, Madiba Dennie, *Is Court Reform Possible?*, BRENNAN CTR. FOR JUST. (June 7, 2022), https://www.brennancenter.org/our-work/analysis-opinion/court-reform-possible [https://perma.cc/ZLS5-TMKG] (arguing that court reform is justified by "extremist" decisions from U.S. Supreme Court); Sahil Kapur, *Schumer Vows Supreme Court Reform Will Be 'a Very Big Priority' If Democrats Win Election*, NBC NEWS (Aug. 1, 2024, 3:15 PM), https://www nbcnews.com/politics/2024-election/schumer-vows-supreme-court-reforms-democrats-win-2024-elections-rcna164719 [https://perma.cc/D2F4-SGCV] (quoting Sen. Chuck Schumer, D-N.Y. who argues that reform was needed because of the "'hard right' agenda" of federal courts).

192. *See* Ralf Michaels, *"Law Is Politics by Other Means?": In Support of Differentiation*, LPE PROJECT (Oct. 5, 2018), https://lpeproject.org/blog/law-is-politics-by-other-meaFns-in-support-of-differentiation/ [https://perma.cc/9NB9-Y4XT] (arguing that the trial-like confirmation hearings of Justice Brett Kavanaugh in 2018 showed a further conflation of law as politics (and nothing else)); Sam Moyn, *Political Courts and Democratic Politics*, LPE PROJECT (Oct. 2, 2018), https://lpeproject.org/blog/political-courts-and-democratic-politics/ [https://perma.cc/Y5EN-46GT] ("If the Supreme Court is a forum of universalization where, in high stakes cases, legal reasoning is little more than a mask for ideological choice and minority rule, it is not clear how much a difference its principled rhetoric of decision should make to progressive observers.").

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

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

under the moniker "the dead hand" of the past.[195] But their lack of novelty is made up for by their directness. Elite, well-educated Americans are increasingly willing to attack the legitimacy of their own founding documents.[196]

To be sure, those voices are still in the minority. Most Americans still believe in the Constitution.[197] And even some in the legal field have moved back toward reasoned analysis. The Supreme Court's decision to overturn *Chevron* was one such corrective: it rejected rigid deference to agencies in favor of a more contextual, rational approach.[198] But even that decision was a product of its time. While it rejected rule-like deference, it retained the primacy of authoritative text.[199] The law was still the words on the page; and those words were still the law because they were pronounced by an authoritative lawgiver.[200] Law was still a product not of reason, but of power.[201] Legally speaking, are we Rome? The answer is not yet. But just as all roads once led to Rome, our road at least seems to run parallel to the Roman one. Like the Romans, we increasingly subordinate reason to power—*ratio* to *auctoritas*. And like them, we may live to regret it.[202]

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195. *See* Michaels, *supra* note 192 ("The idea of a legal system that is somehow autonomous from the political system has always been suspicious for a progressive left that saw law and courts as conservative bulwarks against radical change."); *see also* Britton-Purdy, *supra* note 25 (describing longstanding criticisms of originalism and judicial review).

196. *See, e.g.*, Emmanuel Terray, *Law Versus Politics*, NEW LEFT REV., July/Aug. 2003, at 71, 71 (arguing that "it is politics that makes the law and, as the case demands, remakes it"); *see also* BERMAN, *supra* note 2, at 37 ("The law is [now] presented as having no history of its own, and the history which it proclaims to present is treated as, at best, chronology, and at worst, mere illusion.").

197. *See* Emily Ekins, *New Poll: 74% Worry Americans Could Lose Our Freedoms if We're Not Careful*, CATO INST. (July 4, 2024), https://www.cato.org/blog/new-poll-74-worry-americans-could-lose-our-freedoms-were-not-careful [https://perma.cc/H6JQ-N7MD] (reporting that 85% of respondents had a favorable view of the Constitution).

198. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 400 (2024) (urging courts to find the "best meaning" of a statute); *see also* McKinney, *supra* note 149, at 253 (arguing that overturning *Chevron* would "free[] courts to find the right answer").

199. *See Loper Bright Enters.*, 603 U.S. at 400 (quoting Wis. Central Ltd. v. United States, 585 U.S. 274, 284 (2018)) (focusing the inquiry on the "fixed" meaning of a statutory text).

200. *See id.*; *see also* MERRILL, *supra* note 145, at 195 (noting that the debate over *Chevron* was about whom could authoritatively interpret Congress's handiwork, not whether a more contextual analysis was needed).

201. *See* Michaels, *supra* note 192 (contrasting American legal formalism with a textual approach embraced in other Western democracies), *id.* ("[T]he Blackstonian idea that judges find law and do not make it—is of course a fiction but a valuable one; it forces judges to find arguments within the law, and invites specific criticism when they do not do that."); *cf.* Jeff Neal, *The Argument for Overturning Erie Railroad Co. v. Tompkins*, HARV. L. TODAY (Nov. 17, 2023) (Prof. Stephen Sachs argued that courts' abandonment of general law "left us unable to understand basic aspects of American jurisprudence.").

202. *See generally* Michaels, *supra* note 192 (arguing that the conflation of law with politics impoverishes both).