

## FICTION AT THE COURT

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### INTRODUCTION

In her revelatory Foreword to this year's Supreme Court issue of the *Harvard Law Review*, Professor Karen Tani illuminates how the Supreme Court has been reshaping dominant narratives about who should be deserving of care and concern.<sup>1</sup> The Court's redistribution of attention, as Tani demonstrates, did not begin this year, but represents the culmination of changes that can be traced back to the 1970s.<sup>2</sup> In recent cases, the Court's solicitude has not generally fallen upon people experiencing homelessness or impoverished individuals seeking benefits,<sup>3</sup> but instead has fallen upon "family businesses"<sup>4</sup> and those otherwise perceived as oppressed by governmental excesses.<sup>5</sup> The shift has been accomplished through both rhetorical and institutional means. The Justices have highlighted the plights of certain protagonists in their opinions.<sup>6</sup> Likewise, the Court, through control of its docket, has ensured that certain cases simply are not heard and, therefore, do not make it into the pages of the *New York Times* or onto network TV.<sup>7</sup>

Tani's article engages with a tradition of law and literature approaches to the Court that commenced in its modern form in the 1970s and included, in one of its early instantiations, Professor Robert Cover's 1983 *Harvard Law Review* Foreword, *Nomos and Narrative*.<sup>8</sup> This classic article, which Tani cites as an influence,<sup>9</sup> situates legal doctrine within a larger normative universe comprised of narratives that supply "[e]very prescription . . . with history and destiny, beginning and end, explanation and purpose."<sup>10</sup> According to Cover, "[a] legal tradition is . . . part and parcel of a complex normative world," which "includes not only a corpus juris, but also a language and a mythos — narratives

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<sup>1</sup> See Karen M. Tani, *The Supreme Court, 2023 Term — Foreword: Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court*, 138 HARV. L. REV. 1, 9–10 (2024).

<sup>2</sup> See *id.* at 81–90.

<sup>3</sup> See *id.* at 9, 82–84.

<sup>4</sup> *Id.* at 52 (quoting *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2255 (2024)).

<sup>5</sup> See *id.* at 8–9.

<sup>6</sup> See *id.*

<sup>7</sup> See *id.* at 9–41.

<sup>8</sup> Robert M. Cover, *The Supreme Court, 1982 Term — Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). For one genealogy of modern law and literature scholarship, see Elizabeth S. Anker & Bernadette Meyler, *Introduction* to NEW DIRECTIONS IN LAW AND LITERATURE 1, 1–30 (Elizabeth S. Anker & Bernadette Meyler eds., 2017).

<sup>9</sup> Tani, *supra* note 1, at 44–48.

<sup>10</sup> Cover, *supra* note 8, at 5.

in which the corpus juris is located by those whose wills act upon it.”<sup>11</sup> The relevant narratives do not spring, for Cover, fully formed from the head of one brilliant individual but instead derive from and are sustained by communities of interpretation.<sup>12</sup> The narratives to which Cover refers are not the same as those featured in the proliferation of *Law’s Stories* collections. Those tend to highlight the particular stories that feature in specific cases, as well as the frequent disparities between the Supreme Court’s account of the events and what actually happened.<sup>13</sup> Cover’s point is broader, as he gestures toward the entire web of stories that produces a worldview, generating meaning or rationalizations out of a legal system.

In *Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court*, Tani highlights how the Court’s self-representation as an “umpire”<sup>14</sup> and its “narrative of ease and obviousness”<sup>15</sup> as well as its “[n]arratives of [d]enial”<sup>16</sup> have served its institutional interests.<sup>17</sup> Even more significant, I argue in Part II, is the fact that some of the Justices seem to be denying that the Court is, in fact, bound up with producing various narratives and that there are alternatives to their versions. On the one hand, in *Loper Bright Enterprises v. Raimondo*,<sup>18</sup> one of the most significant cases of the Term, Justice Gorsuch disparaged the use of “fictions” — with the implicit claim that they are disingenuous.<sup>19</sup> On the other hand, several of the Justices have routinely been advancing the assertion that there is a “best interpretation” or “best reading” of statutory provisions — one that the Justices, rather than other branches, can discern.<sup>20</sup> While this is a particular normative proposition, it has been referred to as simply fact — and opposed to the legal fictions found elsewhere.

Relatedly, some Justices have claimed to avoid making “policy” by looking to history for constraints on regulation in constitutional areas like the Second Amendment.<sup>21</sup> In doing so, they both deny their role in constructing normative narratives and overly constrain the discretion of

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<sup>11</sup> *Id.* at 9.

<sup>12</sup> *See id.* at 11 (“Although the state is not necessarily the creator of legal meaning, the creative process is collective or social.”).

<sup>13</sup> For a discussion of the method of one of these volumes, see Nancy S. Marder, *Teaching Civil Procedure Stories*, 55 J. LEGAL EDUC. 138, 138 (2005) (“*Civil Procedure Stories* . . . reveal[s] the people behind the cases. . . . Each essay provides background that does not appear in the U.S. Supreme Court opinion but is nevertheless key to a more complete understanding of the case.”). *See also* Kevin M. Clermont, *Introduction* to CIVIL PROCEDURE STORIES 1, 1–20 (Kevin M. Clermont ed., 2004).

<sup>14</sup> Tani, *supra* note 1, at 16.

<sup>15</sup> *Id.* at 61.

<sup>16</sup> *Id.* at 67 (italics omitted).

<sup>17</sup> *See id.* at 60–77.

<sup>18</sup> 144 S. Ct. 2244 (2024).

<sup>19</sup> *Id.* at 2282 (Gorsuch, J., concurring).

<sup>20</sup> *See infra* notes 63–67 and accompanying text.

<sup>21</sup> *See, e.g.,* United States v. Rahimi, 144 S. Ct. 1889, 1909 (2024) (Gorsuch, J., concurring).

the political branches, as I demonstrate in Part III. The fiction here is that the choice to constrain the scope of current legislative discretion by resorting to historical analogues represents less of a choice or policy decision than employing the kinds of means-ends analysis that the Court has generally used to assess burdens on rights.

The judge or Justice himself or herself is another figure of concern whom Tani does not explicitly treat, but who is a central part of the normative universe surrounding legal decisionmaking today. From the longstanding practice of writing outraged dissents to Justice Kavanaugh's public performance of anger at his confirmation hearing, there has been a pronounced emphasis on the righteous rage of the judge — whether at the excesses of a majority perceived to be overstepping its place or, more recently, at being individually maligned or falsely accused.<sup>22</sup> In his 1925 essay *Law and Literature*, one of the first contributions to the field,<sup>23</sup> Justice Cardozo “furnishes a typology of judicial styles,”<sup>24</sup> contending that these styles are inseparable from substance.<sup>25</sup> In Part IV, I discuss the rise and significance of the new style of the aggrieved Justice.

Judicial displays of aggrievedness — both on the page and in person — also raise questions about their audience. Tani perspicaciously identifies three audiences for the 2023 Term's narratives, including “people who share the conservative Justices' concerns about the administrative state,” “new entrants to the legal profession” (that is, law students), and “the court of history, which will attach retrospective significance to what this Court has done.”<sup>26</sup> The Justices' anger and other forms of aggrievedness tend to spill from the pages of the *Supreme Court Reporter* to the pages of the *New York Times*<sup>27</sup> and *Wall Street Journal*,<sup>28</sup> or from the chambers of the Senate to social media and beyond. More than the specific stories that cases tell, the performance of aggrievedness seems designed to reach not just particular audiences but the public more generally. This is crucial because, as Cover emphasizes, “the

<sup>22</sup> See Aaron Blake, *Brett Kavanaugh Just Got Remarkably Angry — And Political — For a Supreme Court Nominee*, WASH. POST (Sept. 27, 2018, 5:06 PM), <https://www.washingtonpost.com/politics/2018/09/27/brett-kavanaugh-just-got-remarkably-angry-political-supreme-court-nominee/> [<https://perma.cc/WXM6-8R3Q>].

<sup>23</sup> See Bernadette Meyler, *Cardozo's Literary Precedents*, 34 YALE J.L. & HUMANS. 210, 210 (2023).

<sup>24</sup> *Id.*

<sup>25</sup> BENJAMIN N. CARDOZO, *Law and Literature*, in LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 3, 3, 5 (1931).

<sup>26</sup> Tani, *supra* note 1, at 52–53.

<sup>27</sup> See, e.g., Stephen Breyer, Opinion, *Stephen Breyer: The Supreme Court I Served On Was Made Up of Friends*, N.Y. TIMES (Apr. 3, 2024), <https://www.nytimes.com/2024/04/03/opinion/stephen-breyer-friendship-court.html> [<https://perma.cc/9E9B-GDCB>].

<sup>28</sup> See, e.g., Jess Bravin, *Supreme Court's Strains Intensify as Term's End Approaches*, WALL ST. J. (June 9, 2024, 5:30 AM), <https://www.wsj.com/us-news/law/supreme-courts-strains-intensify-as-terms-end-approaches-1d2b3d77> [<https://perma.cc/2B9X-DMYF>].

creative process” of making legal meaning “is collective or social.”<sup>29</sup> Narratives about the legitimacy, or lack thereof, of the Supreme Court, in order to have force, must take hold not only among members of the legal profession or the political branches but also among the general public. The combined effect of the performance of aggrievedness can be to reduce institutional critiques of the Supreme Court — and reform proposals — to character attacks against, and responses by, specific Justices. Individual Justices, as well as the Court’s opinions and its docket-related decisions, thus exert rhetorical force in service of maintaining the Court’s status and its supremacy over other branches.

# I. THE POWER-SHIFTING FICTION OF THE “BEST INTERPRETATION”

In *Loper Bright*, discussed elsewhere in the Supreme Court issue, the Court abandoned deference to administrative agency interpretations of a statute that was “silent or ambiguous with respect to [a] specific issue” if the agency’s interpretation was “based on a permissible construction of the statute,”<sup>30</sup> or so-called *Chevron*<sup>31</sup> deference, derived from the eponymous 1984 case.<sup>32</sup> The decision in *Loper Bright* afforded several of the Justices, including Justice Gorsuch, an opportunity to elaborate upon their understanding of the judicial role. In doing so, the Justices in the majority simultaneously claimed increasing power for the Court (citing *Marbury v. Madison*<sup>33</sup>) to “say what the law is,”<sup>34</sup> regardless of the view of executive agencies, and disparaged the “invention”<sup>35</sup> and “fiction” of the *Chevron* Court that assumed Congress would want to permit some range of latitude to agencies.<sup>36</sup>

Etymologically derived from the Latin word for fashioning or forming,  *fingere* , “fiction” historically designated the action of fashioning as well as arbitrary invention, in addition to usages that connoted deceit or dissimulation.<sup>37</sup> Some of the early usages involved claims of legal authority, such as “[t]he King hauing made positieue lawes . . . disdaines that a Groome should . . . annull those, to . . . aduance other of his own fiction” or “[w]e have never dreamt that parliaments had any right . . . to force a currency of their own fiction in the place of that which is real.”<sup>38</sup>

<sup>29</sup> Cover, *supra* note 8, at 11.

<sup>30</sup> *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2290 (2024) (Gorsuch, J., concurring) (alteration in original) (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

<sup>31</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>32</sup> *Loper Bright*, 144 S. Ct. at 2273.

<sup>33</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>34</sup> *Loper Bright*, 144 S. Ct. at 2283 (Gorsuch, J., concurring) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

<sup>35</sup> *Id.* at 2272 (majority opinion).

<sup>36</sup> *See id.* at 2268.

<sup>37</sup> *Fiction*, OXFORD ENG. DICTIONARY 872 (2d ed. 1989).

<sup>38</sup> *Id.*

Rather than doing away with fiction in its *Loper Bright* decision, the Court replaced one fiction with another. If the assumption that Congress would wish the Court to defer to agencies was itself a fiction created by the Court, the new fiction resides in the notion that there will inevitably be a “best interpretation” of a statute discernible by the Court. The Court has not acknowledged that this latter claim is, however, a fiction. It is this circumstance, rather than fictionality itself, that renders the substitution of one fiction for another troubling. Instead of acknowledging the replacement of one invention by another, the Court insists instead that it is moving toward the nonfictional or the real. And in that reality, the Court maintains a monopoly over interpretation.

Writing for the majority in *Loper Bright*, Chief Justice Roberts rejected a robust version of departmentalism, or even substantial deference to constitutional interpretations by other branches, with citations to Alexander Hamilton’s strong defense of judicial review in *The Federalist No. 78* and *Marbury*.<sup>39</sup> As Chief Justice Roberts opined, even at the Founding, “[w]hatever respect an Executive Branch interpretation was due, a judge ‘certainly would not be bound to adopt the construction given by the head of a department.’”<sup>40</sup> Further (again citing *The Federalist No. 78*), “[j]udges have always been expected to apply their ‘judgment’ independent of the political branches when interpreting the laws those branches enact.”<sup>41</sup>

Referring to the original *Chevron* case, the Chief Justice described it as “a judicial invention that required judges to disregard their statutory duties.”<sup>42</sup> Justice Gorsuch, in a concurrence that also relied heavily on *Marbury*, further critiqued *Chevron* as fiction, a hypothetical account of what Congress intended with the Administrative Procedure Act.<sup>43</sup> In doing so, Justice Gorsuch denied the validity of the interpretive procedure *Chevron* prescribed, contending that “in our democracy unelected judges possess no authority to elevate their own fictions over the laws adopted by the Nation’s elected representatives.”<sup>44</sup> Yet this proposition raises some complications — must the Court defer to Congress by asserting the Court’s own supreme interpretive power?

<sup>39</sup> *Loper Bright*, 144 S. Ct. at 2257. See generally THE FEDERALIST NO. 78 (Alexander Hamilton).

<sup>40</sup> *Loper Bright*, 144 S. Ct. at 2258 (quoting *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 515 (1840)) (citing *Burnet v. Chi. Portrait Co.*, 285 U.S. 1, 16 (1932)).

<sup>41</sup> *Id.* at 2273 (quoting THE FEDERALIST NO. 78, *supra* note 39, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 2003)).

<sup>42</sup> *Id.* at 2272.

<sup>43</sup> *Id.* at 2289–90 (Gorsuch, J., concurring). Interestingly, then-Professors David Barron and Elena Kagan’s article, *Chevron’s Nondelegation Doctrine*, may have been the first to refer to *Chevron* as a “fictionalized statement of legislative desire.” See David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212 (2002) (“Because Congress so rarely makes its intentions about deference clear, *Chevron* doctrine at most can rely on a fictionalized statement of legislative desire, which in the end must rest on the Court’s view of how best to allocate interpretive authority.”).

<sup>44</sup> *Loper Bright*, 144 S. Ct. at 2282 (Gorsuch, J., concurring).

Through dismissing *Chevron*'s interpretive method by associating it with a judicial fiction, Justice Gorsuch seemed to suggest that fiction has no place in the proper act of judging. Yet this was not the view of Justice Douglas, whom Justice Gorsuch relied on heavily in the same concurrence and praised as having "served longer on this Court than any other person in the Nation's history."<sup>45</sup> In a powerful 1960 dissent from a decision in which the Court failed to vindicate the rights of a man falsely convicted, Justice Douglas opined, "I do not take the dim view of fictions that the opinion of the Court reflects. Fictions are commonplace to lawyers. . . . Some fictions worked grievous injustices . . . . Yet fictions were often expedients to further the end of justice."<sup>46</sup> Doesn't this mean, though, embracing falsehood? Much ink has been spilled over what counts as a fiction in law, but Professor Simon Stern's recent and illuminating analysis suggests that such fictions do not need to entail falsehood nor were they historically assumed to do so within the English and other common law systems, including that of the United States.<sup>47</sup> Even Justice Scalia identified some fictions as "benign."<sup>48</sup> But in the context of Justice Gorsuch's concurrence, the identification of a particular reading of the Administrative Procedure Act as a fiction enabled Justice Gorsuch to claim that what sits on the other side is fact.

The way in which this disparagement of fiction in favor of fact plays out in the rest of Justice Gorsuch's concurrence demonstrates how the rejection of fiction stands side by side with another act of verbal creation — the construction of a new narrative through judicial means.<sup>49</sup> Justice Gorsuch wrote separately to explain why, in his view,

<sup>45</sup> *Id.* at 2293.

<sup>46</sup> *Parker v. Ellis*, 362 U.S. 574, 595–96 (1960) (Douglas, J., dissenting).

<sup>47</sup> Simon Stern, *Nothing but the Fictions*, LAW & LITERATURE, July 15, 2024, at 1, 4–5. Stern identifies Professor Lon Fuller's 1930 essay *Legal Fictions* as the source of the misconception, which Fuller had derived from reading civil law sources. *Id.*; L.L. Fuller, *Legal Fictions* (pts. 1–3), 25 ILL. L. REV. 363, 513, 877 (1930–1931).

<sup>48</sup> See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring in the judgment) ("The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated — a compatibility which, by a benign fiction, we assume Congress always has in mind."). Professor William Eskridge views Justice Scalia's fiction as less benign and points out that the latter had little tolerance for fictions pertaining to uses of legislative history. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 680–81 (1990).

<sup>49</sup> Despite his critique of fiction, the way in which Justice Gorsuch himself writes has often been seen as rendering complex issues in a "down-to-earth" manner. See Adam Liptak, *#GorsuchStyle Garners a Gusher of Groans. But Is His Writing Really that Bad?*, N.Y. TIMES (Apr. 30, 2018), <https://www.nytimes.com/2018/04/30/us/politics/justice-neil-gorsuch-writing-style.html> [https://perma.cc/NK4R-P535]. His approach has even seemed literary to some. Bruce Petrie, Jr., *Gorsuch Art*, BRICKER GRAYDON: BRUSH UP ON YOUR CONSTITUTION (Feb. 2, 2017), <https://www.brickergreydon.com/2017/02/02/gorsuch-art/>.

*Loper Bright* represented an appropriate application of stare decisis and related doctrines of precedent, despite the fact that the Court rejected *Chevron*'s interpretive method.<sup>50</sup>

As he argued, the judge's job historically, in seventeenth- and eighteenth-century England, "was to find and apply the law," hence "common law judges did not . . . afford overwhelming weight to any 'single precedent.'"<sup>51</sup> It was precisely this tendency not to "afford overwhelming weight to any 'single precedent,'"<sup>52</sup> however, that allowed a jurist like Sir Edward Coke to assert something like judicial review in *Bonham's Case*<sup>53</sup> while, as T.F.T. Plucknett showed almost a century ago, interpolating his own commentary into passages supposedly derived from prior cases and otherwise reshaping precedent in a fairly dramatic way.<sup>54</sup> Indeed, the selection of precedents itself furnishes a judicially constructed narrative about what the law is, justified through an account of the historical genesis of the contours of legal doctrine.<sup>55</sup> Yet, in fact, the choice to follow or not follow particular precedents is not an act of finding a law that is already out there but is instead itself an act of judicial creativity or making — one an etymologically sensitive person might even call fiction. The precedents that particular Justices or opinions choose to cite — and that they choose not to — themselves tell very specific stories.

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brickergraydon.com/brush-up-on-your-constitution/gorsuch-art [https://perma.cc/27DD-PWJZ] ("Judge Gorsuch's writing art makes his opinions not only a legal narrative, but a literary one . . ."). One of Tani's critiques of the style of opinions from this past Term is that they make their conclusions seem obvious in a way that ignores many of the nonobvious steps that must be taken to reach the result. See Tani, *supra* note 1, at 60–66. Professor Nina Varsava has similarly argued that literary approaches to judicial style may have unethical consequences for judging. See Nina Varsava, *Professional Irresponsibility and Judicial Opinions*, 59 HOUS. L. REV. 103, 104–05 (2021) ("Many commentators suggest that opinions should be lively, engaging, and appealing; judges are supposed to shape facts into compelling and memorable narratives. On this view, opinion writing is a kind of literary task, and well-written judicial opinions have much in common with good poetry or fiction. . . . Not only are those objectives beside the point of judicial writing, they also stand to undermine the integrity of the judicial role and the legitimacy of the adjudicative process." (footnote omitted)); see also Nina Varsava, *Elements of Judicial Style: A Quantitative Guide to Neil Gorsuch's Opinion Writing*, 93 N.Y.U. L. REV. ONLINE 75, 76 (2018) (analyzing the aspects of then-Judge Gorsuch's style that seemed to conform to prescriptions about good writing).

<sup>50</sup> See *Loper Bright*, 144 S. Ct. at 2275–76 (Gorsuch, J., concurring).

<sup>51</sup> *Id.* at 2276 (quoting JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 209–10 (5th ed. 2019)).

<sup>52</sup> *Id.* (quoting BAKER, *supra* note 51, at 209–10).

<sup>53</sup> (1610) 77 Eng. Rep. 646; 8 Co. Rep. 113 b.

<sup>54</sup> See Theodore F.T. Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30, 35–48 (1926) (demonstrating the ways in which Coke played fast and loose with precedents in his opinion in *Bonham's Case*).

<sup>55</sup> For an account of how the selection and citation of precedents creates particular narratives about the law, see Bernadette Meyler, *The Rhetoric of Precedent*, in RHETORICAL PROCESSES AND LEGAL JUDGMENTS 83, 89–99 (Austin Sarat ed., 2016); see also Austin Sarat, *The Relevance of Rhetoric: An Introduction to RHETORICAL PROCESSES AND LEGAL JUDGMENTS*, *supra*, at 1, 9–10.

Justice Gorsuch's concurrence also implicitly analogized judicial use of precedents to the reconstruction of congressional intent itself. He critiqued the way in which judges select precedents in a manner similar to earlier criticism of the use of legislative history for support; echoing Judge Leventhal's claim — which Justice Scalia made famous — that using legislative history is like “entering a crowded cocktail party and looking over the heads of the guests for one's friends,”<sup>56</sup> Justice Gorsuch stated that: “It is not for us to pick and choose passages we happen to like and demand total obedience to them in perpetuity. That would turn *stare decisis* from a doctrine of humility into a tool for judicial opportunism.”<sup>57</sup> This statement suggests that the inverse — picking and choosing passages to ignore — is not a similar tool for judicial opportunism and that it does not represent a similar curation of the story. By ignoring the fact that some precedents will be chosen over others — unless all are ignored — Justice Gorsuch's opinion conceals the judicial decisions that will surround any use of precedent.

The most striking fiction to emerge from *Loper Bright* as well as many other recent cases of statutory interpretation is that of a “best interpretation” discernible by the Justices — even if they disagree about what it is. In this regard, a commonality has been emerging between recent applications of constitutional and statutory interpretation. In both areas, the Court has been narrowing the scope of coordinate branches' discretion through insisting on one correct interpretation rather than the availability of a range of interpretations. The result in the context of the administrative state is the elimination of *Chevron* deference and, in the context of constitutional review of statutes, the increasing abandonment of means-ends scrutiny. Both of these outcomes enhance the power of the judiciary over that of coordinate branches. And it is striking that both were previewed by a speech then-Judge Kavanaugh gave at Notre Dame Law School a few days after Justice Gorsuch's nomination to the Supreme Court.<sup>58</sup>

The dominance of rhetoric about a statute's “best interpretation” or “best reading” is relatively recent at the Supreme Court. Before becoming a Justice, then-Judge Kavanaugh had articulated his views about statutory ambiguity and the “best interpretation” of a statute several times. In his speech at Notre Dame, then-Judge Kavanaugh opined that claims about statutory ambiguity should not trigger the use of most canons of statutory interpretation, including constitutional avoidance, the

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<sup>56</sup> ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 377 (2012).

<sup>57</sup> *Loper Bright*, 144 S. Ct. at 2292 (Gorsuch, J., concurring) (citing *Brown v. Davenport*, 142 S. Ct. 1510, 1528 (2022)).

<sup>58</sup> See Brett M. Kavanaugh, Keynote Address, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1908, 1913–15 (2017).



use of legislative history, and *Chevron* deference.<sup>59</sup> Although he acknowledged in that speech that “[w]e cannot eliminate all ambiguity in statutes,” he nevertheless opined that judges should simply “go with the best reading of the statute.”<sup>60</sup> Similarly, in a review of Judge Robert Katzmann’s book *Judging Statutes*, then-Judge Kavanaugh insisted that there were no “neutral principles” according to which the existence, or lack thereof, of statutory ambiguity could be determined.<sup>61</sup> According to then-Judge Kavanaugh, “because it is so difficult to make those clarity versus ambiguity determinations in a coherent, evenhanded way, courts should reduce the number of canons of construction that depend on an initial finding of ambiguity” and should instead “seek the *best reading* of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying the agreed-upon semantic canons.”<sup>62</sup>

Justice Kavanaugh alone did not introduce the focus on “best reading” or “best interpretation” to the Court’s statutory interpretation cases. Justice Thomas, for example, had previously emphasized that “[t]his Court’s interpretive function requires it to identify and give effect to the best reading of the words in the provision at issue.”<sup>63</sup> Yet it is undeniable that attention has turned in this direction within the past decade or two. A search of all Supreme Court opinions for those phrases yields close to two-thirds of the usages dating from 2008 or after and all but two since 1988.<sup>64</sup>

Insisting on the “best interpretation” in a way that excludes or minimizes considerations of ambiguity, however, simply shifts judicial discretion from one area (determination of whether or not a statute is ambiguous) to another (assessment of the “best reading”). As Judge Katzmann wrote in his response to then-Judge Kavanaugh’s review:

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<sup>59</sup> See *id.* at 1910. To be clear, the success of Justice Kavanaugh’s efforts to steer the Supreme Court away from determinations of ambiguity has not resulted in the eliminations of canons per se. Indeed, the “major questions” doctrine furnishes a significant new intervention. For discussion of that canon and its compatibility with textualism, see Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 541–44 (2023) (treating the major questions doctrine as one of the substantive canons incompatible with textualism) and Brian G. Slocum & Kevin Tobia, Response, *The Linguistic and Substantive Canons*, 137 HARV. L. REV. F. 70, 75 (2023) (arguing that some substantive canons are also linguistic and therefore can be reconciled with textualism, but that the major questions doctrine is unlikely to be one of these).

<sup>60</sup> Kavanaugh, *supra* note 58, at 1912.

<sup>61</sup> Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2153 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)) (“[T]here is no particularly principled guide for making that clarity versus ambiguity decision, and no good way for judges to find neutral principles on which to debate and decide that question.”); see *id.* at 2118 (“[J]udges often cannot make that initial clarity versus ambiguity decision in a settled, principled, or evenhanded way.”).

<sup>62</sup> *Id.* at 2121.

<sup>63</sup> *Harbison v. Bell*, 556 U.S. 180, 198 (2009) (Thomas, J., concurring in the judgment).

<sup>64</sup> This sentence is based on a Westlaw search on August 30, 2024, of all Supreme Court cases for the phrases “best interpretation” or “best reading.” This yielded ninety-six total cases, of which sixty-five were decided in 2008 or later.

When a statute is ambiguous, barring consideration of legislative history leaves a judge with words that could be interpreted in a variety of ways without contextual guidance. Ignoring such guidance increases the probability that a judge will construe a law at odds with legislative meaning, and potentially more in line with the judge's own intuitions and policy preferences.<sup>65</sup>

Whether looking at legislative history or applying some other canon, ignoring ambiguity and focusing on “best reading” renders the judge the ultimate arbiter — even when meaning is ambiguous or otherwise unclear. The result is that the deference that might have been accorded to another branch through canons like *Chevron* or constitutional avoidance, or to individual liberty through canons like the rule of lenity, vanishes.<sup>66</sup> Interpretive claims for a “best reading” hence represent a significant tool in building what Professors Mark Lemley and Kate Shaw have called the “imperial Supreme Court.”<sup>67</sup>

## II. WHOSE “POLICY”?

Just as the fiction of a “best interpretation” discoverable by the Justices consolidates the power to interpret statutes within the judiciary, the Court's recent approach to the adjudication of rights similarly prioritizes judicial authority over legislative judgments. Through increasingly turning away from a tradition of means-ends analysis of legislative incursions on constitutionally protected rights toward a Court-developed historical test for what kinds of legislation are acceptable, the Court similarly substitutes its own purportedly objective standard for another paradigm it calls “policy.” In this case, too, the Court's claim of discovering the scope of permissible legislation within history is a kind of fiction that conceals its own construction. The effect of the new approach is to increase the power of the Court while making that increase seem consistent with a minimalist judicial role.

<sup>65</sup> Robert A. Katzmann, *Response to Judge Kavanaugh's Review of Judging Statutes*, 129 HARV. L. REV. F. 388, 392 (2016).

<sup>66</sup> Then-Judge Kavanaugh explicitly mentioned constitutional avoidance — and its use in the Affordable Care Act case, *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519 (2012) — as one of the canons triggered by a prior determination of ambiguity. Kavanaugh, *supra* note 58, at 1910–11; see also *Biden v. Nebraska*, 143 S. Ct. 2355, 2376–78 (2023) (Barrett, J., concurring) (discussing the difficulty of reconciling substantive canons like constitutional avoidance and the presumption against retroactivity with textualism, but distinguishing the major questions doctrine). He also wrote separately in a criminal appeal to emphasize the limited applicability of the rule of lenity and the idea that it can only be triggered by “grievous ambiguity.” *Shular v. United States*, 140 S. Ct. 779, 788–89 (2020) (Kavanaugh, J., concurring) (quoting, *inter alia*, *Shaw v. United States*, 137 S. Ct. 462, 469 (2016)). Justice Kavanaugh also wrote separately in a subsequent case to distinguish his very narrow view of lenity from Justice Gorsuch's more expansive one precisely on the grounds “that ambiguity . . . cannot be readily determined on an objective basis.” *Wooden v. United States*, 142 S. Ct. 1063, 1075–76 (2022) (Kavanaugh, J., concurring).

<sup>67</sup> Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97 (2022); Kate Shaw, Opinion, *The Imperial Supreme Court*, N.Y. TIMES (June 29, 2024), <https://www.nytimes.com/2024/06/29/opinion/supreme-court-chevron-loper.html> [<https://perma.cc/KAJ9-TAUD>].

The Court has most explicitly theorized its retreat from means-ends analysis in its Second Amendment jurisprudence. Tani's Foreword emphasizes some of the ways in which the Court's Second Amendment decision this past Term, *United States v. Rahimi*,<sup>68</sup> made its method seem obvious and easy to apply in a manner that can distort public discourse around the right to bear arms. As Tani explains:

A narrative of ease and obviousness serves the Court institutionally: This is a fraught area of law, and it will not do for the Court to seem like an inept supervisor of the lower courts, or like an actor that is doing something other than calling "balls and strikes." But the narrative also has casualties: (1) It impliedly discourages further conversation about a method that is conceptually flawed and challenging to apply, and (2) it forces further underground arguments about the unprecedented ways in which gun violence affects American communities.<sup>69</sup>

There is a further consequence — increased restrictions on how and for what purposes legislatures can fashion remedies for gun violence due to the test for evaluating infringements on Second Amendment rights that the Court has selected.

In the constitutional context, Professor Keith Whittington has explicitly theorized the connection between what the Court calls ambiguity and deference to other branches. As Professor Lawrence Solum and Whittington have most prominently elaborated, new originalists distinguish between constitutional interpretation and construction.<sup>70</sup> For Solum, interpretation involves an account of the "linguistic meaning" of the text, "whereas construction determines legal content or legal effect."<sup>71</sup> When textual meaning is "vague," "interpretation makes its exit and construction enters the scene."<sup>72</sup> Although Solum distinguishes in a technical sense between ambiguity and vagueness, much of what the Supreme Court has considered ambiguous would count as vague under his definition, according to which a word is vague "if there are cases where the term might or might not apply."<sup>73</sup> Solum later elaborated that cases involving "[i]rreducible ambiguity, vagueness, contradictions, and gaps . . . are underdetermined by the meaning of the text — they are in the construction zone."<sup>74</sup> Solum has — along with Professor Cass

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<sup>68</sup> 144 S. Ct. 1889 (2024).

<sup>69</sup> Tani, *supra* note 1, at 61 (footnote omitted) (quoting *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of then-Judge John G. Roberts, Jr.)).

<sup>70</sup> JAMES E. FLEMING, FIDELITY TO OUR IMPERFECT CONSTITUTION 31–33 (2015) (explaining the distinction developed by Solum and Whittington between interpretation and construction in the new originalism).

<sup>71</sup> Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 100 (2010).

<sup>72</sup> *Id.* at 106.

<sup>73</sup> *Id.* at 98.

<sup>74</sup> Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 471 (2013).

Sunstein — even extended his analysis to the *Chevron* context, explaining that many of the relevant “ambiguit[ies]” in statutory language are simply cases of vagueness that involve construction of the application of the particular term.<sup>75</sup> Those include questions like what counts as a “source” of pollution under the Clean Air Act<sup>76</sup> or what “harm” includes under the Endangered Species Act.<sup>77</sup>

For Whittington, this field of “construction” is one that should be ceded to branches other than the judiciary. As he writes in *Constitutional Construction: Divided Powers and Constitutional Meaning*:

Constitutional meaning can be partially determined by relatively technical and traditional interpretive instruments, such as text and structure, framers’ intent, and precedent. . . . Additional meaning cannot be discovered in the text through more skillful application of legal tools; it must be constructed from the political melding of the document with external interests and principles.<sup>78</sup>

While the judiciary, Congress, or the Executive could engage in construction, Whittington generally places priority on the political branches’ activity in this sphere.<sup>79</sup>

The recent move of originalists on the Supreme Court away from the traditional levels of scrutiny undermines the extent to which courts can defer to constitutional construction by other branches and, in particular, grant latitude in construction to new political actors. The Court has undertaken its retreat from the conventional “tiers of scrutiny” or “levels of scrutiny” most prominently in the Second Amendment context through its 2022 decision in *New York State Rifle & Pistol Ass’n v. Bruen*.<sup>80</sup> The related case of *Rahimi* this Term furnished an opportunity for more of the Justices to express their particular stances on the turn.

Justice Kavanaugh’s 2017 speech at Notre Dame, however, already augured the possibility of a similar move, on the same occasion that he

<sup>75</sup> See Lawrence B. Solum & Cass R. Sunstein, *Chevron as Construction*, 105 CORNELL L. REV. 1465, 1475 (2020).

<sup>76</sup> *Id.* at 1469 (quoting 42 U.S.C. § 7502(c)(5) (2018)).

<sup>77</sup> *Id.* at 1470 (quoting *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 690 (1995)).

<sup>78</sup> KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 1 (1999).

<sup>79</sup> Lawrence B. Solum, *We Are All Originalists Now*, in ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM: A DEBATE* 69–70 (2011) (“The model of construction as politics is naturally associated with popular sovereignty as a normative justification for originalism. The core idea of this model is simple: when judges leave the realm of constitutional interpretation and enter the construction zone, they defer to the decisions made by political processes. When judges interpret the Constitution, they execute the will of the people, but in the construction zone, by definition, the people have expressed no command. The respect for democracy that underlies popular sovereignty therefore requires that judges defer to democratic decision making in the construction zone. Democratic constitutional construction by the political branches is itself a political process, responding to the values appropriate for democratic deliberation and decision making.”).

<sup>80</sup> 142 S. Ct. 2111 (2022).

critiqued the use of ambiguity to trigger deployment of canons of interpretation — and his concurrence in *Rahimi* tracks the same logic. In both contexts, Justice Kavanaugh uses the language of an “exception[]” to rights, claiming that his audience should not “get hung up on the word ‘exception[]’” because “[w]hether you call them exceptions to a right or the contours of a right is irrelevant to [his] point.”<sup>81</sup> In his *Rahimi* concurrence, Justice Kavanaugh elaborated that, by using the term “exceptions,” he intended to “underscore[] that the constitutional baseline is protection of the textually enumerated right.”<sup>82</sup> Referring to “exceptions” to rights implies that the scope and application of rights are not conditioned on their relation to the public good, which Professor Jud Campbell and others have recently argued might be the correct view of at least natural rights at the Founding.<sup>83</sup> It also calls to mind Carl Schmitt’s famous line: “Sovereign is he who decides on the exception,”<sup>84</sup> adopted in legal circles to treat “black” and “grey holes” in administrative law<sup>85</sup> and referred to in popular discussions of the presidential immunity decision this Term in *Trump v. United States*.<sup>86</sup> Following Schmitt’s logic, the fact that the Supreme Court — not the political branches — decides on exceptions to rights would render it sovereign.

In *Bruen*, Justice Thomas, writing for the Court, affirmed a Second Amendment–based challenge to New York State’s requirement that those seeking a license to carry a concealed handgun demonstrate “proper cause.”<sup>87</sup> In doing so, he dispensed with the form of means-ends scrutiny that lower courts had used to analyze cases involving the Second Amendment since its revival in *District of Columbia v. Heller*<sup>88</sup> and application to the states in *McDonald v. City of Chicago*.<sup>89</sup> Instead, Justice Thomas asserted:

[W]hen the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation’s historical

<sup>81</sup> Kavanaugh, *supra* note 58, at 1913.

<sup>82</sup> *United States v. Rahimi*, 144 S. Ct. 1889, 1912 n.1 (2024) (Kavanaugh, J., concurring) (citing *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 482 (2007) (opinion of Roberts, C.J.)).

<sup>83</sup> See, e.g., Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 86 (2017) (book review); James T. Kloppenberg, *To Promote the General Welfare: Why Madison Matters*, 2019 SUP. CT. REV. 355, 384 (2020).

<sup>84</sup> CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., Univ. of Chi. Press 2005) (1922).

<sup>85</sup> Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1096 (2009).

<sup>86</sup> 144 S. Ct. 2312 (2024); Jennifer Szalai, *The Nazi Jurist Who Haunts Our Broken Politics*, N.Y. TIMES (July 15, 2024), <https://www.nytimes.com/2024/07/13/books/review/carl-schmitt-jd-vance.html> [<https://perma.cc/2BB5-4S4Z>].

<sup>87</sup> *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2156 (2022).

<sup>88</sup> 554 U.S. 570 (2008).

<sup>89</sup> 561 U.S. 742 (2010).

tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."<sup>90</sup>

Some have attempted to reconcile this test with originalism,<sup>91</sup> while others have questioned whether that adequately describes *Bruen*'s methodology.<sup>92</sup> The most significant move, however, is less *Bruen*'s departure from originalism than its effect of depriving current legislatures of latitude in how they protect the public good in the face of underdetermined constitutional rights. Faced with the fact that constitutional rights are not absolute, the Court in *Bruen* created its own criteria of assessment based on historical analogues.<sup>93</sup> This displaced the approach dominant since at least the 1950s of delegating this kind of construction to legislatures and other policymakers and allowing courts to review them later under one of the levels of scrutiny ranging from rationality review to strict scrutiny. To the extent that the Court produces a historical record of restrictions on bearing arms and uses that record to determine whether or not present policymakers can enact gun control measures, it arrogates power to itself that it had previously permitted to legislatures.

Explanations of the departure from traditional modes of scrutiny — like Justice Kavanaugh's in his concurrence in *Rahimi* — attempt, however, to conceal that choice. In *Rahimi*, the Court faced the task of addressing the confusion its *Bruen* decision had sown in the lower courts in the context of a challenge to a ban on the possession of a firearm by

<sup>90</sup> *Bruen*, 142 S. Ct. at 2126 (quoting *Konigsberg v. State Bar*, 366 U.S. 36, 50 n.10 (1961)).

<sup>91</sup> For example, Professors Lawrence Solum and Randy Barnett read the majority opinion in *Bruen* as "appealing to the historical tradition test to identify the exact contours of the preexisting legal right to keep and bear arms in either 1791 or 1868." Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 493 (2023). This reading is enabled partly by the fact that the *Bruen* opinion leaves open whether the relevant original meaning is that of the Bill of Rights or of the Fourteenth Amendment, which was taken in *McDonald* as applying the Second Amendment against the states. *McDonald*, 561 U.S. at 742. Citations of mid-nineteenth-century state laws in *Bruen* could thereby be seen as bolstering an account of the scope of the right in 1868.

The Court has done something similar in the context of the Confrontation Clause, viewing the scope of the right to confrontation as limited only by statutory derogations from the common law prior to ratification of the Bill of Rights. See Bernadette Meyler, *Common Law Confrontations*, 37 LAW & HIST. REV. 763, 766–67 (2019) (treating the limited effect of statutory derogations from the common law in the context of Justice Scalia's approach to the Confrontation Clause). Professor Evan D. Bernick has recently furnished an account of the history of confrontation between ratification of the Bill of Rights and the Fourteenth Amendment that could be used by an originalist interested in locating the relevant date at 1868. See Evan D. Bernick, *Fourteenth Amendment Confrontation*, 51 HOFSTRA L. REV. 1, 3 (2022).

<sup>92</sup> See, e.g., Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 76 n.44 (2023) (opining that "[w]e might even call [Bruen's approach] 'blended origino-traditionalism,' or 'living traditionalism,' or, as one recent essay termed it, 'Originalish'" (citations omitted) (quoting Marc O. DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES 9, 28 (2023); Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1477 (2023); A.W. Geisel, *Bruen Is Originalish* 1 (Jan. 23, 2023) (unpublished manuscript), <https://ssrn.com/abstract=4335950> [<https://perma.cc/B2TL-KJCY>])).

<sup>93</sup> See *Bruen*, 142 S. Ct. at 2134.

individuals subject to a domestic violence restraining order.<sup>94</sup> Although a majority of the Court upheld this restriction in an opinion authored by Chief Justice Roberts that appeared to retreat from the most extreme interpretations of *Bruen* (whose author, Justice Thomas, dissented), several Justices took advantage of this case to separately articulate their views on constitutional interpretation.<sup>95</sup> Returning to the question of “exceptions” to rights that he had addressed in his Notre Dame speech, Justice Kavanaugh’s concurrence insisted that “[h]istory, not policy, is the proper guide.”<sup>96</sup> Glossing “history,” he included both preratification and postratification history, as well as judicial precedent;<sup>97</sup> with “policy,” he referred to “a balancing approach variously known as means-end scrutiny, heightened scrutiny, [and] tiers of scrutiny.”<sup>98</sup> What this account neglects to mention is that the “policy” judgment in question when courts use means-ends scrutiny is not that of judges but of legislatures and policymakers — a judge’s task is simply to assess whether or not enacted state or federal laws or executive branch policies are compatible with the scope of the constitutional right at issue through means-ends scrutiny. Under the *Bruen* approach, it is the Court that gets to decide what policy means are acceptable — albeit through reference to historical statutes — rather than the political branches. This renders the

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<sup>94</sup> United States v. Rahimi, 144 S. Ct. 1889, 1894, 1897 (2024).

<sup>95</sup> See *id.* at 1894.

<sup>96</sup> *Id.* at 1912 (Kavanaugh, J., concurring). Justice Gorsuch’s concurrence in *Rahimi* also took aim at judicial scrutiny of gun regulation prior to *Bruen* as expressing policy preferences. See *id.* at 1909 (Gorsuch, J., concurring) (“Some judges expressed concern that the prevailing two-step test had become ‘just window dressing for judicial policymaking.’ . . . In *Bruen*, we rejected that approach for one guided by constitutional text and history. Perhaps judges’ jobs would be easier if they could simply strike the policy balance they prefer. And a principle that the government always wins surely would be simple for judges to implement. But either approach would let judges stray far from the Constitution’s promise.” (citations omitted) (quoting *Duncan v. Bonta*, 19 F.4th 1087, 1148 (9th Cir. 2021) (Bumatay, J., dissenting)) (citing *Bruen*, 142 S. Ct. at 2126–27; *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008))).

Professor Kunal Parker has recently discussed both Justice Thomas’s majority opinion in *Bruen* (deploying the historical test) and Justice Breyer’s dissent (using means-ends analysis) as responses to “historical contingency, uncertainty, and limits of legal knowledge.” Kunal M. Parker, *What Originalism Can Teach Historians: History as Analogy, Means-Ends Tests, and the Problem of History in Bruen*, 99 NOTRE DAME L. REV. 1541, 1550 (2024). Yet as the historical test becomes increasingly naturalized, historical contingency and uncertainty are buried beneath a veneer of purportedly straightforward administrability. Parker similarly concludes that “[i]n *Bruen*, ‘administrable’ history as a legal tool born out of a sense of the historicity, contingency, and limits of legal knowledge — instead of keeping alive that sense of contingency — has gone rogue. It yields only a spurious and troubling historical fixity, the story of a univocal past that convinces nobody. In so doing, it reproduces the problem of judicial overreach it claimed to seek to minimize.” *Id.* at 1557.

<sup>97</sup> *Rahimi*, 144 S. Ct. at 1912–20 (Kavanaugh, J., concurring).

<sup>98</sup> *Id.* at 1920.

Court instead of Congress or state legislatures the principal engine of constitutional construction.<sup>99</sup>

In order to undermine the idea of applying means-ends scrutiny, Justice Kavanaugh claimed that “[t]he balancing tests (heightened scrutiny and the like) are a relatively modern judicial innovation in constitutional decisionmaking,” following Professor Richard Fallon in tracing “heightened-scrutiny” tests back to the 1950s and 1960s.<sup>100</sup> Even if strict or heightened scrutiny as explicitly named is of relatively recent origin, however, that is not true of means-ends analysis generally. Indeed, the idea of means-ends scrutiny can be found even as early as Chief Justice Marshall’s statement in *McCulloch v. Maryland*<sup>101</sup>: “Let the end be legitimate, let it be within the scope of the [C]onstitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the [C]onstitution, are constitutional.”<sup>102</sup> Without getting into the intricacies of arguments around substantive due process in the *Lochner* era, some have also claimed for that period, or even earlier, an origin point for more rigorous scrutiny regarding rights.<sup>103</sup> Furthermore, even if the tiers of scrutiny are relatively new, the very conception of rights underpinning the Second Amendment revival arguably is as well. As Professor Victoria Nourse has argued, the nature and conception of constitutional rights themselves were potentially different before the 1950s.<sup>104</sup> Whatever may be said about the genealogy of tiers of scrutiny, some deference to

<sup>99</sup> In his *Harvard Law Review* Foreword, Professor John Manning also criticizes the Court for not deferring to Congress when the Constitution “leaves [something] blank,” John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 83 (2014), and instead “claim[ing] higher authority to fill in the blanks of the constitutional structure on matters to which the Constitution does not speak clearly,” *id.* at 84.

<sup>100</sup> *Rahimi*, 144 S. Ct. at 1921 (Kavanaugh, J., concurring); see also Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1270, 1280 (2007).

<sup>101</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>102</sup> *Id.* at 421. For one discussion of this passage as a form of means-ends scrutiny, see Evan H. Caminker, “Appropriate” Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1134–41 (2001).

<sup>103</sup> See, e.g., Steven Menashi & Douglas H. Ginsburg, *Rational Basis with Economic Bite*, 8 N.Y.U. J.L. & LIBERTY 1055, 1061–65 (2014) (looking to *Mugler v. Kansas*, 123 U.S. 623 (1887), for a model for more rigorous rationality review); David E. Bernstein & Ilya Somin, *The Mainstreaming of Libertarian Constitutionalism*, 77 LAW & CONTEMP. PROBS., no. 4, 2014, at 43, 49–53 (arguing for pre-New Deal antecedents of the tiers of scrutiny).

<sup>104</sup> See Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 752 (2009). There is not sufficient space in this Essay to engage at length with historiographic questions, but Professor Howard Schweber has called many accounts of the legal evolution surrounding *Lochner* into question as adhering excessively to a “preconceived jurisprudential narrative.” Howard Schweber, *Lochner v. New York and the Challenge of Legal Historiography*, 39 LAW & SOC. INQUIRY 242, 242 (2014). With respect particularly to the right to bear arms, Jud Campbell has traced the complications of referring back to historical delineations of the right. See Jud Campbell, *Natural Rights, Positive Rights, and the Right to Keep and Bear Arms*, 83 LAW & CONTEMP. PROBS., no. 3, 2020, at 31, 31–34.



legislative decisionmaking has characterized decisions of the Court since the very beginning.

Although *Rahimi* does not go as far as *Bruen* and merely requires historical analogues rather than a “historical twin,”<sup>105</sup> it still restricts legislatures in important ways different from means-ends scrutiny. In particular, as Chief Justice Roberts explained in his opinion for the Court, “if laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations.”<sup>106</sup> By implication, laws that regulate for another purpose would fall outside the boundaries of allowable regulation. This suggests that the Court is controlling the relevant legislative ends through assessing their similarity to Founding-era purposes. Such a step seriously limits the ability of legislatures to take on new tasks that might have arisen in the past decade, or even the past century. To return to Chief Justice Marshall, “legitimate” ends under the Constitution would only be those that had been considered before.<sup>107</sup>

### III. THE AGGRIEVED STYLE

In her Foreword, Tani points out the many ways in which the Court has shaped our distribution of concern through its implicit attitude toward various figures. She observes, for instance, “the decline of Supreme Court cases foregrounding affirmative government responsibility to people in need”<sup>108</sup> as well as the focus on “agency challengers with appealing public faces.”<sup>109</sup> One figure who is absent from her account, however, is that of the Justice himself or herself. Individual Justices have, this Part contends, themselves become bound up in the distribution of concern through expressions of grievance within the public sphere. Through these expressions, the Justices have intervened more directly with an audience comprised of the general public than their opinions otherwise would. Such interventions serve to bolster the idea that attacks on the way in which the Supreme Court is functioning within our democracy or in relation to the political branches can be reduced simply to personal grievances against the Justices and thereby

<sup>105</sup> *Rahimi*, 144 S. Ct. at 1903 (quoting *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2133 (2022)).

<sup>106</sup> *Id.* at 1898.

<sup>107</sup> In other contexts, Chief Justice Roberts and other members of the Court have also expressed suspicion about the constitutionality of “new” legislative techniques. For example, in *Sebelius*, he opined that “[l]egislative novelty is not necessarily fatal; there is a first time for everything. But sometimes ‘the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent’ for Congress’s action.” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549 (2012) (opinion of Roberts, C.J.) (alterations in original) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010)). For a critique of this “antinovelty” position, see generally Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407 (2017).

<sup>108</sup> Tani, *supra* note 1, at 80.

<sup>109</sup> *Id.* at 18.

minimized and dismissed. The force of an appeal to the public consists in how it affects popular narratives about law, which are themselves crucial to any efforts at reform.

One of the earliest forays into law and literature, well preceding the movement of the past fifty years, was Justice Cardozo's essay *Law and Literature*, published in 1925.<sup>110</sup> Justice Cardozo there argues against those who would claim that judicial style represents a mere ornament or an aspect of rhetoric divorced from the substance of decisionmaking.<sup>111</sup> In furnishing a typology of six styles, Justice Cardozo also suggests that these may emerge from and be contingent on particular historical moments. For example, he associates the "magisterial" style, in which "[w]e hear the voice of the law speaking by its consecrated ministers with the calmness and assurance that are born of a sense of mastery and power,"<sup>112</sup> predominantly with Chief Justice Marshall.<sup>113</sup> Although he calls this style the greatest, it appears no longer plausible in his historical moment: "A changing philosophy of law has tended, none the less, to the use of other methods more conciliatory and modest."<sup>114</sup>

While he does not identify dissents with a particular enumerated style, Justice Cardozo does speak about their sometimes distinct rhetorical characteristics. For Justice Cardozo, the dissenter:

has laid aside the role of the hierophant . . . . For the moment, he is the gladiator making a last stand against the lions. The poor man must be forgiven a freedom of expression, tinged at rare moments with a touch of bitterness, which magnanimity as well as caution would reject for one triumphant.<sup>115</sup>

More recent commentators have discussed the righteous anger that is sometimes part of dissents, particularly those intended to galvanize a movement of resistance behind them.<sup>116</sup>

While these occasions for the expression of anger in dissent do sometimes correspond with the "bitterness" that Justice Cardozo references, there is a distinct form of personal aggrievedness that has become a more prominent part of some Justices' demeanor within the past several decades. Rather than remaining in the pages of opinions, this affect has emerged through the Justices' other appearances or writings and has

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<sup>110</sup> CARDOZO, *supra* note 25, at 3.

<sup>111</sup> *See id.* at 4–6.

<sup>112</sup> *Id.* at 10.

<sup>113</sup> *See id.* at 10–12.

<sup>114</sup> *Id.* at 14–15.

<sup>115</sup> *Id.* at 34.

<sup>116</sup> *See, e.g.,* Duncan Hosie, Janus and the Movement Dissent, 65 B.C. L. REV. 371, 372 (2024); Terry A. Maroney, Angry Judges, 65 VAND. L. REV. 1207, 1249–50 (2012); Andrew Siegel, Justice Stevens and the Seattle Schools Case: A Case Study on the Role of Righteous Anger in Constitutional Discourse, 43 U.C. DAVIS L. REV. 927, 934 (2010); *see also* Terry A. Maroney, (What We Talk About When We Talk About) Judicial Temperament, 61 B.C. L. REV. 2085, 2092 (2020) (discussing the role of judicial temperament).

addressed a public audience, not simply the legal insiders or law students at whom, Tani argues, Supreme Court opinions are largely directed. In doing so, aggrievedness sits in interesting ways with the broad claims about the role of judge as umpire that many of the Justices have made.<sup>117</sup>

Examples of Justices' public displays of aggrievedness could include Justice Kavanaugh's much commented-upon display of anger during his confirmation hearing<sup>118</sup> or even Justice Thomas's earlier response to Anita Hill's accusations at his own confirmation hearing.<sup>119</sup> But the most prominent in the recent past may be Justice Alito's writings and interviews in the *Wall Street Journal*.<sup>120</sup> In a June 2023 contribution to the newspaper entitled *ProPublica Misleads Its Readers*, Justice Alito answered a private request from *ProPublica* for a response to several questions with a public opinion piece, the title of which attacked the outlet.<sup>121</sup> Just weeks later, a lengthy interview with him was also

<sup>117</sup> See Tani, *supra* note 1, at 60–66 (commenting on the narratives of neutrality emerging from the metaphor of judge as umpire).

<sup>118</sup> See, e.g., Blake, *supra* note 22.

<sup>119</sup> Justice Thomas famously called the proceedings a “high-tech lynching.” Michael S. Rosenwald, “A High-Tech Lynching”: How Brett Kavanaugh Took a Page from the Clarence Thomas Playbook, WASH. POST (Sept. 27, 2018, 4:54 PM), <https://www.washingtonpost.com/history/2018/09/25/high-tech-lynching-how-clarence-thomas-fury-saved-his-supreme-court-nomination/> [https://perma.cc/E4S7-WMPN]. Justice Sotomayor's confirmation also raised questions surrounding the role of emotions in judging, but from a different vantage point. In that context, she distanced herself from President Obama's praise of empathy in judges. See Peter Baker, *In Court Nominees, Is Obama Looking for Empathy by Another Name?*, N.Y. TIMES (Apr. 25, 2010), <https://www.nytimes.com/2010/04/26/us/politics/26memo.html> [https://perma.cc/2YCW-YWBA]. Professor Robin West contends that the treatment of empathy signaled a broader shift in philosophies of judging away from moral judging to scientific (or umpire-like) judging. See Robin West, *The Anti-Empathic Turn*, in PASSIONS AND EMOTIONS: NOMOS LIII 243, 251 (James Fleming ed., 2013). The label “emotional” also seems to have a negative connotation for at least Justice Alito: In his dissent from the Court's decision in *United States v. Windsor*, 570 U.S. 744 (2013), protecting same-sex marriage, Justice Alito claimed that “[s]ame-sex marriage presents a highly emotional and important question of public policy — but not a difficult question of constitutional law.” *Id.* at 807 (Alito, J., dissenting). This Term he similarly dissented from the Court's dismissal of a case involving the question of whether the federal Emergency Medical Treatment and Labor Act (EMTALA) preempts an Idaho law restricting abortion, writing that the “question is as ripe for decision as it ever will be. Apparently, the Court has simply lost the will to decide the easy but emotional and highly politicized question that the case presents.” *Moyle v. United States*, 144 S. Ct. 2015, 2028 (2024) (Alito, J., dissenting).

<sup>120</sup> Justice Alito also figures prominently in Professors Barry Sullivan and Ramon Feldbrin's catalogue of Justices who have publicly opined about cases the Supreme Court decided or might decide. See Barry Sullivan & Ramon Feldbrin, *The Supreme Court and the People: Communicating Decisions to the Public*, 24 U. PA. J. CONST. L. 1, 31 (2022).

<sup>121</sup> Samuel A. Alito Jr., Opinion, *Justice Samuel Alito: ProPublica Misleads Its Readers*, WALL ST. J. (June 20, 2023, 6:25 PM), <https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda> [https://perma.cc/L9PB-RWG2]. For *ProPublica*'s account of the chronology, see Jesse Eisinger & Stephen Engelberg, *Behind the Scenes of Justice Alito's Unprecedented Wall Street Journal Pre-Buttal*, PROPUBLICA (June 25, 2023, 5:00 AM), <https://www.propublica.org/article/behind-scenes-alito-wall-street-journal-prebuttal-editorial> [https://perma.cc/K97W-TAQQ].

published in the *Wall Street Journal*.<sup>122</sup> In that setting, he acknowledged that his actions were unusual in light of tradition but insisted on the need to defend himself:

“I marvel at all the nonsense that has been written about me in the last year” . . . “[T]he traditional idea about how judges and justices should behave is they should be mute” [and] others, especially “the organized bar” [should] defend them. “But that’s just not happening. And so at a certain point I’ve said to myself, nobody else is going to do this, so I have to defend myself.”<sup>123</sup>

Given Justice Alito’s prominence and the significance of opinions that he has authored to particular movements, including the decision in *Dobbs v. Jackson Women’s Health Organization*<sup>124</sup> overturning the right to abortion under the Fourteenth Amendment,<sup>125</sup> one wonders what “nobody” defending him means.

Individual self-defense quickly shifts, in the interview, into Justice Alito’s defense of the Court against change.<sup>126</sup> Indeed, the effect of the rhetoric of aggrievedness may be to eviscerate a systemic critique of its potency by making it seem like an attack on individual character. During the interview, Justice Alito opines, “I know this is a controversial view, but I’m willing to say it” . . . . “No provision in the Constitution gives [Congress] the authority to regulate the Supreme Court — period.”<sup>127</sup>

The new style of the aggrieved judge doubtless partakes of our political moment, in which President Trump appeals directly to his followers on X about perceived injustices.<sup>128</sup> In this respect, at least, some of the Justices follow another branch. By focusing on the personal, however, this style also minimizes the significance of the prospect of structural change, one fleetingly raised by the Supreme Court Commission’s Report toward the beginning of President Biden’s term and his proposal

<sup>122</sup> David B. Rivkin Jr. & James Taranto, Opinion, *Samuel Alito, The Supreme Court’s Plain-Spoken Defender*, WALL ST. J. (July 28, 2023, 1:57 PM), <https://www.wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender-precident-ethics-originalism-5e3e9a7> [<https://perma.cc/5GDA-AKYY>].

<sup>123</sup> *Id.*

<sup>124</sup> 142 S. Ct. 2228 (2022).

<sup>125</sup> *See id.* at 2279.

<sup>126</sup> *See* Rivkin & Taranto, *supra* note 122. Interestingly, Justice Kagan’s public interviews — while not referring as personally to herself as Justice Alito’s — have sometimes taken the contrasting position, forcefully warning that the Supreme Court is undermining its own legitimacy. *See* Josh Gerstein, *Kagan Repeats Warning that Supreme Court Is Damaging Its Legitimacy*, POLITICO (Sept. 14, 2022, 5:56 PM), <https://www.politico.com/news/2022/09/14/kagan-supreme-court-legitimacy-00056766> [<https://perma.cc/8W85-GLVW>].

<sup>127</sup> Rivkin & Taranto, *supra* note 122.

<sup>128</sup> For a discussion of Trump’s cultivation of an aggrieved persona, see Rich Lowry, Opinion, *The Victim President*, POLITICO (Dec. 18, 2019, 7:46 PM), <https://www.politico.com/news/magazine/2019/12/18/trump-impeachment-victim-087534> [<https://perma.cc/FGS9-XZRC>].

for Supreme Court term limits and a binding code of conduct toward the end.<sup>129</sup>

### CONCLUSION

Tani's Foreword asks us to look at the stories that the Supreme Court picks for us to care about and those that they do not and the narrative that the Court constructs about its own authority. What unifies its stories of a "best interpretation" of statutes and a historical alternative to creating "policy" in constitutional rights adjudication with the emergence of the new figure of the aggrieved Justice is that these narratives and characters work together to enhance the power of the Court over state and federal legislatures and the administrative state.

Maintaining the existence of a "best reading" of text discernible by judges takes discretion away from agency or other executive branch interpreters. Moving away from means-ends scrutiny tethers legislatures to consistency with historical rationales for lawmaking rather than allowing them to reason anew in the present. And the persona of the aggrieved Justice suggests that any congressional efforts to reign in the Court are simply personal attacks rather than systemic reforms. Once we fully see the artifice involved in these narratives, perhaps we can begin to undo their effects.

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<sup>129</sup> See PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT 6–10 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf> [<https://perma.cc/ME4K-WJ9G>]; Press Release, The White House, FACT SHEET: President Biden Announces Bold Plan to Reform the Supreme Court and Ensure No President Is Above the Law (July 29, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/07/29/fact-sheet-president-biden-announces-bold-plan-to-reform-the-supreme-court-and-ensure-no-president-is-above-the-law> [<https://perma.cc/GW6T-3QWD>].