

Partisanship, Remedies, and the Rule of Law

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ABSTRACT. This is a response to a Book Review of *The Collapse of Constitutional Remedies* by Judge Don R. Willett and Aaron Gordon. This response is motivated by several concerns about the accuracy of the Review’s description of my book. To begin with, the Review ignores one of the book’s two main, interlocking arguments. It addresses the book’s other main claim. But, confusingly, it first rejects that claim – that there is a remedial gap between cases involving violence and cases involving regulation – and then endorses it. Other large tracts of the Review do not even address the book’s arguments. Instead, it sets out a highly controversial account of what the *substance* of constitutional law should be. While notionally labeled “originalist,” this account is explicitly centered around early twentieth-century liberty of contract and the deregulatory vision of the post-Reagan Republican Party coalition. While orthogonal to *Collapse’s* discussion of remedies, this constitutional vision inadvertently illustrates one of the book’s main themes – how judges can bundle together bundles of policy preferences associated with contemporaneous partisan formations, and peremptorily label them as “constitutional law.”

INTRODUCTION

“*[E]very theory is ‘partisan.’*”¹

On the last day of the October 2021 Term, the Supreme Court stripped the Environmental Protection Agency of effectual authority to regulate greenhouse emissions.² Its decision to treat the case as justiciable did not rely on any operative or even imminent regulation. Indeed, no such regulation existed. Rather, it hinged on the government’s failure to categorically disavow any *future possibility*

1. RAYMOND GEUSS, PHILOSOPHY AND REAL POLITICS 29 (2008).

2. *West Virginia v. EPA*, 142 S. Ct. 2587, 2606 (2022) (“EPA informed the Court of Appeals that it does not intend to enforce the Clean Power Plan because it has decided to promulgate a new Section 111(d) rule.”).

that it would “reimpose emissions limits.”³ The same day, the Court resolved on the merits another challenge to administrative-agency authority—this time, the Biden administration’s ability to shut down the Trump-era “remain in Mexico” program.⁴ This result came about in the teeth of what all acknowledged was a lack of subject-matter jurisdiction on the part of the intermediate appellate tribunal under review.⁵ In both cases, the Court reached the substance of these hard questions about regulatory action despite substantial procedural objections. In one case, it did so in the absence of any actual or imminent exercise of such power and notwithstanding the strictures of Article III justiciability.

One week earlier, in stark contrast, the same Court took the step of eliminating jurisdiction under 42 U.S.C. § 1983 over actions challenging an actual “violation of the *Miranda* rules.”⁶ The same Term, the Court also imposed two new sets of boundaries on postconviction habeas courts’ power to gather new evidence.⁷ These new boundaries constrained the availability of habeas relief for petitioners who had, in fact, experienced a constitutional violation. Both also increased the number of evidentiary hurdles a habeas petitioner must surmount to secure merits consideration.⁸ Yet another case snuffed out jurisdiction over a subset of damages remedies against federal officials who used extralegal violence against private citizens.⁹ And in a pair of further judgments, the Court first extinguished the ability of noncitizens detained by the federal government on immigration grounds to seek relief from their confinement in a periodic bond hearing,¹⁰ and then shut off their ability to obtain class-wide relief on any legal

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3. *Id.* The majority also noted that the Solicitor General “‘vigorously defend[ed]’ the legality” of new emissions limits. *Id.*
 4. *Biden v. Texas*, 142 S. Ct. 2528, 2535 (2022).
 5. *See id.* at 2538; *id.* at 2552 (Alito, J., dissenting); *id.* at 2564 (Barrett, J., dissenting).
 6. *Vega v. Tekoh*, 142 S. Ct. 2095, 2101 (2022).
 7. *See Shoop v. Twyford*, 142 S. Ct. 2037, 2043 (2022) (limiting the ability of district courts to issue transportation orders because the federal habeas statute “restricts the ability of a federal habeas court to develop and consider new evidence”); *Shinn v. Ramirez*, 142 S. Ct. 1718, 1732, 1739 (2022).
 8. *Brown v. Davenport*, 142 S. Ct. 1510, 1531 (2022) (holding that a “federal court cannot grant habeas relief unless a state prisoner like Mr. Davenport satisfies both this Court’s equitable precedents and Congress’s statute”).
 9. *Egbert v. Boule*, 142 S. Ct. 1793, 1802–04 (2022).
 10. *Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827, 1833 (2022) (“[T]here is no plausible construction of the text of § 1231(a)(6) that requires the Government to provide bond hearings before immigration judges after six months of detention, with the Government bearing the burden of proving by clear and convincing evidence that a detained noncitizen poses a flight risk or a danger to the community.”).

ground.¹¹ Across all the latter class of cases, individuals faced immediate state coercion, violence, or restraint—not merely the prospect of choosing between regulatory compliance or paying a penalty in the future. And in each case, an individual experiencing state violence lost their ability to contest the legality of such treatment in federal court.

At stake in all these disputes, from the climate-change litigation to retail immigration-detention matters, was *the allocation of federal-court remedies*: Which litigants can access Article III adjudication? When must litigants await the consummation of a challenged governmental action? When can they turn to the federal courts to act as a shield? And when is a litigant either de facto or de jure precluded from any effectual federal judicial response to a wrong—and, in particular, a constitutional wrong?

Remedial access is conceptually distinct from substantive law. In practice, however, a denial or delay in remediation often translates into the dilution or destruction of a substantive right. At the same time, remedial access in federal court is rarely constitutionally obligate. Instead, the scope and distribution of individual remedies typically depends on a complex blend of constitutional analysis (e.g., of Article III bounds on justiciability), statutory interpretation, and prudential judgment.

In crafting remedial access, the Supreme Court appeals expressly and frequently to consequentialist considerations. Justice Thomas’s opinion in *Shinn v. Ramirez*, for example, lauded “the many benefits of exhaustion and procedural default, and the substantial costs when those doctrines are not enforced,” and then bemoaned the risk of “sandbag[ging]” that attends “broadly available habeas relief.”¹² As a matter of black-letter law, the scope of constitutional remedies is not determined solely by the Constitution. It is also shaped by the Justices’ understanding of statutory text and their own evaluation of what policy consequences matter.

Focusing narrowly on the management of remedial access during the Court’s October 2021 Term, even an unschooled eye quickly apprehends a clear pattern. The Supreme Court is actively raising the bar for individual efforts to contest immediate state coercion in the form of physical violence or imprisonment. At the same time, the Court remains very receptive to challenges to federal regulations. This second class comprises challenges to rules that regulate conduct primarily via civil sanctions, even when those rules will not be imminently applied. This binary pattern raises the question of how the Court’s doctrine allocates the

11. *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2062–63 (2022) (holding that 8 U.S.C. § 1252(f)(1) “deprive[s] the District Courts of jurisdiction to entertain [immigration detainees’] requests for class-wide injunctive relief”).

12. *Ramirez*, 142 S. Ct. at 1732, 1739.

limited stock of federal adjudicative resources between different classes of cases. Is the divergent treatment of remedies for state violence and for regulation an isolated quirk of the 2021 Term? Or is it a more persistent feature of the Roberts Court's jurisprudence?

My 2021 book *The Collapse of Constitutional Remedies (Collapse)* demonstrates that this remedial gap between rights and structure cases has been an enduring one.¹³ The October Term 2021 cases are, in effect, an “out of sample” test of its hypothesis. The book is further an effort to explain, for a nonspecialist audience beyond the legal academy, why the Court's remedies decisions matter and how they come to be.

Collapse's central argument is twofold. *First*, the Framers crafted a model of judicial independence focused on individual judges, not the institutional character of the judiciary. This model rested on two assumptions: (1) that there would be a limited supply of qualified jurists, and (2) that there would be a nonpartisan Senate. Both those assumptions failed in the republic's first decades. In consequence, the agenda and dispositions of judicial appointments – especially to the Supreme Court – have long been shaped by elected officials' partisan-inflected choices among otherwise qualified nominees. The vulnerability of individual appointments to partisan political influence did not abate even as the federal courts grew from relatively minor elements of the national government to more geographically extensive, bureaucratically muscular, and politically influential bodies.

Second, one domain of law in which partisan dynamics can be observed is the jurisprudence of constitutional remedies, especially in cases involving discrete acts of state violence. This is true on both sides of the aisle. The (liberal) Warren Court enlarged the scope of potential remediation; the (conservative) Burger, Rehnquist, and Roberts Courts have all narrowed remedial access for subjects of individual state coercion while keeping federal courthouses open to those challenging federal regulation. The ensuing remedial gap has regressive effects. It disadvantages some of the most marginalized and vulnerable in society. Given this morally undesirable effect, I argue, the remedial gap warrants congressional action.

I set all this out because it is difficult to glean the book's argument from Judge Don R. Willett and Aaron Gordon's Book Review of *Collapse*.¹⁴ To begin with, the book's first claim – that Article III is structurally porous to partisan forces via the appointment process – is largely absent from their review. Almost half of *Collapse's* argument is thereby ignored. On my second claim, Willett and Gordon at

13. AZIZ Z. HUQ, *THE COLLAPSE OF CONSTITUTIONAL REMEDIES* (2021).

14. Don R. Willett & Aaron Gordon, *Rights, Structure, and Remediation*, 131 *YALE L.J.* 2126 (2022) (reviewing HUQ, *supra* note 13).

least engage. They deny the existence of a remedial gap between cases involving violence and cases involving regulation. But then, they endorse the same combination of limited remedies against state violence and plenary remedies against regulation. Remarkably, they do not even appear to notice they are embracing the very remedial double standard they elsewhere deny.

Their account of remedies touches on several interesting points.¹⁵ But it is overshadowed by a hasty pivot to substantive constitutional law. Specifically, Willett and Gordon devote a large portion of their piece to setting out a highly controversial account of constitutional law that has little to do with *Collapse's* analysis of remedies. Their vision is centered around the early twentieth-century idea of liberty of contract and the deregulatory vision of the post-Reagan Republican coalition. These partisan-coded positions are awkwardly repackaged under the flag of “originalism.” To be clear, their account of constitutional law is only remotely connected to the law of remedies and, therefore, to the argument of *Collapse*. Its most important connection to the latter is negative: by systematically marginalizing the concerns of those most vulnerable to state violence, Willett and Gordon’s theory implicitly critiques *Collapse's* use of a substantive, moral lens.¹⁶ Their review then concludes by invoking the “rule of law” to criticize my call for Congress to exercise its textually committed, historically well-trodden authority to adjust federal jurisdiction to address such violence.¹⁷

So there are several quite specific reasons for me to respond to Willett and Gordon, quite apart from my self-regarding desire to correct their description of *Collapse*. More broadly, I respectfully disagree not only with the substance of Willett and Gordon’s review, but also demur to the way they make their arguments. This Response is an opportunity, therefore, to rearticulate, emphasize, and practice three important norms of scholarship.

15. Willett and Gordon occasionally raise good points, and I want to acknowledge a couple here. First, in discussing individual remedies for state violence, they correctly observe that, in the pool of presently litigated cases, qualified immunity “is not the reason most plaintiffs are unsuccessful.” *Id.* at 2183. This is true enough, although it tells us little about how weakening the doctrine of qualified immunity would alter the rate at which claims were settled or change the mix and character of litigated claims. Second, Willett and Gordon note that litigants in separation-of-powers challenges to the administrative state have ultimately gone on to be subject to regulatory oversight. *Id.* at 2155-56. Clearly, this is not true of successful challenges to agency authority, such as *West Virginia v EPA*. See *supra* note 2 and accompanying text. But Willett and Gordon surely have a point with respect to other cases, and I agree that this warranted more attention than I gave it. Finally, I do not address their Part III, which makes various arguments about constitutional torts. I do not mean, by omission, to imply agreement with those contentions.

16. Willett & Gordon, *supra* note 14, at 2144.

17. *Id.* at 2191-92.

First, while Willett and Gordon repeatedly use vitriolic and personal language to attack either *Collapse* or me as “ideological[],” “emotionally charged,” and “insincer[e],”¹⁸ I extend to them a consistent presumption of good faith. So, when I underscore the close correlation between their views of “law” and partisan positions, I am not making a claim about “sincerity.” I am instead illuminating the way in which Willett and Gordon’s own arguments refute the supposed constitutional law/partisan politics divide on which they trade.

In a similar vein, I avoid attributing to Willett and Gordon views they do not express on the published page.¹⁹ Doing so presents certain challenges. A persistent feature of Willett and Gordon’s piece is a slippage between different modalities of argument. For example, they define “law” to exclude categorically all policy considerations or personal preferences²⁰ but then draw “legal” conclusions explicitly on policy grounds. It is difficult to discuss their argument using their terms because they deploy these terms inconsistently or in ways at odds with their standard usages. By highlighting how and when Willett and Gordon slip from one rhetorical register to another, I aim to avoid mischaracterizing their

18. *Id.* at 2131, 2177, 2192.

19. In contrast, there are many errors in their Book Review’s presentation of the arguments in *Collapse*. I offer here three examples. But I want to underscore that these instances are very much exemplary and not at all exhaustive.

First, Willett and Gordon say that I reject all procedural-default rules in postconviction habeas. *Id.* at 2177–78. But I make no such claim. Indeed, they apparently did not look at my published work on postconviction habeas. My work argues that the “model of habeas as it now exists can be useful as a discrete instrument within the much larger project of reforming larger criminal law institutions in ways that improve social welfare.” Aziz Z. Huq, *Habeas and the Roberts Court*, 81 U. CHI. L. REV. 519, 594 (2014).

Second, Willett and Gordon accuse me of “misreading[] . . . the Court’s holdings.” Willett and Gordon, *supra* note 14, at 2148. Specifically, they accuse me of a “misstatement” of the holding of *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012). Willett & Gordon, *supra* note 14, at 2153. I state the holding of *Sebelius* as follows: “[T]he Court found that Congress lacked power to impose an insurance mandate except as a conditional tax, and struck down a major expansion of Medicaid as an exercise of improper coercion by the federal government.” HUQ, *supra* note 13, at 141. I subsequently say that “a majority of Justices” took a position on “the Commerce Clause of Article I” that would work as a “means to finding the whole law unconstitutional.” *Id.* at 147 (emphasis added). By omitting the first statement, and by omitting the fact that the second statement was *only about the Commerce Clause holding*, Willett and Gordon manufacture a “misstatement” from thin air.

Third, Willett and Gordon say I “fret[] about the increasing in the volume and complexity of federal legislation” and so, should support a more robust nondelegation doctrine. Willett & Gordon, *supra* note 14, at 2194. This takes a *descriptive* point that the complexity of legal text means that text alone imposes less of a constraint on judges, HUQ, *supra* note 13, at 44, and twists it into the completely different *normative* claim that a lighter regulatory footprint is better.

20. Willett & Gordon, *supra* note 14, at 2137, 2139.

argument while also drawing out their argument's acute internal inconsistencies and conflicts. This requires close attention on my part to their use of language.

Finally, all should agree that reasoned argument is impossible if one follows the example of Humpty Dumpty. In Lewis Carroll's famous tale, Humpty Dumpty declared that when he used a word, "it means just what I choose it to mean – neither more nor less."²¹ Working in this vein, Willett and Gordon deploy key terms in idiosyncratic and misleading ways. They do so without offering either warning or operative definition. This is particularly true of their deployments of the terms "judicial independence" and "the rule of law." It is also true of their bald assertions about what counts as constitutional "law." In contrast, I strive here for definitional clarity.²² I take pains to show how their inconstant usage of key terms leads Willett and Gordon not merely to caricature my argument, but also to place themselves at war with their own originalist commitments.

However, this is not merely a dispute over a book or the merits of a review. A written response to the Book Review is warranted for a second reason of broader interest. Recall that Willett and Gordon make large claims about what constitutional "law" is. In doing so, they crisply illustrate how an ideological package of policy preferences can be bundled together and peremptorily labeled as "law." To the extent that their views reflect those of recent Republican appointments to the federal bench and the dominant coalition on the Supreme Court, their text offers a roadmap for how such judges might try to translate their own policy preferences into law. Their arguments thus provide an illustration and a striking confirmation of *Collapse's* core claim: they show how the approach of Article III judges can be shaped by partisan forces.

21. LEWIS CARROLL, *THE ANNOTATED ALICE: ALICE'S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING-GLASS* 251 (Martin Gardner ed., 2015) (1960).

22. One of the touchstones of Willett and Gordon's critique is the "vagueness" of *Collapse's* claims, Willett & Gordon, *supra* note 14, at 2159, and the absence of empirical support, *see id.* at 2162 ("Huq rarely offers more than a scintilla of evidence . . ."). But *Collapse* is a book for a general audience. It is not written in the style of a law-review article and does not have the supporting apparatus of a law review's footnotes and appendices. In effect, Willett and Gordon take a general-audience book and repeatedly criticize it for not being a law-review article. Their inattention to form is just one of the baffling features of their Book Review, and I can only speculate on its origins. But since this is a law review, I can and do offer more detailed substantiation of empirical points.

All that said, it is worth noting in advance that even on minor points, *Collapse* is founded on evidence. For instance, Willett and Gordon complain that I have no evidence that property owners tend to win in the Supreme Court. *Id.* at 2161 n.186. They might have glanced at a recent study that found "86% of civil property-related disputes" in the Roberts Court ended in a victory for owners. John G. Sprankling, *Property and the Roberts Court*, 65 U. KAN. L. REV. 1, 1 (2016).

To reiterate, this mapping of partisan effects does not necessarily imply an absence of good faith on Willett and Gordon's part. It is quite possible to hold a set of views sincerely even if those opinions are shaped by unacknowledged external forces. But at a moment in history when the Supreme Court is more ideologically extreme than it has been in almost a century,²³ and in which partisan actors are looking to the Court not just to achieve their substantive policy goals but also to entrench their political power beyond electoral challenge,²⁴ a close reading of such arguments is especially instructive.

My Response here proceeds in three steps. Part I addresses Willett and Gordon's confusion about the key term "judicial independence" and their resulting misrepresentation of *Collapse's* central descriptive thesis. Part II explores Willett and Gordon's claim that there is no remedial gap, as well as their controversial, one-sided definition of what counts as constitutional "law." Finally, Part III examines the criteria Willett and Gordon use to evaluate legal claims and, in particular, their misuse of the term "rule of law."

I. NATIONAL PARTISAN POLITICS AND FEDERAL JUDGING

To illuminate past and present landscapes of remedial access, *Collapse* maps out how Article III historically structured the relationship between national partisan politics and federal decision-making. The design of Article III, I explain, gives Congress broad power to establish (or not) lower federal courts and assign them more or less jurisdiction.²⁵ Instead of protecting the courts as an *institution* from improper political influences, Article III protects *individual* judges through ex post tenure protections.²⁶ It also rejects any mandatory lower-court

23. Stephen Jessee, Neil Malhotra & Maya Sen, *A Decade-Long Longitudinal Survey Shows that the Supreme Court Is Now Much More Conservative than the Public*, 119 PROC. NAT'L ACAD. SCI. art. no. 24, at 1 (2022); see also Joan Biskupic, *The Court Hasn't Been This Conservative Since the 1930s*, CNN (Sept. 20, 2020), <https://www.cnn.com/2020/09/26/politics/supreme-court-conservative/index.html> [<https://perma.cc/X735-5SM9>] (arguing that the addition of Amy Coney Barrett to the Supreme Court could "wind back the law in America for decades").

24. Adam Liptak & Nick Corasaniti, *Supreme Court to Hear Case on State Legislatures' Power over Elections*, N.Y. TIMES (June 30, 2022), <https://www.nytimes.com/2022/06/30/us/politics/state-legislatures-elections-supreme-court.html> [<https://perma.cc/LV25-G3LK>].

25. HUQ, *supra* note 13, at 24-29.

26. *Id.* at 30. This is a well-established distinction. See John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 355 (1999) ("Independence seems to have at least two meanings. One meaning [is] commonly invoked when considering the circumstances of the individual judge Another meaning . . . applies naturally to courts and to the judicial system as a whole."); Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 340 (1999). I have developed the same distinction

jurisdiction, leaving the choice of whether and how to fashion such tribunals to Congress, and it does not take up the possibility of *ex ante* protection through the use of a nonpartisan selection process. In consequence, judges are protected as individuals once appointed, even as the judiciary as an institution remains exposed to legislative change. That is, Article III picks one out of many possible ways of understanding and realizing judicial independence.

Collapse argues that the Framers' decision to vest appointments in the Senate and White House rested on two "presuppositions" – that the supply of qualified lawyers would be so limited, and the upper chamber of Congress so nonpartisan, that the federal courts would be shielded from political influence.²⁷ These assumptions quickly failed because of the rise of law schools and national political parties. This left the judiciary susceptible to political influence by the early nineteenth century.²⁸

With this structural critique developed, *Collapse* then charts a separate historical arc from the "weak," thinly staffed federal courts of the late eighteenth century to the robust and extensive institutional apparatus of the contemporary federal courts.²⁹ This growth was a result of congressional decisions. Not surprisingly, it reflected transient partisan priorities. Legislation enlarging judicial institutions was enacted only when it helped the policy ends of a national political coalition.³⁰ Jurisdiction-related legislative initiatives also tended to be asymmetrical. Once created, new courts and new jurisdictional powers proved hard to "unravel."³¹ The result was a far more powerful *institutional* judiciary by 1900, albeit one still appointed via a channel vulnerable to partisan tides.

A reader of Willett and Gordon's Book Review will be surprised by this summary, which covers two chapters, or roughly one-third, of *Collapse*. Willett and Gordon spend one page recounting it.³² They do not seriously engage with either the structural point about Article III's design or the historical development

in light of extensive comparative and empirical research in an earlier article. See Aziz Z. Huq, *Why Judicial Independence Fails*, 115 NW. U. L. REV. 1055 (2021).

27. HUQ, *supra* note 13, at 33-37.

28. *Id.* at 37-46.

29. *Id.* at 53-75.

30. *Id.* at 53-54; *id.* at 58 (linking the growth of judicial power to "the larger project of American state-building").

31. *Id.* at 72-73. There are important exceptions to this trend, which I discuss *infra* at text accompanying notes 170-172.

32. Willett & Gordon, *supra* note 14, at 2133.

of federal jurisdiction. And what they do say is analytically confused and misleading.³³

Before I respond to Willett and Gordon's critiques, it is helpful to offer a precise definition of one important term their Book Review employs in confused ways. Willett and Gordon use the term "judicial independence" to refer to one arbitrarily selected element of that complex phenomenon. At the same time, they selectively suppress its other essential components.

The extensive scholarly literature on judicial independence identifies several different ways in which a constitution can protect judicial independence. A constitution can, for example, focus on either the individual judge or the judiciary as an institution. It can also install either *ex ante* or *ex post* shields.³⁴ Following that literature, *Collapse* explains why our Constitution's specific choice from the range of institutional design features meant to engender and sustain judicial independence has fallen short. It explains, in other words, why and how the selection of *individual* judges can be subject to partisan forces, even as the autonomy and influence of the *institutional* judiciary have become increasingly entrenched.³⁵

Implicitly and without any explanation, Willett and Gordon define judicial independence solely in relation to threats of *ex post* congressional interference. They thereby garble the central claim of *Collapse*—namely, that the Article III selection process is structurally porous to partisan influence. That is, Willett and Gordon use the term "judicial independence" as if it were a single quality that is either present or absent.³⁶ They criticize *Collapse* on the basis of a definition unmoored from both conventional usage and constitutional law. They repeatedly conflate "inadequate protections for judicial independence" with congressional changes to jurisdiction.³⁷ They praise the "ingrained norm" of avoiding "ex post

33. Willett and Gordon argue that there is no causal claim in my account and that I "revise" my claim "roughly halfway through the book." See *id.* at 2133-34. I explain why both criticisms fall wide of the mark. See *infra* text accompanying notes 55-59.

34. The idea that there are several different ways of translating the abstract concept of "judicial independence" into practice is well-trodden ground. See, e.g., Bernd Hayo & Stefan Voigt, *Mapping Constitutionally Safeguarded Judicial Independence—A Global Survey*, 11 J. EMPIRICAL LEGAL STUD. 159, 159-61 (2014) (surveying national constitutions and finding that most insatiate judicial independence through plural elements); James Melton & Tom Ginsburg, *Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence*, 2 J.L. & CTS. 187, 195-96 (2014); Bernd Hayo & Stefan Voigt, *Explaining De Facto Judicial Independence*, 27 INT'L REV. L. & ECON. 269, 272 (2007).

35. HUQ, *supra* note 13, at 37-46.

36. See Willett & Gordon, *supra* note 14, at 2133; see also *id.* at 2134 (asking whether there have been "successful efforts by Congress during the relevant period to eliminate lower courts, curtail federal jurisdiction, or add seats").

37. *Id.* at 2133.

political checks” as evidence of judicial independence.³⁸ They hence assume (contrary to Article III’s design) that judicial independence operates at the *institutional* level. They also systematically ignore the effect of partisanship on the selection of *individual* judges.

This definitional choice is not only misleading. It is arbitrary. Willett and Gordon offer no justification for why, as self-identified originalists, they ignore Article III’s approach to the structural value of judicial independence as a matter of individual and not institutional protection. For their understanding of judicial independence is radically different from the one embodied in Article III. Nor do they offer a reason for simply ignoring *Collapse’s* structural and historical critique of how Article III realizes the autonomy of the federal courts.

This definitional confusion then leads to serious analytic error. It is obviously false to assume that if judicial independence is protected at the institutional level, it will necessarily be protected at the individual level. An institution can be powerful and entrenched, and yet politically captured through its appointment process. Willett and Gordon miss this basic point. They ignore, or fail to see, the difference between courts as an institution and judges as individuals.

What, then, of *Collapse’s* core argument that Article III’s presuppositions have failed, resulting in an appointment process porous to partisan influences? Willett and Gordon do not seriously engage with this structural and historical critique. Instead, they baldly assert that “the Constitution’s judicial-selection mechanism, designed to ensure *ex ante* that appointees have the requisite skills and character . . . *generally promote[s]* the objective of adjudication in conformity with law.”³⁹ Partisan battles over judicial selection, their argument goes, are the fault of “so-called ‘Legal Realism’” and would abate if only judges adhered to Willett and Gordon’s view of law.⁴⁰

Let us set aside the claim that “Legal Realism” as a body of scholarship *causes* federal judges to act in certain ways.⁴¹ I will also defer to Section II.B an analysis of Willett and Gordon’s highly selective account of constitutional law. I want instead to cut through their terminological confusion and focus here on the first part of their claim – that Article III’s “judicial-selection mechanism” “generally” insulates the federal bench from ideological forces.

This assertion is at odds with an enormous body of empirical evidence. Just as they fail to substantively engage with *Collapse’s* structural critique, Willett and

38. *Id.* at 2136.

39. *Id.* (emphasis added).

40. *Id.* at 2195-96.

41. This logic suggests that one should blame Pablo Picasso for the horrors of Guernica and Francisco Goya for the crimes of the Peninsular War.

Gordon also turn a blind eye to the extensive research on judicial ideology. Their core empirical claim is not just false; its falsity has been known for decades.

Adam Bonica and Maya Sen’s recent review of the empirical literature on judicial ideology starts by explaining that “most contemporary researchers agree that ideology— usually measured via partisanship [of the appointing President or political coalition⁴²]— is among the most important factors shaping judicial decision making.”⁴³ You would not know this consensus existed from reading Willett and Gordon’s Book Review. Given their silence, I offer here an illustrative (but far from exhaustive) sampling of empirical findings with respect to the Supreme Court (the focus of *Collapse*) and a brief nod to evidence about the circuit courts.

Empirical evidence of ideological effects in Supreme Court decision-making spans the breadth of American history. To identify such effects is not, therefore, to criticize contemporary courts. It is to recognize a structural regularity of federal judicial behavior. In a comprehensive, multivariate analysis of Supreme Court decisions invalidating statutes across a two-hundred-year span, for example, Linda Camp Keith found that “a Supreme Court justice’s vote on the constitutionality of a congressional statute is strongly influenced by the consistency between the policy direction of the statute and the [J]ustice’s ideological preferences.”⁴⁴ Leading political scientists Lee Epstein, Andrew D. Martin, Kevin M. Quinn, and Jeffrey A. Segal identified a “wealth of behavioral data” demonstrating “the extent to which initial impressions of the ideology of many Justices, as

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42. On the influence of congressional politics on presidential nomination decisions, see Kevin J. McMahon, *Presidents, Political Regimes, and Contentious Supreme Court Nominations: A Historical Institutional Model*, 32 LAW & SOC. INQUIRY 919, 921 (2007).
43. Adam Bonica & Maya Sen, *Estimating Judicial Ideology*, 35 J. ECON. PERSPS. 97, 98 (2021); *id.* at 103 (A consistent finding in this literature is that “the party of a judge’s appointing president is a powerful predictor of Supreme Court decision-making across a variety of subject matters.”). For a stronger version of this point, see JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 66 (2002), which declares that the notion of group intent may be “meaningless” based on empirical findings using the attitudinal model.
44. LINDA CAMP KEITH, *THE U.S. SUPREME COURT AND THE JUDICIAL REVIEW OF CONGRESS* 179 (2008); *accord* STEFANIE A. LINDQUIST & FRANK B. CROSS, *MEASURING JUDICIAL ACTIVISM* 59–64 (2009) (finding that the majority of Justices serving since 1953 were ideological in their approach to judicial review); Robert M. Howard & Jeffrey A. Segal, *A Preference for Deference? The Supreme Court and Judicial Review*, 57 POL. RSCH. Q. 131, 131 (2004) (arguing that many Justices “appear to base their decisions to strike or uphold . . . laws on ideological considerations,” though the Court “itself can be called restraintist in that it never appears to strike laws sua sponte”); Stefanie A. Lindquist & Rorie Spill Solberg, *Judicial Review by the Burger and Rehnquist Courts*, 60 POL. RSCH. Q. 71, 72 (2007) (finding that “members of both the Burger and Rehnquist Courts are responsive to a number of different factors when assessing the constitutionality of legislative enactments, including their own ideological predispositions toward the substantive policy embedded in the statute”).

nominees, correlate with their subsequent voting on the Court.”⁴⁵ As a corollary, a 2004 computational-modeling study of the Court found that “close attention to legal doctrine turned out to be insufficient to predict reliably the Court’s decisions.”⁴⁶

Nor are ideological effects confined to one political party or one tribunal. The Roosevelt Administration made unprecedented use of judicial ideology and policy considerations in nominating Justices after the Senate rejected wholesale judicial reorganization in July 1937.⁴⁷ On the other hand, focusing just on the Rehnquist Court, Rorie Spill Solberg and Stefanie A. Lindquist found that “conservative justices as well as liberals are likely to strike down state laws when those laws fail to conform to [their] ideological preferences.”⁴⁸ The circuit courts are not as well studied as the Supreme Court. But even with respect to those bodies, the evidence of ideological effects has been accumulating for almost a half century.⁴⁹ For example, in one notable recent study, Neal Devins and Alison Orr

45. Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1490 (2007).

46. Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin & Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1186 (2004).

47. Rayman L. Solomon, *The Politics of Appointment and the Federal Courts’ Role in Regulating America: U.S. Courts of Appeals Judgeships from T.R. to F.D.R.*, 9 AM. BAR FOUND. RSCH. J. 285, 323-27, 341-43 (1984).

48. Rorie Spill Solberg & Stefanie A. Lindquist, *Activism, Ideology, and Federalism: Judicial Behavior in Constitutional Challenges Before the Rehnquist Court, 1986-2000*, 3 J. EMPIRICAL LEGAL STUD. 237, 237 (2006).

49. For instance, a 1999 meta-analysis of over twenty studies involving more than 79,000 court-of-appeals decisions found that political-party affiliation of the circuit-court judge explained about twenty-four percent of the variance in circuit-court outcomes. Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 236 tbl.3 (1999). Three years later, another study found significant correlations between dominant political ideology at the time of appointment and judicial decisions in all substantive domains of law studied. Donald R. Songer & Martha Humphries Ginn, *Assessing the Impact of Presidential and Home State Influences on Judicial Decisionmaking in the United States Courts of Appeals*, 55 POL. RSCH. Q. 299, 322 (2002); accord Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 505 (1975). Other studies have found that the “ideological effect is clear, although it varies for each appointing president.” Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CALIF. L. REV. 1457, 1506 (2003) (finding greater ideological effects for Republican than Democratic presidential appointees); see also Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 304-05 (2004) (finding ideological voting, moderated by peer effects, in the federal circuit courts).

In tension with these studies, Willett and Gordon briefly canvass rates of dissent in the lower federal courts as evidence of the absence of ideology. Willett & Gordon, *supra* note 14, at 2196. But this evidence of intrapanel dissent does not reflect the degree of ideological divergence

Larson found that “partisan splits . . . hovered at around only nineteen percent of all [constitutional] en banc decisions” in the 1990s through the 2010s but saw “a dramatic and strongly statistically significant spike in both partisan splits and partisan reversals of en banc decisions” since 2010.⁵⁰

Willett and Gordon do not acknowledge any of this well-known evidence that the appointment process is porous to partisan ideology and that, as a result, Justices’ votes strongly correlate with the policy preferences of their appointing presidents. They instead proceed as if these findings do not exist. Any decision to ignore well-known and oft-duplicated empirical findings, however, is hard to reconcile with basic norms of scholarly argument.

A secondary consequence of this omission is that Willett and Gordon distort beyond recognition *Collapse’s* argument linking judicial ideology to the availability of constitutional remedies. The book argues that the mid-twentieth-century Court issued a set of decisions expanding constitutional remedies, including damages, habeas relief, and evidentiary exclusion.⁵¹ I explain that this “liberalization of individual rights is best understood as a result of . . . partisan forces.”⁵² That is, “liberal” presidents appointed Justices who reached these “liberal” decisions, just as the empirical literature would predict.⁵³ Republican President Richard Nixon subsequently campaigned against this remedial expansion and appointed Justices who shared his preferences.⁵⁴ This marked the beginning of a move toward the political right and remedial constriction. *Collapse’s* claim here is symmetrical with respect to partisanship: because Article III is porous to ideological forces, judicial appointments change doctrine in *both* political directions.

Willett and Gordon just ignore this argument. “Nowhere,” they say, does *Collapse* explain what “caused the alleged remedial collapse.”⁵⁵ As I have just explained, this is untrue. They also repeatedly say that I “shift[] halfway through the book” from praising to blaming judicial independence.⁵⁶ This is also false. I do not “revise [my] claim halfway through the book.”⁵⁷ Rather, I argue that the

that is manifest in other ways: “[c]omparisons between panels . . . suggest far higher rates of disagreement.” Joshua B. Fischman, *How Many Cases Are Easy?*, 13 J. LEGAL ANALYSIS 595, 616 (2021); see *id.* at 616-17 (“[B]oth within- and between-panel measures of disagreement understate actual levels of judicial disagreement . . .”).

50. Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373, 1380 (2021).

51. HUQ, *supra* note 13, at 89-98.

52. *Id.* at 100.

53. See *supra* text accompanying notes 43-52.

54. HUQ, *supra* note 13, at 99.

55. Willett & Gordon, *supra* note 14, at 2134.

56. *Id.* at 2135.

57. *Id.* at 2134.

partisan appointment process shaped *both* the mid-century expansion and the late-century narrowing of remedies.

Tellingly, Willett and Gordon take sharp umbrage at my “purple-prose denunciations of the Rehnquist Court and Roberts Court” but pass in silence over my diagnosis of the partisan forces behind the Warren Court’s expansion of constitutional remedies.⁵⁸ As I have shown here, my diagnosis is not confined to one political party’s appointees. Willett and Gordon’s selectivity about what criticism to deplore, we shall see, is a harbinger of their one-sided claims about what is, and what is not, constitutional law.⁵⁹

II. DISAGREEMENTS ABOUT REMEDIES, OR A POLITICS OF THE NEW RIGHT?

The longest section of Willett and Gordon’s review mainly pivots on just one chapter of *Collapse*.⁶⁰ Willett and Gordon first dispute that there is a relevant lack of constitutional remedies against state violence and then provide an extensive account of what, in their view, constitutes a “constitutional right.” I address each part of their argument in turn.

At the threshold, however, it is again worth stressing that the second point has little to do with *Collapse*. My book is concerned with remedial doctrine. It is common ground among all the Justices that remedial doctrine is not the same as substantive constitutional law but is informed by both statutory interpretation and policy considerations.⁶¹ Still, Willett and Gordon’s elaborate account of constitutional law is worth analyzing for a different reason: it confirms one of my

58. *Id.* at 2198. Willett and Gordon also object to my sources for the Rehnquist and Roberts Courts. *Id.* at 2134 (complaining that *Collapse*’s “post-Warren Court history is simply a laundry list of complaints”). But I draw here on the work of respected political scientist Kevin J. McMahon, who has explained that “not only did Nixon successfully use the powers of the presidency to shape the Court doctrinally, he used the Court issue as a means of attracting votes at the ballot box.” Kevin J. McMahon, *Will the Supreme Court Still “Seldom Stray Very Far”? Regime Politics in a Polarized America*, 93 CHI.-KENT L. REV. 343, 351 (2018); see KEVIN J. MCMAHON, *NIXON’S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES* 7 (2011). The same point can be made about President Reagan. See KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 89 (Ira Katznelson, Martin Shefter & Theda Skocpol eds., 2007) (noting the Reagan Administration’s emphasis on “judicial ideology” across many issue areas). Willett and Gordon offer no reason to ignore these secondary sources.

59. See *infra* Section II.B.

60. Willett & Gordon, *supra* note 14, at 2147-78.

61. See *supra* text accompanying note 12.

book's central theses about the percolation of partisan influences into constitutional law.

I demonstrate in the second Section of this Part that Willett and Gordon's account of law: (1) is internally inconsistent; (2) lacks any discernable theoretical foundation; and (3) instead systematically maps onto the policy preferences of the present Republican coalition. Willett and Gordon thus unintentionally confirm *Collapse's* structural critique of Article III as porous, consciously or not, to political ideology.

A. *Is There a Remedial Gap?*

In Chapter 4 of *Collapse*, I explained that the Supreme Court has “move[d] away from the robust judicial commitment to individual remedies that manifested in the 1950s.”⁶² As a result, “victims of potentially unconstitutional state coercion” often have no chance to “brief or argue” their substantive claims in court.⁶³ I then summarized changes to the doctrines of qualified immunity, implied rights of action against federal officials, the exclusionary rule in criminal adjudication, and the availability of discovery in litigation concerning discriminatory motives.⁶⁴ I further argued that this doctrinal recession was not “justified” on welfarist grounds—which is, of course, a normative claim, not a legal one.⁶⁵ I then situated these doctrinal changes in a larger institutional context,⁶⁶ taking care to recognize the bipartisan character of the doctrinal change.⁶⁷ In Chapter 5, I then explored the ways in which the doctrinal treatment of remedies against the “despotic” state—that is, the direct use of violence by the state—has differed from remedies against the “regulatory and social state.”⁶⁸

Three important features of this argument are worth laying out at the front end.

First, it is an argument about *remedies*. I assume that there are both rights against state violence and rights against regulation. I am interested, however, in

62. HUQ, *supra* note 13, at 107.

63. *Id.* at 108.

64. *Id.* at 109-23. In a series of articles, I have examined in detail these doctrinal developments. See Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1265-84 (2018); Aziz Z. Huq & Genevieve Lakier, *Apparent Fault*, 131 HARV. L. REV. 1525, 1564-85 (2018); Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 20-52 (2015); Huq, *supra* note 19, at 531-81.

65. HUQ, *supra* note 13, at 123-29.

66. *Id.* at 123-35.

67. *Id.* at 133-35.

68. *Id.* at 140.

the mechanisms for vindicating those rights in court. *Second*, the scope of remedies for legal violations is largely not specified in the Constitution. Instead, as I underscored in the Introduction, the reasoning of recent cases embodies a blend of statutory interpretation, judge-made doctrine, and consequential reasoning. *Third* and finally, *Collapse* draws a sharp line between (1) remedies for rights against immediate state violence (e.g., physical coercion or detention) and (2) remedies against unlawful regulation (e.g., primary-conduct rules enforced by administrative agencies via fines or contempt sanctions). In drawing this line, it is fair to say that I implicitly assume that there is a palpable difference between being physically assaulted and being subjected to a regulation with some kind of delayed enforcement. The basis for this distinction is, in my view, intuitive. Even a dog, Oliver Wendell Holmes might have said, knows the difference between being kicked and being subject to a regulation with the prospect of a fine in the indeterminate future.⁶⁹

Surprisingly, Willett and Gordon do not accept any of these rather banal points. They begin by asserting that an analysis of remedies doctrine cannot proceed without “criteria for identifying what amounts to a constitutional wrong.”⁷⁰ So, it is impossible to discuss remedies alone. They then criticize “consequentialist” reasoning, which they characterize as focusing on the “benefit of social groups with which Huq sympathizes.”⁷¹ Indeed, they flatly reject *all* consequentialist arguments about remedies.⁷² Willett and Gordon finally condemn my “neglect” of “other freedoms,”⁷³ arguing that I treat certain rights as “good” and others as “bad.”⁷⁴

All of these complaints trade in some profound confusions about constitutional-law scholarship. *Pace* Willett and Gordon, there is nothing incoherent about an analytic focus on remedies alone. Those who have taken a remedies or a federal-courts class, I would hope, take this point to heart.

Their second complaint is equally baffling. The relevance of policy and consequentialist grounds to remedies doctrine is widely accepted. Recall that in October Term 2021, both Justices Thomas and Gorsuch wrote opinions endorsing

69. Cf. OLIVER WENDELL HOLMES, *THE COMMON LAW* 3 (Little, Brown & Co. 1923) (1881) (“Even a dog distinguishes being stumbled over and being kicked.”).

70. Willett & Gordon, *supra* note 14, at 2137.

71. *Id.* at 2139.

72. *Id.* at 2163.

73. *Id.* at 2141-45 (discussing property rights and liberty-of-contract claims).

74. *Id.* at 2160.

common-law rules⁷⁵ and consequentialist considerations.⁷⁶ No other Justice suggested their reasoning was out of bounds, and Willett and Gordon offer no reason to think either Justice erred.

Willett and Gordon's third complaint is really with the scope of my book, not its substance. So far as I can tell, they appear to object to my project of writing a book focusing on (a) remedies (b) for unlawful state violence. But why? They do not dispute that the Constitution's Fourth Amendment, Eighth Amendment, and Due Process Clauses protect against much physical coercion by the state.⁷⁷ Willett and Gordon fail to say why it is wrong to write about some elements of the Constitution and not others. I take the (again, banal) view that not being subject to illegal physical violence is of distinctive importance to most people — hence the book's focus. As far as I can tell, Willett and Gordon just value other constitutional rights more. Yet they give absolutely no reason why a focus on overt state violence should be condemned as a culpable “neglect” of other values. And they give absolutely no reason why other scholars should prioritize the elements of constitutional law they find most engaging.

These three complaints, in other words, are ephemeral at best.

75. *Brown v. Davenport*, 142 S. Ct. 1510, 1531 (2022) (enforcing limits on habeas relief based on “th[e] Court’s equitable precedents and Congress’s statute”).

76. *Shinn v. Ramirez*, 142 S. Ct. 1718, 1732, 1739 (2022) (lauding “the many benefits of exhaustion and procedural default, and the substantial costs when those doctrines are not enforced,” and bemoaning the risk of “sandba[gg]ing” that attends “broadly available habeas relief” (quoting *Murray v. Carrier*, 477 U.S. 478, 492 (1986))).

77. They do, however, dispute the Supreme Court’s power to impose prophylactic rules on the states, such as the *Miranda* warnings. See Willett & Gordon, *supra* note 14, at 2139-41. Their argument ignores the well-known “ubiquity” of prophylactic rules in “constitutional law.” David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190, 205 (1988). Later in their review, Willett and Gordon also take a different view when they seem to endorse a robust nondelegation doctrine as a means to address what they see as the recent excessive growth of the American state. See Willett & Gordon, *supra* note 14, at 2172. Apparently, constitutional prophylaxis is justified in that context.

In addition, the application of procedural rules respecting federal rights in state courts is far more complex than one would know from their treatment. They ignore, for example, the “core purpose of the Supremacy Clause . . . to prevent the states from interfering with the unified operation of federal law.” Anthony J. Bellia, Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 902 (2005). As a result, “a great amount of federal law — be it constitutional, statutory, or common law — flows down to apply in state courts.” Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1, 21 (2006). Further, when state courts address federal-law questions, “[u]niformity concerns analogous to those that underlie the *Erie* doctrine have a normative punch . . . and long have animated the fundamental conception that most lawyers share that federal law is supposed to mean the same thing in every jurisdiction.” Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1965 (2011).

At the same time, a distinct, and rather more substantial, strand of their Book Review disputes the existence and practical salience of the remedial gap. Willett and Gordon suggest first that there is no “evidence” of “real-world” consequences from remedial decisions.⁷⁸ In an extended comparison of cases involving individualized state violence by police and state regulation by administrative agencies, they further deny any “judicial partiality for certain litigants” and say that any difference in outcomes is instead simply the result of “different procedural contexts.”⁷⁹ To substantiate this last point, they conduct what purports to be an empirical study of “all Supreme Court cases considering the constitutionality of federal statutes” and find no “statistically significant” difference between different categories of cases.⁸⁰ Yet perhaps the most revealing statement Willett and Gordon make about the remedial gap is simple and declarative: “so what?” they say – there is “no inherent problem with . . . a pattern” in which structural claims are more favorably treated than rights against state violence.⁸¹

These arguments are clearly substantive. But they are also deeply flawed. First, Willett and Gordon are wrong to dismiss the real-world effects of remedial decisions. Second, while they claim there is no meaningful remedial gap, they go on to *endorse* the very same remedial deficit for victims of state violence, while arguing for remedies for regulated parties. Finally, their purported empirical evidence is irrelevant to the question at issue and, for good measure, shows a misapprehension of basic principles of statistical inference.

Let’s take these in turn.

1. *Real-World Effects*. It is useful to start with the “real-world” effects of limiting remedies for unconstitutional state violence. It is not completely clear what Willett and Gordon mean here. Their doubt about the propriety of focusing on state violence alone, however, suggests a skepticism as to whether unconstitutional state violence is a serious problem. I focus on that question first.⁸²

78. Willett & Gordon, *supra* note 14, at 2162–63.

79. *Id.* at 2147–56.

80. *Id.* at 2159–60.

81. *Id.* at 2162.

82. The other way in which one might take Willett and Gordon’s “real-world” critique would construe them as suggesting that judicial remedies generally do not make a difference to the rate of constitutional violations when it comes to unlawful state violence. I agree that there are important questions about when and how specific remedies – such as damages actions or the exclusionary rule – change official behavior on the ground. *See id.* at 2176–77 (arguing against the exclusionary rule on efficacy grounds).

They also argue that criminal-procedure rights impose harmful externalities on vulnerable communities because they lead to the release of “dangerous” individuals. *Id.* at 2174. As I have explained in other work, there are specific contexts in which the rate of false negatives in crime control has a direct public-safety effect on vulnerable communities. *See Aziz Z. Huq, Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1043, 1113–15 (2019) (examining the trade-

Willett and Gordon spend a lot of time critiquing *Collapse* for not offering the kind of empirical proof typical of a law-review article in a book that was written (and footnoted) for a general audience. As it happens, in a recent law-review article, I did empirically examine the frequency of some likely constitutional violations involving state violence or coercion. My coauthors and I found evidence that the vast majority of police stops in a Nashville sample were vanishingly likely to yield evidence, implying a high rate of Fourth Amendment violations.⁸³ In both the Nashville data and a large sample of Chicago stop data, we also identified evidence of racial discrimination against Black suspects.⁸⁴ In a similar vein, a recent study of criminal adjudication found that municipal courts “routinely lack the usual indicia of independence, impartiality, and legal due process that conventionally characterize the judiciary and on which criminal law relies for much of its integrity.”⁸⁵

It is also worth reflecting on data about the use of deadly force. Police kill, on average, 2.8 people every day in the United States.⁸⁶ This equates to about

off of the costs and benefits of increased pretrial detention to minority communities). But it is not at all clear that the argument from negative public-safety spillovers extends to other constitutional rights. For example, it is not at all clear that unconstitutional state violence has the effect of preventing any such spillover. The same is true of many pretrial and trial rights that aim toward accuracy, say by minimizing the coercive production of evidence.

Not surprisingly, Willett and Gordon are once again selective about where they deploy their externalities argument. While they raise it in respect to the individual rights they dislike, they are silent about the negative spillovers from enforcing structural constitutional rules on minority communities. See, e.g., DAVID A. ANSELL, *THE DEATH GAP: HOW INEQUALITY KILLS* 137-38 (2017) (developing this point on the application of federalism principles to limit the expansion of Medicaid). It is quite unclear why Willett and Gordon overlook negative spillovers with substantial, population-wide mortality effects on minority communities – while making great hay of hypothetical spillovers for which empirical support is lacking.

83. Alex Chohlas-Wood, Marissa Gerchick, Sharad Goel, Aziz Z. Huq, Amy Shoemaker, Ravi Shroff & Keniel Yao, *Identifying and Measuring Excessive and Discriminatory Policing*, 89 U. CHI. L. REV. 441, 458 (2022) (looking at police stops in Nashville, “the average prediction [that a stop would yield a weapon] is 2%, and more than 15% of stops had less than a 0.5% chance of turning up a weapon”).

84. *Id.* at 460, 468.

85. Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 968 (2021).

86. Frank Edwards, Michael H. Esposito & Hedwig Lee, *Risk of Police-Involved Death by Race/Ethnicity and Place, United States, 2012–2018*, 108 AM. J. PUB. HEALTH 1241, 1243 (2018).

1,000 people per year.⁸⁷ These deaths occur in racially disproportionate ways.⁸⁸ A recent study found that 1 in 1,000 Black men are killed by police.⁸⁹ Another 2016 study of several states found that Black people are killed by police almost three times as often as non-Black people are (0.48 per 100,000 as opposed to 0.17 per 100,000).⁹⁰ There is no sure way of determining how many of these deaths – let alone uses of deadly police force that did not result in death – were unlawful. But there is no reason to think this proportion is particularly low. Indeed, in the domain of criminal trials and punishment – where officials are acting within the physical walls of state institutions rather than on the streets, and hence are easier to monitor – there is substantial “evidence that states systematically violate criminal defendants’ rights.”⁹¹ If constitutional violations are rife when officials are easy to monitor, how frequent are they likely to be when official behavior is costly to observe – as is often the case when deadly force is used?

In short, there are urgent and compelling reasons to home in on the state’s immediate infliction of violence through despotic instruments. There are powerful grounds to closely examine doctrines that prohibit federal-court remedies for such violence. Present remedial doctrine may well fall short in addressing these harms, but it is often the only compensatory tool available to those subject to state violence and their survivors. So, for those victims and their surviving family at least, judicial remedies have very “real” effects.

87. Joseph Wertz, Deborah Azrael, John Berrigan, Catherine Barber, Eliot Nelson, David Hemenway, Carmel Salhi & Matthew Miller, *A Typology of Civilians Shot and Killed by US Police: A Latent Class Analysis of Firearm Legal Intervention Homicide in the 2014-2015 National Violent Death Reporting System*, 97 J. URB. HEALTH 317, 318 (2020).

88. *Fatal Police Violence by Race and State in the USA, 1980–2019: A Network Meta-Regression*, 398 LANCET 1239, 1243, 1245 (2021) (estimating 30,800 deaths, with the age-standardized mortality rate due to police violence highest in non-Hispanic Black populations).

89. Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PROC. NAT’L ACAD. SCI. U.S. 16793, 16793–95 (2019); see also Cody T. Ross, Bruce Winterhalder & Richard McElreath, *Racial Disparities in Police Use of Deadly Force Against Unarmed Individuals Persist After Appropriately Benchmarking Shooting Data on Violent Crime Rates*, 12 SOC. PSYCH. & PERSONALITY SCI. 323, 324–27 (2020) (analyzing a benchmarking methodology and showing that it “does not remove the bias introduced by crime rate differences but rather creates potentially stronger statistical biases that mask true racial disparities” in police killings of unarmed civilians).

90. Catherine Barber, Deborah Azrael, Amy Cohen, Matthew Miller, Donza Thymes, David Enze Wang & David Hemenway, *Homicides by Police: Comparing Counts from the National Violent Death Reporting System, Vital Statistics, and Supplementary Homicide Reports*, 106 AM. J. PUBL. HEALTH 922, 924 (2016).

91. Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 2 (2010); see also Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and the Value of Liberty*, 108 VA. L. REV. 709, 713–16 (2022) (demonstrating that a substantial proportion of pretrial detention occurring in the United States potentially fails the current constitutional test).

2. *No Double Standard?* Willett and Gordon ostensibly seek to refute the existence of a remedial gap. Instead, their argument confirms and embraces that disparity.

On the surface, their claim is about parity. They insist that “[t]he Court affords the same treatment to any party invoking the Constitution in a defensive posture.”⁹² A plaintiff in a structural constitutional case such as *Seila Law LLC v. Consumer Financial Protection Bureau*⁹³ could sue as a “defense against ongoing proceedings.”⁹⁴ In contrast, the class of plaintiffs in a police-brutality case such as *City of Los Angeles v. Lyons*⁹⁵ might have been denied injunctive relief against police chokeholds, but it could nonetheless pursue a damages action. Accordingly, Willett and Gordon argue, it is a “mischaracterization” for me to say that the legality of the challenged police practice evaded review.⁹⁶ In their view, both kinds of plaintiffs had and have access to adequate remedies.

Willett and Gordon’s key mischaracterization here is their suggestion that a damages action provided a meaningful avenue for review of a novel constitutional challenge to a police practice. As *Collapse* details at length, and indeed as Willett and Gordon recognize elsewhere in their review,⁹⁷ this assertion is often false. The doctrine of qualified immunity, for example, frequently precludes the litigation of novel legal theories via constitutional tort.⁹⁸ This complements the practical impediments to tort litigation that deter many potential plaintiffs.⁹⁹ And even setting aside the point that the many class members who had previously been throttled could not sue for damages, Willett and Gordon are simply incorrect that a litigant like Adolph Lyons could or did necessarily secure relief parallel to that which *Seila Law* received. Their factual assertion that Lyons

92. Willett & Gordon, *supra* note 14, at 2149.

93. 140 S. Ct. 2183 (2020).

94. Willett & Gordon, *supra* note 14, at 2151.

95. 461 U.S. 95 (1983).

96. Willett & Gordon, *supra* note 14, at 2151.

97. *Id.* at 2179.

98. *Collapse*’s discussion of *Lyons*, which Willett and Gordon criticize, is focused on whether “Lyons was entitled to an injunction” against potentially lethal chokeholds. HUQ, *supra* note 13, at 146; *see id.* at 147 (noting also that Lyons sued on behalf of a class of Black men—none of whom would be entitled to damages). I am at a loss to understand why they claim it is a mischaracterization to say that Lyons’s continued exposure to a serious risk of death at police hands is not a remedial shortfall.

99. Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539, 1548 (2020) (describing complex “civil rights ecosystems—including plaintiffs’ attorneys; state and federal judges; state and federal juries; defense counsel; § 1983 doctrine and defenses; state tort law; damages caps; and litigation, settlement, and indemnification decisions” and exploring “how the interaction of these elements may determine whether a police misconduct claim is ever filed, whether it succeeds, and the magnitude of its success”).

himself obtained relief is baffling given what actually happened in that case. The available records show that Lyons received a “nominal amount” of damages.¹⁰⁰ Their argument also shows a regrettable indifference to the obvious fact that what the *Lyons* class wanted – and could not get – was security from future police violence. Willett and Gordon do not explain why they think it is a “mischaracterization” to say that nominal damages (for Lyons alone, but not potential class members) and continued exposure to unconstitutional police chokeholds (for Lyons and other Black motorists alike) is in any sense a meaningful remedy.

Willett and Gordon also offer a misleading account of the *Seila Law* decision. *Collapse*’s central observation about that case was that the plaintiff firm could not show “harm from an alleged Article II violation” for the simple reason that there was no evidence that then-President Trump had sought and failed to remove the Bureau’s head.¹⁰¹ That is, there was no reason to believe that the alleged constitutional flaw (the statute’s limits on removal) had any causal relation at all to the challenged agency action.¹⁰² Willett and Gordon apparently concede that there was no live question regarding the President’s removal power. They do not pretend that *Seila Law*, like *Lyons*, had experienced an actual (as opposed to hypothetical) constitutional violation, or faced an ongoing risk of losing that right. Why, then, should *Seila Law* be able to sue for a hypothetical constitutional violation? Here, Willett and Gordon equate *Seila Law*’s and *Lyons*’s positions by making a *consequentialist* policy argument. They say that it is “eminently reasonable” to allow regulated parties such as *Seila Law* to sue because it would otherwise be “difficult or impossible . . . to show that the [agency’s] design . . . played a causal role.”¹⁰³

This is jarring. Recall that Willett and Gordon have already rejected the use of consequentialist arguments in sweeping terms.¹⁰⁴ Why are those same arguments relevant here? More significantly, they seem unaware that the consequentialist logic they apply to *Seila Law* – titrating litigation rates in light of the scarcity of probable litigants – applies with equal force to litigants like *Lyons*.

100. Michael R. Mitchell, *Lyons v. Los Angeles*, <https://www.oocities.org/mraley.geo/lyons.html> [<https://perma.cc/8R69-GZCU>] (providing a timeline of events regarding the *Lyons* case).

101. HUQ, *supra* note 13, at 146 (emphasis added).

102. Willett and Gordon invoke a version of the “valid rule” doctrine as an explanation here. Willett & Gordon, *supra* note 14, at 2149 (citing a “well-settled proposition . . . [that] when an improperly constituted authority takes action against someone,” no “prejudice” is required for standing purposes). This will be news to those robbed of congressional representation by partisan gerrymanders. And I have elsewhere explained that this “well-settled proposition” is far more partial and indifferently applied than Willett and Gordon imply. Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1453–57 (2013) (explaining why the valid rule doctrine is “simply not a plausible account of current constitutional practice”).

103. Willett & Gordon, *supra* note 14, at 2150.

104. *Id.* at 2139, 2141.

This is not a small inconsistency. Rather than disproving the existence of a “double standard[.]” in the case law,¹⁰⁵ Willett and Gordon here *endorse* that double standard. That is, their selective willingness to recognize consequentialist arguments leads to their differential treatment of those subject to state violence (who get nominal damages) and those regulated by the state (who can litigate the availability of injunctive relief). In other words, their argument embodies the very remedial gap that they deny.

Willett and Gordon directly contradict their claim that there is no “double standard” a second time when it comes to procedural rules. Take the example of postconviction habeas review of Sixth Amendment ineffective-assistance-of-counsel claims that could not be developed in state court.¹⁰⁶ These claims are subject to strict procedural constraints even if a federal habeas court is the first forum in which they can effectively be raised. Rather than explaining why habeas petitioners are on equal footing to litigants making structural arguments, Willett and Gordon go out of their way to defend the “good reasons” for erecting procedural barriers *that are unique to habeas*.¹⁰⁷ In so doing, they once again appeal to the alleged consequences of granting habeas relief—flouting their earlier position that consequentialist positions are out of bounds. They also appear not to notice that their defense of these unique procedural barriers cannot be squared with their claim that there is no “double standard” in remedial doctrine. Indeed, they appear not to realize that they are *endorsing* such a double standard yet again.

Beyond these specific endorsements of the remedial gap, an even more fundamental error in Willett and Gordon’s logic is worth underscoring. Imagine a soccer match between two sets of kids. The usual rules of soccer—no hands, no fouls, the offside rule, etc.—apply evenhandedly to both sides. But one team is made up of ten-year-olds, while the other team is made up of sixteen-year-olds. Who wins under this regime?¹⁰⁸ It is obvious that a formally equal regime will have unequal effects where relevant groups are unequally situated. Victims of state violence and regulated parties are obviously differently situated for the purpose of bringing “defensive” suits in expectation of state action. Regulated parties such as Seila Law often can more reliably predict the timing and the likelihood of enforcement, and they have ample time to initiate litigation. In contrast, a person subject to a deadly chokehold during a police encounter cannot predict *ex ante* when and how the state will exercise violence against them. Unlike

105. *Id.* at 2148.

106. *See, e.g.,* Shinn v. Ramirez, 142 S. Ct. 1718, 1732, 1739 (2022).

107. Willett & Gordon, *supra* note 14, at 2177.

108. I borrow this example from RAYMOND GEUSS, NOT THINKING LIKE A LIBERAL 113–15 (2022), although Geuss uses it to a different end.

agency-regulated parties, the victims of state violence do not have the luxury of time. In other words, *even if* victims of state violence did not face unique remedial and procedural barriers, Willett and Gordon’s argument would still hinge upon a fallacy. Their argument—which holds that an Adolph Lyons, or a George Floyd, was similarly situated to a Seila Law in their access to anticipatory relief—is not just specious. It is cruel.

3. *Empirics*. What of their argument that empirical analysis rebuts the existence of a remedial gap? Willett and Gordon focus only on cases “considering the constitutionality of federal statutes.”¹⁰⁹ It seems they exclude cases involving challenges to discrete unconstitutional actions (such as police violence)—the very data that concerns the question at hand. Further, despite a tellingly defensive footnote,¹¹⁰ they seem not to realize that the proportion of Supreme Court decisions decided either for or against litigants has no relation to the actual effect a decision has on “real-world” remediation. It is trite to observe that a single decision can open the courthouse door to multitudes—or shut it. Comparing the rate of wins and losses at the Supreme Court on a case-by-case basis supplies no meaningful information.

Willett and Gordon also seem unaware of basic principles of inference from a corpus of reported cases. Most importantly, they appear not to account for the Priest-Klein theorem. The theorem is a well-known model in the law-and-economics literature that explains why litigated cases are not necessarily representative of the universe of potentially litigable disputes.¹¹¹ Famously, Priest and Klein explained that not all potential disputes will be litigated, and that the selection of disputes that are litigated will be an unrepresentative sample of the underlying universe of cases because of litigants’ divergent beliefs about likely outcomes. Willett and Gordon’s failure to account for the well-known problem of selection effects in litigation, which is key to sound empirical design, further compromises their supposed evidence of remedial parity.

* * *

In the end, Willett and Gordon say “so what?” when they face an individual victim of state violence without a remedy.¹¹² In so doing, they evince shades of Jeremy Bentham’s “Judge and Co.,” who “care for the rest of the mass of

¹⁰⁹. Willett & Gordon, *supra* note 14, at 2159.

¹¹⁰. *Id.* at 2159 n.183.

¹¹¹. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 6-30, 55 (1984). At the University of Chicago, the theorem is taught as part of the core canon of legal scholarship.

¹¹². Willett & Gordon, *supra* note 14, at 2162.

suffering . . . what a steam-engine would care for the condition of a human body pressed or pounded by it.”¹¹³ Their indifferent posture toward victims of state brutality is all the more remarkable given their deep solicitude for small business and property owners. Readers will have to decide for themselves why certain classes of plaintiffs are deemed more deserving of their sympathy and of remediation than others.

B. The Law Is What I Say It Is

If I wanted to pen an acid parody of contemporary originalism, I would start by asserting that I am an originalist. I would not say anything about what originalism means, but instead assume that there are no disputes about the meaning and implications of Founding-era debates or practice. Then, I would pronounce my preferred policy positions as the “law.” In so doing, I would sometimes lean on text and sometimes ignore it. I would also make claims about original intent that had been challenged, or even refuted, in the legal and historical scholarship. And I would freely make arguments based on consequences when it suited me to do so — again, so long as they fit my policy agenda.

This, in essence, is the style of reasoning that Willett and Gordon pursue in arguing that constitutional law is sufficiently determinate to constrain judicial discretion and hence to mitigate the partisan forces buffeting the appointment process.¹¹⁴ It also leads them to a motley band of substantive constitutional positions. As *Collapse* is a book about *remedies*, I do not think this is the right place to take up their substantive positions. I want instead to make the narrower point that their account of constitutional law confirms one of the core claims of *Collapse*: that Article III is porous to partisan-coded policy preferences.

What counts as law for Willett and Gordon? They celebrate property rights;¹¹⁵ gun rights;¹¹⁶ a *Lochner*-style liberty of contract¹¹⁷ and constitutional constraints on economic regulation;¹¹⁸ the repudiation of *Chevron* deference to agency interpretation;¹¹⁹ a broad presidential removal power;¹²⁰ a broad

113. JEREMY BENTHAM, *Full-Length Petition for Justice*, in 5 THE WORKS OF JEREMY BENTHAM 496 (William Tait ed., 1843).

114. Willett & Gordon, *supra* note 14, at 2136-37, 2196.

115. *Id.* at 2142-43.

116. *Id.* at 2143-44.

117. *Id.* at 2144; *see id.* at 2157 (celebrating “commercial liberty”).

118. *Id.* at 2163-64.

119. *Id.* at 2158.

120. *Id.* at 2169.

nondelegation doctrine;¹²¹ an express willingness to tolerate violations of constitutional rights;¹²² and a related resistance to remedies for constitutional violations in the criminal-adjudication process.¹²³

It is immediately apparent that these legal positions do not track the law as accepted by the Supreme Court, even given its current originalist majority. Some of these ideas have not been the law for almost a century (*Lochner*, anyone?). Some – like the nondelegation doctrine – expressly strive to address a *contemporary* problem. Others drag us back to an imagined past of gun-toting yeomen. Despite Willett and Gordon’s vague hand-waving toward originalism, it is not at all obvious how their positions have been deduced from a single, coherent theory of law.

Yet there is golden thread silently knitting together Willett and Gordon’s heteroclitic declamations. Their positions – antiregulatory, pro-property, probusiness, progun, and tough on crime – unerringly track policy views associated with the Republican Party. Some of the views they espouse (think deregulation as a constitutional ideal) have a decades-old pedigree. Others have come to be aligned with the political right only in the last decade.¹²⁴

Willett and Gordon hence achieve the remarkable feat of presenting what are in practice highly contingent policy positions as “constitutional” – and therefore universal.¹²⁵ In reaching their grab bag of constitutional positions, moreover, Willett and Gordon repeatedly toggle between modes of reasoning in ways that bely their claim to be principled originalists. Despite saying that “text matters,” they appeal to common-law principles with no textual foundation when it helps them justify a limit on individual habeas relief.¹²⁶ Or, when constitutional text

121. *Id.* at 2172.

122. *Id.* at 2146-47 (describing the need to remedy constitutional violations as a “principle, not an ironclad rule”) (quoting Richard H. Fallon Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778 (1991)).

123. *Id.* at 2177-78.

124. For a historical account of how the constitutional critique of *Chevron* emerged in a context of widespread support for the doctrine among jurists appointed by Republican presidents, see Craig Green, *Chevron Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654, 655 (2020).

125. To be sure, Willett and Gordon are critical of qualified immunity and limits upon constitutional torts against federal officials. Willett & Gordon, *supra* note 14, at 2178-91. But given their view that such changes would not yield many more new suits, *id.* at 2183, this is hardly in tension with their other positions. Moreover, in both cases, they ultimately defer to Congress, which reflects the position of the Justices who oppose constitutional-tort liability. See, e.g., *Egbert v. Boule*, 142 S. Ct. 1793, 1809 (2022) (Gorsuch, J., concurring). So, their position is, in the end, consistent with the Republican-aligned consensus.

126. See, e.g., Willett & Gordon, *supra* note 14, at 2178 (relying on “settled rules of procedural default” in habeas).

fails them with respect to presidential removal,¹²⁷ they turn to postratification history.¹²⁸ In so doing, further ignore penetrating recent historical work casting doubt on the unitary executive's historical foundation.¹²⁹ They similarly make no mention of the extensive historical evidence against their account of a non-delegation principle.¹³⁰

Moreover, Willett and Gordon selectively rely on sources that support their position, while ignoring contrary empirical evidence. Hence, in dismissing *Miranda*, they cite that decision's opponents¹³¹ but ignore the devastating critiques leveled against those opponents' work.¹³² And when they defend deregulation as a constitutional mandate, they offer only a Trump-era White House document as support.¹³³ For them, in other words, the Constitution does not merely "enact Mr. Herbert Spencer's Social Statics."¹³⁴ It defies the Reagonomics of Mar-a-Lago.

And in a now familiar move, they once again dismiss out of hand here all consequentialist arguments – only to embrace them when they find them to their liking. For instance, Willett and Gordon complain that arguments from "impolicy or inconvenience" should "be of no weight" in constitutional matters¹³⁵ and then, *in the very next paragraph*, go on to make a policy-based argument in favor of closer governmental scrutiny of regulations in light of the "pathologies that

127. Cf. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1943 (2011) (criticizing an interpretive approach that "tends to privilege general constitutional purpose over specific textual detail").

128. See, e.g., Willett & Gordon, *supra* note 14, at 2169 (asserting the existence of a presidential removal power without reference to the text of Article II).

129. See, e.g., Jed H. Shugerman, *Presidential Removal: The Marbury Problem and the Madison Solutions*, 89 FORDHAM L. REV. 2085, 2087 (2021) (explaining why "the historical evidence for exclusive presidential removal is so thin and contradicted"); accord Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 5 (2021).

130. See, e.g., Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021).

131. See Willett & Gordon, *supra* note 14, at 2175 nn.264-65.

132. See Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996); see also Stephen J. Schulhofer, *Miranda, Dickerson, and the Puzzling Persistence of Fifth Amendment Exceptionalism*, 99 MICH. L. REV. 941, 943 (2001) ("Professor Cassell's position has not won overwhelming agreement from criminal justice scholars.").

133. See Willett & Gordon, *supra* note 14, at 2163 n.195.

134. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

135. Willett & Gordon, *supra* note 14, at 2163 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 426 (1833)).

inhere [in] representative democrac[ies].”¹³⁶ Similarly, in defending a limited postconviction habeas vehicle, they cite the fear that habeas would “undercut the penal system.”¹³⁷

In short, Willett and Gordon define law using “political considerations,”¹³⁸ defeating their own claim that “law” (as they understand it) is insulated from partisan politics. They ignore disputes over historical or empirical evidence by citing only evidence on one side of the debate. And then they predictably arrive at the preferred position of the ideological right. In these ways, Willett and Gordon offer a vision of constitutional law that exemplifies and affirms the political scientist’s complaint that legal argument “serve[s] only to rationalize the Court’s decisions and to cloak the reality of the Court’s decision-making process.”¹³⁹ “[U]nbound by legal principle,” their account of law is, to use their own words, “far more likely to sink the Court’s legitimacy than to save it.”¹⁴⁰

III. WAYS OF CRITICIZING THE LAW AND THE CONSTITUTION

In critiquing *Collapse*, Willett and Gordon make two startling normative claims: They first imply that external critiques of the “law” (as they define it) are “ideological” and, by necessary implication, improper.¹⁴¹ Then, they assert that it would violate “the rule of law” for Congress to exercise its control over federal jurisdiction to exclude certain constitutional claims.¹⁴² Both of these arguments betray fundamental misunderstandings of the ways in which law can and cannot be criticized.

A. Can the Law Be Criticized as Unjust?

Willett and Gordon object to “consequentialist” criticisms that constitutional law burdens marginalized or vulnerable groups and benefits solely the “privileged and powerful.”¹⁴³ They take particular umbrage at the idea that the gap between remedies for police brutality and remedies for federal agency action

136. *Id.* at 2163-64.

137. *Id.* at 2177.

138. *Id.* at 2196.

139. SEGAL & SPAETH, *supra* note 43, at 53.

140. Willett & Gordon, *supra* note 14, at 2197.

141. *See, e.g., id.* at 2131.

142. *Id.* at 2192, 2197.

143. *Id.* at 2139.

evinces a “malign neglect” for victims of state violence.¹⁴⁴ They seem to insist that the only ground of legitimate criticism is internal to the law.¹⁴⁵

But *Collapse* is quite plain that it is making a moral critique, not just a legal one.¹⁴⁶ It follows in a well-trodden tradition of moral critiques of constitutional law. This is a trail blazed by abolitionists condemning the Constitution’s accommodation of slavery; by suffragettes condemning the misogynistic exclusion of women from the franchise before the Nineteenth Amendment; and by civil-rights activists fighting against Jim Crow.¹⁴⁷

More generally, there is nothing illegitimate or improper about making a moral critique of law. H.L.A. Hart observed that it is simply “untrue” to say that “what is utterly immoral cannot be law or lawful.”¹⁴⁸ To say that all criticisms of law must come from within law can only “serve to cloak the true nature of the problems with which we are faced.”¹⁴⁹ It is better, Hart explained, to “say that laws may be law but too evil to be obeyed” for this is “a moral condemnation which everyone can understand and it makes an immediate and obvious claim to moral attention.”¹⁵⁰ Hart was right. My critique in *Collapse* is in his spirit.

There is also a legal worry with Willett and Gordon’s argument here. Since 1789, all federal judges have had to “solemnly swear (or affirm)” that they will “do equal right to the poor and to the rich.”¹⁵¹ As the First Congress well knew, the rich have resources that allow them to access and leverage the law in ways the poor do not. So, the oath is hard to comprehend as anything other than a command to attend with particular care to the interests of the impecunious.

144. *Id.* at 2178. Yet once more, I am obliged to note that Willett and Gordon seriously misrepresent *Collapse*’s argument. The passage they cite talks of “malign neglect” of those subject to “state violence.” HUQ, *supra* note 13, at 150–51. Willett and Gordon twist this passage beyond recognition when they characterize it as saying instead that structural constitutional cases *on their own merits* evince “malign neglect.” Willett & Gordon, *supra* note 14, at 2178. I say no such thing.

145. Willett & Gordon, *supra* note 14, at 2137–38 (claiming to delineate “basic principles of legal reasoning”).

146. HUQ, *supra* note 13, at 151.

147. See, e.g., William Lloyd Garrison, *The Constitution a “Covenant with Death and an Agreement with Hell,”* 12 LIBERATOR 71 (1842), reprinted in 9 THE LIBRARY OF ORIGINAL SOURCES 97, 98 (Oliver J. Thatcher ed., 1907); Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the “Living Constitution,”* 76 N.Y.U. L. REV. 1456, 1475–76 (2001) (discussing suffragette critiques of the Reconstruction Amendments).

148. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 620 (1957).

149. *Id.*

150. *Id.*; see also H.L.A. HART, THE CONCEPT OF LAW 114 (1961) (warning that a society in which “only officials might accept and use the system’s criteria of legal validity” is one that “might be deplorably sheeplike; the sheep might end in the slaughter-house”).

151. Judiciary Act of 1789 § 8, 28 U.S.C. § 453 (2018).

Moreover, the oath cannot easily be squared with a doctrine of remedies that excludes most victims of immediate state violence – most of them poor or otherwise socially marginalized – from the courthouse, while facilitating litigation by regulated parties such as *Seila Law*.¹⁵² And, most relevant here, Willett and Gordon’s hostility to my expression of special concern for the poor is antithetical to the oath’s command.

B. *What Does the Rule of Law Require?*

Even as they reject *Collapse*’s moral critiques, Willett and Gordon embrace a normative critique of their own. They invoke the moral ideal of “the rule of law” to resist my suggestion that Congress should use its power over federal jurisdiction to limit the courts’ ability to work as “free-ranging innovator[s] of constitutional theories to use against the regulatory state.”¹⁵³ Mindful of its generalist audience, *Collapse* did not offer a specific suggestion of how this might be done. It is possible to imagine statutory measures ranging from a robust finality requirement for challenges to agency action to an absolute bar on certain kinds of legal claims. I took no position on which of these Congress should pursue. But even this bare gesture toward Congress’s authority to control Article III jurisdiction was sufficient for Willett and Gordon to launch into apoplectic denunciations on “rule-of-law” grounds of any exercise of jurisdiction-limiting action respecting constitutional claims against legislation.¹⁵⁴

One response to their complaints would be to note that it is *prima facie* implausible to suggest that *any* constraint on judicial review of agency action violates the rule of law (which is apparently what Willett and Gordon believe). This response is true but trivial. But I want to consider a more interesting version of their critique by asking a different question: what is the “rule of law” that Willett and Gordon seek to defend when they argue against jurisdictional limitations? As with “judicial independence,” they do not define their terminology. Nor is the term defined in the Constitution. So, what do they mean? They *seem* to identify it with the exercise of constitutional review of laws, but not of the actions of individual officials, although this is not explicit in their text. But is this what the term means?

152. And the minimal version might be deficient. Cf. Richard M. Re, “*Equal Right to the Poor*,” 84 U. CHI. L. REV. 1149, 1153 (2017) (“Historical versions of the equal right principle coincided with judicial efforts to promote substantive equality.”).

153. Willett & Gordon, *supra* note 14, at 2192 (quoting HUQ, *supra* note 13, at 159).

154. See *id.* at 2197.

Once again, Willett and Gordon use a technical term, here the “rule of law,” to “mean[] just what [they] choose it to mean – neither more nor less.”¹⁵⁵

An originalist might be thought to understand the term “rule of law” in light of its usage in English common law before the Founding. In English legal history, the ideal of the rule of law was understood as a means of constraint on the “arbitrary will” of the powerful that “prevent[ed] government agents from oppressing the rest of society.”¹⁵⁶ It was realized through specific “institutional restraints.”¹⁵⁷ Most importantly, the “writ of habeas corpus,” the remedy for unlawful detention, “expressed the essential mystique of rule-of-law.”¹⁵⁸ The rule of law could not be understood to entail judicial review of laws for compliance with a written constitution for the simple reason that England did not (and does not) have one.

In contrast, Willett and Gordon do not define the rule of law in terms of remedies against discrete acts of state violence. They disparage the writ of habeas. Indeed, they urge a dramatic reduction in the jurisdiction of postconviction habeas courts.¹⁵⁹ Hence, they appear to believe that there is no rule-of-law problem if prisoners are denied access to the federal courts after an unlawful state criminal process. At the same time, they seem to think there is a catastrophic failure of legality if regulated parties’ access to the courts is pared back. This not only betrays a powerful historical amnesia. It also embodies a sharply etched “double standard” between (disfavored) remedies against state violence and (favored) remedies against regulation – one that Willett and Gordon have repeatedly denied.

Nor does their rule-of-law complaint fare any better if we consider more recent accounts of the rule of law. Influential twentieth-century definitions of this term focused on the nature and efficacy of legal rules. In his leading account, Lon L. Fuller defined the rule of law in terms of eight desiderata that have nothing to do with the extent of jurisdiction over constitutional questions.¹⁶⁰ Joseph Raz and John Finnis similarly focused on how rules are conceived and enforced to

155. CARROLL, *supra* note 21, at 251.

156. JOHN PHILLIP REID, *RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURY* 4 (2004) (citation omitted).

157. *Id.* (citation omitted).

158. *Id.* at 5 (emphasis omitted).

159. Willett & Gordon, *supra* note 14, at 2177 (urging a return to “traditional limitation[s]” on habeas relief before *Brown v. Allen*, 344 U.S. 443 (1953)).

160. See LON L. FULLER, *THE MORALITY OF LAW* 33-94 (rev. ed. 1969) (identifying generality, promulgation, ordinary prospectivity, clarity, internal consistency, capacity to be obeyed, relative stability, and predictable enforcement as the desiderata).

enable law's subjects to anticipate its effects.¹⁶¹ In a like vein, Friedrich Hayek underscored the power of general rules to generate certain guidance.¹⁶² Fuller, Raz, Finnis, and Hayek differ on many points. But all defined the rule of law in terms of the formal qualities of legal rules, not the availability of judicial review over structural constitutional challenges.

Indeed, where courts are mentioned, these canonical works seem to have in mind the sorts of individual remedies for state coercion that Willett and Gordon repeatedly deride. For example, Raz does say that an independent judiciary is “essential for the preservation of the rule of law.”¹⁶³ But he then underscores that they should have only “very limited review” of legislation or regulations.¹⁶⁴ Likewise, A.V. Dicey identified the rule of law with the prospect that the same body of law would apply to government officials and private individuals through the operation of the “ordinary courts” consisting of a “judge and jury.”¹⁶⁵ Dicey’s endorsement of “ordinary” rules of law is inconsistent with a definition of the rule of law that focuses on principles of law that *only* apply to the state. Indeed, Dicey was inveighing against the exemptions for official conduct akin to those created by sovereign-, absolute-, and qualified-immunity doctrines.¹⁶⁶ Again, the canonical definitions of the rule of law offer no support for Willett and Gordon’s blanket condemnation of jurisdictional change.

Instead, their argument embodies a tortuous sort of irony. As we have seen, Willett and Gordon claim an originalist mantle even as they launch into this rule-of-law bluster. Yet in suggesting that Congress cannot exercise *in any form* its textually committed authority to determine lower-court jurisdiction and (to some extent) Supreme Court jurisdiction,¹⁶⁷ they appear unaware of this power’s lengthy historical pedigree. The 1789 Judiciary Act, for example, provided no Supreme Court review of federal criminal cases (including, perforce,

161. See JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 214 (1979); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 270-71 (1980).

162. F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 152-57 (1960) (arguing that the general applicability of abstract rules of law is an important attribute, which allows individuals to predict the consequences of their actions).

163. RAZ, *supra* note 161, at 217.

164. *Id.*

165. A.V. DICEY, *AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 23, 250 (10th ed. 1959).

166. See N.W. Barber, *Must Legalistic Conceptions of the Rule of Law Have a Social Dimension?*, 17 *RATIO JURIS*. 474, 479 (2004).

167. The Constitution creates no lower federal courts; therefore, their jurisdiction depends on the exercise of congressional discretion. The Exceptions Clause of Article III also vests Congress with substantial control over the appellate jurisdiction of the U.S. Supreme Court. U.S. CONST. art. III, § 2, cl. 2.

constitutional claims) or state-court decisions upholding constitutional claims.¹⁶⁸ Congress chose to withhold such jurisdiction. If the First Congress's actions are decisive for removal, as Willett and Gordon suggest,¹⁶⁹ it is mysterious why they should ignore its exercises of jurisdictional control.

Nor has Congress stinted on its use of jurisdiction-stripping authority of late. The Antiterrorism and Effective Death Penalty Act of 1996,¹⁷⁰ the Prison Litigation Reform Act of 1996,¹⁷¹ and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996¹⁷² all imposed sharp boundaries on federal courts' authority to grant relief to individuals for unconstitutional state violence and detention.¹⁷³ Willett and Gordon have nothing to say about any of these measures. All of them, of course, targeted individual efforts to hold state coercion to the full standards of constitutional law. And as I have already observed, Willett and Gordon embrace and advocate for limitations on individual remedies akin to these recent jurisdiction-stripping measures.¹⁷⁴ That is, their selective attention to the historical practice of jurisdiction stripping suggests that they are comfortable with such limitations so long as they fit their normatively approved policy agenda. Their rule of law is only for the benefit of some. It is not for all.

The implication of Willett and Gordon's larger argument here is as follows: Their rule of law would be offended if Congress exercised a textually committed power that has been repeatedly deployed since 1787 to prevent *Seila Law* from going to court before it has been subjected to a regulatory penalty. But the rule of law has no bearing when a capital defendant is put to death without an effectual opportunity to air or vindicate a claim under the Sixth Amendment right to counsel. The rule of law, so defined, defies the core meaning that term has had for centuries. Willett and Gordon thus inject the term "rule of law" with novel and ahistorical meaning that is at odds with the Constitution.

168. On the first, see *United States v. More*, 7 U.S. (3 Cranch) 159, 172-74 (1805). On the second, see Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85 (1789).

169. *But see supra* note 142.

170. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1217.

171. Prison Litigation Reform Act, Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321, 1321-71 (1996).

172. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.

173. Willett and Gordon first appear unaware of these statutes. See Willett & Gordon, *supra* note 14, at 2134 ("Have there been any successful efforts by Congress during the relevant period to eliminate lower courts, curtail federal jurisdiction, or add seats to the federal bench so as to manipulate its composition? None leap to mind . . ."). But they then cite a passage in *Collapse* that mentions several statutes that curtail federal jurisdiction. See *id.*

174. See *supra* text accompanying notes 106-107.

For scholars ostensibly so concerned with original meaning, text, and tradition, this sort of Humpty-Dumptyism ought to be on the shelf, and not on the table.

CONCLUSION

I have explained that Willett and Gordon do not accurately describe the argument of *Collapse*. They omit, in particular, its central structural and historical argument about Article III's design. Their argument is further flawed in that their denial of "different standards" for those protesting state violence and those objecting to regulation is explicitly contradicted by their own positions. And their conjuring of judicial independence and the rule of law betray a deep misunderstanding of those core terms. Arguments of scholarly interest are eclipsed by internally contradictory rhetoric, hollow empirics, and an almost parodically partisan account of constitutional law.

Where Willett and Gordon do succeed is in laying bare the substantive aims and methodological premises that likely inform the jurisprudence of many recent Republican appointees to the federal courts. If the October 2021 Term is any harbinger, the Supreme Court's majority will also look at victims of state violence with cold scorn¹⁷⁵ while flexing its discretion for interest groups (coal companies, Evangelical Christians, gun owners) central to the Republican coalition.¹⁷⁶ This is a moment in which the Supreme Court is more ideologically extreme than it has been in a century.¹⁷⁷ It is also a moment when aligned partisan actors are looking to the Court not just to achieve their substantive policy goals, but also to entrench their own political power.¹⁷⁸ Willett and Gordon help us see how this will be done. Their work hence has the distinctive virtue of boiling down into a particularly vivid form the self-justifying apologetics of those now poised to wield raw judicial power in the service of partisan ends.

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175. See *supra* text accompanying notes 7-12.

176. See *supra* text accompanying notes 2-4.

177. See sources cited *supra* note 23.

178. On the dynamics of this process, see Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 107 CORNELL L. REV. (forthcoming 2023); and Aziz Z. Huq, *The Supreme Court and the Dynamics of Democratic Backsliding*, 699 ANNALS AM. ACAD. POL. & SOC. SCI. 50, 60-61 (2022).