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The Reconstructed Bench: Executive Autarchy and the Return to *Imperium*

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Legal systems do not usually abandon liberty all at once. They lose it by removing the small frictions that keep power divided: the distance between the official who states the rule, the official who finds the facts, and the official who commands the force. This article traces that danger across three older institutions—the Roman magistracy, the Spanish Inquisition, and the English Star Chamber—and then follows the same structural logic into the modern American administrative state and Israel's recent constitutional crisis. Across these settings, the danger appears in different clothes but follows the same institutional pattern: efficiency, emergency, or expertise becomes the reason to fuse powers that law had once worked to separate. Whenever legal systems treat separation as inefficiency, and friction as a technical obstacle to be overcome, they begin to rebuild the very architecture that constitutional law exists to prevent. The enduring question is therefore not whether officials act in good faith, but whether the structure they inhabit makes arbitrary judgment difficult even when they do.

I. Constitutional Friction and the Old Problem of Fused Power

Students of constitutional law usually meet the judiciary through Alexander Hamilton's reassuring account in *Federalist No. 78*. Courts, on that account, are the least dangerous branch because they possess "neither FORCE nor WILL, but merely judgment."[1] A court issues an opinion, but it must wait for

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[1] The Federalist No. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

a marshal, a sheriff, or a governor to enforce it. That dependence on external force is the ultimate structural leash—the guarantee that a court can rule only if it maintains the passive moral authority of law.

History gives less comfort. Legal institutions do not remain passive once the checks on them begin to loosen. They tend to move in a predictable direction—one might call it an institutional original sin. Original sin, classically understood, does not describe individual wickedness. It describes a condition of structure: the situation every human being enters independent of personal virtue, a pull that precedes any choice. The institutional pathology that this article traces is structural in that sense. The temptation to reclaim what the Romans called *imperium*, the undifferentiated fusion of rulemaking, fact-finding, and coercive enforcement concentrated in the same hands, is not a character flaw in the actors who hold power. It is built into the logic of power itself. Remove the institutional friction that keeps these functions apart, and the institution will find itself exercising powers that amount to tyranny, even if no official set out to become a tyrant.

A methodological caution is necessary at the outset, and it can be met directly. The Roman plebeian had no concept of separation of powers. The Spanish Inquisitor was not violating due process as any modern lawyer would define it. The Stuart Privy Councillor was not thinking about administrative law. Comparing these institutions through the lens of modern constitutional vocabulary carries the obvious risk of anachronism—projecting present concepts onto a past that neither possessed nor required them. The claim here is pitched at a level beneath that vocabulary entirely. It operates at the level of what happens to a person when the same institution defines her obligation, determines whether she has met it, and commands the force that punishes her failure. The Roman plebeian who lost his person to *addictio*[2] did not need Montesquieu to understand his situation. The *converso*[3] whose property was seized before any verdict, interrogated by the same officers who would adjudicate his guilt, denied the identity of his accuser—he did not need the Fifth Amendment to feel the violation. These dynamics are legible at the level of raw power, before any constitutional vocabulary exists to name them. The disaggregation of the power to define the legal rule and the power to enforce the legal rule is the most elementary constraint that sovereign power can impose on itself—the first step out of pure *imperium* toward anything recognizable as law rather than mere domination. Modern constitutional thinking is the belated articulation of something that old. Which is why,

[2] *Addictio*, Ballentine's Law Dictionary (LexisNexis 3d ed. 2010) ("A judicial award under which ownership of property was acquired. The commitment of a debtor.").

[3] *Converso*, Britannica, https://www.britannica.com/topic/converso ("converso, (Spanish: 'converted'), one of the Spanish Jews who adopted the Christian religion after a severe persecution in the late 14th and early 15th centuries and the expulsion of religious Jews from Spain in the 1490s.") (boldface suppressed).

when institutional decay sets in, this is always the first protection to collapse. The basic things, built first, go first.

The modern debate over the administrative state is still caught in a stale 17th century argument. Formalists denounce federal agencies as constitutional usurpers; functionalists defend them as mandatory adaptations to technological complexity. Both sides miss the larger historical pattern. The modern regulatory agency—writing a compliance rule, investigating its breach, and adjudicating the penalty inside its own walls through its own employees—is not an unprecedented twentieth-century invention. It is a familiar historical regression. Whenever a legal institution eliminates the procedural friction separating juridical power from coercive force, it ceases to be a court and reverts to something older and more dangerous: the sovereign sitting in judgment of himself.[4]

The pattern of that regression follows a recurring pattern across at least two millennia, from the class warfare of the early Roman Republic, running through the secret registries of the Spanish Inquisition, and reappearing in the corporal terror of the English Star Chamber. In each instance, the slide into arbitrary power does not begin as an avowed program of oppression, but with a claim of administrative necessity. And in every instance, the decay begins by destroying the most protective boundary in legal history: the distinction between the official who defines the legal rule and the official who determines the relevant facts.

II. The Roman Magistracy and the Separation of The Sword

The procedural separation of law from fact was not an Enlightenment invention. It was forced into institutional form over nearly three centuries of class warfare in the early Roman Republic, emerging not as a single legislative act but as the accumulated result of a sustained constitutional struggle between the patrician aristocracy and the plebeian commons.[5]

A. The Patrician Monopoly and the Weaponization of Procedure

In the early Roman Republic, there was no separation of powers in any meaningful sense. The patrician magistrates held *imperium*, the supreme executive power to command armies and coerce citizens, and they exercised it without

[4] *Compare* Philip Hamburger, Is Administrative Law Unlawful? (Univ. of Chicago Press 2014), *with* Adrian Vermeule, Law's Abnegation: From Law's Empire to the Administrative State (Harvard Univ. Press 2016).

[5] *See generally* Social Struggles in Archaic Rome: New Perspectives on the Conflict of the Orders (Kurt Raaflaub ed., Wiley-Blackwell 2d ed. 2005); T.J. Cornell, The Beginnings of Rome: Italy and Rome from the Bronze Age to the Punic Wars (c. 1000-264 B.C.) 242–71 (Routledge 1995).

effective procedural constraint. Sovereignty was, as a practical matter, a single violent mass.[6]

This concentration rested on two interlocking advantages. The first was the secrecy of the law. Before the Twelve Tables of 450 B.C., Roman civil law was unwritten and its interpretation jealously guarded by the patrician priestly colleges, above all the pontifices. The distinction matters: the pontifices did not hold *imperium*, which was the constitutional power of magistrates, not priests. What they held was a functional equivalent in the litigation context—control over *ius sacrum*, the legal calendar, and the interpretive tradition that governed which actions a magistrate would recognize. A citizen who did not know when courts sat, or which legal forms applied to his grievance, could not litigate at all. The priestly monopoly over that knowledge was the effective monopoly over access to justice.[7]

The second advantage lay in procedure. Civil litigation required a citizen to recite with exacting technical precision the oral formulas of the *legis actiones*, the law-actions, before the magistrate. These stylized rituals served as traps for the unwary. Gaius records the instructive example of a man who brought a claim for damage to his vines and lost because the Twelve Tables spoke only of trees, and he had said vines. The magistrate dismissed the case instantly. The plebeian citizen had no right to correction, no right to refile, and no right to appeal to anyone outside the same patrician magistracy that had just ruled against him.[8]

The magistrate's lictors—the armed attendants who carried the fasces—stood as the constant physical reminder of what backed these proceedings. Within the city walls, within the sacred *pomerium*,[9] Roman constitutional convention required that the axes be removed from the fasces. A citizen inside the city retained the right of *provocatio ad populum*, appeal to the popular assembly, against a magistrate's capital sentence. The constitution had built its own theory of separated power into the physical emblem of state authority: even the symbol of *imperium* acknowledged that coercive force operated under different rules in civic space than in the field. The axes

[6] Andrew Lintott, The Constitution of the Roman Republic 94–96 (Clarendon Press 1999). On *imperium* as the specific executive power of magistrates, technically distinct from the interpretive authority of the priestly colleges, see Alan Watson, Roman Private Law Around 200 B.C., at 3–12 (Edinburgh Univ. Press 1971).

[7] On the pontifical control of the legal calendar, the *fas* and *nefas* distinction governing court days, and the pre-Flavian monopoly over the *legis actiones*, see H.F. Jolowicz & Barry Nicholas, Historical Introduction to the Study of Roman Law 86–91 (Cambridge Univ. Press 3d ed. 1972).

[8] Gaius, Institutiones 4.11–12, *in* The Institutes of Gaius 421–23 (W. M. Gordon & O. F. Robinson trans., Cornell Univ. Press 1988). The vine-and-tree example is among the most cited illustrations of *legis actio* formalism in the primary literature and is taken to be authentic by virtually all modern commentators.

[9] *Pomerium*, Britannica, https://www.britannica.com/topic/pomerium ("pomerium, (from Latin *post-moerium*, 'behind the wall'), in ancient Rome, a sacred open space located just inside the wall surrounding the four hills—the Esquiline, the Palatine, the Quirinal, and the Capitoline—of the early city.") (boldface suppressed).

went back in when the magistrate crossed the city boundary. They came out again when he returned. The entire subsequent history of judicial tyranny can be understood as a story of magistrates finding ways to bring the axes back inside the walls.[10]

The practical devices of creditor oppression in the early Republic were two related but institutionally distinct mechanisms: *nexum* and *addictio*. *Nexum* was a private contractual arrangement—a formal ceremony conducted *per aes et libram*, with scales, a bronze weight, and witnesses—by which a debtor pledged his own person as security for a debt.[11] The pledge was technically voluntary—that is, no magistrate issued a decree that a debtor perform the act—though the economic desperation that drove him to it made that voluntariness largely fictional. *Addictio* was the genuine judicial mechanism: the magistrate's formal act, issued following judgment or on the default of a *nexum* obligation, transferring the debtor into the physical custody of his creditor. This was where *imperium* was most exposed: the magistrate determined the legal duty, found the facts he needed to find, and directed his lictors accordingly. The gap between legal definition and coercive enforcement, in the *addictio* proceeding, was almost nonexistent.[12]

Together, these mechanisms fused law-defining power, fact-finding, and coercive enforcement in the same patrician hands. The plebeians understood the structural problem with remarkable clarity: their status as free citizens did not secure their liberty so long as the same actor who defined the legal duty was the official who found the facts and commanded the men who executed the sentence.

B. The Conflict of Orders and the Principle It Established

The plebeian response was one of antiquity's most effective collective actions. Beginning with the First Secession of 494 B.C.—the organized withdrawal of the plebeian population from the city to the Sacred Mount—the commoners demonstrated that the Republic could not wage war without them, and proceeded to extract for the next two centuries structural concessions in

[10] On the *provocatio ad populum*, the removal of axes from the fasces within the *pomerium*, and the constitutional significance of that distinction for the structure of magisterial power, see LINTOTT, THE CONSTITUTION OF THE ROMAN REPUBLIC, *supra* note 6, at 35–38; JOLOWICZ & NICHOLAS, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW, *supra* note 7, at 15–17.

[11] *Nexum*, BALLENTINE'S LAW DICTIONARY, *supra* note 2 ("(Roman law.) A formal contract between a debtor and his creditor whereby the debtor pledged his personal liberty as security for his indebtedness.").

[12] On *nexum* as a private contractual pledge distinct from the judicial act of *addictio*, see BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 155–57 (Clarendon Law 1962); ALAN WATSON, THE LAW OF OBLIGATIONS IN THE LATER ROMAN REPUBLIC 111–15 (Scientia Verlag 1965). The *Lex Poetelia Papiria* of 326 B.C. substantially curtailed both institutions by prohibiting imprisonment for debt where the debtor could swear to inability to pay.

exchange for their return to civic life.[13] The central argument concerning the legal developments arising from the conflict of orders depends on understanding these concessions as stages of a single institutional project, rather than as isolated political transactions.

1. *The Twelve Tables*

The Twelve Tables (450 B.C.) addressed the first element of the patrician monopoly: the secrecy of the law. By requiring that the civil law be written, displayed publicly in the Forum, and made available to all citizens, the Twelve Tables broke the pontifical their monopoly on interpretation. Law that is written and publicly displayed is law that can be quoted back to the magistrate. It is the first check on arbitrary law-defining power.

2. *The Praetorship*

The praetorship (367 B.C.), created by the lex *Licinia Sextia*, inserted a structural wedge into the magistracy itself.[14] By creating a dedicated juridical office separate from the consulship, the Republic acknowledged that adjudication required its own institutional home—one with a specifically juridical rather than military or executive character. The praetor held *imperium*, but circumscribed *imperium*, and his function was defined as the administration of justice, not the command of armies. He was subject to the same annual term limit, collegial constraints, and tribunician veto as the other magistracies.

3. *The Legal Calendar and the* Legis Actiones

The publication of the legal calendar and the *legis actiones* by Gnaeus Flavius around 304 B.C. completed the attack on interpretive secrecy. By making the procedural formulas themselves publicly available, Flavius destroyed what remained of the patrician knowledge monopoly. Citizens could now arrive at court knowing the required incantations in advance. The magistrate could no longer prevail through surprise.

4. *The* Lex Hortensia

The *Lex Hortensia* of 287 B.C. effectively ended the constitutional conflict of the orders by making plebiscites binding on the entire Roman people,

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[13] Livy, Ab Urbe Condita 2.32–33, *in* Livy: History of Rome, Books 1–2 305–13 (B.O. Foster trans., Harvard Univ. Press 1919). On the historicity of the secession narrative and its relation to the wider conflict of the orders, see Cornell, The Beginnings of Rome: Italy and Rome from the Bronze Age to the Punic Wars (c. 1000–264 B.C.), *supra* note 5, at 256–63.

[14] *See Praetor*, Ballentine's Law Dictionary, *supra* note 2 ("One of the two high Roman officers who performed judicial functions.").

including the patricians. From this point forward, the fundamental legal inequality between the orders was resolved, and Rome's subsequent political conflicts were fought on different ground.[15]

These reforms established the structural principle that no single actor should hold simultaneously the powers to define the law, to determine the facts, and to command the force. They did not yet produce the procedural mechanism that would express that principle most completely. That mechanism developed later, in response to the administrative demands of an emerging commercial empire rather than the dynamics of class conflict.

C. The Formula*: Mature Institutional Expression*

The *legis actio* system, despite the reforms surrounding it, remained brittle. Its rigid oral requirements were a trap for the unwary and a weapon for the technically sophisticated. By the middle of the second century B.C., Rome's Mediterranean expansion had generated commercial disputes of a complexity the old procedure could not handle. Foreign litigants had no access to the Roman law-actions at all. New relationships such as partnerships, agency, and good-faith contracts required legal forms that the *legis actiones* could not accommodate.

The *Lex Aebutia*, passed around 150 B.C., authorized a new procedural form—the *formula*—that would eventually supersede the *legis actiones* entirely. The *Leges Iuliae* of 17 B.C. under Augustus completed the transition, abolishing the old oral procedure and making the formulary procedure universal.[16]

The *formula* procedure was therefore not a direct product of plebeian class pressure. It emerged more than a century after the conflict of the orders was substantially resolved, developed by juristic elites working within the praetorian magistracy to meet the demands of a transformed commercial world. But it embodied and perfected the structural principle the class conflict had established in rougher form: the person who commands the force does not determine the facts.

The architecture that resulted operated on two distinct levels of institutional pre-commitment.

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[15] On the *Lex Hortensia* of 287 B.C. and the effective constitutional resolution of the conflict of orders, see Jolowicz & Nicholas, Historical Introduction to the Study of Roman Law, *supra* note 7, at 24–25; Fritz Schulz, History of Roman Legal Science 7–9 (Clarendon Press 1946).

[16] On the *Lex Aebutia* and the gradual displacement of the *legis actiones* by the formulary procedure, see Jolowicz & Nicholas, Historical Introduction to the Study of Roman Law, *supra* note 7, at 177–81, 219–24; J.M. Kelly, Roman Litigation 1–18 (Oxford Univ. Press 1966). The precise date of the *Lex Aebutia* remains contested; scholarly estimates range from approximately 149 to 123 B.C., with the earlier date now favored by most authorities.

1. *The Praetor's Edict*

The first level was the *edictum praetoris*, the praetor's edict. At the start of each annual term, the praetor posted a public notice, displayed on a whitened board, an album, in the Forum and announcing in advance what categories of legal action he would recognize, what *formulas* he would grant, and what defenses and exceptions he would honor. This announcement was a comprehensive, prospective statement of legal rules, binding on the praetor himself for the duration of his year in office. Most praetors carried their predecessors' edicts forward with only incremental modifications—the *edictum tralaticium*—so that the accumulated text came to function as a *de facto* standing body of law, refined year by year through praetorian practice. The process concluded when Hadrian directed the jurist Julian to codify the entire accumulated text into a permanent fixed form—the *edictum perpetuum*—around 130 A.D. After Julian, the praetor issued *formulas*; he could no longer create new law.[17]

The edict was the *formula* procedure's foundational structural contribution, and it is easily underestimated. By requiring the political magistrate to announce his legal rules publicly and in advance, before any specific litigant or dispute had appeared, the Roman constitution denied the praetor the ability to invent or shape the law in response to the parties before him. Whatever the praetor thought of the plaintiff or the defendant personally, the edict already told the world what he was obligated to do.

2. *The* Formula

The second level was the *formula* itself—the written instruction issued by the praetor to the fact-finder in each individual case, once the nature of the dispute was established at the first stage of the proceedings. The *formula* was a conditional instruction of elegant economy: "If it appears to the judge that the defendant owes the plaintiff ten thousand sesterces, condemn him. If it does not so appear, acquit him." The praetor had real discretion in drafting it; he could frame the condition broadly or narrowly, recognize or deny particular defenses, include or exclude specific exceptions. However, once drafted and delivered, the *formula* locked the proceeding. At that point, the legal question was decided, and only the factual question remained open.

With the *formula* signed, the case left the political arena entirely and moved to the second stage—*apud iudicem*—conducted before a *iudex*. The *iudex* was a private citizen (rather than a government official) drawn from the *album iudicum*, the publicly maintained list of persons eligible to serve

[17] On the praetor's edict, the development of the *edictum tralaticium*, and the codification of the *edictum perpetuum* by Julian under Hadrian, see Otto Lenel, Das Edictum Perpetuum (3d ed. 1927) (the standard modern reconstruction); Schulz, History of Roman Legal Science, *supra* note 15, at 33–44; John A. Crook, Law and Life of Rome, 90 B.C.–A.D. 212, at 72–77 (Cornell Univ. Press 1967).

as fact-finders. In the late Republic, that list was drawn predominantly from the senatorial and equestrian orders—that is, men of substantial property and standing, not plebeian commoners—and its precise composition was the subject of repeated and bitterly contested legislative reform throughout the Republican period. The *iudex* heard the witnesses, examined the accounts, and rendered his verdict strictly within the conditional boundaries that the praetor's *formula* had established. He could not expand the legal question, he could not consult the praetor mid-trial, and he could not go outside the *formula*'s terms. His authority was purely factual; and it was final.[18]

The praetor's lictors could not move until the *iudex* had spoken. Physical force followed factual determination, not the other way around.

D. The Political Economy of the Split and Its Limits

The *formula* procedure's durability rested on the fact that it served every relevant faction simultaneously, which is a reliable test of institutional robustness.

For the commercial class, and by the mid-Republic's boom years when prosperous plebeians had long since joined that class, the procedure offered predictability. Contracts could be drafted and businesses structured with reasonable confidence about the legal framework governing future disputes. If the arbitrary magistrate was the enemy of commercial planning, then the *formula* was its institutional antidote.

For the senatorial elite, the procedure served a different and equally vital purpose. Because the praetorship rotated annually among the aristocracy, a senator's bitterest political rival would hold that office next year. Separating the political magistrate who commanded the armed apparatus from the private fact-finder who determined individual liability ensured that a manufactured lawsuit could not be weaponized to expropriate a senator's estates without persuading an independent member of the propertied class—the *iudex*—of the underlying facts. Mutual deterrence was embedded in procedure itself.

The system did not eliminate praetorian power to shape outcomes. The edict pre-committed the praetor's general rules, but the praetor retained real discretion in drafting the individual *formula*: how broadly or narrowly to frame the conditional, which defenses to incorporate, and whether to grant a *formula* at all for a novel claim. A hostile or creative praetor could tilt the legal playing field before the *formula* was ever issued. The constraint on the

[18] On the composition of the *album iudicum*, the selection process for the *iudex*, and the political contests over panel composition in the late Republic—including the *Lex Aurelia* of 70 B.C., which divided jury panels among senators, equestrians, and *tribuni aerarii*—see KELLY, ROMAN LITIGATION, *supra* note 16, at 31–47; W.W. BUCKLAND, A TEXTBOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 618–22 (rev. Peter Stein, Cambridge Univ. Press 3d ed. 1963).

praetor's authority operated upstream, at the level of publicly announced rules, not at the level of individual case management.

The Roman Republic had nonetheless stumbled onto the foundational blueprint of constitutional design: civil liberty depends less on the ruler's virtue, and more on ensuring that the official who defines the legal rule does not determine the facts and ensuring that the official who determines the facts does not command the armed officers. The *formula* procedure did not achieve perfect justice, but rather structural friction—the deliberate institutional separation of definition from fact-finding from enforcement.

That structural friction is the thing every subsequent legal system, at its best, has struggled to preserve. It is what every regression into arbitrary power has moved first to eliminate. The next two episodes—the Spanish Inquisition's *proceso inquisitorial* and the Star Chamber's conciliar jurisdiction—show the same mechanism of elimination operating at full power.

III. The Spanish Inquisition and the Legal Architecture of Capture

The Spanish Inquisition is so infamous that its notoriety has partly obscured its legal significance. The popular images of hooded figures, rack and thumbscrew, and the systematic terror of religious fanaticism are not merely false, but they are incomplete in an important way for legal history. The Inquisition was itself a highly detailed procedure, not a breakdown of one. Tomás de Torquemada's *Instrucciones* set out dozens of procedural articles.[19] The inquisitors kept meticulous records. The *procesos*, the trial dossiers, survive by the thousands. The accused were entitled to defense counsel. There were internal mechanisms of review. The institution was, on its face, more procedurally elaborate than most contemporaneous secular courts.

The Inquisition demonstrates that the regression to fused sovereign power need not require the absence of rules. It requires only that the rules be designed to resemble procedure while systematically eliminating every structural check that gives procedure its protective function. The Roman *formula* had driven a wedge between the definition of law and the finding of fact. The Inquisition's institutional achievement (to use the word cautiously) was to reconstruct the appearance of a two-stage proceeding while collapsing both stages into a single institutional actor with a direct financial stake in the outcome.

[19] Tomás de Torquemada, Compilación de las Instrucciones del Oficio de la Santa Inquisición (1484).

A. The Converso *Crisis and the Royal Inquisition*

The crisis that produced the Spanish Inquisition was social and economic as much as it was theological. Following the catastrophic anti-Jewish pogroms of 1391, which swept across Castile and Aragon in a wave of mass violence, large numbers of Spanish Jews converted to Christianity under direct physical compulsion or its credible threat. In the generations that followed, conversion became a strategy of survival and social advancement. By the mid-15th century the *conversos*—baptized Jews and their descendants—had penetrated deep into the institutions of Spanish society. They occupied cathedral chapters, municipal councils, royal administration, and the learned professions. The conversions were, by almost every external measure, substantially genuine.

What the Inquisition in fact prosecuted has divided historians ever since. The traditional account holds that crypto-Judaism—the secret maintenance of Jewish practice beneath a Christian exterior—was real and widespread among the *conversos*, and that the tribunal's prosecutions were responses to a genuine theological offense, however brutal in their methods. Benzion Netanyahu's monumental and still-contested study of the origins of the Inquisition challenged this account at its foundations. Netanyahu argued that the *conversos* were overwhelmingly sincere Christians, that the charge of Judaizing was fabricated or vastly exaggerated in the great majority of prosecuted cases, and that the actual engines driving the Inquisition's ferocity were ethnic hostility to the *conversos*' social ascent and economic competition from their commercial success.[20] The *limpieza de sangre* statutes, the blood-purity requirements that began appearing in Spanish institutions from the 1440s onward, conditioning access to office and guild membership on demonstrable descent from Old Christians for several generations back, confirm that the hostility operated through racial as much as theological categories.

The debate over the extent of genuine crypto-Judaism among the *conversos* is real and unresolved—Netanyahu's critics have marshaled substantial archival evidence of actual Judaizing practice, at least in the early post-conversion generation, and the quantitative record does not uniformly support his thesis. For the legal historian, however, the institutional question is the legally important one. The structure of the proceeding reveals its function independent of whether any particular defendant was guilty. And the structure was designed from the beginning to guarantee conviction.[21]

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[20] Benzion Netanyahu, The Origins of the Inquisition in Fifteenth Century Spain (Random House 1995). Netanyahu's thesis generated substantial scholarly controversy. Earlier works maintain the reality of widespread crypto-Jewish practice. *See* Haim Beinart, Conversos on Trial: The Inquisition in Ciudad Real (Magnes Press 1981); 2 Yitzhak Baer, A History of the Jews in Christian Spain (trans. L. Schoffman, Jewish Publication Society of America 1966). For a balanced assessment, see Henry Kamen, The Spanish Inquisition: A Historical Revision 44–59 (Yale Univ. Press 4th ed. 2014).

[21] See Beinart, Conversos on Trial: The Inquisition in Ciudad Real, *supra* note 20; 1 Henry Charles Lea, A History of the Inquisition of Spain 1–160 (Macmillan 1906). The evidentiary record

King Ferdinand and Queen Isabella obtained the papal bull *Exigit sincerae devotionis affectus* from Sixtus IV in November 1478, authorizing a specifically royal inquisition for Castile. The medieval papal inquisition, whatever its procedural defects, was at least nominally answerable to Rome. The Spanish Inquisition was a royal institution. The Inquisitor General was appointed by the Crown, answered to the Crown, and administered the institution's budget, personnel, and territorial jurisdiction as an arm of the royal executive. When Sixtus IV subsequently complained about the tribunal's procedures and their effect on loyal *converso* subjects, Ferdinand's response was essentially dismissive: the matter fell within royal prerogative, and Rome would not interfere. The canonical vestments cloaked a state instrument of social control.[22]

B. The Instrucciones*: The Architecture of Procedural Fusion*

Torquemada's *Instrucciones* of 1484, extended and refined by his successors, were in one sense a sophisticated administrative achievement. They standardized procedure across the regional tribunals, established uniform rules for evidence and sentence, and committed the entire process to writing. A practitioner reading them would recognize the forms of adversarial procedure: a prosecutor (*promotor fiscal*), defense counsel (*abogado*), multiple hearings (*audiencias*), a right to present witnesses. The *calificadores*, theological qualifiers who were officers of the Inquisition, examined the initial denunciation and determined whether it disclosed sufficient matter to constitute formal heresy. There was even the *período de gracia*, a grace period during which voluntary self-denunciation carried lighter penalties than conviction after full process. The appearance was of a structured, rule-governed, even lenient proceeding.

The substance was something entirely different.

The proceeding began with secret denunciation. A citizen appeared before the tribunal and reported a neighbor's suspicious conduct. The *calificadores* examined the denunciation in closed session and determined whether it disclosed sufficient matter to constitute heresy. If they concluded it did, the defendant was arrested. And the identity of the accuser was withheld,

from the Ciudad Real tribunal in particular supports the existence of genuine Judaizing practice in the early post-1391 generation, though the extent and persistence of such practice in later generations remain contested.

[22] On the bull *Exigit sincerae devotionis affectus* (November 1, 1478) and the constitutional significance of royal rather than papal control over the new tribunal, see 1 Lea, A History of the Inquisition of Spain, *supra* note 21, at 157–72; Kamen, The Spanish Inquisition: A Historical Revision, *supra* note 20, at 44–52.

Ferdinand's correspondence with Rome following Sixtus IV's protests of 1482 is analyzed in 1 Lea, A History of the Inquisition of Spain, *supra* note 21, at 172–78; Kamen, The Spanish Inquisition: A Historical Revision, *supra* note 20, at 52–55.

permanently. The accused never learned who had denounced them, could never confront or cross-examine the witness against them, and could never impeach testimony whose source remained unknown. The adversarial check on accusation—the testing of the accuser's credibility, motive, and reliability before a neutral arbiter—was abolished at the first step of the proceeding.[23]

The inquisitors who had reviewed the denunciation and approved the arrest then conducted the trial. In other words, the same institutions who decided that the evidence was sufficient to proceed now sat in judgment of that evidence's sufficiency to convict. There was no transfer of the factual question to an independent body—no division equivalent to the Roman *formula*'s dispatch of the case from the praetor's presence to the *iudex*'s chamber. Investigation and adjudication resided in the same hands, applying the same presumptions, toward the same institutional ends.

The defense counsel requires particular attention, because his presence in the *Instrucciones* is often cited as evidence of procedural regularity. The *abogado* was an officer of the Inquisition itself, not an independent advocate. He was expressly required, if he concluded that the evidence against his client was strong, to urge his client to confess and reconcile rather than contest the charges. The defense counsel was institutionally captured, retaining the form of an advocate while serving the function of a pressure mechanism toward the outcome the tribunal required.[24]

C. Property, Confession, and the Self-Sustaining Machine

The most revealing feature of the Inquisition, which removes any remaining possibility of attributing its design to theological zeal, was the rule governing property sequestration.

Upon arrest and before any hearing, presentation of any evidence, or any finding of fact, the defendant's property was placed under sequestration and administered by the Inquisition's own receivers. The sequestered estate paid for the defendant's maintenance during imprisonment and the costs of the proceeding itself. If conviction followed, as it almost invariably did in cases where the tribunal had committed itself to arrest, a portion of the confiscated estate flowed to the Crown and a portion to the Inquisition's operating budget. That is, the institution that decided guilt controlled the financial proceeds of the guilty verdict before the verdict was reached.[25]

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[23] On the *calificadores*, the secret denunciation procedure, and the permanent concealment of accusers' identities, see 2 LEA, A HISTORY OF THE INQUISITION OF SPAIN, *supra* note 21, at 459–508; EDWARD PETERS, INQUISITION 74–89 (Univ. of California Press 1988).

[24] On the *abogado* as an officer of the tribunal and his institutional obligation to counsel confession when evidence was strong, see 2 LEA, A HISTORY OF THE INQUISITION OF SPAIN, *supra* note 21, at 512–27.

[25] On property sequestration upon arrest and its financial consequences for the institution's incentive structure, see 2 LEA, A HISTORY OF THE INQUISITION OF SPAIN, *supra* note 21, at 529–61; KAMEN, THE SPANISH INQUISITION: A HISTORICAL REVISION, *supra* note 20, at 170–86.

The mechanism that drove the system was confession. A defendant who confessed completely, reconciled to the church, and performed the assigned penance could expect a lighter sentence. A defendant who refused reconciliation faced *relaxado en persona*, a euphemism for being burnt at the stake. This created a powerful institutional incentive to produce confessions, and the instrument for producing them was the *tormento*—judicial torture, authorized under the *Instrucciones* once the inquisitors determined that the evidence warranted it. The authorization was issued by the same inquisitors who had decided that the evidence was suspicious enough to justify arrest, who had conducted the failed hearings, and who would evaluate the confession the torture extracted.[26]

Historians following the revisionist work of Henry Kamen, confirmed by quantitative analysis of surviving tribunal records, have substantially reduced earlier estimates of the Inquisition's total execution rate.[27] The institution's death toll across its entire three-and-a-half-century history was likely in the range of several thousand executions rather than the tens of thousands claimed in older accounts. This revision does not redeem the structural design. It establishes only that the machine was not always used to its full capacity. A court whose accusatorial and adjudicative functions are fused in the same officers, whose finances depend on convicting those it arrests, whose accused cannot confront their accusers, and whose institutional toolkit includes torture authorized by the judges themselves—that court's capacity for destroying the innocent is not captured by counting the years in which it chose restraint.[28]

D. The Form of Separation Without the Substance

The Inquisition preserved one structural feature that superficially resembled the Roman *formula*'s division between juridical and coercive power. It could not itself execute. Capital sentences required relaxation to the secular arm—formal transfer of the condemned to the civil authorities, who conducted the burning at the *auto de fe*. The church shed no blood, and the Inquisitors pronounced no death sentence in their own names.

This was a transparent constitutional fiction, and contemporaries saw through it without difficulty. Secular authorities who declined to execute a person *relaxado en persona*, "relaxed" to them, by the Inquisition would have

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[26] On the authorization and administration of *tormento* under the *Instrucciones*, see 3 Lea, A History of the Inquisition of Spain, *supra* note 21, at 1–78; Peters, Inquisition, *supra* note 23, at 89–96.

[27] Kamen, The Spanish Inquisition: A Historical Revision, *supra* note 20, at 59–62.

[28] Jaime Contreras & Gustav Henningsen, *Forty-Four Thousand Cases of the Spanish Inquisition (1540–1700): Analysis of a Historical Data Bank*, *in* The Inquisition in Early Modern Europe: Studies on Sources and Methods 100–29 (Gustav Henningsen & John Tedeschi eds., Northern Illinois Univ. Press 1986); Kamen, The Spanish Inquisition: A Historical Revision, *supra* note 20, at 59–62.

faced investigation for heresy themselves. The division the Roman constitution had made substantive—the *iudex* found the facts and the praetor's lictors then moved on the basis of that independent determination—was here reduced to a ceremonial handoff between two arms of the same state apparatus.[29]

The structural principle the Roman Republic had established, that the official who commands the force must not determine the facts, had been preserved in formal terms while being annihilated in substance. In England, in the council chamber of the English kings, a different institutional form would produce an identical structural result through entirely different procedural mechanics.

IV. The English Star Chamber and the Displacement Of The Jury

The history of the English Star Chamber differs from that of the Spanish Inquisition in one critical respect. The institution against which it pressed was not a foreign import or a canonical transplant but the indigenous English common law, with its jury, its open accusation, its right of confrontation, and its deep conviction that no man could be compelled to be a witness against himself. The conflict between the Star Chamber and the common law courts was therefore not only a jurisdictional turf war between competing institutions. It was a constitutional point about whether the procedural friction that the common law had spent centuries constructing was a fundamental right or a dispensable technicality. The Stuarts argued the latter. They lost the argument catastrophically, yet the argument itself has never really disappeared.

A. The Conciliar Court: Three Functions in One Room

The Court of the Star Chamber, named for the starred ceiling of the chamber in Westminster Palace where it sat, evolved from the judicial functions of the royal Privy Council. In the early Tudor period, the Council had begun to hear certain categories of case that the ordinary common law courts could not handle effectively: riots by powerful nobles who could intimidate local juries, maintenance and embracery, perjury in lower courts, and forgery. The Star Chamber Act of 1487 created a specific committee of Privy Councillors to hear these matters, though the full court as it developed through the

[29] On the *relaxatio ad brachium saeculare* and its character as a legal fiction rather than a genuine jurisdictional division, see 3 Lea, A History of the Inquisition of Spain, *supra* note 21, at 195–220; Netanyahu, The Origins of the Inquisition in Fifteenth Century Spain, *supra* note 20, at 1085–1100.

16th century derived its authority from the Council's inherent jurisdiction rather than from that single enactment.[30]

The Star Chamber made plain what the Inquisition had taken pains to obscure: the same men who governed the kingdom also judged its subjects. The Privy Councillors who sat in the Star Chamber were the same men who issued royal proclamations, managed foreign affairs, directed the executive machinery of government, and advised the Crown on what would become the law of the land. They were simultaneously executive officers, quasi-legislators through their control of proclamations and orders in council, and the tribunal before which political opponents were prosecuted. The three functions the Roman constitution had separated with such institutional care—the definition of law, the determination of fact, the command of force—were concentrated in men who exercised all three as a single undifferentiated expression of royal authority.

The common law courts had developed over centuries a procedural architecture specifically designed to insulate fact-finding from royal pressure. At its center stood the jury: twelve men from the locality, required to reach a unanimous verdict on the facts, and insulated from judicial coercion by the rule that jurors could not be punished for their verdicts regardless of the outcome. The jury was the English *iudex*, the private citizen fact-finder inserted between the Crown's legal machinery and the defendant's person. The Star Chamber removed it, and the Privy Councillors determined the facts themselves.

B. The Ex Officio *Oath and the Inversion of Adversarial Procedure*

If the Inquisition's central procedural weapon was the secret accusation that could never be confronted, the Star Chamber's was the *ex officio* oath. The accused was required to swear, before the charges against him were specified, to answer truthfully all questions the court chose to put. The oath was administered *ex officio*, by virtue of the judge's authority alone, without the instigation of any private accuser, and refusal to take it was treated as evidence of guilt. Having sworn, the defendant was interrogated about charges he was learning for the first time. His own sworn answers became the primary evidence against him.[31]

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[30] On the origins of the Court of The Star Chamber, the Act of 1487 (*The Star Chamber Act*), 3 Hen. VII c. 1 (Eng.), and the development of conciliar jurisdiction through the Tudor period, see John A. Guy, The Court of The Star Chamber and Its Records to the Reign of Elizabeth I, at 1–26 (H.M.S.O. 1985); 1 Sir William Holdsworth, A History of English Law 493–511 (Sweet & Maxwell 7th ed. 1956).

[31] On the *ex officio* oath, its operation in the Star Chamber and the High Commission, and the common law objections to it, see Leonard W. Levy, Origins of the Fifth Amendment: The Right Against Self-Incrimination 43–82 (Oxford Univ. Press 1968). Levy's treatment remains the definitive account of this history in English legal scholarship.

The inversion was radical. In the common law's adversarial procedure, the Crown bore the burden of proving its case through independent evidence, presented by witnesses who could be cross-examined by the defendant and evaluated by an independent jury. The accused had no obligation to supply that evidence. The *ex officio* oath reversed this entirely: it transferred the prosecution's evidentiary burden to the defendant, who was compelled under oath before he knew what he was being accused of or who had accused him.

Sir Edward Coke, whose sustained conflict with King James I over the constitutional boundary between common law jurisdiction and royal prerogative produced some of the most consequential legal arguments in English history, identified the structural problem in terms that echo the Roman *formula*'s logic. A court could not compound the functions of accusation, investigation, and adjudication without destroying the legal protection these functions separately provided. The *ex officio* oath eliminated the adversarial check on factual determination in exactly the same way that the Star Chamber's abolition of the jury eliminated the independent fact-finder.[32]

The High Commission, the ecclesiastical equivalent of the Star Chamber, established under Queen Elizabeth I to enforce conformity in matters of religion, operated the same machinery in a parallel jurisdiction. It too proceeded without a jury and deployed the *ex officio* oath. The common lawyers attacked both courts on identical structural grounds.

John Lilburne's refusal to take the *ex officio* oath before the Star Chamber in 1637, for which he was sentenced to be whipped from the Fleet Prison to the pillory at Westminster, became one of the foundational episodes of English constitutional history. Lilburne grasped the point precisely. The oath required not merely that he answer questions, but that he surrender the procedural position that protected him from the court's power before he had any way of knowing what that power was about to be turned to.[33]

C. The Stuart Weaponization and the Pattern of Institutional Decay

In its early Tudor operation, the Star Chamber had served recognizably legitimate functions. It controlled powerful men who could corrupt local juries and place themselves beyond the reach of ordinary process. Thomas Barnes' careful study of the court's records concluded that through most of the Tudor period it operated with reasonable procedural regularity—disciplining the powerful rather than the politically inconvenient, and imposing fines rather

[32] On Coke's constitutional arguments against prerogative courts and the *ex officio* oath, see SIR EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 51–56 (1642); Roland G. Usher, *James I and Sir Edward Coke*, 18 ENG. HIST. REV. 664 (1903).

[33] On Lilburne's refusal and his 1637 prosecution before Star Chamber, see PAULINE GREGG, FREE-BORN JOHN: A BIOGRAPHY OF JOHN LILBURNE 40–62 (George G. Harrap 1961); LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION, *supra* note 31, at 271–313.

than mutilation as its characteristic remedy. This is the same point that Kamen made about the Inquisition's early operation: the structure was the problem, even when the operators showed restraint.[34]

The Stuart period destroyed this credibility quickly. Under James I and Charles I, the Star Chamber became the instrument of choice for prosecuting religious dissent and political opposition. The court imposed punishments no common law court could issue: ear-cropping, nose-slitting, branding, and ruinous fines calibrated to destroy families financially rather than merely punish them.

The 1637 prosecution of William Prynne, Henry Burton, and John Bastwick made clear to Parliament what the court had become. Prynne, a Puritan lawyer who had already appeared before the Star Chamber in 1634 and had already had his ears cropped, appeared again in 1637 alongside Burton and Bastwick, all charged with seditious libel for attacking the episcopal church. The court sentenced all three to have the stumps of what remained of Prynne's ears, and the full ears of his co-defendants, cut off in the pillory, their faces branded, and their books publicly burned, before indefinite imprisonment. The sentences were handed down by men who had directed the prosecution, defined the offense, and would supervise the imprisonment that followed.[35]

D. The 1641 Abolition and the Constitutional Reckoning

The Long Parliament abolished the Star Chamber in July 1641. The abolition statute repays careful reading, because it does not chiefly rest the case against the court on political grievance or abuse of discretion.[36] It rests it on structural grounds. The court had proceeded by requiring the defendant to take an oath concerning his own acts before any charge was specified. It had imposed fines, imprisonments, and corporal punishments without the benefit of lawful jury trial. It had exercised jurisdiction through the personal authority of Privy Councillors who were simultaneously the Crown's executive officers and the court's judges.

Parliament was not complaining that the Star Chamber had reached wrong answers in particular cases. It was identifying the procedural mechanisms—the ex officio oath, the absent jury, and the fused executive and

[34] Thomas G. Barnes, *Star Chamber Mythology*, 5 Am. J. Legal Hist. 1 (1961). Barnes' careful archival study argues that the court's reputation for systematic tyranny properly attaches to the Stuart period rather than to Tudor practice.

[35] On the prosecution of Prynne, Burton, and Bastwick and the 1637 sentence, see 8 S.R. Gardiner, History of England from the Accession of James I to the Outbreak of the Civil War 228–40 (Longmans, Green & Co. 1884); William M. Lamont, Marginal Prynne, 1600–1669, at 28–45 (Routledge 1963).

[36] An Act for the Regulating of the Privy Council and for Taking Away the Court Commonly Called the Star Chamber (*Habeas Corpus Act*) 1641, 16 Car. I c. 10 (Eng.).

adjudicative authority—that guaranteed the answers it reached were untrustworthy regardless of the quality or intentions of the individual judges. The institution was defective in its architecture. Replacing the judges would not have fixed it.

The constitutional principle that the abolition statute articulates is, at its core, the same principle that the Roman Republic had encoded in the *formula* procedure: civil liberty is not secured by ensuring that judges are virtuous but by ensuring that institutional architecture makes arbitrary judgment hard to achieve, regardless of who sits on the bench. The *formula* achieved this by separating the praetor's definitional function from the *iudex*'s fact-finding function through a written, public, prior commitment. The Inquisition destroyed it by fusing investigation, adjudication, and enforcement in the same hands while dressing the fusion in procedural robes. The Star Chamber destroyed it by abolishing the jury, compelling self-incrimination, and seating the Crown's executive officers as the judges of the Crown's political opponents.

V. From *Formula* to Agency: The Recurrent Logic of Institutional Regression

The Roman *formula*, the Inquisition, and the Star Chamber belong to different legal worlds, but they expose the same institutional weakness. Each shows how quickly law loses its protective character when the same authority defines the rule, determines the facts, and controls the force that follows. The modern administrative state did not arise from tyranny, fanaticism, or royal prerogative, but rather from the genuine demands of complexity, expertise, and speed. Yet those demands press in the same structural direction, making separation look wasteful, and fusion practical.

A. Three Traditions, One Pathology

The three histories considered so far share little in legal culture, theology, or political form. They cannot be reduced to a common villain or a common cultural failure. Each arose from a distinct civilization's distinct response to a distinct institutional problem. That is what makes the structural convergence so instructive.

The Roman *formula* procedure emerged from the class warfare of a pagan republic whose institutional genius was its distrust of concentrated power. That republic, operating entirely within its own constitutional logic, nonetheless produced magistrates who had arrogated to themselves the undivided power to define obligation, find facts, and command force. It required two centuries of sustained political conflict to prize these functions apart.

The Spanish Inquisition was built on the canonical legal tradition of a church that had spent a millennium refining its procedural forms—a tradition that produced Gratian's *Decretum*, the great medieval canonical collections, and some of the most sophisticated jurisprudence the Western world had generated before the common law emerged. That tradition produced an institution that fused accusation with adjudication, investigation with sentencing, and financial interest with fact-finding, all inside the same institution.

The English Star Chamber arose within the oldest continuous common law tradition in the world—a tradition that had generated Magna Carta, the jury of peers, the writ of habeas corpus, and Coke's *Institutes*—that had articulated the separation of independent fact-finding from royal power centuries before the Enlightenment gave it philosophical vocabulary. That tradition produced a court that abolished the jury, compelled self-incrimination, and seated the Crown's executive officers as the judges of the Crown's political opponents.

The point is not that these traditions uniquely failed. It is that no tradition is sufficient. The structural regression need not require bad theology, alien legal transplants, or the absence of a constitutional heritage. It requires only an institutional logic—of efficiency, necessity, or emergency—that persuades the actors within a system that the friction separating law-defining power from fact-finding power from enforcement power is a technicality rather than a structural support. Once that persuasion takes hold, the regression proceeds identically regardless of whether the institution wears a magistrate's toga, inquisitor's habit, or Privy Councillor's robe.

The common element across all three episodes is institutional rather than cultural. It is the elimination of institutional distance between the official who commands the force and the official who determines when the force is deserved. Every other variable—theology, ethnicity, political form, legal tradition—is simply the raw material the regression exploits once that structural protection is gone. The machinery was indifferent to its targets. What made it dangerous was not who happened to be operating it at any given moment but that it existed at all without the structural checks that would have made its abuse institutionally impossible rather than merely morally disapproved.

None of this required a shared theoretical framework to produce identical results. The Roman plebeians did not philosophize about structural friction; they struck. The Long Parliament did not theorize the separation of powers when it abolished the Star Chamber; it described what the court had done and declared it intolerable. The structural logic was operating before any of these actors possessed vocabulary adequate to describe it—which is the evidence that it is a structural logic and not a retrospective projection

of modern constitutional sensibility onto more primitive institutional arrangements.

B. The Administrative State and the Familiar Bargain

The American administrative state arrived with now-familiar justifications. Complex modern problems require expert integrated agencies. Ordinary courts lack the technical sophistication to second-guess agency determinations in areas of scientific and economic complexity. The separation of rulemaking from enforcement from adjudication would cripple the regulatory capacity the modern state requires.

The doctrinal expression of the administrative state's institutional bargain was the Supreme Court's decision in 1984 in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,[37] which held that courts should defer to agency interpretations of ambiguous statutory language. The praetor's *edictum* had been the Roman constitution's solution to this problem: by requiring the political magistrate to commit to his legal rules publicly and in advance, before any particular dispute arose, the *formula* procedure prevented the official who commanded the force from authoritatively interpreting the rule that justified deploying it. Chevron undid this separation at the level of statutory construction, granting the agency that wrote, enforced, and adjudicated the regulation the authoritative power to say what it meant when a court found the text ambiguous.[38]

The Supreme Court's 2024 term brought this structural argument to its head. In *Loper Bright Enterprises v. Raimondo*,[39] the Court overruled Chevron and restored independent judicial judgment on questions of statutory interpretation. The majority's reasoning was explicitly structural: Article III of the Constitution vests the judicial power—including the power to say what the law means—in the federal courts, and that vesting cannot be abdicated to the agency whose conduct is under review.[40]

SEC v. Jarkesy,[41] decided the same term, carried the structural argument further and in doing so reproduced the abolition of the jury with striking precision. The Securities and Exchange Commission had brought civil

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[37] 467 U.S. 837 (1984) (Stevens, J.).

[38] *Id.* Chevron's foundational premise—that statutory ambiguity constitutes an implicit congressional delegation of interpretive authority to the administering agency—was, as the majority in *Loper Bright* recognized, difficult to square with the APA's instruction that courts "decide all relevant questions of law." 5 U.S.C. § 706.

[39] 603 U.S. 369 (2024) (Roberts, C.J.).

[40] *Id.*; *see also* Relentless, Inc. v. U.S. Dep't of Commerce, No. 22-1219 (U.S. 2024) (companion case). The majority opinion in *Loper Bright*, written by Chief Justice Roberts, held that *Chevron* was inconsistent with the APA and with Article III and must be overruled. Courts must exercise "independent judgment in determining the meaning of statutory provisions." *Loper Bright*, 603 U.S. at 394.

[41] 603 U.S. 109 (2024) (Roberts, C.J.). The Court held 6–3 that the Seventh Amendment guarantees defendants in civil penalty actions for securities fraud the right to a jury trial in an Article III court.

enforcement actions through its own in-house administrative law judges—agency employees determining liability under rules that the agency had written, in proceedings that the agency prosecuted, with penalties flowing to the agency's enforcement mission. The Court held this unconstitutional under the Seventh Amendment's guarantee of jury trial in suits at common law. The majority's analysis, setting aside its doctrinal vocabulary, is the institutional argument of this article, stated in a contemporary key: the official who writes the rule cannot also be the official who determines whether it was violated, and the determination of factual liability cannot be committed to a body with an institutional stake in the outcome. The dissent made the functionalist argument directly.[42]

Seila Law LLC v. CFPB,[43] decided four years earlier, had addressed the enforcement dimension of the same structural problem. The Consumer Financial Protection Bureau's single-director structure—one officer exercising vast regulatory, enforcement, and adjudicative power, removable only for cause—concentrated in a single unaccountable person exactly the combination of functions the Constitution's separation of powers was designed to distribute across competing institutions.[44]

C. The Israeli Inflection

The Israeli constitutional crisis of 2023 warrants attention in this context because it illustrates the structural problem appearing simultaneously in two opposing directions within a single modern democracy—and because the collision of those two directional pressures produces a constitutional crisis that good faith alone and no quantity of legal argument can resolve without structural reform.

Israel operates without a fully codified constitution. The Israeli Supreme Court's answer, developed through the jurisprudence of President Aharon Barak beginning with the landmark *United Mizrahi Bank* decision of 1995,[45] claimed authority to strike down Knesset legislation inconsistent with the Basic Laws, even though no Basic Law had explicitly conferred that power, and it developed standards of reasonableness and proportionality as grounds for reviewing virtually any governmental decision. A court that authorizes its own expanded review power has committed a version of the

[42] *Id.* at 198–203 (Sotomayor, J., dissenting).
[43] 591 U.S. 197 (2020) (Roberts, C.J.).
[44] *Id.* The Court held that the CFPB's single-director structure—an officer removable only for inefficiency, neglect, or malfeasance—unconstitutionally concentrated executive power in a position insulated from presidential oversight.
[45] CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village, 49(4) PD 221 (1995) (Isr.).

same institutional overreach this article has been tracing: it has made itself the unchecked definer of the rules by which its own expanding authority is justified.[46]

Simultaneously, the Israeli Attorney General serves both as the government's primary legal advisor, providing binding opinions on the legality of proposed governmental actions, and as the head of the state prosecution, with authority to bring criminal charges against the officials whose conduct the Attorney General's own office has been advising on. The same institution that draws the line between legal and illegal governmental conduct also prosecutes officials for crossing it. The structural conflict this creates is not a matter of individual bias or institutional bad faith. It is architectural.[47]

Prime Minister Benjamin Netanyahu government's judicial reform package of 2023 addressed genuine structural problems through responses that created structural problems of equivalent severity. A simple Knesset majority override of Supreme Court decisions, government control over judicial appointments, elimination of the reasonableness standard—each addressed a real institutional overreach by concentrating in the governing majority the power to nullify judicial review, select the judges who would conduct it, and eliminate the standards it applied. The cure reproduced the disease in a more dangerous constitutional form.[48]

D. The Permanent Structural Problem

The insight traced here—that civil liberty depends not on the virtue of rulers but on the institutional architecture that makes arbitrary judgment structurally impossible—is simple in statement and difficult in practice to maintain. It is deceptively simple because the underlying principle is not controversial. It is extraordinarily difficult to maintain because the conditions that make the separation seem unnecessary always recur. Emergencies are real. Inefficiency is real. Corruption of the independent fact-finder is real. The technical complexity that seems to require integrated expertise is real. These are not always pretexts. They are genuine institutional problems, and the structural

[46] President Barak's opinion held that the Basic Laws enacted in 1992 constituted a "constitutional revolution," conferring on the Israeli Supreme Court authority to strike down Knesset legislation inconsistent with their provisions. *Id.*, Opinion of Barak, at 164.

[47] On the structural implications of the Attorney General's dual advisory and prosecutorial functions in the Israeli system, see Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review*, 39 Hastings Const. L.Q. 457 (2012); 2 Amnon Rubinstein & Barak Medina, The Constitutional Law of the State of Israel 1100–35 (6th ed. 2005).

[48] On Israel's constitutional structure, Basic Laws, judicial review, and amendment procedures, see Suzie Navot, Constitutional Law of Israel 45–72 (Kluwer Law Int'l 3d ed. 2024). On the 2023 reform proposals and the constitutional crisis they produced, see Yaniv Roznai & Amichai Cohen, *Populist Constitutionalism and the Judicial Overhaul in Israel*, 56 Isr. L. Rev. 502 (2023); Yaniv Roznai, Rosalind Dixon & David Landau, *Judicial Reform or Abusive Constitutionalism in Israel*, 56 Isr. L. Rev. 292 (2023). The reform ultimately stalled following mass public protest and a Supreme Court ruling in January 2024 striking down the first enacted reform measure.

argument does not dissolve them. It insists only that they be solved without demolishing the load-bearing walls.

The Roman *formula* solved the problem not by making magistrates virtuous but by requiring them to commit to their legal rules in writing and in public before any particular dispute arose. The commitment was architectural, not moral. The Inquisition destroyed this solution not by appointing wicked inquisitors but by designing a proceeding in which virtuous ones would produce the same result. The Star Chamber destroyed it not by seating corrupt Privy Councillors but by creating an institution in which honest men, applying their honest judgment about state necessity, produced what amounted to judicial tyranny.

The genius of the *formula* was not sophistication but simplicity: it drove a wedge between two functions that institutional gravity always tends to reunite, and it enforced the separation through prior public commitment rather than present good faith. Any durable reform of the administrative state, in the United States, in Israel, or in any legal system that has allowed the structural separation to erode, will require the same kind of architectural thinking. The necessary reform is the structural restoration of the distance between the official who defines the legal duty and the official who determines whether it has been fulfilled, enforced by mechanisms that operate regardless of the individual actors' intentions.

VI. The Administrative State and the Constitutional Reckoning

The administrative state brings the old problem into modern constitutional form. Agencies were built to solve real problems that courts and legislatures were poorly equipped to manage in real time, such as technical regulation, continuous supervision, and expert fact-finding. But the institutional bargain that made agencies useful also made them dangerous. Rulemaking, enforcement, and adjudication increasingly gathered inside the same walls, softened by procedure but not fully separated by structure. The modern American constitutional reckoning asks whether those internal safeguards are enough, or whether the architecture itself must be rebuilt.

A. The New Deal Settlement and Its Structural Bargain

The modern American administrative state was defended in terms that should now sound familiar. The Sherman Act and the Interstate Commerce Act had demonstrated that ordinary courts, proceeding through adversarial process before generalist juries, could not effectively regulate the complex technical relationships of industrial capitalism. The railroad rate-setter, the securities

issuer, the food and drug manufacturer—these required expert factual determination and continuous supervisory oversight that the episodic and formalistic common law proceeding could not supply. The efficiency argument was the same argument advanced for the praetor's undivided imperium in times of civic crisis, for the Inquisition's integrated canonical procedure, and for the Star Chamber's conciliar jurisdiction to reach powerful nobles whom local juries could not be trusted to try.

The foundational doctrinal case for nearly 100 years until 2026 had been *Humphrey's Executor v. United States*.[49] Franklin Roosevelt had sought to remove FTC Commissioner William Humphrey—deceased by the time the case was decided—on the ground that the President required loyal subordinates capable of executing his policy program. The Supreme Court held unanimously that the statute's protection against removal except for inefficiency, neglect, or malfeasance was constitutional, because the FTC performed not purely executive functions but "quasi-legislative" and "quasi-judicial" ones, placing the agency in a different constitutional category than purely executive officers.[50] The Court would overrule *Humphrey's Executor* in 2026, as discussed below.

By classifying the FTC's functions as neither purely legislative, nor purely executive, nor purely judicial—but as "quasi" versions of each—the Supreme Court created a category of governmental power exempt from all three branches' structural constraints simultaneously. An independent agency could make binding rules without Article I's bicameralism and presentment requirements. It could adjudicate liability without Article III's guarantee of an independent court and the Seventh Amendment's jury right. Its leadership could be insulated from the accountability to the President that Article II imposes on executive officers. The "quasi" classification was a doctrinal escape hatch wide enough to admit the entire modern regulatory state.

Congress's response to this constitutional situation was the Administrative Procedure Act (APA) of 1946.[51] The APA was Congress's attempt to impose procedural friction on administrative proceedings from within, and its central instrument was the separation of functions provision of section 554(d): the Administrative Law Judge was to be insulated from the agency's investigative and prosecutorial staff.[52] The structural parallel to the Roman

[49] 295 U.S. 602 (1935) (Sutherland, J.).

[50] *Id.* Before Trump v. Slaughter, No. 25-332, 2026 U.S. LEXIS 2877 (U.S. June 29, 2026) (Roberts, C.J.), the tension between *Humphrey's Executor* and *Myers v. United States*, 272 U.S. 52 (1926) (Taft, C.J.), was never satisfactorily resolved at the doctrinal level and generated persistent instability through *Morrison v. Olson*, 487 U.S. 654 (1988) (Rehnquist, C.J.), until *Seila Law* clarified the outer limits of *Humphrey's Executor* without formally overruling it.

[51] Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

[52] 5 U.S.C. § 554(d) (separation of functions in formal adjudications).

formula procedure was deliberate but the structural result was considerably diminished. The Roman *iudex* was a private citizen with no institutional relationship to the praetor's office whatsoever. The APA's ALJ is an agency employee, appointed by the agency head, compensated by the agency, and subject to agency administration and supervision on everything except as to the specific merits of the case before him.[53]

The *Chevron* doctrine, installed in 1984, represented the administrative state's structural consolidation at the level of legal interpretation. The *formula* procedure's foundational structural contribution was the praetor's edict: the requirement that the political magistrate commit to his legal rules publicly and prospectively, before any particular dispute arose, so that the official who commanded the force could not define the governing rule in the midst of an enforcement action. *Chevron* inverted this structure at the level of statutory interpretation. When a reviewing court found the statute governing agency conduct ambiguous, *Chevron* required judicial deference to the agency's own construction of that ambiguity. *Brand X Internet Services*[54] pressed the logic further still: even where a federal court had previously interpreted the governing statute, a subsequent agency interpretation, if reasonable, would displace the judicial construction. The institution that commands the force also authoritatively states what the force is warranted to reach. Justice Roberts's dissent in *City of Arlington v. FCC*[55] identified the structural consequence with precision: courts cannot defer to an agency's interpretation of the scope of its own jurisdiction without abandoning the judicial independence that Article III requires.

B. The Non-Delegation Problem: Definitional Power Without Prior Constraint

The non-delegation doctrine addresses the article's central concern at an even more fundamental level than *Chevron*. Article I, Section 1 of the Constitution answers the foundational question: the legislative power is vested in Congress, not in the executive branch and not in the agencies Congress creates. Congress cannot delegate that power wholesale to another body; it can only authorize executive agencies to fill in the details of a framework that

[53] *See* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557 (1996). On the structural tension between ALJ independence and agency control before *Lucia*, see Kent Barnett, *Resolving the ALJ Quandary*, 66 Vand. L. Rev. 797 (2013).

[54] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (Thomas, J.). Justice Scalia's dissent predicted the doctrinal instability that *Brand X* would produce: "The Court today moves to solve this problem of its own creation by inventing yet another breathtaking novelty: judicial decisions subject to reversal by executive officers." *Id.* at 1016 (Scalia, J., dissenting, joined by Souter & R.B. Ginsburg, JJ.).

[55] 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting, joined by Kennedy & Alito, JJ.) ("A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference."); *id.* at 327 ("We do not leave it to the agency to decide when it is in charge.").

Congress itself has specified, provided it supplies an "intelligible principle" to guide and limit the exercise of that delegated authority.[56]

The doctrine's constitutional force has been inversely proportional to its textual clarity. The Court applied it with genuine effect exactly twice: in *Panama Refining*[57] and *Schechter Poultry*,[58] both decided in 1935. No statute has been invalidated on non-delegation grounds in the ninety years since. The "intelligible principle" test has been stretched until virtually any delegation survives it. Standards requiring agencies to act in the "public interest," to set air quality standards "requisite to protect the public health" with "an adequate margin of safety," or to regulate in ways that are "fair and equitable" have all been upheld as constitutionally sufficient guidance.[59]

The consequence is direct. An agency operating under a broad statutory delegation possesses, within the domain of that delegation, something approaching full legislative definitional authority. It defines what constitutes a threat to public health before any specific case arises, determines that a particular configuration of facts constitutes unfair competition in the course of investigating a specific defendant, and enforces that self-defined standard against parties who had no concrete notice of its specific content before the agency articulated it in the context of their own case. Justice Neil Gorsuch's dissent in *Gundy v. United States* called for reinstating the non-delegation doctrine as a genuine constitutional check, arguing that the intelligible principle test as currently administered permits Congress to transfer the legislative power to executive agencies while retaining only the constitutional form.[60]

The major questions doctrine, articulated explicitly in *West Virginia v. EPA*,[61] represents the Supreme Court's preferred intermediate position—not a full revival of non-delegation but an insistence that Congress speak with specificity before agencies claim authority over issues of vast economic and political significance. The EPA's attempt to restructure the national electricity grid,[62] OSHA's vaccine mandate,[63] the student loan forgiveness program[64]—

[56] J.W. Hampton & Co. v. United States, 276 U.S. 394, 409 (1928) (Taft, C.J.).

[57] Panama Refin. Co. v. Ryan, 293 U.S. 388 (1935) (Hughes, C.J.).

[58] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (Hughes, C.J.).

[59] Whitman v. Am. Trucking Assocs., 531 U.S. 457 (2001) (Scalia, J.) (upholding the EPA air quality standard against a non-delegation challenge). For the standard academic assessment that the intelligible principle test has ceased to function as a genuine constitutional constraint, see Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002).

[60] Gundy v. United States, 588 U.S. 128, 149 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J., Thomas & Kavanaugh, JJ.). Justice Samuel Alito, concurring in the judgment, stated that he would be willing to reconsider the non-delegation doctrine if a majority of the Court were prepared to do so. *Id.* at 148.

[61] 597 U.S. 697 (2022) (Roberts, C.J.) (construing the major questions doctrine).

[62] *See id.*

[63] *See* Nat'l Fed'n of Indep. Bus. v. U.S. Dep't of Lab., Occupational Safety & Health Admin., 595 U.S. 109 (2022) (*per curiam*).

[64] *See* Biden v. Nebraska, 600 U.S. 477 (2023) (Roberts, C.J.).

all fell to the requirement of clear congressional authorization for regulatory decisions of this magnitude. The doctrine limits agency definitional expansion at the high end of regulatory ambition. It leaves the vast middle range of agency activity under delegation standards that permit broad legislative authority with minimal congressional precision.[65]

C. Hamburger, Vermeule, and the Historical Verdict

The theoretical debate over the administrative state's constitutionality has been conducted, over the past decade, primarily between Philip Hamburger's *Is Administrative Law Unlawful?*[66] and Adrian Vermeule's *Law's Abnegation*[67]—two books that reach opposite conclusions from much of the same doctrinal material, and whose disagreement tracks the structural argument of this article with particular clarity.[68]

Hamburger's core argument is structural and historical. Administrative agencies exercise the judicial power of the United States—binding determinations of legal rights and obligations in specific cases—that Article III vests exclusively in courts staffed by life-tenured judges with protected salaries. They simultaneously exercise the legislative power that Article I vests in Congress. The combination of those two powers in a single institution, insulated from both branches' constitutional accountability structures, is the administrative state. It is, Hamburger argues, what the Constitution's architecture was designed to prevent and what the prerogative courts—the Star Chamber and the High Commission—had been abolished in 1641 for doing.

Vermeule's answer in *Law's Abnegation* is that the separation of powers is not a set of enforceable hard rules but a flexible governance framework within which Congress may legitimately design regulatory institutions suited to modern conditions. Courts lack the technical sophistication to second-guess agency determinations in complex regulatory domains. Judicial deference, even deference more complete than *Chevron* required, is not abdication but appropriate institutional modesty.

The historical argument this article has developed adjudicates this debate in Hamburger's favor on the structural diagnosis, while parting company with the remedial implications that critics find impractical. Vermeule's functionalism, the argument that integrated institutional authority is justified by the complexity of the problems it addresses and the expertise of

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[65] For the major questions doctrine's relationship to the broader non-delegation question, see Cass R. Sunstein, *There Is Nothing That the Major Questions Doctrine Decides*, 2022 Sup. Ct. Rev. 1.

[66] Hamburger, Is Administrative Law Unlawful?, *supra* note 4.

[67] Vermeule, Law's Abnegation: From Law's Empire to the Administrative State, *supra* note 4.

[68] Cass R. Sunstein & Adrian Vermeule, Law and Leviathan: Redeeming the Administrative State (Belknap Press 2020). For a critical engagement with both positions, see Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1 (2017).

those who exercise it, is the argument advanced in defense of every institutional regression this article has traced. The complexity of modern regulatory problems is real. It provides no answer whatever to the structural question of whether the body that defines the legal duty should also command the force deployed to enforce it.

D. The Structural Correction and Its Limits

Seila Law, *Loper Bright*, and *Jarkesy* read as a jurisprudential arc rather than three isolated decisions, constitute the most sustained judicial effort to restore structural friction to the administrative state since the New Deal settlement. Each addresses one of the three functions whose fusion this article has argued produces the characteristic pathology of institutional regression.[69]

Seila Law addressed the enforcement dimension: an agency whose head is insulated from presidential removal exercises coercive power without the accountability that Article II requires. *Loper Bright* addressed the definitional dimension: the agency that enforces the rule cannot also provide the authoritative interpretation of the rule's meaning. Courts must exercise independent legal judgment on questions of law. *Jarkesy* addressed the fact-finding dimension: the agency that defines the violation and prosecutes it cannot be the body that determines whether it occurred. The Seventh Amendment's jury right restores to civil penalty adjudication something structurally analogous to the independence that the Roman *iudex* provided.

Jarkesy's correction is significant, but gaps still remain. And even though *Humphrey's Executor* has now been overruled, that correction reaches only the President's power of removal, whereas multi-member agencies combining rulemaking, enforcement, and adjudication retain that fusion of functions within their own walls. The APA's internal separation of functions remains the primary structural protection against the fusion of prosecution and adjudication within agencies conducting formal proceedings, and it is a substantially weaker protection than the institutional independence the *formula* procedure created. The non-delegation doctrine remains dormant in practice.

Most fundamentally, the structural correction accomplished by the recent cases operates at the level of judicial doctrine rather than institutional architecture. The *formula* procedure's protection was embedded in the proceeding itself—it was not possible for the praetor to find facts himself, not because courts stood ready to review the proceeding afterward, but because the institutional design removed the fact-finding function from his

[69] For the antecedent Article III problem of adjudication in the political branches, see Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559 (2007).

chambers before any case began. The administrative state's structural correction is currently being accomplished through doctrinal holdings that must be applied case by case, subject to the pressures of litigation strategy, political appointment, and doctrinal evolution across changing Court compositions. The judicial reimposition of structural friction is essential. Yet it is not a solution on its own. The durable solution requires institutional architecture that makes the pathology structurally impossible, not merely legally prohibited and occasionally corrected.

As this article went to press, the Supreme Court removed the keystone of the New Deal settlement. In *Trump v. Slaughter*, a 6–3 majority held the FTC's for-cause removal provision incompatible with the separation of powers and overruled *Humphrey's Executor* outright.[70] The decision completes the arc *Seila Law* began: the enforcement function must answer to the Chief Executive whether it is lodged in a single director or a multi-member commission. Two features bear on the argument advanced here. First, the Supreme Court grounded its holding not in the separation of functions but in the unitary executive—the President's obligation to control all who wield executive power. *Slaughter* relocates the fused powers of the modern agency under presidential command rather than disaggregating them, a point Justice Gorsuch pressed in concurrence when he observed that independent agencies exercise legislative and judicial power as well, and that, "after today's decision, the President can effectively exercise all those powers too."[71] Second, *Slaughter* leaves the FTC's internal fusion of rulemaking, prosecution, and in-house adjudication intact. Indeed, it treats that fusion as proof that the agency wields executive power. The decision thus vindicates this article's attack on the "quasi" classification while confirming its central caution: doctrine that reassigns control over the fused functions is not the same as architecture that separates them. Removal at will is not the independent fact-finder that the *formula* installed between definition and force.

VII. The Israeli Inflection: Structural Regression in a Constitutional Democracy

The three historical episodes this article has examined are, in their respective cultural contexts, easier to explain than to excuse. The Roman magistrate exercised power that no institutional framework had yet constrained. The Spanish Inquisitor operated within a canonical culture that genuinely fused ecclesiastical and royal authority. The Stuart Privy Councillor inhabited a constitutional order that had not completed its articulation of the jury right's

[70] Trump v. Slaughter, No. 25-332, 2026 U.S. LEXIS 2877, at *43 (U.S. June 29, 2026) (Roberts, C.J.).
[71] *Id.* at *52 (Gorsuch, J., concurring).

foundational status. In each case the structural regression operated against the background of an incomplete or contested constitutional settlement.

Israel in the 21st century offers no such mitigation. It is a functioning democracy with an independent legal profession, a judiciary of genuine institutional distinction, and a political culture that has taken constitutional point with profound seriousness since independence. If the structural temptation this article has traced can manifest with full force in that context—and the events of the past decade confirm that it can, running simultaneously in two opposing institutional directions—then the article's central claim about the universality of the structural regression is established at its maximum strength.

A. The Constitutional Vacuum and Its Structural Consequences

Israel declared independence in 1948 with the stated intention of drafting a constitution. The constitution was never completed. Religious and secular factions could not agree on the foundational questions, including the role of Jewish religious law, the relationship between democratic majority rule and biblical precept, and the civic status of Arab citizens in a state defined by Jewish national identity. The founding generation chose deferral over confrontation, adopting Basic Laws incrementally rather than the comprehensive constitutional settlement that foundational constitutional moments typically produce.

Eleven Basic Laws had accumulated by 2023, governing the Knesset, the executive, the judiciary, the military, and fundamental rights. Two Basic Laws passed in 1992—(1) Basic Law: Human Dignity and Liberty[72] and (2) Basic Law: Freedom of Occupation[73]—proved constitutionally decisive. They protected an enumerated set of fundamental rights and included proportionality provisions limiting governmental interference with those rights. What they conspicuously did not include was an explicit grant of authority to the Supreme Court to strike down Knesset legislation that violated them. The power of judicial review—the foundational structural question in any constitutional order—was left textually unaddressed.

This was not a minor procedural gap. It was a structural vacuum at the center of the legal order. The structural questions were left open, available to be resolved by whoever moved first and most decisively. The Supreme Court moved first.

[72] Basic Law: Human Dignity and Liberty, 5752-1992, SH 1391 (1992) 150 (Isr.).
[73] Basic Law: Freedom of Occupation, 5752–1992, SH 1387 (1992) 60 (Isr.).

B. The Barak Revolution: Judicial Self-Authorization and Its Structural Logic

President Aharon Barak's 1995 majority opinion in *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*[74] was the most consequential judicial act in Israeli constitutional history. Barak held that the 1992 Basic Laws had effected a "constitutional revolution"—that they were higher-law norms that the Knesset could not override through ordinary legislation, and that the Supreme Court possessed authority to strike down inconsistent legislation. The holding filled the constitutional vacuum the founding generation had left open. It did so through a judicial act rather than a constitutional convention, a referendum, or an explicit legislative grant.[75]

The structural novelty warrants emphasis. The U.S. Supreme Court's claim of judicial review in *Marbury v.* Madison[76] rested on arguable but textually grounded premises. The Barak Court's parallel claim rested on no comparable textual foundation. The 1992 Basic Laws said nothing about judicial review of legislation. Barak argued that the power was inherent in the concept of constitutional supremacy. The structural move was a court deciding it possessed the authority to define the limits of legislative power, on the basis of a constitutional text that had not granted that authority. The administrative law parallel is direct: just as *Chevron* permitted agencies to interpret the statutory grants of power that bounded their own authority, the Barak Court defined the scope of its own review authority without external constraint.

Having established judicial review without textual grant, the Barak Court developed the substantive standards of review through the same process of judicial self-definition. The proportionality doctrine and the reasonableness standard, which authorizes review of governmental decisions that were "severely unreasonable," were judicial creations with no Basic Law text to anchor them. Richard Posner, then Circuit Judge on the U.S. Court of Appeals for the Seventh Circuit, reviewing Barak's jurisprudential writings, observed that Barak's conception of judicial role—the judge as guardian of fundamental values with authority to override democratic decisions that fall below those values—was essentially a claim to govern, dressed in the language of constitutional interpretation.[77]

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[74] CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village, 49(4) PD 221 (1995).

[75] For a comparative perspective on the constitutional revolution thesis, see Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism 38–76 (Harvard Univ. Press 2004).

[76] 5 U.S. (1 Cranch) 137 (1805) (Marshall, C.J.).

[77] Richard A. Posner, *Foreword: A Political Court*, 119 Harv. L. Rev. 31, 86–89 (2005). Barak's most complete statement of his judicial philosophy is Aharon Barak, The Judge in a Democracy 3–75 (Princeton Univ. Press 2006).

C. The Attorney General's Structural Contradiction

The Israeli Attorney General occupies an institutional position that would have struck the common law tradition as structurally incoherent. The Attorney General serves simultaneously as the government's primary legal advisor, providing binding opinions on the legality of proposed governmental actions, and as the head of the prosecution, with supervisory authority over criminal investigations of government officials and the power to authorize indictments against them. The same institution that draws the line between legal and illegal governmental conduct also prosecutes officials for crossing it.[78]

The structural conflict this creates is not a matter of individual bias or institutional bad faith. When the Attorney General advises the cabinet that a proposed regulatory action is permissible and the minister proceeds on that basis, any subsequent prosecution of that minister for conduct in the same regulatory domain is institutionally compromised regardless of the specific facts in the particular case. The formal independence that Israeli law grants the Attorney General—insulation from at-will removal, professional norms of prosecutorial neutrality—is the bureaucratic equivalent of the APA's separation of functions provision: real, valuable, and constitutionally insufficient to substitute for the structural independence it approximates.

D. The Reform Crisis and the Bidirectional Temptation

The Netanyahu government's judicial reform program and the Supreme Court's response to it are best understood not as a clash between the defenders of the rule of law and its enemies, but as the collision of two structural regressions, each feeding on the other's institutional excess.

The reform proposals addressed genuine structural problems through responses that created structural problems of equivalent severity. The Barak Court had claimed judicial review without textual authorization and had developed open-ended review standards without democratic input or constraint. The proposed remedies—a simple Knesset majority override of Supreme Court decisions, government control over judicial appointments, and elimination of the reasonableness standard by Basic Law amendment—addressed those overreaches by concentrating in the governing majority the power to nullify judicial review, select the judges who would conduct it, and eliminate the standards it applied. The cure reproduced the disease in a more dangerous constitutional form.

[78] On the structural implications of the Attorney General's combined advisory and prosecutorial functions, see Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review*, 39 Hastings Const. L.Q. 457, 491–99 (2012); 2 Rubinstein & Barak Medina, The Constitutional Law of the State of Israel, *supra* note 47, at 1100–35.

The override clause warrants particular attention. Under the proposed clause, the Knesset could enact legislation, receive a Supreme Court ruling that the legislation violated a Basic Law, and then override that ruling with sixty-one votes—a bare parliamentary majority. The body that enacted the law would also determine its constitutional validity. The institutional separation between the legislature's definitional authority and the judiciary's review of that authority—the structural analog to the *formula* procedure's removal of fact-finding from the praetor's chambers—would be reduced to an advisory opinion that the majority could discard at its convenience.

The Israeli Supreme Court's response, delivered in January 2024, matched the government's structural ambition in kind. Sitting in a full panel, the Court struck down the Basic Law amendment eliminating the reasonableness standard, not as ordinary legislation inconsistent with a higher Basic Law, but as a constitutional amendment that violated the "constitutional core" of Israel's basic framework. The Court claimed authority not only to review legislation against the Basic Laws but to void amendments to the Basic Laws themselves if they undermined the democratic foundations of the constitutional order. A court that had begun by reviewing legislation without textual authorization had arrived at voiding constitutional amendments on the basis of implied structural principles that it had itself developed.[79]

The prosecution of Prime Minister Netanyahu sits at the center of this structural picture in a way that confirms the article's historical parallel with striking precision. Case 4000, the most serious of the three criminal charges, carrying bribery allegations, involves the alleged use of ministerial regulatory authority over the communications sector for personal political benefit: favorable news coverage in exchange for regulatory decisions worth billions to a controlling shareholder of a major telecommunications company.[80] The structural core of the allegation is the pathology that the *formula* procedure addressed: a minister using law-defining power over an economic sector as an instrument of private interest rather than public obligation, with the

[79] HCJ 5658/23 Movement for Quality Gov't in Isr. v. Knesset (2024) (Isr.). The High Court of Justice, sitting as a full panel of fifteen justices, struck down Basic Law: The Judiciary (Amendment No. 3), 5783-2023 SH 3066 (2023) 548 (Isr.)—the provision eliminating the reasonableness standard for judicial review of governmental decisions—holding that the amendment undermined the core characteristics of Israel as a democratic state and therefore exceeded the legitimate scope of the constitutional amendment power. For analysis, see Yaniv Roznai & Limor Yehuda, *Unconstitutional Constitutional Amendments in Israel*, 52 Isr. L. Rev. 1 (2019).

[80] CrimC (Jerusalem Dist.) 67104-01-20 State of Israel v. Netanyahu (*Case 4000*) (2020) (Isr.). Case 4000 involves charges of bribery, fraud, and breach of trust arising from the alleged exchange of regulatory benefits to Bezeq International and its controlling shareholder Shaul Elovitch for favorable coverage in the *Walla!* news service. The indictment was filed in January 2020. The structural dimension of the case—ministerial regulatory authority allegedly deployed for private political benefit—is independent of the evidentiary questions before the court and is the specific dimension relevant to this article's institutional argument.

enforcement mechanism and the definitional authority residing in the same institutional hands.

The prosecution of a sitting Prime Minister by the Attorney General's office, which simultaneously advises that same Prime Minister's government on the legality of its actions, exhibits the same structural fusion from the enforcement side. Whatever the merits of the specific charges—and the charges in Case 4000 are serious and backed by substantial evidence according to the indictment—the institutional design concentrates in the Attorney General's office a combination of definitional and enforcement authority, the structural tradition that this article has traced, from the Roman *formula* to the 1641 abolition of the Star Chamber, which has been consistently identified as the precondition of proceedings whose structural integrity cannot be verified regardless of the outcome.

The Israeli experience does not confirm that the prosecution of Netanyahu is politically motivated or legally unfounded. It confirms something anterior and more fundamental: that the institutional design of the Israeli legal system has created conditions under which such questions cannot be answered with confidence, regardless of the specific evidence and regardless of the intentions of those who conduct the proceedings. That institutional uncertainty—the inability of a scrupulous observer to separate the legal merits from the structural conflicts that surround them—is itself the structural pathology, not necessarily injustice in any particular case. Indeed, something more corrosive is created: a proceeding whose architecture makes the determination of justice structurally unreliable, independent of the quality of the evidence or the integrity of the individual actors.

The Israeli crisis confirms what the three historical episodes had established: that structural friction cannot be improvised in the heat of a confrontation between competing institutional claims. It must be built into the architecture before any specific dispute arises. The Roman Republic understood this. It took two centuries of class warfare to teach the lesson. Israel has not yet arrived at its *Lex Hortensia*.

Conclusion

Hamilton told the ratifying conventions that courts were the least dangerous branch because they possessed "neither FORCE nor WILL, but merely judgment."[81] This article has argued that Hamilton's reassurance is exactly half right, and that the half which is wrong has been the more consequential half in the institutional history of the West.

[81] The Federalist No. 78, *supra* note 1, at 464 (Alexander Hamilton).

Courts as designed hold neither force nor will, and that is what makes them safe. But legal institutions do not remain as designed. They respond to the structural logic of concentrated power unless the architecture prevents them from doing so. The Roman magistrate who held *imperium*, commanded armed lictors, and decided cases of debt and obligation was not a court in any meaningful constitutional sense. He was a sovereign in miniature, and he behaved accordingly. The Spanish Inquisitors who defined heresy, gathered evidence, extracted confession, and delivered the condemned were not aberrant religious fanatics. They were institutional actors responding rationally to a structural design that fused every power of the legal process in their hands. The English Privy Councillors who wrote proclamations, investigated offenses, and sat in judgment of political opponents were not uniquely corrupt. They were members of an institution whose architecture made arbitrary power the path of least resistance.

The five episodes this article has examined—Roman *addictio*, the Inquisition's *proceso*, the Star Chamber's conciliar jurisdiction, the American administrative state, and the Israeli constitutional crisis—span 25 centuries, five distinct legal traditions, three religious systems, and every major form of Western political organization. They share little culturally. They share one structural feature: in each case, the same institution came to exercise (to varying degrees) the power to define legal duty, determine whether specific facts satisfied that definition, and command the enforcement that followed. In each case the fusion produced the same architectural result regardless of the quality of the individuals involved. In each case the restoration of liberty required the reimposition of institutional distance between these functions.

The lesson is not that rulers are always corrupt, or that bureaucracies are inherently oppressive, or that expertise is the enemy of liberty. The lesson is institutional and more basic: institutional design overrides individual virtue. That is what the institutional original sin formulation means in its most precise sense: not that the actors are fallen in any personal way, but that the situation they enter is structured to produce the regression regardless of their individual quality, and that no quantity of personal virtue substitutes for the architectural work of making it structurally impossible. The praetor's *formula* did not require honest praetors to work. The APA's separation of functions provides some protection without requiring honest administrators to supply it. Neither system produced perfect justice—the *formula* because the praetor retained substantial *ex ante* discretion; the APA because the ALJ remains an agency employee—but both produced more justice than their alternatives, and they did so structurally, not because of the character of those operating within them.

The reform lesson suggested by this history is simpler than administrative law scholarship typically acknowledges. The necessary reform is not the

abolition of expert administrative agencies, not the return to a 19th-century model of courts-only adjudication, and not the selection of more virtuous administrators or judges. The necessary reform is the reinstatement of one structural fact: an independent determination of whether specific conduct satisfies the applicable legal standard, made by an actor with no institutional stake in the outcome, before the official who commands the enforcement can deploy it. That determination need not be made by an Article III judge in every case, but it must be made by someone or some body that does not report to, is not funded by, does not benefit from, and is not selected by the institution whose enforcement initiative the determination constrains.

That is what the Roman *iudex* provided. It is what the jury provided before the Star Chamber abolished it. It is what Article III courts provide when they exercise independent legal judgment rather than deferring to the agency whose conduct they review. It is what *Loper Bright* and *Jarkesy* have partially restored. It is what the Israeli constitutional crisis has demonstrated cannot be improvised in the heat of a confrontation between a self-expanding judiciary and a majority seeking to subordinate it. Structural friction cannot be created on demand when the conflict it was meant to prevent has already broken out. It must be built into the architecture before any specific dispute arises.

Two and a half millennia of institutional history, spanning cultures and traditions that share nothing except this recurring problem, admit one conclusion: the separation of law-defining power from enforcement power is not a procedural technicality, not a bureaucratic inconvenience, and not a relic of a simpler regulatory world. It is the load-bearing wall of legality. Every generation that removes it discovers this. Few generations have had the institutional wisdom to leave it standing.