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Michael C. Dorf

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SPANDREL OR FRANKENSTEIN'S MONSTER? THE VICES AND VIRTUES OF RETROFITTING IN AMERICAN LAW

MICHAEL C. DORF*

INTRODUCTION

Ancient mythology, literary fiction, and modern science fiction films all recount a similar cautionary tale: human ingenuity gives rise to a powerful invention, but through human fallibility and, in some tellings, venality, the invention becomes a monster and turns on its creators. Perhaps the most famous example is Mary Shelley's *Frankenstein*, in which Dr. Frankenstein's attempt to fashion a living man from the dead remains of others succeeds, only then to go horribly awry.¹ Such stories are timeless because they warn of

* Robert S. Stevens Professor of Law, Cornell Law School. I thank Sherry Colb, Neal Devins, Scott Dodson, Ted Eisenberg, Michael Green, George Hay, Ori Herstein, Nathan Oman, Jason Solomon, and Timothy Zick for very helpful comments. Alison Skaife provided excellent research assistance. This Essay is based on my James Gould Cutler Memorial Lecture at William & Mary Law School.

1. MARY WOLLSTONECRAFT SHELLEY, *FRANKENSTEIN* (1818). The Prometheus story is an ancient version of this cautionary tale. See Olga Raggio, *The Myth of Prometheus*, 21 *J. WARBURG & COURTAULD INSTS.* 44, 44 (1958) (describing Prometheus—who gave fire to mortals—as “the destroyer of a happy original state, a golden age when men lived ‘remote and

the dangers of indelible features of human nature: hubris and short-sightedness. Recent large-scale catastrophes such as the 2010 Deepwater Horizon Gulf oil spill and the 2011 tsunami-induced radiation leakage at the Fukushima nuclear power facility are only the latest reminders of the limits of human ingenuity and the continuing relevance of the Frankenstein story.

But if the unintended consequences of human ingenuity can sometimes prove disastrous, at other times, they may turn out to be felicitous. We are all familiar with accidental inventions like penicillin,² Post-it Notes,³ and the microwave oven.⁴ Spandrels are a more whimsical example. A spandrel is the space between a curved arch and a rectangular boundary;⁵ although an artifact of architecture and geometry, since ancient times, artists and architects have used spandrels to enhance the beauty of buildings.⁶

We see a similar process in nature: evolution, or in the case of human culture, our own artifice, retrofits organs and capacities that were originally selected for one purpose to serve some very different purpose. Feathers evolved as insulation but proved useful for flight.⁷ Evolutionary biologists debate the causal origins of sophisticated human language,⁸ but it certainly did not evolve to enable the writing of sonnets or the delivery of lectures on law. The late

free from toil and heavy sickness"). The Frankenstein story itself resembles the golem myth. See Trevor Pinch, *Science as Golem*, ACADEME, Jan.-Feb. 1996, at 16, 16 (stating that "[a] golem is a hybrid creature of Jewish mythology made out of clay by human hands" that, when uncontrolled, can "destroy its masters"). Modern science fiction films that explore this theme include *The Matrix*, THE MATRIX (Warner Brothers Pictures 1999), and *The Terminator*, THE TERMINATOR (Hemdale Film Corporation 1984). In both films, and many other science fiction stories, machines created to serve humans end up attacking.

2. David Ho, *Bacteriologist Alexander Fleming*, TIME, Mar. 29, 1999, at 117, available at www.time.com/time/magazine/article/0,9171,990612,00.html.

3. Art Fry & Spencer Silver, *First Person: 'We Invented the Post-it Note'*, FIN. TIMES MAG., Dec. 3, 2010, available at www.ft.com/cms/s/2/f08e8a9a-fcd7-11df-ae2d-00144feab49a.html.

4. DAVID E. BROWN, INVENTING MODERN AMERICA 80 (2002).

5. *Spandrel Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/spandrel> (last visited Oct. 15, 2012).

6. See S.J. Gould & R.C. Lewontin, *The Spandrels of San Marco and the Panglossian Paradigm: A Critique of the Adaptationist Programme*, 205 PROC. ROYAL SOC'Y LONDON SERIES B 581, 581-83 (1979).

7. Carl Zimmer, *The Long Curious Extravagant Evolution of Feathers*, NAT'L GEOGRAPHIC, Feb. 2011, at 32, 39, available at <http://ngm.nationalgeographic.com/2011/02/feathers/zimmer-text>.

8. See CHRISTINE KENNEALLY, THE FIRST WORD: THE SEARCH FOR THE ORIGINS OF LANGUAGE 8-10 (2007).

evolutionary biologist Stephen Jay Gould popularized the term “exaptation” to refer to this phenomenon, expressly analogizing it to spandrels in architecture.⁹

So much for literature, science, and art. Let me turn now to something about which I am more qualified to express an opinion: law. The law contains numerous examples of retrofitting. Legal institutions, doctrines, and texts that were originally thought to serve one purpose can come to serve quite different purposes.

Consider the jury. We think that the role of the jury is to represent the common sense and values of the community in finding the facts and applying the law.¹⁰ In doing so, jurors must avoid bias.¹¹ Thus, lawyers and judges question prospective jurors to weed out those with experiences or prior relationships with parties or witnesses that might interfere with their ability to make a decision solely based on the law and the evidence presented in court.¹²

Yet the medieval English jury—from which our modern jury evolved¹³—was composed of people from the locale in which the disputed events took place precisely because local jurors would have knowledge of the facts and parties based on their prior relationships.¹⁴ In other words, medieval jurors served both of the functions now served by jurors and witnesses. What we would now call a juror’s disqualifying bias was the very characteristic that rendered medieval jurors qualified to sit in judgment.

9. Stephen J. Gould & Elisabeth S. Vrba, *Exaptation—A Missing Term in the Science of Form*, 8 PALEOBIOLOGY 4, 6 (1982) (“We suggest that such characters, evolved for other usages (or for no function at all), and later ‘coopted’ for their current role, be called *exaptations*.”); see also Gould & Lewontin, *supra* note 6, at 587 (“One must not confuse the fact that a structure is used in some way (consider again the spandrels ...) with the primary evolutionary reason for its existence and conformation.”).

10. *Williams v. Florida*, 399 U.S. 78, 100 (1970).

11. *Ballew v. Georgia*, 435 U.S. 223, 233-34 (1978).

12. See *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O’Connor, J., concurring) (stating that the Sixth Amendment right to an impartial jury should not allow a verdict to stand under circumstances in which a juror is a close relative of one of the participants in the trial); *Frazier v. United States*, 335 U.S. 497, 511 (1948) (noting that courts have a duty “to see that the jury as finally selected is subject to no solid basis of objection on the score of impartiality”).

13. See Stephan Landsman, *The Civil Jury in America: Scenes from an Underappreciated History*, 44 HASTINGS L.J. 579, 592 (1993).

14. See John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 314 (1973).

Does that mean that the modern jury is normatively unjustified? Not necessarily. A post hoc rationalization can nonetheless be a good justification. Still, the knowledge that some legal institution or practice that we take for granted was originally understood to serve purposes wholly unrelated to its contemporary justification should at least give us pause. Reflecting on the accidental quality of our institutions and practices can be a first step toward examining their efficacy relative to other possible arrangements.

In this Lecture, I shall provide additional examples of retrofitting of the sort just described: legal doctrines, texts, and practices that initially served one purpose coming to serve some quite different purpose. My methodology in this Lecture is chiefly descriptive. I aim to show that legal retrofitting is relatively common. I also hope to shed some new light on old debates by recasting them as contests over the legitimacy of legal retrofitting.

Whether we view any particular example of retrofitting as creating a Frankenstein's monster or a beautiful spandrel will depend on the views we hold about the sources of law's authority and disputed matters of interpretive methodology. Because views about such matters will sometimes vary with the type of law at issue, I give separate consideration in this Lecture to examples drawn from the common law, statutes, and the Constitution.

I. COMMON LAW RETROFITTING

I begin with the common law. To illustrate and evaluate spandrels and Frankenstein's monsters in the common law, I shall take my cue from three of our greatest judges: Oliver Wendell Holmes, Jr., Benjamin Cardozo, and Learned Hand.

Both Holmes and Cardozo warned of the Frankensteinish tendencies of the common law. Holmes famously wrote in *The Path of the Law*:

It is revolting to have no better reason for a rule than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long

since, and the rule simply persists from blind imitation of the past.¹⁵

Changed circumstances without a corresponding change in the law, Holmes says, can thus render monstrous what was once a useful invention.¹⁶

Moreover, a once-justified legal principle can become a monster even without changed circumstances, simply through the internal dynamics of the law. Cardozo described this dynamic in *The Nature of the Judicial Process*.¹⁷ The common law, he said, is ideally a synthesis of multiple methodologies.¹⁸ To fill gaps and answer novel questions, the common law method melds “philosophy” (by which Cardozo meant abstract reasoning), historical inquiry into the origins of legal rules and principles, attention to custom, and express consideration of public policy.¹⁹ In the hands of the right judge, the vices of each of these different modes of analysis counteract one another.²⁰ Yet sometimes judges write opinions that emphasize one or another mode of reasoning to the exclusion of others.²¹ That can be especially dangerous when the judge overemphasizes the “philosophical” mode. Within that domain, Cardozo observed “[t]he tendency of a principle to expand itself to the limit of its logic.”²² If there it comes to rest, all is well, but “philosophical” common law reasoning can run amuck. Cardozo noted that when not held in check by other factors, the human mind, including, perhaps especially, the human judicial mind, will exhibit a “constant striving ... for a larger and more inclusive unity, in which differences will be reconciled, and abnormalities will vanish.”²³

Of course, the law cannot really reconcile all differences and make abnormalities vanish. Cardozo was describing the way in which the common law sometimes lumps together disparate phenomena. For example, we treat a one-time bilateral arms-length transaction for

15. O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

16. *See id.*

17. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

18. *See id.* at 64-67.

19. *See id.* at 51-67.

20. *See id.* at 64-68.

21. *Cf. id.* at 53.

22. *Id.* at 51.

23. *Id.* at 50.

the sale of personal property and a long-term multilateral agreement among repeat players as both governed by the “law of contract.”²⁴ Too much lumping untempered by the splitting impulse of the turn to history, custom, and policy, Cardozo warned, can lead to a Frankenstein’s monster.²⁵

Fortunately, the tendency of the common law towards overlumping is very often tempered by life’s messiness. Holmes made that point in his frequently quoted observation that “[t]he life of the law has not been logic: it has been experience.”²⁶ Holmes himself was not consistent in his thinking on this point. The not-logic-but-experience line emphasizes particularities and differences. Yet in other writings, Holmes championed legal doctrines that would flatten differences and abnormalities. For example, in a charming and no doubt apocryphal story in *The Path of the Law*, Holmes mockingly described a Vermont judge who searched the law books in vain for the law applicable to churns in order to resolve a dispute over a broken churn.²⁷ In an insightful discussion of this story, Professor Schauer astutely observed that insofar as Holmes was making a prediction that the law would increasingly use legal rather than prelegal categories, he may well have been wrong: “[W]hen we observe the ‘path’ of the law” over the last century, Schauer writes, “what we see is not the increasing utility of such trans-doctrinal categories, but rather their decreasing utility, and the increasing use of statutes, regulations, and common law principles that hook onto relatively specific parts of the prelegal world.”²⁸

If the last century of legal developments has seen a movement away from overlumping, that is not to say that the law never overlumps anymore. What Cardozo described as the “philosophical” instinct remains strong among judges, in no small part because it still dominates legal education.²⁹ It is easy for law professors such

24. See RESTATEMENT (SECOND) OF CONTRACTS § 1 cmt. f (1981).

25. See CARDOZO, *supra* note 17, at 64-65.

26. O. W. HOLMES, JR., *THE COMMON LAW* 1 (1881).

27. See Holmes, *supra* note 15, at 474-75.

28. Frederick Schauer, *Prediction and Particularity*, 78 B.U. L. REV. 773, 781 (1998).

29. See Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155, 181-82 (2006) (explaining the influence of philosophy on legal scholarship).

as myself to pose relatively abstract hypothetical questions to a room full of law students in order to elicit the best rule; it is considerably more difficult to provide insight into the enormous variety of prelegal life worlds that may call for distinctive legal regimes. Thus, young lawyers leave law school trained in the slicing and dicing of Holmes's legal categories rather than the prelegal categories to which Schauer points.³⁰

To the extent that the tendency of the common law to lump disparate phenomena into ill-fitting legal categories goes unchecked by the countervailing pressure of other modes of common law reasoning, the common law can grow monstrous. In some circumstances, the resulting law is monstrous from an ethical perspective. For example, in the slave states of the antebellum United States, enslaved human beings were treated as a species of personal property.³¹

I should be clear that I am not saying that the common law classification of enslaved human beings as property was the primary *cause* of slavery. The law mostly *reflects* social attitudes and political interests.³² However, causation runs in both directions. Law both shapes and is shaped by public attitudes, politics, and economic and social institutions.³³ Thus, when the law turns monstrous, the impact may be widely felt.

30. See Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609, 610 (2007).

31. See, e.g., *United States v. Amy*, 24 F. Cas. 792, 810 (C.C.D. Va. 1859) (No. 14,445) (holding that a slave's imprisonment for mail theft was a constitutional deprivation of the slave owner's property rights "although the [imprisonment] may render the property of the master of little or no value"). See generally THE FEDERALIST NO. 54, at 367 (James Madison) (Jacob E. Cooke ed., 1961) ("But we must deny the fact that slaves are considered merely as property, and in no respect whatever as persons. The true state of the case is, that they partake of both these qualities; being considered by our laws, in some respects, as persons, and in other respects, as property."); A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Property First, Humanity Second: The Recognition of the Slave's Human Nature in Virginia Civil Law*, 50 OHIO ST. L.J. 511, 514 (1989) (stating that any consideration of the human nature of slave property was considered by the Virginia court "only up to the point that it began to encroach on the property rights of the owner").

32. See, e.g., Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 749, 756-58 (2009).

33. See, e.g., J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849, 851 (1996).

I have just used the notion of a legal monster to connote ethical monstrosity, but the phenomenon to which I mean to allude is much broader. In general, when I say that the common law may spawn a Frankenstein's monster, all I mean is that some legal doctrine is ill suited to its contemporary needs, either because the doctrine has outlived its usefulness—Holmes's worry³⁴—or because a useful doctrine or approach has expanded to domains to which it is ill suited—Cardozo's worry.³⁵

If the common law spawns Frankenstein's monsters, it also provides us with beautiful spandrels. Consider Judge Hand's signal contribution to tort law—the so-called Hand Formula, which defines the duty of care as a duty to take precautions that are cheaper than the probabilistically discounted value of the harm those precautions aim to avert.³⁶ I call the Hand Formula a spandrel because prior tort law did not generally define the duty of care explicitly in cost-benefit terms.³⁷ Yet Hand—and to an even greater extent, subsequent scholars and judges committed to the law and economics approach to tort law—reconceptualized tort duties so that they would thenceforth be understood in economic terms.³⁸ Tort duties that emerged over the

34. See *supra* text accompanying notes 15-16.

35. See *supra* text accompanying notes 22-23.

36. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.) (“[I]f the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether $B < PL$.”).

37. See Patrick J. Kelley, *The Carroll Towing Company Case and the Teaching of Tort Law*, 45 ST. LOUIS U. L.J. 731, 746 (2001) (differentiating the Hand Formula from prior negligence standards by noting that “courts explaining the negligence standard in the 1920s and 1930s ordinarily referred to the conduct of the ordinary reasonable man, not to the conduct that poses an unreasonable foreseeable risk of harm to another” (citing WILLIAM L. PROSSER, *HANDBOOK ON THE LAW OF TORTS* 224-55 (1941))); Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587, 588 (2002) (“The history of the development of the negligence standard in the early nineteenth century suggests that the *ordinary reasonable person* standard of conduct was adopted in order to preserve the jury's historic role in judging the *wrongfulness of the defendant's conduct* in tort actions.” (second emphasis added)); Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1775 (1981) (disputing the efficiency theory for nineteenth-century tort law based on an analysis of nineteenth-century tort cases in California and New Hampshire, which show that the common law focused on victim protection).

38. See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757 (1975).

course of decades and even centuries to serve diverse, sometimes forgotten purposes were rerationalized in a way that would then adapt tort law to modern ends.

Some of my audience will no doubt be suppressing the urge to shout out something like this: “But the law and economics approach to tort law is no spandrel. It’s a Frankenstein’s monster!” There is a robust debate within tort law scholarship over the extent, if any, to which tort duties should be understood as serving to minimize the net costs of accidents plus precautions against accidents—as implied by the Hand Formula and law and economics more broadly³⁹—or whether it should instead be understood as serving other goals, such as corrective justice,⁴⁰ or simply serving as a “law of wrongs.”⁴¹

I confess that as a scholar of constitutional law rather than tort law, I do not have a well-informed view about this debate. I do know enough about the debate to be able to recognize that it has both a descriptive and a normative dimension: the tort theorists argue about whose theory provides the most descriptively accurate account of the extant tort duties and whose theory is most normatively attractive.⁴² Knowing what I know about human psychology, I am willing to guess that the normative views of the participants in the debate influence their respective descriptive views. Thus, without ruling out the possibility that a resolution to the descriptive debate could occur, I shall focus my attention on the normative.

Let us suppose that tort law as it came down to American judges by the middle of the twentieth century was a jumble of doctrines susceptible to a variety of rationalizations. To use categories introduced by Professor Dworkin, let us imagine, in other words, that a considerable variety of tort theories—from law and economics to corrective justice—could be considered sufficiently good “fits” for tort

39. See *supra* notes 36-37 and accompanying text.

40. See, e.g., JULES COLEMAN, RISKS AND WRONGS 382-83 (1992); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 538 (1972) (characterizing tort law as “a unique repository of intuitions of corrective justice”); Stephen R. Perry, *On the Relationship Between Corrective and Distributive Justice*, in OXFORD ESSAYS IN JURISPRUDENCE 237, 239 (Jeremy Horder ed., 4th ed. 2000) (grounding tort law in corrective justice).

41. See John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 917-18 (2010) (arguing that tort law should not be understood as “accident-law-plus” but as “a law of wrongs and recourse”).

42. See *id.* at 920.

doctrine. The key question would then be which theory best *justifies* tort doctrine.⁴³

But now it looks like the question of whether some body of law or theory rationalizing the law should be counted as a hideous Frankenstein's monster or a beautiful spandrel is mostly just a question of what one thinks about the body of law or rationalizing theory as a normative matter. If you are a utilitarian, you will regard the Hand Formula as a spandrel. If you are a deontologist, you are more likely to regard it as a Frankenstein's monster.⁴⁴

In saying that the question of whether a repurposed law is beautiful or ugly depends on the judge's notions of beauty or ugliness, I hope I shall not be understood to have undermined the entire enterprise of identifying monsters and spandrels. If there really is *no* reason for a rule other than that it was laid down at the time of Henry IV, then everyone concerned today will agree that the rule is a monster. Or, consider another straightforward example: despite continued controversy over the proper scope and limits on class actions, the modern doctrine—which views class actions as a mechanism for efficiently aggregating and resolving large numbers of claims⁴⁵—makes considerably more sense in today's world than did its common law forebear, which required persons litigating as a class to form a coherent social group.⁴⁶ To that extent, at least, there

43. See RONALD DWORKIN, *LAW'S EMPIRE*, at vii (1986) (“[O]ur law consists in the best justification of our legal practices as a whole.”).

44. I say “more likely” rather than “certain” because deontology relates to moral duties, whereas the non-law-and-economics approaches to tort law tend to distinguish moral duties from legal duties. See Kenneth W. Simons, *Deontology, Negligence, Tort, and Crime*, 76 B.U. L. REV. 273, 273-75, 288 (1996) (defining deontology and comparing it to other approaches to tort law). Still, the two are closely related. See Goldberg & Zipursky, *supra* note 41, at 953 (“[W]hen a judge makes clear that she is talking about legal duties when she is deciding a case, not moral duties, she is indicating that she is identifying obligations within an institutionally entrenched web.... [T]he articulation of the terms that constitute this web will often require the use of reasoning of a sort commonly deployed in discerning moral duties.”).

45. See *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 148 (1982) (noting that the “principal purpose” of class action is “the efficiency and economy of litigation” (quoting *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974))).

46. See Susan T. Spence, *Looking Back ... in a Collective Way: A Short History of Class Action Law*, BUS. L. TODAY, July-Aug. 2002, at 21, 22 (“Unlike many modern American classes, the early English classes were cohesive. Class members lived, worked and worshiped together. They were aware of the dispute and might even have played a part in selecting class representatives.”); Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 872-77 (1977) (stating that the people involved in

can be agreement that the modern class action is a spandrel, not a monster.

Still, in a great many instances, there will not be consensus, and the common law judge will have freedom to decide whether to embrace some new understanding of the law as a spandrel or to reject some old one as a monster—even as other judges might adopt other approaches. That basic legal realist fact in turn raises a familiar legitimacy question: should judges rather than legislators be charged with the task of modernizing outdated legal doctrines?

That very question would have been regarded by most judges as backwards a century ago.⁴⁷ Despite the proliferation of Progressive Era legislation, in the early twentieth century, the courts still took the common law as presumptively legitimate, viewing statutes as an unwelcome polluting element to be isolated as much as possible from the common law.⁴⁸ Dean Pound bluntly criticized the old approach, arguing that there was no good justification for “[t]he proposition that statutes in derogation of the common law are to be construed strictly.”⁴⁹ Interestingly, Pound viewed the nonderogation principle itself as a kind of Frankenstein’s monster: he thought the principle made some sense in England, where it originated, because it served as a lone safeguard against legislative overreaching, given that English courts lacked the power of judicial review under a written constitution.⁵⁰ Transplanted to the United States, however, the nonderogation principle was unnecessary, in light of the presumption in favor of construing statutes consistently with the Constitution.⁵¹

Today, most states have abolished the principle favoring strict construction of statutes in derogation of the common law.⁵² In the

collective litigation in the sixteenth and seventeenth centuries—groups of manorial tenants, villagers, and parishioners—existed as social entities independent of the lawsuit).

47. See Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 383-84 (1908) (“It is fashionable to preach the superiority of judge-made law.”).

48. See *id.* (noting that twentieth-century courts “incline to ignore important legislation”).

49. *Id.* at 387.

50. *Id.*

51. See *id.*

52. See, e.g., CAL. CIV. CODE § 4 (West 2012) (“The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code.”); OKLA. STAT. ANN. tit. 12, § 2 (West 2012) (“[T]he rule of the common law, that statutes in derogation thereof, shall be strictly construed, shall not be applicable to any general statute of Oklahoma; but all such statutes shall be liberally construed to promote their object.”); TEX. GOV’T CODE

postrealist world that the likes of Holmes, Cardozo, and Pound helped to create, we understand that common law judging is rife with questions of policy. We nonetheless accept the enterprise as legitimate for a number of reasons: first, with the demise of the nonderogation principle, judge-made common law now serves only to establish default rules that can be changed by legislation;⁵³ second, American lawyers retain their skepticism of the continental pretense that a civil code can ever be complete,⁵⁴ and so we value judicial adjustment of common law rules as serving a necessary function of interstitial lawmaking; and third, whether directly elected or appointed through processes that filter—but still reflect—public opinion, judges bring to their task a measure of democratic legitimacy.

II. STATUTORY RETROFITTING

The common law may provide the oldest examples of legal rules and standards either outliving their usefulness or being adapted to serve unintended goals, but for some time now, we have been living in an age of statutes.⁵⁵ Thus, it would not be surprising if we

ANN. § 312.006 (West 2011) (“(a) The Revised Statutes are the law of this state and shall be liberally construed to achieve their purpose and to promote justice. (b) The common law rule requiring strict construction of statutes in derogation of the common law does not apply to the Revised Statutes.”).

53. See *supra* note 52 and accompanying text.

54. See Lewis A. Grossman, *Langdell Upside-Down: James Coolidge Carter and the Anticlassical Jurisprudence of Anticodification*, 19 YALE J.L. & HUMAN. 149, 212-13 (2007) (discussing Jerome Frank’s comparison of the belief in a man-made code that is exhaustive and final to a dream, “[f]or only a dream-code can anticipate all possible legal disputes and regulate them in advance” (quoting JEROME FRANK, LAW AND THE MODERN MIND 203-04 (1970)) (internal quotation marks omitted)); Maurice E. Harrison, *The First Half-Century of the California Civil Code*, 10 CALIF. L. REV. 185, 189 (1922) (stating that John Norton Pomeroy contended that the continental theory of code interpretation was inapplicable to the California Civil Code, which “does not embody the whole law concerning private relations, rights and duties; it is incomplete, imperfect and partial”); Aniceto Masferrer, *The Passionate Discussion Among Common Lawyers About Postbellum American Codification: An Approach to Its Legal Argumentation*, 40 ARIZ. ST. L.J. 173, 200 (2008) (stating that James Coolidge Carter believed that “a complete code was simply incompatible with justice, for no code could ever contain a sufficient number of rules to fairly resolve every dispute that might arise”).

55. See generally GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (proposing methods for adapting the common law to the ubiquity of statutes).

were to find that statutes themselves can become spandrels or Frankenstein's monsters.

I begin with examples of statutes changing through a comedy of combined judicial and legislative errors. My Cornell Law School colleague Professor Eisenberg has documented a particularly interesting case. He notes that 42 U.S.C. § 1988, which is now known primarily as an attorney fee provision for civil rights cases, also contains what “appears to be a choice-of-law provision instructing federal courts hearing civil rights cases to fill the inevitable gaps in federal statutes with compatible state law.”⁵⁶ But that seems puzzling. The original version of § 1988 was adopted in 1866.⁵⁷ Given Congress's extreme distrust of the states during Reconstruction, why would it have given states the opportunity to undermine federal civil rights policy through hostile interpretations of state law?

The answer, Eisenberg argues, is that Congress did no such thing.⁵⁸ The original language was intended as an instruction to federal courts hearing *state causes of action* to apply state law, but that instruction was inadvertently generalized when an ostensibly nonsubstantive recodification of the United States Code in 1874 separated substantive, procedural, and jurisdictional provisions.⁵⁹ Consequently, the limited nature of the choice-of-law instruction—and the underlying mistrust of states on matters of federal civil rights—were lost. A statutory provision enacted to combat the Black Codes has been transformed, ironically, into one that expands the influence of state law.⁶⁰ As currently interpreted, it is a Frankenstein's monster.

Section 1988 is not the only federal statute that has been changed through combined judicial and legislative inattentiveness. Consider the Anti-Injunction Act, now codified at 28 U.S.C. § 2283. Putting aside a minor stylistic revision and the codification of judge-made exceptions, the critical language in the modern statute reproduces

56. Theodore Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499, 499 (1980).

57. Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1988 (2006)).

58. Eisenberg, *supra* note 56, at 540-41.

59. *See id.*

60. *See id.* at 535-36.

a provision, first articulated in the original 1793 version of the Act,⁶¹ forbidding federal courts from enjoining state court proceedings.⁶² Modern case law treats the Anti-Injunction Act as reflecting a Founding Era judgment about federalism. Here is how Justice Hugo Black expounded what he supposed to be the policy of the Anti-Injunction Act in a 1970 case:

When this Nation was established by the Constitution, each State surrendered only a part of its sovereign power to the national government. But those powers that were not surrendered were retained by the States and unless a State was restrained by “the supreme Law of the Land” as expressed in the Constitution, laws, or treaties of the United States, it was free to exercise those retained powers as it saw fit. One of the reserved powers was the maintenance of state judicial systems for the decision of legal controversies.⁶³

Black continued by invoking the Madisonian Compromise to suggest that the Anti-Injunction Act, if not quite constitutionally required, was tied up in constitutional policies.⁶⁴ Because Article III and the Supremacy Clause treat state courts as constitutionally adequate fora for the resolution of all disputes, including those arising under federal law, the Anti-Injunction Act tells federal courts to respect the autonomy of state courts—or so Justice Black read the Act.⁶⁵

That is a nice story, but the truth appears to be rather different. As Professor Mayton has explained, the 1793 Act that contained what we now call the Anti-Injunction Act included that language as an exception to a provision that granted individual Supreme Court Justices the power to grant injunctions, and thus was likely intended to bar only *single Justices* from granting injunctions against state court proceedings.⁶⁶ The subsequent reading of the relevant language as a freestanding prohibition on the granting of certain

61. Act of Mar. 2, 1793, ch. 22, 1 Stat. 333.

62. 28 U.S.C. § 2283 (2006).

63. *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 285 (1970).

64. *Id.* at 285-87.

65. *See id.* at 285 (citing the compromise that gave Congress the power to decide whether to create any lower federal courts).

66. William T. Mayton, *Ersatz Federalism Under the Anti-Injunction Statute*, 78 COLUM. L. REV. 330, 333 (1978).

injunctions by all federal *courts* appears to have been partly the result of the inadvertent replacement of a colon with a semicolon when the handwritten bill was printed.⁶⁷ Unaware of the error, the Supreme Court in 1849 accepted the argument of counsel that the Anti-Injunction Act indeed was a general bar on federal courts enjoining state court proceedings.⁶⁸

But then a funny thing happened. When Congress recodified the key language in 1874, it separated that language from the materials authorizing actions by single Justices.⁶⁹ Moreover, to remove any doubt, Congress expressly specified that the prohibition applied to “any court of the United States,” not just single Justices.⁷⁰ What began as an erroneous reading of a federal statute was thus formally ratified.

So, is the Anti-Injunction Act a Frankenstein’s monster or a spandrel? The answer to that question has almost nothing to do with the law’s historical origins. Even if we all agree that the 1793 version of the Act should have been read only to limit the powers of individual Justices,⁷¹ Congress was entitled to look at the misreading and decide that it made sense. Congress was even entitled to make that judgment, as it apparently did, without any knowledge of the original purpose of the language. Whether the Anti-Injunction Act is a monster, a spandrel, or something in between, depends on what one thinks of the substance of the Act.

The two foregoing examples of statutory retrofitting involved interactions between the courts and Congress. But we can also find examples of courts acting even when Congress, having written the initial statute, leaves the field. The transformation of antitrust law beginning in the 1970s provides a close parallel with the transformation of tort law accomplished by Judge Hand and his economics-inflected followers.⁷²

67. *See id.* at 336.

68. *See id.* at 344 (discussing *Peck v. Jenness*, 48 U.S. (7 How.) 612 (1849)).

69. *See id.* at 346 (citing REV. STAT., tit. 13, ch. 12, § 720, *printed at* 18 Stat., pt. 1, at 137 (1874)).

70. *See id.* at 346 & n.100 (quoting REV. STAT., tit. 13, ch. 12, § 720, *printed at* 18 Stat., pt. 1, at 137 (1874)).

71. For a mildly skeptical view of Mayton’s account, see RICHARD H. FALLON, JR. ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1030 & n.1 (6th ed. 2009).

72. I shall shortly detail the changes in antitrust law that emerged as a result of efforts

The leading antitrust statutes, the Sherman Act⁷³ and the Clayton Act,⁷⁴ were the products of Populist and Progressive Era politics, but in recent decades have been largely remade in response to withering academic criticism of the case law as it had developed under these laws.⁷⁵ The basic problem, as explained most forcefully by then-Professor Bork in *The Antitrust Paradox*, was that antitrust law had been interpreted to frustrate bigness per se.⁷⁶ From an economic perspective, however, big is not necessarily bad. Larger firms can take advantage of economies of scale that smaller firms cannot effectively exploit. Yet, Bork argued, the antitrust doctrine that the courts had fashioned had “inhibited or destroyed a broad spectrum of useful business structures and practices” to the detriment of the consumers who would ultimately benefit from those business structures and practices.⁷⁷

To be sure, Bork also claimed support from the language and legislative history of the antitrust laws themselves. They were not originally intended to prohibit bigness as such, he claimed.⁷⁸ Their goal, Bork said, was to promote consumer welfare—that is, to forbid only anticompetitive bigness.⁷⁹ Bork no doubt overstated his historical case. For example, he did not cite what was then and still remains the leading history of the Sherman Act—Professor Letwin’s *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act*.⁸⁰ Letwin provided a more nuanced account, in which the Sherman Act emerged from a confluence of forces, including traditional distrust of monopolies, political agitation against trusts,

like those of then-Professor Bork. *See generally* ROBERT H. BORK, *THE ANTITRUST PARADOX* (1978). Lest there be any confusion, it should be noted that Bork strongly criticized Judge Hand’s antitrust opinions for giving effect to values other than consumer welfare. *See id.* at 51-53. I am analogizing the courts’ recent behavior in antitrust cases to Judge Hand’s behavior in earlier tort cases; I am not arguing that Judge Hand and the antitrust revisionists agreed on antitrust issues.

73. Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-7 (2006).

74. Clayton Antitrust Act of 1914, 15 U.S.C. §§ 12-27 (2006).

75. *See* BORK, *supra* note 72, at 50 (arguing for a clear definition of the economic goals of antitrust law).

76. *Id.* at 54, 246-49.

77. *Id.* at 4.

78. *See id.* at 56-66.

79. *See id.* at 57, 61, 66.

80. WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* (1965).

faith in the common law, and any number of other motives, which together produced an open-ended text.⁸¹ But, in any event, Bork's real problem with antitrust doctrine was not its supposed infidelity to the original goals of the Congresses that passed the antitrust laws. His aim was to displace a jumble of legal doctrines—and especially those that promoted noneconomic goals—with a set of doctrines organized around the unifying theme of economic efficiency.⁸²

Bork, along with others who voiced similar sentiments,⁸³ enjoyed wild success. Today, antitrust law has been virtually completely transformed, as per se rules have been replaced by rules of reason and, more broadly, the case law treats economic analysis as the starting point and, effectively, the ending point of legal analysis.⁸⁴

How should we understand the transformation of American antitrust law? From the Borkian perspective, the original statutes had spawned a Frankenstein's monster—a set of doctrines that were internally incoherent or worse, concerned about protecting small business for no evident reason other than its smallness, at the cost

81. See *id.* at 53-99. Another source that Bork might have cited, but did not, is RICHARD HOFSTADTER, *What Happened to the Antitrust Movement?*, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 188, 199-200 (1965) (identifying political, as well as social and moral, goals as complementing the economic motivation for the Sherman Act).

82. Throughout *The Antitrust Paradox*, Bork used terms like “consumer welfare,” *e.g.*, BORK, *supra* note 72, at 9, and “general welfare,” *e.g.*, *id.* at 10, as though they were synonyms. They are not, and Bork's prescriptions may be better suited towards maximizing general or total welfare rather than consumer welfare. A schematic example illustrates the difference. The combination of two relatively inefficient firms to form a more efficient monopolist will not maximize consumer welfare if, even though the monopolist has lower costs, it can charge a monopoly price that is higher than the market price previously charged by the two less efficient firms. That result nonetheless maximizes total welfare because the surplus redounds to shareholders in the resulting monopolist firm. In addressing a version of this example, Bork worried about only net welfare, not consumer welfare as such. See *id.* at 219. An antitrust doctrine more focused on consumer welfare would worry about distributional effects between firms and consumers. See Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 *HASTINGS L.J.* 871, 875 (1999) (arguing that the antitrust laws are concerned primarily with “preventing unfair acquisitions of consumers' wealth by firms with market power”).

83. See, *e.g.*, HAROLD DEMSETZ, *THE MARKET CONCENTRATION DOCTRINE* (1973) (arguing against per se rules and much of the balance of older antitrust doctrine); RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976) (analyzing antitrust issues from an economic perspective).

84. See THOMAS D. MORGAN, *CASES AND MATERIALS ON MODERN ANTITRUST LAW AND ITS ORIGINS* 465-895 (4th ed. 2009) (excerpting modern era cases taking an economic perspective on antitrust law).

of rendering the overall economy less productive.⁸⁵ The transformation wrought by Bork and the other revisionists, in this view, was less a matter of taking advantage of a spandrel than of slaying, or at least hobbling, a monster.

Yet from another perspective, the revisionists' reduction of anti-trust to economics was itself the monstrous act.⁸⁶ Maybe antitrust law was originally adopted in order to serve noneconomic ends. Maybe it was merely adaptable to such ends, in which case the doctrine that had emerged by the middle of the twentieth century was itself a useful spandrel. In either case, to make sense of this perspective, one needs to understand why one might think that antitrust can usefully serve noneconomic goals. That is not especially difficult.

One such goal could be social. National big-box retailers like Walmart may be able to sell consumer goods at lower prices than Main Street family stores, and in that sense enhance consumer welfare, but antitrust law could be thought to embody a preference for the sort of community fostered by neighbors purchasing their goods from one another. Perhaps the intangible benefits of living in a community with a thriving Main Street culture outweigh the cost of higher prices charged by the less efficient Main Street stores. We cannot rule this story out due to the fact that consumers in fact shop at big-box stores because they face a collective action problem: no single big-box store purchase kills off the Main Street culture, and people benefit from that culture even when they do not shop on Main Street. That, at least, is a possible account of one kind of social benefit of a law that expresses hostility to bigness per se.

Another noneconomic goal of antitrust law could be political. We might worry that firms holding large concentrations of wealth will use their wealth to corrupt democracy.⁸⁷ In light of the Supreme Court's First Amendment doctrines limiting the ability of Congress to curtail these political effects directly,⁸⁸ restrictions on growth in the size of accumulated wealth, whether through antitrust or

85. *See supra* text accompanying notes 76-77.

86. *See supra* notes 80-81 and accompanying text.

87. For an elaboration of this view, see Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979).

88. *See, e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) (invalidating a federal statute forbidding corporate-funded expenditures on campaign speech).

taxation policies, might be the most effective way of protecting democracy from this kind of corruption.

Which perspective is correct? That depends on the answers to a number of complex empirical and normative questions. What are the social and political effects of different kinds of wealth concentration? How should we trade off total welfare for distributional concerns? For democracy? What mix of legislative and judicial decision making is appropriate to answering such questions?

I shall not attempt to resolve these questions today, but instead simply note them, and move on to my final statutory example, which will highlight that last institutional concern. I turn now to the Racketeer Influenced and Corrupt Organizations Act (RICO).⁸⁹ The statute authorizes both criminal prosecution for, and civil lawsuits by victims of, any “pattern of racketeering activity,” defined as “at least two” of a long list of criminal acts, including very serious violent offenses like murder, kidnapping, and arson, but also nonviolent offenses like gambling, dealing in obscenity, and wire fraud.⁹⁰ The diverse list of crimes covered by “racketeering activities” reflects Congress’s effort to cover just about all of the activities in which groups like the mafia engage, and the legislative history of RICO makes clear that groups like the mafia were the original target of the legislation.⁹¹

The best scholarly analysis of the legislative history of RICO, performed by then-Professor and now-Second Circuit Judge Lynch, shows that “Congress viewed RICO principally as a tool for attacking the specific problem of infiltration of legitimate business by organized criminal syndicates.”⁹² The Supreme Court, however, rejected that limitation as inconsistent with the statute’s language.⁹³ Meanwhile, the statutory language covers more than the mafia. For example, a person who hosts a couple of illegal poker games in his basement has participated in an “enterprise”⁹⁴ that conducts a

89. 18 U.S.C. §§ 1961-1968 (2006).

90. *Id.* § 1961(1), (5).

91. *See, e.g.*, S. REP. NO. 91-617, at 76 (1969).

92. Gerard E. Lynch, *RICO: The Crime of Being a Criminal* (pts. 1 & 2), 87 COLUM. L. REV. 661, 662 (1987).

93. *See United States v. Turkette*, 452 U.S. 576, 584-85 (1981) (construing “enterprise” to include wholly illegal as well as legal enterprises).

94. The statute also defines an enterprise to include an individual. 18 U.S.C. § 1961(4).

“pattern of racketeering activity,”⁹⁵ making him potentially subject to RICO. Judges and commentators have criticized the scope of RICO,⁹⁶ but it remains extraordinarily broad.

Well, so what? Perhaps Congress likes it that way. In other words, whatever the original subjective expectations of the Congress that first enacted RICO, if the fairest reading of the words that Congress used goes beyond the intentions of Congress, then it is for Congress, not the courts, to correct the error. Its failure to do so suggests that Congress did not err or has, through inaction, ratified the courts’ broad construction of RICO.

The view I have just articulated sounds in the theory of statutory interpretation that is sometimes called “textualism,”⁹⁷ which in turn may be opposed by other theories, such as “intentionalism” and “purposivism.”⁹⁸ Intentionalists say that courts should treat the words used by the legislature as significant only insofar as they reflect the intent of the legislature.⁹⁹ Intentionalism has fallen out of favor in recent years, although it still has a small but hardy band of defenders.¹⁰⁰ More commonly, textualism does battle with purposivism, which emphasizes the gaps and ambiguities in statutory text, and argues that, in the famous words of Professors Hart and Sacks, legislation should be presumed to be the output of “reasonable men pursuing reasonable purposes reasonably.”¹⁰¹

I do not intend to referee the battle among textualism, intentionalism, and purposivism today.¹⁰² Instead, I wish to point out how

95. *See id.* § 1961(5).

96. *See, e.g.*, Adam B. Weiss, Note, *From the Bonannos to the Bin Ladens: The Reves Operation or Management Test and the Viability of Civil RICO Suits Against Financial Supporters of Terrorism*, 110 COLUM. L. REV. 1123, 1124 (2010) (noting “decades of criticism and repeated efforts by the federal courts to constrain [RICO’s] reach”).

97. *See, e.g.*, John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2408 (2003) (“[M]odern textualism suggests that the complexities of the legislative process make it meaningless to speak of a legislative ‘intent’ at odds with the intent expressed by the clear social meaning of the enacted text.”).

98. *See* Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 118-19 (2009) (contrasting textualism with intentionalism and purposivism).

99. *Id.*

100. *See, e.g.*, Larry Alexander & Saikrishna Prakash, “*Is That English You’re Speaking?*” *Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 971-72 (2004); Stanley Fish, *There Is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 649-50 (2005).

101. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 1124-25 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

102. I have previously written that “the differences between ... textualism and purposivism

that debate can be understood as a debate about spandrels and Frankenstein's monsters. Textualists, intentionalists, and purposivists argue about how courts ought to go about applying statutes to circumstances that were not foreseen, or not foreseen perfectly, by the statutes' drafters.¹⁰³ To take a tired but useful example, the application of a prohibition on "vehicles in the park" to a functional truck mounted on a pedestal as a memorial can be condemned as a Frankenstein's monster,¹⁰⁴ whereas the application of the same prohibition to a tricycle¹⁰⁵—assumed for our purposes not to have been considered by the prohibition's adopters—may be a monster or a spandrel, depending on where one comes out on a variety of jurisprudential and other questions.

To be clear, I am not taking sides in the Hart-Fuller debate.¹⁰⁶ Rather, I mean to show only that issues that have been at the heart of disputes over how to interpret statutes can be understood as raising questions about the line between monsters and spandrels. To followers of Fuller as well as Hart and Sacks, RICO looks like a monster—a statute adopted for a limited purpose that, through a fetishistic textualism, has been the basis for severe overcriminalization and crippling liability for otherwise legitimate businesses. By contrast, to modern textualists and those who follow in the positivist footsteps of H.L.A. Hart, the modern interpretation of RICO is, if not exactly a beautiful spandrel, largely unobjectionable so long as that interpretation finds solid roots in the text, which it pretty clearly does. Accordingly, the Frankenstein's monster question is, in an important sense, the central question of statutory interpretation.

... mask the degree to which [their practitioners] proceed from similar assumptions." Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 14 (1998). For a sharper delineation of the differences between textualism and its rivals, see Siegel, *supra* note 98.

103. See Siegel, *supra* note 98, at 118-19.

104. See Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 663 (1958).

105. See *id.* at 662.

106. For Fuller's position, see *id.* For Hart's, see H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

III. CONSTITUTIONAL RETROFITTING

I turn, finally, to the topic of constitutional law. Here, too, we will find that the spandrel versus monster question is ubiquitous. I shall consider, in turn, three examples: judicial review, political parties, and the Second Amendment.

A familiar story holds that John Marshall arrogated the power of judicial review to the Supreme Court in *Marbury v. Madison*.¹⁰⁷ Scholars have discredited that story by pointing, among other places, to the text of Article III, which, as Marshall himself noted, and as Professor Wechsler later emphasized, empowers the federal courts to hear all cases arising under the Constitution,¹⁰⁸ to Federalist No. 78, which laid before the ratifying public a set of arguments that largely anticipated *Marbury*,¹⁰⁹ and to pre-1787 antecedents of judicial review, which showed that the concept was familiar.¹¹⁰ These and other sorts of arguments make clear that critics cannot credibly portray the institution of judicial review as a Frankenstein's monster because of some sin committed by John Marshall.

107. 5 U.S. (1 Cranch) 137 (1803).

108. *Id.* at 147; Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 3-4 (1959).

109. THE FEDERALIST NO. 78 (Alexander Hamilton). John Marshall himself made much the same argument in the Virginia ratifying convention. See 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 553 (Jonathan Elliot ed., 1987) ("If [the government of the United States] were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void.").

110. See Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 504 (2006) (arguing that the practice of voiding legislation repugnant to the Constitution developed from the English practice of limiting corporate ordinances that were contrary to the law); see also Barbara Aronstein Black, *An Astonishing Political Innovation: The Origins of Judicial Review*, 49 U. PITT. L. REV. 691, 692-93 (1988) (noting that eighteenth-century Americans knew of provisions requiring a hierarchy of law such that laws made by dependent law-making bodies were void if repugnant to the laws of England, and that such laws' conformity to the laws of England was a question for the judiciary); Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 899 (2003) (arguing that there was a "shared understanding at the time of the framing that judicial review was an appropriate judicial authority"); William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 457-58 (2005) (analyzing pre-*Marbury* case law and concluding that the doctrine of judicial review was commonly applied to invalidate statutes).

But if usurpation is a myth, a puzzle remains: given its relative institutional weakness, how did the Supreme Court succeed in building a power base so that today's political actors—especially Congress and the President—routinely accept the authority of its decisions even when they disagree? Here the Frankenstein story may be relevant after all.

Consider a recent article by Professors Delaney and Friedman.¹¹¹ They contend that the Court built up its prestige in the nineteenth century by allying itself with federal actors and against the states.¹¹² National actors, in this narrative, benefited from a strong Court because antebellum judicial review was chiefly a tool for bringing states in line with federal policy.¹¹³ Congress and the President benefited from what Delaney and Friedman call “vertical” judicial supremacy.¹¹⁴ But like Dr. Frankenstein, the national political actors were unable to control their creation, which eventually turned on its creators, and by then it was too late.¹¹⁵ The arguments that had been used to establish the Court's legitimacy when acting against the states also served to establish its legitimacy against the federal government, giving rise to the monster of “horizontal” supremacy.¹¹⁶

The story that Delaney and Friedman tell is not uncontroversial. For example, it does not explain why sophisticated national political actors were not alert to the possibility that they were creating a monster they would prove unable to control. After all, *Marbury* was decided in 1803, and although the Court would not invalidate another federal statute until 1857, the case in which it did so, *Dred Scott v. Sandford*,¹¹⁷ was momentous.

Perhaps the key is that *Marbury* was, in its day, chiefly a marker of judicial weakness, not strength,¹¹⁸ whereas *Dred Scott* was

111. Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137 (2011).

112. *See id.* at 1152-59.

113. *Id.* at 1158.

114. *Id.* at 1149-50, 1157.

115. *Id.* at 1166-72.

116. *See id.* at 1140. There are additional steps in the story as told by Delaney and Friedman, but the text sets forth the broad outline.

117. 60 U.S. (19 How.) 393 (1857).

118. *See* Michael W. McConnell, *The Story of Marbury v. Madison: Making Defeat Look Like Victory*, in CONSTITUTIONAL LAW STORIES 13 (Michael C. Dorf ed., 2d ed. 2009).

decided after the Court had already garnered the support of erstwhile critics like Andrew Jackson.¹¹⁹ Or perhaps it is naïve to imagine that political actors involved in the controversies of their day would worry themselves much over the unintended consequences that might befall their successors as a result of steps that concretely benefited them at present. Faced with the opportunity to advance the goals of his own presidency at the cost of potentially weakening *the presidency* (relative to the courts) at some point in the distant future, we might expect any president to prioritize his or her own agenda.

In any event, even if the dynamic Delaney and Friedman identify only partly accounts for the development of judicial supremacy,¹²⁰ it surely counts for something. The evolution of judicial supremacy in the United States was complex, but the Frankenstein's monster theme was a piece of it.

When I say that judicial supremacy was a Frankenstein's monster, I do not mean to make a normative judgment. I am claiming—or rather, Delaney and Friedman claim—that horizontal judicial supremacy is a monster, *from the perspective of Congress and the President*. So far as the system as a whole or the American people are concerned, horizontal judicial supremacy may well be a beautiful spandrel, an institution that evolved to serve the needs of national political actors and that has been “exapted” to hold those very actors accountable to the law.

Indeed, it is not even accurate to say that horizontal supremacy is a monster from the perspective of the President or Congress. It would be more accurate to say that, on average, horizontal supremacy constrains national political actors,¹²¹ but in any given case that may be fine with any given actor because judicial supremacy is also being used to constrain a rival actor. Thus, Republicans in Congress who opposed the Patient Protection and Affordable Care Act¹²² favorably viewed horizontal judicial supremacy as a potential means of scoring a victory through constitutional litigation that eluded

119. See Friedman & Delaney, *supra* note 111, at 1156 & n.95.

120. See *id.* at 1193.

121. See *id.* at 1140.

122. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C.).

them in the legislative process.¹²³ Likewise, the Obama administration has adopted an enforce-but-do-not-defend approach to the Defense of Marriage Act¹²⁴ as a means of enlisting the courts in striking down the law—a result it almost certainly could not achieve through legislation.

These familiar political dynamics rest on the ideological opposition of political parties, which are themselves either spandrels or Frankenstein's monsters. The Framers, especially James Madison, were hostile to political parties,¹²⁵ but they fashioned a system of government that all but guaranteed the emergence of such parties.

To be sure, we may regard the fact that the United States has usually had only *two* major national parties in any given era as a function of a subconstitutional phenomenon: Article I leaves states free to allocate House members among geographical districts or to use at-large districts for the state as a whole.¹²⁶ Today, only the seven smallest states have at-large districts consisting of one representative for the entire state.¹²⁷ In earlier periods, however, some states allocated multiple seats to at-large districts.¹²⁸ Had they combined that allocation with a proportional representation system for choosing the representatives, third parties might well have emerged, as they do in parliamentary systems with proportional

123. See, e.g., Elizabeth J. Bondurant & Steven D. Henry, *Constitutional Challenges to the Patient Protection and Affordable Care Act*, 78 DEF. COUNS. J. 249, 249-50 (2011) (noting that all Republicans in both the Senate and the House of Representatives voted against passage of the Act).

124. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C (2006)), *invalidated by* Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234 (D. Mass. 2010); see Press Release, U.S. Dep't of Justice, Statement of the Attorney Gen. on Litig. Involving the Def. of Marriage Act (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>.

125. See THE FEDERALIST NO. 10, at 53 (James Madison) (E.H. Scott ed., 1898) (describing the vice of "faction").

126. U.S. CONST. art. 1, § 4, cl. 1.

127. These seven states are Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming. U.S. Census Bureau, *Apportionment Data*, U.S. CENSUS 2010, <http://2010.census.gov/2010census/data/apportionment-data-text.php> (last visited Oct. 15, 2012).

128. Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333, 336 n.12 (1998) ("Historically, from the late 18th century through 1967, a number of states elected representatives at large or from multi-seat districts."); see also Luis Fuentes-Rohwer & Laura Jane Durfee, *Leaving the Thicket at Last?*, 2009 MICH. ST. L. REV. 417, 432 (noting that at-large elections were "even encouraged" in the 1960s).

representation. The existence of a stable two-party system can thus be attributed to the subconstitutional choice of states to hold first-past-the-post elections for each of their congressional seats, in light of Duverger's Law.¹²⁹

Accordingly, it would be an overstatement to treat the two-party system itself as an unintended but inevitable consequence of the Constitution. Yet the existence of political parties at all probably should be counted as such a consequence. Perhaps parties are unnecessary for politics on the scale of the New England town meeting, but it is nearly impossible to imagine politics on a national or even statewide scale without political parties or their equivalent to coordinate, organize, and communicate political views among the people. Accordingly, there is no good reason to argue over whether political parties are a Frankenstein's monster or a spandrel. They are an inevitability.

The Supreme Court cases involving political parties do not uniformly reflect an awareness of the forces that give rise to and shape parties. As Professor Pildes has noted, much of the Court's doctrine in this area treats American democracy as though it were Weimar Germany,¹³⁰ with an unstable mix of fractious voices constantly on the verge of plunging us into the sort of chaos from which a dictator might emerge. The truth, however, is more nearly the opposite: our two major parties exert a near stranglehold on political power. The most that political outsiders can hope is that they may be able to force some issue onto the agenda of the major parties. Once they have succeeded in doing so, however, their power ends. Or, as historian Richard Hofstadter aptly put it: "Third parties are like bees: once they have stung, they die."¹³¹

129. See Marc John Randazza, *The Other Election Controversy of Y2K: Core First Amendment Values and High-Tech Political Coalitions*, 82 WASH. U. L.Q. 143, 161 (2004) (noting that Duverger's Law recognizes that "the simple-majority and single-ballot (SMSB) system ... directs voting behavior in a manner that prefers a two-party system").

130. Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 128 & n.424 (2004) ("In cases involving democratic issues, both momentous and mundane, the current Court has acted out of concern that judicial review is needed to ensure that democracy remains stable, orderly, and properly restrained." This concern reflects "views about whether American democracy ... entails acceptable chaos and tumult or requires greater structure and order.").

131. RICHARD HOFSTADTER, *THE AGE OF REFORM* 97 (1955).

If the two-party system was an inevitable side effect of the Constitution, other features are less clear cut. For my final example, I turn to the Second Amendment. As you know, it states: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”¹³² In *District of Columbia v. Heller*, the Supreme Court held that it protects the right of individuals to possess firearms for self-defense.¹³³ In the course of reaching that conclusion, Justice Scalia began by construing “keep and bear” in the “operative” clause of the Second Amendment to mean “possess and carry,”¹³⁴ and then went on to address the fact that the “prefatory” language states a purpose for the clause that has nothing to do with individual self-defense.¹³⁵ Justice Scalia himself said that the purpose of the Second Amendment was “to prevent elimination of the militia.”¹³⁶ He then said that the means chosen to achieve that purpose—banning the federal government from disarming the people—must be given effect, because that is what the text protects.¹³⁷

To be sure, Justice Scalia attempted to show that protecting the common law right of self-defense was also one of the core purposes of the Second Amendment right, but his argument on this point was obscure: he characterized the dissent’s historical argument as showing merely “that self-defense had little to do with the right’s *codification*,” but said that this showing ignores that self-defense “was the *central component* of the right itself.”¹³⁸

Suppose, however, that one agrees with the *Heller* dissenters that protection of firearms possession for purposes of self-defense was mostly a by-product, rather than the core purpose or “central component” of the Second Amendment.¹³⁹ We then have a peculiar situation in which the Second Amendment today serves *only* a function that is extraneous to its original core purpose. The Congress that adopted the Bill of Rights worried that a disarmed

132. U.S. CONST. amend. II.

133. 554 U.S. 570, 635 (2008).

134. *See id.* at 592.

135. *See id.* at 599.

136. *Id.*

137. *See id.*

138. *Id.*

139. *See id.* at 714-15 (Breyer, J., dissenting).

people would be unable to resist a tyrant with force.¹⁴⁰ Today, as Justice Scalia acknowledged, “it may be true that no amount of small arms could be useful against modern-day bombers and tanks.”¹⁴¹ But still, he concluded, “the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.”¹⁴²

Why not? Justice Scalia does not exactly say in *Heller*, but he and other textualist judges and scholars have long made the argument in other contexts: laws are rarely coextensive with their background justifications,¹⁴³ when the two diverge, courts should enforce the law as written, rather than its background justification.¹⁴⁴ And for most of those who hold that view of legal texts, it applies to constitutional provisions no less than to other kinds of law.¹⁴⁵

Accordingly, we might associate textualism with an embrace of spandrels and Frankenstein’s monsters, while associating antiformalist conceptions of law with the urge to hew closer to purposes. That association certainly is available as an explanation of *Heller*. The dissenters argued that the majority’s recognition of an individual right to self-defense was inconsistent with, and thus unauthorized by, the core purpose of the Second Amendment, which was to protect state militias.¹⁴⁶ Thus, the ideological divisions in *Heller* appear to map reasonably well onto the association over the last

140. See *id.* at 598-99 (majority opinion).

141. *Id.* at 627.

142. *Id.* at 627-28.

143. See, e.g., Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 545-47 (1983) (arguing that the inevitable imprecision of a statutory rule “is not a good reason for a court ... to add or subtract from [the rule]”).

144. See FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 135 (1991) (“Where there is entrenchment, agents decide ... in accordance with the indications of the [generalization that constitutes the rule] even when doing so produces results divergent from and inferior to those that would be produced by direct application of the background justification.”). Schauer is a positivist rather than a textualist, see Randy E. Barnett, *The Intersection of Natural Rights and Positive Constitutional Law*, 25 CONN. L. REV. 853 (1993), but for present purposes we may overlook that subtle distinction.

145. See William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar’s Bill of Rights*, 106 MICH. L. REV. 487, 488 (2007).

146. See *Heller*, 554 U.S. at 636-37 (Stevens, J., dissenting).

several decades between conservatives and textualism, on the one hand, and liberals and purposivism, on the other hand.¹⁴⁷

But matters are considerably more complicated because liberal judges and Justices tend to embrace dynamic interpretation, whereas conservative judges and Justices tend to embrace originalism, or at least to give greater emphasis to arguments rooted in original understanding than liberals do.¹⁴⁸ Originalists frequently criticize nonoriginalist decisions on the ground that such decisions depart from the text's original meaning, which, in practice—if not always in theory—will incorporate the Framers' and ratifiers' original purposes.¹⁴⁹ Thus, in many contexts, conservatives accuse liberals of seeing what the liberals regard as spandrels in nooks and crannies of the constitutional text that, the conservatives say, do not exist. In many such cases, the conservatives also appear to think that the liberals' interpretation gives rise to a Frankenstein's monster, not a spandrel.

It is thus tempting to say that in constitutional law, as in law more generally, the difference between a spandrel and a monster—as well as the legitimacy of interpreting a text to go beyond its purpose—simply depends on whose ox is being gored, and surely it does. But if one thinks, as I do, that jurisprudential arguments are not entirely a mask for ideological and other nonlegal considerations, then one will take seriously what courts say and do about spandrels and Frankenstein's monsters.

CONCLUSION

Of course, courts do not literally say *anything* about spandrels and Frankenstein's monsters because those are not legal categories—at least not yet! But as I have endeavored to show in this Lecture, spandrels and monsters loom large in American jurispru-

147. See *supra* notes 97-107 and accompanying text (discussing the different views).

148. See James Greene et al., Essay, *Profiling Originalism*, 111 COLUM. L. REV. 356, 360, 373, 378, 392 (2011) (contrasting the conservative originalist view with the liberal "living Constitution" view).

149. See John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 378-81 (2007) (arguing that the original meaning of the Constitution will typically overlap with the original purposes of its Framers and ratifiers).

dence. Without exploring other legal systems, it is impossible for me to say whether American law is *especially* fertile ground for spandrels and monsters, but—assuming one could come up with a sufficiently rigorous definition of spandrels and monsters—it would not surprise me to learn that the United States is somewhat of an outlier.

For one thing, judicial decision making in common law systems tends towards evolution over time. To be sure, the common lawyer's view of continental systems as completely lacking precedent is overly simplistic. Still, the formal need to always refer back to the code probably limits drift in continental systems, whereas legal principles in a common law system have no fixed point of contact with an original text, and thus can drift indefinitely.

But even more than in other legal systems based in the English common law, we are likely to see monsters and spandrels in American law for reasons of necessity. The American Constitution is notoriously difficult to amend, but strong separation of powers and multiple veto gates lead to a sclerotic process for making subconstitutional law as well. As times change but laws remain the same, once-sensible laws may become Frankenstein's monsters. Meanwhile, if one assumes relatively constant demand for legal adaptation across legal systems, then the blockages that prevent change to formal legal text in the United States will lead to legal change occurring by other means.¹⁵⁰ In other words, because it is so difficult for the political process to change the law, American courts more frequently try to retrofit existing law than do courts in legal systems that allow formal text to change more readily.

To repeat, however, I have not conducted the sort of study that would be needed to validate these comparative speculations, and doing so poses formidable challenges.¹⁵¹ What I hope I have done is

150. See ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 163-64, 167 (2009) (discussing means, such as judicial review and interpretation, employed throughout history to change the United States Constitution without formal amendment of the text); Tom Ginsburg et al., *The Lifespan of Written Constitutions*, *THE REC. ONLINE*, Spring 2009, <http://www.law.uchicago.edu/alumni/magazine/lifespan> ("If the methods of securing formal amendment are difficult (as in the United States ...), there may be pressures to adapt the constitution through judicial interpretation.").

151. Ran Hirschl's work is an example of the sort of study one would need to conduct. RAN HIRSCHL, *TOWARDS JURISTOCRACY* (2004). Hirschl looks closely at the relatively recent adoption and implementation of rights-based judicial review in four common law countries:

to persuade you of the importance of spandrels and Frankenstein's monsters in American law.

Canada, Israel, New Zealand, and South Africa. *Id.* at 4-5. His work is elegant and conducted at the right level of detail to provide insights about the questions he asks, but the question about which I am speculating is broader along two dimensions: first, I am interested in spandrels and monsters across the range of law, not just with respect to constitutional rights; and second, to generate a reliable answer to the question about which I am speculating in the text, one would need to look at a great many legal systems. None of that is meant as a criticism of Hirschl's first-rate study. I mean only to emphasize how truly speculative my concluding thoughts are.