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Optimizing Constitutionalism: The Mature Position

The last chapter defined and illustrated precautionary constitutionalism, attempting to put that approach in its best light. This chapter turns to criticisms of constitutional precautions offered by early proponents of national power such as Hamilton, Marshall, and Story, and by New Dealers such as Frankfurter and Jackson. These critics argued that precautionary constitutionalism might prove futile for lack of incentive-compatibility; might jeopardize other values, resulting in greater risks overall; might prove perversely self-defeating, if and because the precautions create or exacerbate the very risks they were intended to prevent; and might prove unnecessary, given the availability of after-the-fact remedies against materialized risks. As we will see, these criticisms of precautionary constitutionalism parallel the criticisms of precautionary principles in the theory of regulation. Critics of precautionary regulation are following a path that the critics of precautionary constitutionalism have already traveled.

I argue that the modern theory of risk regulation has arrived at a conclusion that is structurally equivalent to Hirschman's mature position.[1] On this view, the goal of regulators should simply be to take optimal precautions, according to a calculus that weighs all relevant risks of action and inaction. As it turns out, however, constitutional theorists such as Publius and Story already endorsed the mature position, arguing in their own language for a resolutely optimizing approach to constitutionalism. What's new is, in this case at least, very old.

Once the historical and interpretive work is complete, I offer an argument that the mature position is the best approach to constitution-making. I identify a strictly negative but nonetheless valuable function of the mature

[1] Albert O. Hirschman, The Rhetoric of Reaction 153–54 (1991).

position, which improves the processes of constitutional design and interpretation by laundering out one-sided arguments and thereby placing all relevant risks before decision makers. The mature position is sometimes criticized on second-order or indirectly consequentialist grounds, the argument being that even if the mature position is the ideal decision procedure, precautionary principles are necessary to compensate for predictable biases or distortions in regulatory decision making. I trace a parallel argument through the constitutional debates and also outline a rejoinder, applicable to both ordinary risk regulation and the regulation of political risks more specifically. Because relevant biases and distortions appear on all sides of the issues, the second-order argument for precautions, based on the capacities of decision makers, neglects tradeoffs and can prove self-defeating in precisely the same fashion as first-order arguments for precaution. In some cases, localized precautions may fall out naturally from a mature, even-handed assessment of all relevant political risks, but the set of constitutional rules will not be generally and systematically precautionary. Even if particular rules end up being precautionary, a mature assessment should govern at the highest level of analysis.

Let me caution again that this is a study in the theory of constitutional argumentation, not a treatise on constitutional design or interpretation. I aim to critique precautionary arguments for constitutional rules, not to evaluate the ultimate merits of those rules. Where particular precautionary arguments fail, the rules they were offered to justify may or may not be independently justifiable under the mature position. If we get the analysis right, the set of constitutional rules that will result is not my concern here.

COUNTERING PRECAUTIONARY ARGUMENTS

If constitutional law, history, and theory provide a wide array of precautionary justifications for legal rules, they also provide a repertoire of counterarguments. In various eras, framers, judges, and other actors have attempted to undermine the arguments for precaution. At the stage of constitutional design, such actors offer arguments to block the formulation of precautionary constraints. At the stage of constitutional interpretation, the point of the arguments is to prevent narrow construction of powers already granted.

Although anti-precautionary arguments appear in many eras and in many diverse contexts, I suggest they fall into recurring structural patterns. Adapting a set of categories from Albert Hirschman's analysis of political

rhetoric,[2] supplemented by the modern theory of risk regulation, I will sort the arguments into four groups:

(1) *Futility arguments*, in which the opponent argues that a given precautionary principle will fail to attain its ends.
(2) *Jeopardy arguments*, in which the opponent argues that a given precaution will produce net costs in light of countervailing risks on other margins.
(3) *Perversity arguments*, in which the opponent argues that a given precaution will prove self-defeating because of countervailing risks on the *same* margin – in other words, because it actually exacerbates the very risk that the precaution attempts to prevent.
(4) *Arguments for ex post remedies*, in which the opponent acknowledges the risk but argues that the correct mechanism to address it is not a general ex ante precaution. Instead, the correct mechanism is an ex post remedy applied case-by-case, after the relevant risk has actually materialized. Strictly speaking, this can be described as a special case of jeopardy, but it is an important special case that warrants separate treatment.

FUTILITY: "PARCHMENT" PRECAUTIONS AND COMMITMENT PROBLEMS

One rejoinder to a proposal for constitutional precautions is that the proposal may fail the criterion of incentive-compatibility.[3] The very conditions that make the precaution necessary also ensure that the actors against whom precautions are taken will have incentives to undermine or ignore it, and no other actors will have incentives to enforce the precaution against its violators.[4] Where this is so, the benefits of the precaution are zero and the proposal is futile.

Checks and balances; standing armies. The *locus classicus* of futility argument in constitutional theory is Madison's reference to "parchment

[2] *Id*. at 7.
[3] For summaries of and citations to the relevant literatures in political economy, see Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 Harv. L. Rev. 657, 670–80 (2011); Mark Tushnet, Taking the Constitution Away from the Courts 95–128 (2000). A particularly clear treatment is Daron Acemoglu, *Why Not a Political Coase Theorem? Social Conflict, Commitment, and Politics*, 31 J. Comp. Econ. 620, 639–48 (2003).
[4] *See* Adrian Vermeule, Judging Under Uncertainty: An Institutional Theory of Legal Interpretation 118–52 (2006).

barriers" in Federalist 48. The general line of his argument, which extends over Federalist 47, 48, and 51, is that formal specification of electoral accountability and separated powers in the constitution will be inadequate to contain legislative tyranny unless checks-and-balances mechanisms are added as "auxiliary precautions" and unless those mechanisms are made incentive-compatible by tying "[t]he interest of the man" to "the constitutional rights of the place [i.e., the institution]," so that "ambition [can] be made to counteract ambition."[5]

Yet the claim that parchment precautions are futile first appears in the Federalist Papers in connection with the debate over standing armies, not checks-and-balances, and was made by Hamilton, not Madison. Internal insurrections within Pennsylvania and Massachusetts, Hamilton observed, had compelled both states to raise and maintain standing forces, the general lesson being "how unequal parchment provisions are to a struggle with public necessity."[6] Hamilton's futility critique of precautionary prohibitions on standing armies in peacetime thus took the form of an argument in the alternative. One possibility would be that the exception for war or insurrection would be interpreted, in operation, so as to nullify the prohibition, because "the national government, to provide against apprehended danger, might in the first instance raise troops, and might afterwards keep them on foot as long as they supposed the peace or safety of the community was in any degree of jeopardy.... [A] discretion so latitudinary as this would afford ample room for eluding the force of the provision."[7] If, alternatively, the prohibition were seriously thought to prevent even the raising of armies in time of peace, it would simply be ignored or violated when apparent risks of invasion or insurrection so required. Whether evaded by interpretation or violated outright, the prohibition would prove futile.

None of this is to say that Hamilton's argument was in fact correct. But as noted earlier, the federal constitution did not ultimately embody the stringent precautions against standing armies that the Antifederalists desired. Even without such precautions, standing armies did not become a regular feature of the federal establishment until after the Civil War, suggesting at a minimum that the Antifederalists' preferred precautions were unnecessary. As for the broader issues surrounding the checks and balances of the federal lawmaking system, I take them up at length in Chapter 3. James Bryce, as we will see, argued that both checks and balances, and also

5 The Federalist No. 51, at 290, 322 (James Madison) (Clinton Rossiter ed., 1961).
6 The Federalist No. 25, at 167 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
7 *Id.* at 165.

the extended federalist republic, amounted to self-defeating constitutional precautions.

Free speech. In modern terms, the "parchment barriers" argument offered by Hamilton and then Madison points to the difficulties of commitment. As there is no agent external to society who can enforce the terms of constitutional commitments,[8] some indirect incentive-compatible mechanism must be called into play to make such commitments stick, and the existence of such a mechanism cannot be assumed.[9] The commitment problem only partially overlaps the issue of constitutional precautions: not all precautions suffer from commitment problems, while, conversely, those problems may also beset constitutional rules and structures not justified in precautionary terms.

An example of the area of overlap is the precautionary "pathological perspective" on free speech doctrine, under which "the overriding objective at all times should be to equip the first amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent."[10] The pathological perspective underwrites doctrines that attempt to create an intertemporal commitment: judges will commit themselves, or their successors, to clear speech-protective rules that will provide a bulwark against majoritarian oppression or other political pathologies. As we have seen, the stock example is the rule of *Brandenburg v. Ohio*,[11] under which government may not ban speech to preserve public order unless there has been advocacy that is intended to produce and likely to produce an imminent violation of the law.

However, the pathological perspective by itself provides no mechanism to make doctrinal restrictions of this sort stick when pressing exigencies arise. The predictable result has been that when an impressionistic judicial calculus of expected harms shows the existence of a grave threat to public order that the *Brandenburg* test would disable government from addressing, it is the test that has given way.[12] The main objection to the

8 *See* Jon Elster, Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints 88–174 (2000); Acemoglu, *supra* note, at 622–23.

9 *See* Levinson, supra note, at 663.

10 Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 Colum. L. Rev. 449, 449 (1985).

11 395 U.S. 444 (1969).

12 *See* Eric A. Posner & Adrian Vermeule, Terror in the Balance: Security, Liberty, and the Courts 232–34 (2007); Frederick Schauer, *A Comment on the Structure of Rights*, 27 Ga. L. Rev. 415, 417 (1993) (arguing that the pre-*Brandenburg* test of "clear and present danger" implicitly persists, in modified form, in contexts such as national

"pathological perspective" argument for a precautionary approach to free speech law is simply that precautions will systematically tend to prove futile when they would prevent government from taking action against apparently dangerous threats.

Clear statement requirements and emergency powers. Similar problems afflict the idea that presidential action in emergencies can be constrained by a doctrinal requirement of clear statutory authorization. The judges who are charged with enforcing the requirement may themselves be swept away by the sense of crisis, and when they are, they will tend to find the requirement satisfied so long as there is any plausibly relevant statute in the picture. In the words of political scientists Terry Moe and William Howell:

> The Court can issue rulings favorable to presidents, but justify its decisions by appearing to give due deference to the legislature.... Congress's collective action problems, combined with the zillions of statutes already on the books, make it entirely unclear what the institution's "will" is – and this gives the Court tremendous scope for arguing that, almost whatever presidents are doing, it is consistent with the "will of Congress."[13]

The upshot is that during conditions of perceived war, crisis or emergency, the judges' track record has been extremely forgiving; judges have frequently found "clear" authorization under statutes whose terms were hardly pellucid.[14] The judges do this in part because they have powerful incentives to do so at the time; when a perceived crisis occurs, judges who are aware of the limits of their own knowledge rationally fear the security consequences of holding that an executive measure lacks statutory authorization, and thus are powerfully tempted to read statutes for all they are worth, rather than enforcing a clear-statement requirement. Even if such a requirement is announced in prior legal doctrine, there is little incentive on the part of later judges to enforce it, and the requirement will prove incentive-incompatible. As with other precautionary measures, clear-statement restrictions on presidential emergency powers and war powers suffer from severe commitment problems.

security, and allows speech rights to be "outweighed" even where they apply); *see also, e.g.*, United States v. Progressive, Inc., 467 F. Supp. 990 (1979) (granting an injunction against a magazine article that provided instructions for building a hydrogen bomb, with no plausible showing of intent to produce imminent harm).

13 Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. Econ. & Org. 132, 152 (1999).

14 Posner & Vermeule, *supra* note, at 48.

JEOPARDY: OTHER-RISK TRADEOFFS

In many settings, the most forceful argument against precautions is simply that the optimal level of the target risk is not zero, and that some degree of expected harm from the target risk is necessary to obtain other goods. This jeopardy response invokes other-risk tradeoffs. Faced with a precautionary argument aimed at preventing a target risk, the opponent points to a distinct countervailing risk whose expected costs will be increased by the precaution.[15] If the opponent instead argues that the precaution will exacerbate the target risk itself, the appeal is to a same-risk tradeoff, and the response is one of perversity.

To illustrate the distinction, Hamilton (as Publius) deployed both types of argument against a precautionary rule that would prohibit the raising of standing armies in times of peace. Under such a prohibition,

> [a]ll that kind of policy by which nations anticipate distant danger and meet the gathering storm must be abstained from, as contrary to the genuine maxims of a free government. We must expose *our property and liberty* to the mercy of foreign invaders, and invite them by our weakness to seize the naked and defenseless prey, because we are afraid that rulers, created by our choice, dependent on our will, might endanger that liberty by an abuse of the means necessary to its preservation.[16]

Here, Hamilton argues both that a prohibition against standing armies in peacetime, justified as a precaution to protect liberty, would create a countervailing risk on a different margin – the seizure of property by foreign invaders – and that it would perversely create a risk to liberty itself, because a foreign invasion would destroy liberty as surely as would domestic despotism.

National governmental powers. If there is a main line of argument to the Federalist Papers, jeopardy is it. Although Publius employs memorable futility arguments and perversity arguments as well – we have seen some of the former and will soon see some of the latter – the overall structure of the Federalist Papers frames a large-scale jeopardy argument: the status quo under the Articles of Confederation poses intolerable

[15] For the terms "target risk" and "countervailing risk," see, for example, Jonathan B. Wiener, *Precaution in a Multirisk World*, *in* Human and Ecological Risk Assessment: Theory and Practice 1509, 1520 (Dennis J. Paustenbach ed., 2002).

[16] The Federalist No. 25, at 165–66 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

countervailing risks on multiple dimensions apart from liberty, such as public order, strong national defense, and the security of property. Liberty-protecting precautions against the power of the Union will hamper the strong national government needed to protect against those risks; therefore the ratifiers should be willing to trade off some risks to liberty against other goods.

In Federalist 41, Publius offered his most general rebuttal to the general Antifederalist argument for precautions against abuse of power:

> It cannot have escaped those who have attended with candor to the arguments employed against the extensive powers of the government that the authors of them have very little considered how far these powers were necessary means of attaining a necessary end. They have chosen rather to dwell on the inconveniences which must be unavoidably blended with all political advantages; and on the possible abuses which must be incident to every power or trust of which a beneficial use can be made.... [C]ool and candid people will at once reflect, that the purest of human blessings must have a portion of alloy in them; that the choice must always be made, if not of the lesser evil, at least of the GREATER, not the PERFECT, good; and that in every political institution, a power to advance the public happiness involves a discretion which may be misapplied and abused.[17]

Quite remarkably, given the contemporary political context, the passage blandly observes that some abuse of power is the inevitable byproduct of cost-justified grants of governmental discretion; the optimal level of political abuse is therefore greater than zero.

Recess appointments. We have seen that the *Canning* decision, from the federal court of appeals for the District of Columbia Circuit, articulated a precautionary rule against presidential power to make intrasession recess appointments. It can be argued that the decision was myopic, in the sense that the *Canning* court focused selectively, even to the point of obsession, on a particular target risk, while ignoring countervailing risks, including risks generated by the precautions themselves.

[17] THE FEDERALIST NO. 41, at 255–56 (James Madison) (Clinton Rossiter ed., 1961). For a version of the argument that emphasizes the paranoid or otherwise nonrational cognition of those who worry in general terms about governmental "abuse," see 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 408 (Boston, Hilliard, Gray & Co. 1833): A power, given in general terms, is not to be restricted to particular cases, merely because it may be susceptible of abuse, and, if abused, may lead to mischievous consequences. This argument is often used in public debate; *and in its common aspect addresses itself so much to popular fears and prejudices, that it insensibly acquires a weight in the public mind, to which it is no wise entitled* (emphasis added).

One countervailing risk is that a narrow interpretation of the recess appointment power interferes with the major purpose of recess appointments, the purpose that caused the framers to insert the power in the first place: to "keep important offices filled and the government functioning," as another circuit court put it.[18] That purpose has the same constitutional status as the concern the *Canning* court focused on exclusively, the constitutional provision for a senatorial check on appointments. If Congress as a whole has used its undoubted constitutional powers to create an office and mandates that it be filled; the president has tried to fill it; yet the tug-of-war over appointments within the Senate keeps the office empty for a protracted period, the result is a problem of *constitutional* stature, not just a policy problem. All provisions of the Constitution, and indeed the document's very existence, implicitly presuppose that a functioning government is a worthy aim of constitutional interpretation.

Furthermore, the only reason the recess appointments issue even arises, as a practical matter, is the toxic interaction between appointments and the Senate practice of the filibuster, which requires sixty votes for approval of relevant business, including appointments. If the majority in the Senate –at present, a Democratic majority – could just approve regular appointments under majority rule, no problem would occur. So the *Canning* court's narrow interpretation of the recess appointments power indirectly promotes the power of a blocking minority in the Senate.

Madison assumed in Federalist 10 that the risk of oppression by entrenched minorities was low, because "the republican principle … enables the majority to defeat [a minority faction's] sinister views by regular vote."[19] But if the principle of majority rule is disabled, as it is by the filibuster, then the risk of presidential aggrandizement has to be weighed against the risk of minoritarian factional oppression. (We have learned since Madison's time that it can be just as oppressive to prevent government from operating as to hijack its positive operation for factional ends.) A very clear and narrow interpretation of the recess appointment power minimizes the aggrandizement risk, but also increases the risk and harms of factionalism in the Senate. Precautions on one margin can themselves create new risks on other margins.

Reasonable doubt rule. For an example conventionally treated under the rubric of "rights," consider the justification of the reasonable doubt rule as a precautionary principle against a certain type of political

[18] *Evans v. Stephens*, 387 F.3d 1220, 1224 (CA 11 2004).
[19] The Federalist No. 10 (Clinton Rossiter ed. 1961).

risk – erroneous conviction of the innocent. Such justifications usually overlook the countervailing risks of false negatives, when those actually guilty are erroneously set free. If those actually guilty of crime can, as a class, be expected to create more far dangerous risks than the average citizen, then a precautionary perspective might even be invoked in favor of the opposite rule – better to convict ten innocents rather than let one guilty man go free. Thus it has been argued, tongue in cheek, that because "[v]iolence is a problem of public risk and public health [, i]n this context, the precautionary principle would favor earlier and more stringent intervention to prevent the 'future dangerousness' of persons who may, with considerable uncertainty, be forecast to commit violence in the future."[20]

This exemplifies a jeopardy argument because the risk against which the reasonable doubt rule takes precautions – unjustified deprivation of liberty through the criminal law – is not the same as the countervailing risk to which the critic of the reasonable doubt rule points – here, "public risk and public health."[21] If the criticism is that the violence to be anticipated from letting the guilty go free will itself deprive third-party innocents of their liberty, suitably defined,[22] then the liberty of innocents appears on both sides of the balance, and a same-risk tradeoff or perversity argument would arise.[23]

In light of these countervailing risks, the reasonable doubt rule and the traditional ten to one ratio are abrogated, quite sensibly, when the costs of false negatives seem higher than usual, according to some impressionistic judicial calculus – a pattern that also illustrates the commitment problems with precautionary judicial doctrines, discussed earlier under the heading of futility and parchment barriers. In *Hamdi v. Rumsfeld*,[24] for example, a plurality held that in hearings to determine enemy combatant status, the burden of proof could be placed on the alleged enemy combatant to disprove the government's evidence.[25] Here the costs of mistakenly releasing an enemy are high; not a few detainees released from Guantanamo have reappeared as jihadis in Iraq or Afghanistan.[26] So the judges relax the

[20] Wiener, *supra* note, at 1517.
[21] *Id*.
[22] *See* Adrian Vermeule, *A New Deal for Civil Liberties: An Essay in Honor of Cass R. Sunstein*, 43 Tulsa L. Rev. 921, 922–28 (2008).
[23] *Cf*. Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 Stan. L. Rev. 703, 745 (2005).
[24] 542 U.S. 507 (2004).
[25] *Id*. at 534.
[26] Alissa J. Rubin, *Bomber's Final Messages Exhort Fighters Against U.S.*, N.Y. Times, May 9, 2008, at A14.

reasonable doubt rule, even though the cost of a mistaken positive finding of combatant status is indefinite preventive detention of the innocent – arguably worse, from the standpoint of a risk-averse innocent, than a term certain with the equivalent expected duration. Decisions of this sort rest on a kind of implicit and unsystematic risk analysis that belies the precautionary principle embodied in the reasonable doubt rule.[27] That rule might or might not be optimal in light of all relevant risks, depending on the value of N, but a precautionary perspective does not structure the questions the right way.

Free speech. A structurally similar point has been made by Frederick Schauer in the setting of free speech.[28] Robust protections for free speech, on Schauer's account, may prevent government from taking precautions against an uncertain possibility or risk of catastrophic harms, such as terrorist attacks. On the other hand, those protections may themselves be seen as precautions against a different harm, "the large-scale restriction of speech."[29] The consequence of this view is that free speech analysis should embody a "decision-theoretic approach"[30] that takes into account countervailing risks and harms on all sides of speech protections and speech restrictions – in other words, a mature analysis of speech-related problems.

The administrative state and the combination of functions. In the protracted rear-guard action fought by various legalists and libertarians against the advance of the administrative state, one of the main arguments has been that combining rulemaking, prosecution, and adjudication in the hands of the same administrative agencies effects a violation of core norms of separation of powers, and thus creates an unacceptable risk of biased agency action. The agency that makes rules and prosecutes violators, the claim runs, cannot possibly adopt an impartial perspective in adjudicating violations of its rules. Accordingly, the Court has periodically been urged to declare the combination of functions in the administrative state a *per se* violation of due process.

The Court, however, has consistently rejected this sort of claim.[31] In *Withrow v. Larkin*, the Court acknowledged that the vast and varied federal

27 *See* Esmail v. Obama, 639 F.3d 1075, 1077–78 (Silberman, J., concurring).

28 See Frederick Schauer, *Is it Better to be Safe than Sorry? Free Speech and the Precautionary Principle*, 36 Pepp. L. Rev. 301 (2009).

29 *Id*. at 305.

30 *Id*. at 314.

31 *See* Marcello v. Bonds, 349 U.S. 302 (1955); FTC v. Cement Inst., 333 U.S. 683 (1948). In *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), the Court more or less endorsed the requirements of the Administrative Procedure Act (APA) as constitutionally sufficient. The APA requires separation of functions at the lower level of initial agency adjudication,

administrative state would grind to a halt if the combination of functions – a routine feature of federal administrative agencies – were declared *per se* unconstitutional on precautionary grounds.[32] This is an implicit jeopardy argument: the administrative state supplies so many valued goods that the risk of administrative bias is a constitutionally tolerable byproduct. I will return to this issue later.

Takings and public use. We have seen that critics of the Court's 2005 *Kelo* decision argued for a rule that economic development cannot count as a public use that justifies a taking of private property – a precautionary stance based on the concern that interest groups might cause legislatures to abuse the power of eminent domain for private ends. One of the Court's main responses, along the very lines of Publius's argument in Federalist 41, was simply that all governmental power can be abused:

> Speaking of the takings power, Justice Iredell observed that '[i]t is not sufficient to urge, that the power may be abused, for, such is the nature of all power – such is the tendency of every human institution: and, it might as fairly be said, that the power of taxation, which is only circumscribed by the discretion of the Body, in which it is vested, ought not to be granted, because the Legislature, disregarding its true objects, might, for visionary and useless projects, impose a tax to the amount of nineteen shillings in the pound. We must be content to limit power where we can, and where we cannot, consistently with its use, we must be content to repose a salutory confidence.'[33]

Like the taxing power, in other words, the power to take property for purposes of economic development is justified despite the possibility of abuses, because the gains are greater still. By focusing myopically on a particular target risk – the public-choice concern about interest-group influence – the critics of *Kelo* overlook the possibility that some level of abuse is optimal, in the sense that it is a necessary byproduct of a constitutional grant of power that is cost-justified overall.

PERVERSITY: SAME-RISK TRADEOFFS

Perversity arguments are particularly useful and attractive to opponents of precautions when there is a dominant constitutional value in the culture

but explicitly permits combination of functions at the top level of agency decision making, and combined arrangements are the norm in most federal agencies.

32 *See* Withrow v. Larkin, 421 U.S. 35, 52 (1975) ("The incredible variety of administrative mechanisms in this country will not yield to any single organizing principle").

33 Kelo v. City of New London, 545 U.S. 469, 487 n. 19 (2005).

of the day – a value that has become sacralized, making it unacceptable to argue that the value should be traded off against other goods. Under conditions of that sort, perversity arguments effect a kind of intellectual jiu-jitsu, turning the value against itself and seizing the high ground.

Standing armies. We have seen that in the debate over standing armies, Publius offered a straightforward jeopardy argument based on the goods of public order and national security from foreign invasion. Yet Publius also attempted to turn the Antifederalist argument on its head by suggesting that a prohibition on a national standing army would itself endanger liberty. The jewel of Hamilton's brilliant series of papers on the issue[34] was the crushing Federalist No. 8, titled "The Effects of Internal War in Producing Standing Armies and Other Institutions Unfriendly to Liberty,"[35] which offered a sustained case that the Antifederalist stance against standing armies would exacerbate the very risk that it sought to prevent.

If Antifederalists blocked ratification of the proposed constitution as a precaution against a national standing army, Hamilton warned, the consequence would be to create a European world of warring polities on the North American continent. Such a world would itself inevitably produce an array of standing armies. Moreover, the militarization of the states would result in systematic expansion of executive authority, "in doing which their [i.e., the state] constitutions would acquire a progressive direction towards monarchy.... Thus we should, in a little time, see established in every part of this country the same engines of despotism which have been the scourge of the old world.... [O]ur liberties would be a prey to the means of defending ourselves against the ambition and jealousy of each other."[36] The Antifederalists' error was to focus on the risks of the proposed constitution, while neglecting the countervailing risks of the steadily deteriorating status quo and the accelerating collapse of the Articles of Confederation regime.

Executive power and dictatorship. Along similar lines, Hamilton argued throughout the founding era that precautionary restrictions on the power of the executive would have the perverse result of causing the executive to slip off the bonds of constitutionalism altogether. The general problem, which Hamilton's Federalist No. 20 diagnosed by reference to the history of the Netherlands, was that

34 Most directly, see The Federalist Nos. 23–28, at 152–82 (James Madison) (Clinton Rossiter ed., 1961), as well as the somewhat more general diagnoses of the faults of the Articles of Confederation in The Federalist Nos. 2–10,(Clinton Rossiter ed., 1961).

35 The Federalist No. 8, at 66–71 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

36 *Id*. at 68, 71.

> [a] weak constitution must necessarily terminate in dissolution for want of proper powers, or the usurpation of powers requisite for the public safety. Whether the usurpation, when once begun, will stop at the salutary point, or go forward to the dangerous extreme, must depend on the contingencies of the moment. Tyranny has perhaps oftener grown out of the assumptions of power called for, on pressing exigencies, by a defective constitution, than out of the full exercise of the largest constitutional authorities.[37]

Although this passage in isolation might be taken to refer to government generally, Hamilton elsewhere made it pellucid that the dynamic of excessive weakness turning into excessive strength applied especially to the executive. As he warned the Philadelphia Convention, "establish a weak government and you must at times overleap the bounds. Rome was obliged to create dictators."[38]

Modern Hamiltonians point to similar possibilities. As against the precautionary view that a reinvigorated or reinforced separation of powers is necessary, in the United States today, to prevent a possible presidential or military coup,[39] it may be that the separation of legislative and executive powers is itself a risk factor for dictatorship. For one thing, the separation of powers may reduce civilian control of the military by allowing the military to foment or exploit conflicts between civilian institutions[40] – a type of divide-and-conquer strategy. Thus one comparative study of civil-military relations finds that civilian control is greater in the United Kingdom than in the United States.[41]

Furthermore, the separation of powers might increase the stability of the system in normal times while creating a risk or uncertain chance that the system will become radically unstable in abnormal times.[42] Suppose that in a system with an independently elected president, constitutional rule-makers set up elaborate vetogates, legislative and judicial oversight, and other checks and balances, all with an eye to minimizing the risks of executive dictatorship. However, these checks and balances create gridlock and

37 The Federalist No. 20, at 136–37 (James Madison) (Clinton Rossiter ed., 1961).

38 1 The Records of the Federal Convention of 1787, at 329 (Max Farrand ed., 1911).

39 *See* Bruce A. Ackerman, The Decline and Fall of the American Republic 141–79 (2010).

40 Samuel P. Huntington, The Soldier and the State: The Theory and Politics of Civil-Military Relations 177–84 (1957).

41 Deborah D. Avant, Political Institutions and Military Change: Lessons from Peripheral Wars 21–49 (1994).

42 This paragraph is adapted from Eric A. Posner & Adrian Vermeule, *Tyrannophobia*, in Comparative Constitutional Design (Tom Ginsburg ed. 2012).

make it difficult to pass necessary reforms. Where the status quo becomes increasingly unacceptable to many, as in times of economic or political crisis, the public demands or at least accepts a dictator who can sweep away the institutional obstacles to reform.[43] Here the very elaborateness of the designers' precautions against dictatorship creates pent-up public demand that itself leads to dictatorship. Comparative politics provides (contested) evidence for this story, especially from Latin America.[44] The New Deal, a "constitutional moment" of higher lawmaking, can be understood as our brush with the Latin American scenario, in which Roosevelt achieved near-dictatorial stature precisely because he seemed the best hope for overcoming the excessive status quo bias of the Madisonian constitution.[45]

The comparative evidence on which these mechanisms rest is uncertain. But that very uncertainty, coupled with the severity of the resulting harms if they do materialize, implies that on a precautionary perspective weakening the separation of powers might itself be the best safeguard against dictatorship. At a minimum, there are uncertainties on all sides of the issue; under certain conditions, the separation of powers may represent a self-defeating precaution.

Presidential emergency powers. Similar issues arise in recent constitutional theory, a prime example being Ackerman's proposals for constraining presidential emergency powers. Ackerman's "supermajoritarian escalator" proposes a framework statute that requires legislative authorization of emergency powers by successively larger supermajorities. Yet this framework fails to account for the reactions of legislators who themselves are aware of the rules.[46] Legislators will know, by virtue of the framework's escalating requirements, that a vote to authorize emergency powers at any

43 *See, e.g.*, Jonathan Hartlyn, *Presidentialism and Colombian Politics*, *in* The Failure of Presidential Democracy **294**, 294–96 (Juan J. Linz & Arturo Valenzuela eds., 1994).

44 *See id.* at 294–96; Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, *in* The Failure of Presidential Democracy, *supra* note 43, at 3, 6–8; Adam Przeworski et al., *What Makes Democracies Endure?*, J. Democracy, **39**, 44–46 (1996). The Latin American evidence is contested in José Antonio Cheibub, Presidentialism, Parliamentarism, and Democracy (2007), which argues that the correlation between presidentialism and dictatorship is merely an artifact of selection effects: polities that are less stable to begin with are more likely to have presidential systems.

45 Along similar lines, recent scholarship suggests a roughly one-in-eight chance that executive term limits perversely tend to increase the risk of executive coups, by removing the incentive of strong executives to continue to play within the system (a final-period problem). Tom Ginsburg, James Melton & Zachary Elkins, *On the Evasion of Executive Term Limits*, **52** Wm. & Mary L. Rev. 1807, 1849–50 (2011).

46 *See* Adrian Vermeule, *Self-Defeating Proposals: Ackerman on Emergency Powers*, **75** Fordham L. Rev. 631, 641 (2006).

given time will be followed by another vote under even more stringent conditions, and this in effect *lowers* the cost to legislators of granting such powers in the present. The result is a type of moral hazard: legislators may be *more* willing to grant emergency powers than they would be in a regime in which, once granted, emergency powers become a new status quo for the indefinite future. In the limit, the result might be perverse; the very mechanism that is intended to constrain presidential emergency powers might cause legislators to grant them more freely.

Recess appointments. Recall that the court in *Canning* barred intrasession recess appointments, at least in part as a precautionary measure against presidential aggrandizement. That holding might actually turn out to be *perverse*, making matters worse on the very same margin the court was worried about. In other words, the court's precaution against presidential aggrandizement might actually increase the overall risk of aggrandizement in the long run.

How would this occur? The main mechanism involves the risk of backlash. Suppose that the combination of the filibuster, other obstructionist tactics in the Senate, and decisions like *Canning* eventually produce so much pent-up public demand for reform of the appointments process that the president offers some radical reinterpretation of the Constitution, one that gives him substantially increased discretion over appointments. Ingenious commentators have already begun to supply such reinterpretations.[47] Should the new position stick as a political equilibrium, then – given the *Canning* court's own concern with safeguards against presidential power – the court might bitterly regret, *ex post*, that it threw up an obstruction that contributed to creating a backlash in the other direction.

The general point is that an enlightened decision maker will do well to consider the systemic, dynamic, and long-run effects of any given precaution, including the long-run risk of backlash resulting in perverse outcomes. True, where information is costly and time is limited, a rational and sophisticated decision maker might decide to ignore all long-run effects, on the theory that the dynamic possibilities are so numerous and varied as to be essentially incalculable. But that would be a different, far more respectable and self-aware sort of myopia than the myopia on display in *Canning*.

The Senate. Antifederalists favored direct and frequent legislative elections and restrictions on the re-eligibility of representatives, as precautions

47 For one possibility, see Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 Yale L.J. 940 (2013).

against elected oligarchy, corruption, and abuse of power. For obvious reasons, the indirect election, long terms, and indefinite re-eligibility of the Senate triggered Antifederalist fears. Madison, writing as Publius in Federalist 63, responded with a perversity argument:

> In answer to all these arguments, suggested by reason, illustrated by examples, and enforced by our own experience, the jealous adversary of the Constitution will probably content himself with repeating, that a senate appointed not immediately by the people, and for the term of six years, must gradually acquire a dangerous pre-eminence in the government, and finally transform it into a tyrannical aristocracy. To this general answer, the general reply ought to be sufficient, that *liberty may be endangered by the abuses of liberty as well as by the abuses of power*; that there are numerous instances of the former as well as of the latter; and that the former, rather than the latter, are apparently most to be apprehended by the United States.[48]

Madison's point rests on the sort of precommitment argument that underpins much of liberal constitutionalism: a Senate "may be sometimes necessary as a defense to the people against their own temporary errors and delusions.... What bitter anguish would not the people of Athens have often escaped if their government had contained so provident a safeguard against the tyranny of their own passions?"[49] The sting in the final sentence is the word "tyranny," which emphasizes the perverse threat to political liberty posed by unrestricted popular liberty to direct events.

Free speech.[50] In a liberal legalist culture, the sacrosanct status of free speech principles – understood as precautions against politically motivated abuse of governmental power – implies that such principles are especially likely to become the target of perversity arguments, which attempt to turn such principles against themselves. Two illustrations come from the free speech law of political protest and subversive advocacy. The first is Justice Jackson's dissent in *Terminiello v. City of Chicago*,[51] in which the Court invalidated a conviction of a defrocked Catholic priest, a right-wing demagogue, for breach of the peace. The demagogue had given a speech that caused riotous battles between his supporters and a hostile mob of left-wing activists. Jackson's argument appealed in part to the benefits of

48 The Federalist No. 63, at 387–388 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

49 *Id*. at 384.

50 A helpful treatment of the cases and issues discussed in this sub-section is Eugene Volokh, *Freedom of Speech and the Constitutional Tension Method*, 3 U. Chi. L. Sch. Roundtable 223 (1996).

51 337 U.S. 1 (1949).

public order, but argued more pointedly in the vein of perversity: liberty – in particular the liberty of free political speech – itself requires public order as a precondition of its existence, so that the Court's short-sighted protection of speech put at risk the very freedom it was intended to protect. As Jackson put it,

> [i]n the long run, maintenance of free speech will be more endangered if the population can have no protection from the abuses which lead to violence. No liberty is made more secure by holding that its abuses are inseparable from its enjoyment. We must not forget that it is the free democratic communities that ask us to trust them to maintain peace with liberty and that the factions engaged in this battle [Fascists and Communists] are not interested permanently in either.[52]

Jackson here implicitly points to the classic liberal dilemma whether liberalism requires toleration of the intolerant. In the long run, the argument goes, liberalism may undermine itself by tolerating political speech and participation by groups who would repeal liberal protections if they came to power. This is a large-perversity argument: liberal freedoms, at least if pressed too far, put themselves at risk.

That liberal dilemma also underpins the opinion in *Dennis v. United States*, which upheld a conviction of Communist defendants for conspiring to organize the Communist Party to advocate and teach the overthrow of the U.S. government by violence.[53] As we have seen, the majority opinion by Chief Justice Vinson upheld the conviction by adopting Judge Learned Hand's expected-harm test for free speech protection, under which courts "ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[54] As against Justice Black's dissent, which offered a precautionary argument for free speech protection – "the freedoms [that the First Amendment] guarantees provide the best insurance against destruction of all freedom"[55] – the majority replied that if the government fell to Communism, all of Black's freedoms, including free speech, would fall with it:

> Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure

52 *Id*. at 36–37.
53 341 U.S. 494 (1951).
54 *Id*. at 510 (internal quotation omitted) (citing *United States v. Dennis*, 183 F.2d. 201, 212 (2d Cir. 1950)).
55 *Id*. at 580 (Black, J., dissenting).

> from armed internal attack, it must follow that no subordinate value can be protected.[56]

This sort of perversity argument boils down to the claim that liberty itself depends on strong and stable government – the obverse of Benjamin Franklin's civil-libertarian claim that "[t]hose who would give up essential [l]iberty to purchase a little temporary [s]afety, deserve neither [l]iberty nor [s]afety."[57]

Judicial Review. The perversity critique of a precautionary approach to free speech cases can be generalized into a critique of the larger precautionary justification for judicial review. Conditional on certain theories of rights that recognize affirmative claims to governmental aid or support, judicial review can be argued to block legislative or executive measures that are necessary to implement rights or to protect rights against private violation. On this view, the perverse result is that judicial review might increase the overall incidence of rights-violations. "Inserting an additional veto point into the process of obtaining effective legislation *threatens* erroneous underprotection of fundamental rights; it does not provide a 'hedge' against legislative underprotection of fundamental rights."[58]

Judicial review, interest groups, and property rights. Along similar lines, perversity underlies a general critique of interest-group justifications for judicial review.[59] Such theories posit that courts should exercise closer scrutiny of governmental action where there is a risk of interest-group "capture" – a risk that narrow, well-organized groups will exert disproportionate influence over legislatures or agencies, according to some normative conception of proper influence. As we have seen, the capture concern underlies many criticisms of the *Kelo* decision, which allowed governmental takings of private property for purposes of economic development. The critics believe that interest groups will cause government to abuse the takings power in order to confer benefits on private groups, reducing social welfare overall and undermining the security of property rights.

In Chapter 4, I will discuss some of the affirmative "benefits of capture,"[60] which can provide decision makers with specialized information

56 *Id*. at 509 (majority opinion).

57 Benjamin Franklin, *Pennsylvania Assembly: Reply to the Governor* (Nov. 11, 1755), *in* 6 The Papers of Benjamin Franklin **242** (Leonard W. Labaree ed., 1963).

58 Mark Tushnet, *How Different are Waldron's And Fallon's Core Cases For and Against Judicial Review?*, 30 Oxford J. Legal Stud. 49, 61 (2010) (emphasis in original).

59 For an overview and critique of such theories, see Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 Yale L.J. 31 (1991).

60 *See* Dorit Rubinstein Reiss, *The Benefits of Capture*, 47 Wake Forest L. Rev. 569 (2012).

or spur decision makers to take decisions. Even apart from such benefits, however, it has been argued that enhancing judicial scrutiny in order to raise the costs of interest-group capture may have perverse effects. In the words of a leading critic of interest-group justifications for judicial review,

> even if more intrusive judicial review does increase the transaction costs of capture, that can perversely encourage interest group activity by making successful capture harder to undo. [Furthermore], because increasing transaction costs also increases the costs facing large diffuse groups, it may increase the *relative* advantage of small intense groups and thus increase their success.[61]

In other words, the interest-group justifications for judicial review focus myopically on one sort of response to the threat of capture, overlooking that the precautions they advocate may themselves exacerbate that very threat.

Maximin constitutional design.[62] As we have seen, Federalist 41 gives the most general form of the jeopardy argument: precautions that restrict governmental discretion to provide other goods may reduce social welfare overall. The most general form of the perversity argument holds that designing a constitution on worst-case assumptions – maximin constitutional design, loosely speaking – may itself bring about the worst case. In light of that risk, systematic constitutional caution may prove self-defeating.

An example is a critique of Hume's knavery principle, discussed in Part I.A. Anti-Humean critics object that *the expectation of knavery is self-fulfilling*: presuming officials to be knaves will tend to make officials into knaves.[63] One possibility is that official motivations are partly endogenous to the constitutional rules. On this view, "a constitution for knaves crowds out civic virtues,"[64] a possibility that in turn can rest on one of several mechanisms.[65] Constitutional sanctions for self-interested behavior

61 Elhauge, *supra* note, at 88.

62 For an earlier stab at these issues, see Adrian Vermeule, *Hume's Second-Best Constitutionalism*, 70 U. Chi. L. Rev. 421 (2003).

63 An excellent treatment of these issues is Lewis A. Kornhauser, *Virtue and Self-Interest in the Design of Constitutional Institutions*, 3 Theoretical Inq. L. 21 (2002).

64 *See* Bruno S. Frey, *A Constitution for Knaves Crowds Out Civic Virtues*, 107 Econ. J. 1043, 1044–45 (1997).

65 For a model of conditions under which laws (here meaning legal sanctions or incentives) and norms act as either substitutes or complements, see Roland Bénabou & Jean Tirole, *Laws and Norms* (Nat'l Bureau of Econ. Research, Working Paper No. 17579, November 2011), *available at* http://ssrn.com/abstract=1954505.

might undermine social norms that would constrain the same behavior; the net effect may then be an increase in self-interested action by officials. Alternatively, sanctions for self-interested behavior might (unintentionally) convey a signal that many other officials are engaged in the behavior that the sanctions aim to eliminate. If so, the net result may be an increase in noncompliance by office-holders, either because they are conformists who adjust their behavior to track what the majority does,[66] or because they are "reciprocal altruists" who would comply with public-regarding norms if others were complying also, but who are afraid of being chumps and are thus unwilling to comply unilaterally.[67]

Even if officials' motivations are not endogenous to the constitutional rules, the Humean presumption of knavery may have selection effects that perversely tend to filter self-interested actors into office while filtering out public-spirited actors. If public-spirited actors experience a cost from being subjected to elaborate monitoring devices based on a presumption of knavery – the cost of frustration, or of operating under a cloud of suspicion – then the presence of such devices will tend, at the margin, to filter out such actors while filtering in actors for whom the presumption of knavery is, in fact, accurate. Although this is merely one possible effect of such devices, the overall result may be that designing a constitution for knaves perversely tends to select knaves into the public sphere.

EX ANTE PRECAUTIONS VS. EX POST REMEDIES: "NOT WHILE THIS COURT SITS"

By their nature, precautions are taken ex ante the materialization of the relevant risk. Accordingly, another argument against precautions is that ex ante safeguards are unnecessary in light of the availability of ex post remedies, such as suits for damages against officers who execute an unconstitutional policy. Technically, this is a special case of jeopardy and could have been covered under that heading. The core of the concern is simply that ex ante precautions that are unnecessary will imposes costs greater than their benefits. Because the temporal dimension is distinctive, however, separate treatment is warranted.

66 Dirk Sliwka, *Trust as a Signal of a Social Norm and the Hidden Costs of Incentive Schemes*, 97 Am. Econ. Rev. 999, 1000 (2007).

67 Joel J. Van der Weele, *The Signaling Power of Sanctions in Social Dilemmas*, 28 J.L. Econ. & Org. 103–26 (2012).

There is a standard conceptual issue about the distinction between ex ante precautions and ex post remedies, one that crops up in this setting as well. Clearly, the anticipation of an ex post sanction will itself produce ex ante deterrent effects, if the law can make a credible commitment to providing remedies after the fact. Yet it is wrong (here and elsewhere) to assume that there is no difference between ex ante precautionary regulation and a system of ex post sanctions. For present purposes, a key difference is whether the constitutional rule is formulated to ward off an uncertain harm, or instead is formulated to require that the complaining party demonstrate that a harm has already materialized. The latter approach places the burdens of production and proof on the complainant and requires case-by-case assessment of evidence before the tribunal.

Taxation of federal instrumentalities and contractors. As we have seen, Chief Justice Marshall's opinion in *McCulloch* formulated a rule against state taxation of federal instrumentalities, based on the precautionary principle that "the power to tax involves the power to destroy."[68] The rule of *McCulloch* – a "prophylactic per se rule"[69] that still holds today – is that states may not regulate or tax federal instrumentalities without express congressional authorization.

Later cases extended the precautionary zone to bar state taxation of private parties who do business with the federal government.[70] The governing doctrine was that any state regulation or tax that indirectly regulated the federal government's activity was invalid; the point of this doctrine was to create a precautionary buffer to protect the freedom of otherwise valid federal operations. Justice Holmes, by contrast, articulated a competing position: ex post, case-by-case assessment of the destructive effect of state taxation on federal contractors would be enough to protect vital federal interests, without overprotecting those interests to such a degree as to squash the legitimate taxing power of the states.

In the most famous of Holmes's opinions on this issue, a dissent in *Panhandle Oil Co. v. Mississippi ex rel. Knox*,[71] Holmes voted to uphold a state sales tax on oil sold to the United States for the use of the Coast Guard. "The power to tax," Holmes argued, "is not the power to destroy while this Court sits."[72] The Court's ability to review interference with federal operations at retail thus undermined the need for a wholesale

68 17 U.S. 316, 431 (1819).
69 Laurence H. Tribe, American Constitutional Law 1223 (3d ed. 2000).
70 *See, e.g.*, Osborn v. Bank of the United States, 22 U.S. 738, 867 (1824).
71 277 U.S. 218 (1928).
72 *Id*. at 223 (Holmes, J., dissenting).

precautionary principle. Starting in 1937, the Court began to limit the precautionary buffer zone around federal operations, and the opinion from which Holmes had dissented was eventually overruled.[73] Under current law, federal contractors can generally be subjected to nondiscriminatory state taxes and regulations.[74]

Free speech. Holmes's "not while this Court sits" principle later migrated to other parts of constitutional law, including the law of free speech. In *Beauharnais v. Illinois*,[75] the Court sustained a criminal statute that prohibited the publication of libelous assertions about groups. Rejecting the contention that free speech precautionary principles should be invoked to invalidate the law, Justice Frankfurter wrote for the Court along Holmesian lines:

> We are warned that the choice open to the Illinois legislature here may be abused, that the law may be discriminatorily enforced; prohibiting libel of a creed or of a racial group, we are told, is but a step from prohibiting libel of a political party. Every power may be abused, but the possibility of abuse is a poor reason for denying Illinois the power to adopt measures against criminal libels sanctioned by centuries of Anglo-American law. 'While this Court sits' it retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel.[76]

In other words, the political risk that group libel law would be used as a pretext for the abuse of power could be dealt with through ex post, case-by-case assessment, rather than through ex ante precautions. Here as elsewhere in free speech law, however, the precautionary approach has largely prevailed; the consensus is that *Beauharnais* is no longer good law.[77]

Takings and public use. The principle "not while this Court sits" migrated more successfully to another area, however: constitutional property law. As against the argument for a precautionary rule that economic development can never count as a "public use," for fear that the takings power will be abused by interest groups for self-regarding ends, the *Kelo* Court offered not only a jeopardy response – discussed earlier – but also the response that welfare-reducing interest-group influence can be discerned

73 *See* James v. Dravo Contracting Co., 302 U.S. 134, 151–52 (1937).
74 *See, e.g.*, United States v. New Mexico, 455 U.S. 720 (1982).
75 343 U.S. 250 (1952) (internal citation omitted).
76 *Id*. at 263–64.
77 *See, e.g.*, Anti-Defamation League of B'Nai B'Rith v. FCC, 403 F.2d 169, 174 n.5 (D.C. Cir. 1969) ("[F]ar from spawning progeny, *Beauharnais* has been left more and more barren by subsequent First Amendment decisions, to the point where it is now doubtful that the decision still represents the views of the Court.").

through fact-specific review in particular cases. Quoting Holmes's dictum from *Panhandle Oil*, the Court said that even where there is a "suspicion that a private purpose [is] afoot, the hypothetical cases posited by [the parties challenging the taking] can be confronted if and when they arise. They do not warrant the crafting of an artificial restriction on the concept of public use."[78] On this view, there is no need for a precautionary restriction on the takings power because abuses can be separated from legitimate uses in a case-by-case review.

Due process. We have seen, in the law of due process, a precautionary principle against the risk of biased judgment by adjudicators with a personal financial stake in the controversy, even an indirect one.[79] By contrast, the risk of bias that arises from combination of investigative, prosecutorial, and adjudicative functions in the same hands is remitted to case-by-case assessment and ex post protection. In *Withrow v. Larkin*,[80] the Court upheld a scheme in which a board of physicians was given the authority to investigate and prosecute claims of professional misconduct, and then to adjudicate those claims; the particular case involved proceedings against an abortionist and had more than a whiff of ideological bias to it. The Court refused to apply a precautionary rule against this combination of functions:

> [V]arious situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome.... [However, there is] no support for the bald proposition ... that agency members who participate in an investigation are disqualified from adjudicating. The incredible variety of administrative mechanisms in this country will not yield to any single organizing principle.... [This holding] does not, of course, preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high.[81]

Despite the Court's reference to "risk" in the final sentence, lower court cases have made clear that once a precautionary principle barring the combination of functions is rejected, the complaining party must make a specific showing – "in the case before it," as the Court instructed – that biased

78 Kelo v. City of New London, 545 U.S. 469, 487 (2005).
79 *See* Gibson v. Berryhill, 411 U.S. 564 (1973).
80 421 U.S. 35 (1975).
81 *Id*. at 47, 52, 58.

judgment has actually materialized.[82] Earlier, I suggested that the Court's tolerance for administrative combination of lawmaking, prosecutorial, and adjudicative functions rests in part on a jeopardy argument, based on the many goods that the combination of functions supplies; here I add that the Court has relegated any risks arising from the combination of functions to ex post, case-by-case assessment, rather than addressing them through an ex ante precautionary approach.

CONSTITUTIONAL RISK REGULATION: THE "MATURE POSITION"

Given the arguments for encoding precautions against political risk in constitutional law, and the counterarguments against such principles, what is to be done? Story addressed the question with reference to the political risks posed by standing armies:

> Too much precaution often leads to as many difficulties, as too much confidence.... It may be admitted, that standing armies may prove dangerous to the state. But it is equally true, that the want of them may prove dangerous to the state. What then is to be done? The true course is to check the undue exercise of the power, not to withhold it.[83]

Here Story in effect argues for a position that considers all relevant risks of all relevant alternatives, including both action and inaction, and then adopts cost-justified precautions in light of those risks. In all this, Story was following a path marked out by Publius. Federalist 41 did not deny the risks of standing armies, but merely argued for balanced risk assessment:

> A standing force, therefore, is a dangerous, at the same time that it may be a necessary provision. On the smallest scale it has its inconveniences. On an extensive scale, its consequences may be fatal. On any scale, it is an object of laudable circumspection and precaution. A wise nation will combine all these considerations; and whilst it does not rashly preclude itself from any resources which may become essential to its safety, will exert all its prudence in diminishing both the necessity and the danger of resorting to one which may be inauspicious to its liberties.[84]

82 *See, e.g.*, Alpha Epsilon Phi Tau Chapter Housing Ass'n v. City of Berkeley, 114 F.3d. 840, 845 (9th Cir. 1997); Valley v. Rapides Parish Sch. Bd., 118 F.3d. 1047, 1053 (5th Cir. 1997).

83 3 Joseph Story, Commentaries on the Constitution of the United States 71, 73 (Boston, Hilliard, Gray & Co. 1833).

84 The Federalist No. 41, at 257–58 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

Publius and Story here supplied an example of what Hirschman, writing about the political theory of institutional reform, calls the "mature position":

(1) There are dangers and risks in both action and inaction. The risks of both should be canvassed, assessed, and guarded against to the extent possible.
(2) The baneful consequences of either action or inaction can never be known with [certainty].... When it comes to forecasts of impending mishaps or disasters, it is well to remember the saying *Le pire n'est pas toujours sûr* – the worst is not always sure (to happen).[85]

The mature position is structurally parallel, in the domain of political risks, to the position advanced by critics of precautionary principles in health, safety, and environmental regulation. On this view, given the possibility of countervailing risks, the goal of the designer of a regulatory system should be *optimal* precautions rather than *maximal* precautions.[86] The latter is an incoherent goal in any event, because precautions may themselves create risks, and thereby prove self-defeating.[87] The mature calculus, then, posits that "[o]ptimal regulation in the face of a target risk (TR) and a countervailing risk (CR) would take both seriously and strive to maximize their difference ($\Delta TR - \Delta CR$). Uncertainty is not the crucial problem – trade-offs are."[88]

An example. For a simple illustration, let me return to the issue of recess appointments and the *Canning* decision. (The rest of the book will be occupied with providing more extended and complex illustrations.) The *Canning* court barred all intrasession recess appointments as a precaution against presidential aggrandizement, but we have seen that the holding created countervailing risks and harms – both risks of collateral harm to the orderly functioning of government, and the perverse consequence of possibly increasing the long-term risk of presidential aggrandizement itself. Yet there are at least two other alternative constitutional rules. Those alternatives are far less cramped than the court's holding, and would plausibly optimize across the relevant constitutional risks, or at least do better

85 Hirschman, *supra* note, at 153–154.
86 Wiener, *supra* note, at 1511.
87 *See* Cass R. Sunstein, Laws of Fear: Beyond the Precautionary Principle 4 (2005) (the precautionary principle is "literally incoherent" because "[t]here are risks on all sides of social situations" and thus the precautionary principle "forbids the very steps it requires").
88 Wiener, *supra* note, at 1520.

overall than the rule the court chose, while sufficiently accommodating the court's slippery-slope concerns.

One possibility would be to say that historical practice has liquidated and fixed, within a range, the duration of intrasession recesses within which an appointment may be made. The practice has varied somewhat, but there is a stable basin of attraction in the region of about ten days. Many intrasession appointments have involved longer recesses — *Canning* itself involved a twenty-day recess — while a few such appointments have fallen in recesses slightly shorter than ten days. But we simply do not observe presidents making intrasession appointments when the Senate recesses for five days, let alone for a lunch break. Observable behavior suggests that the slope is not so very slippery after all.

If that seems too vague or elastic, another possibility would be to tie recess appointments to the Adjournments Clause, which prohibits either house of Congress from adjourning for more than three days, during the session, without the other's consent.[89] The law could say that any adjournment of longer than three days counts as a "recess" and thus enables a recess appointment, but that three days or less will not do. That would offer a perfectly determinate and enforceable line.

The *Canning* court rejected this because there is no explicit textual link between the recess appointments power on the one hand and adjournments on the other.[90] So what? The pragmatic point of the court's enterprise, after all, was to find a "clear distinction" that would prove "judicially defensible in the heat of interbranch conflict." The three-day line offers exactly that, but with reduced countervailing harms and risks, compared to the court's rule. Even granting the concern with presidential aggrandizement, the court's highly precautionary holding represents a poor overall treatment of the relevant risks, in light of the problems of jeopardy and perversity that the holding created. And there were feasible alternative rules that illustrate the optimizing approach of the mature position.

The mature position, cost-benefit analysis, and democracy. Having laid out the mature position, let me clarify its limits, both conceptual and political, in the hope of forestalling confusions. First, the mature position does not necessarily entail cost-benefit analysis, depending on how the latter idea is specified. "Cost-benefit analysis" is a protean term[91] that can be

89 U.S. Const. art. I, sec. 5, cl. 4.
90 See *Canning*, 705 F.3d at 504.
91 *See* Amartya Sen, *The Discipline of Cost-Benefit Analysis*, 29 J. Legal Stud. 931, 932–33 (2000).

used to encompass everything from informal consequentialism – Charles Darwin's list of the pros and cons of marriage[92] – to a formal, fully monetized analysis of compensating variations based on willingness to pay and to accept.[93] When used as a loose synonym for consequentialism, cost-benefit analysis can encompass a range of theories about what consequences are relevant and what weights to be assigned to them. Although the version of consequentialism that underpins formal monetized cost-benefit analysis attends only to consequences for subjective welfare, nothing inherent in consequentialism so requires. Violations of rights, somehow defined, may themselves count as bad consequences.[94] What the mature position does point out, however, is that rights may appear on all sides of relevant issues; both the jeopardy and the perversity arguments emphasize the possibility of rights-rights tradeoffs, with jeopardy being relevant if different rights are in conflict and perversity being relevant if the same right appears on both sides of the issue.

Second, the mature position does not, by itself, exclude a fully informed democratic decision to depart from optimal precautions. Risk regulation, whether at the first-order or second-order level, is only a part of what societies might properly care about; once democratic decision makers have figured out what the optimal precautions are, there is a separate normative question about what to do, in light of that mature risk assessment. What the mature position does exclude, however, is a decision to depart from optimal precautions for the wrong sort of reasons, or on spurious grounds. Although democratic decision makers might adopt a suboptimal set of precautions, they should do so with their eyes open, after an evenhanded assessment of both target risks and countervailing risks, rather than in the misguided belief that a prudent approach to risk so requires.

Political fat tails and maximin constitutionalism. Another set of issues involves risk, uncertainty, and extreme outcomes that are, in some sense, real but remote possibilities. Although I have been speaking the language of risk, the point is the same whether put in those terms or instead in the language of uncertainty. The precautionary concern with political fat tails and rare but extreme political outcomes, such as a sudden collapse into dictatorship, is compelling in the abstract, at least if the resulting harms to constitutional values would be sufficiently great. The problem is that the

92 2 The Correspondence of Charles Darwin: 1837–1843, at 443–445 (Frederick Burkhardt & Sydney Smith eds., 1986).

93 Matthew D. Adler & Eric A. Posner, New Foundations of Cost-Benefit Analysis 166–73 (2006).

94 Amartya Sen, *Rights and Agency*, 11 Phil. & Pub. Aff. 3, 4–7 (1982).

concern with political fat tails has no particular valence and yields no particular implications for constitutional rulemaking. The basic reason is that *precautions may themselves have fat tails*[95] – both in ordinary policymaking and in constitutional rulemaking. The very constitutional structures that rulemakers set up to safeguard against remote but extremely damaging possibilities may themselves create a remote chance of an exceedingly harmful outcome.

Consider the possibility, discussed earlier, that the separation of executive and legislative powers, erected in part as a precaution against either executive dictatorship or legislative tyranny, is itself a risk factor for dictatorship or tyranny, perhaps because the separation of powers gridlocks the lawmaking system and thus created pent-up public demand for strong extraconstitutional action. That possibility is a remote one, but may prove extremely damaging to constitutionalism if it does materialize. Constitutional precautions, in other words, can be as susceptible to the fat-tail problem as are the political harms the precautions are intended to guard against.

Likewise, maximin constitutionalism fails to the extent that precautions may themselves trigger a worst-case scenario. Suppose – and the earlier examples substantiate these possibilities – that there is some unquantifiable probability that strong free speech protection will trigger a backlash that results in suppression of political speech, or that strong protection for property rights will trigger a backlash that results in a severe curtailment of property rights. It is unclear what the maximin perspective on constitutionalism implies in such cases. Where a worst-case outcome may, with some unquantifiable probability, result from the precautions taken to prevent that outcome, the maximin approach is at odds with itself.

Second-order precautions? In the risk-regulation debates, one critique of the mature position takes a second-order or indirect-consequentialist form. Although balancing of all relevant risks is the ideal, the argument runs, regulators display predictable cognitive biases and motivational distortions that will cause them to make suboptimal decisions under a balancing approach.[96] Regulators may predictably underweight soft or nonquantifiable variables, such as environmental values; may predictably

95 *See* Gary W. Yohe and Richard S.J. Tol, *Precaution and a Dismal Theorem: Implications for Climate Policy and Climate Research*, *in* Risk Management in Commodity Markets 91 (Hélyette Geman ed., 2008).

96 *See* David A. Dana, *A Behavioral Economic Defense of the Precautionary Principle*, 97 Nw. U. L. Rev. 1315 (2003); David A. Dana, *The Contextual Rationality of the Precautionary Principle*, 35 Queen's L.J. 67 (2009).

overweight certain costs, as opposed to uncertain ones; may be excessively optimistic, and thus underestimate the risk that catastrophic harms will occur in the absence of regulation; or may be influenced or politically constrained by self-interested private groups who oppose regulation. Some version of the precautionary principle can compensate for these distortions, and is therefore a pragmatically useful second-best. On these grounds, rulemakers such as legislators and judges might do well, in a long-run and aggregate sense, to embody precautionary principles in statutes or legal doctrines even if such principles would be harmful when applied to constrain the decisions that an ideal regulator would make. In general, second-order or indirectly consequentialist arguments for (some version of) the precautionary principle imply that it is not necessarily best for regulators to attempt to weigh all relevant risks, because they will predictably display certain biases in doing so.

Proponents of the mature position in the risk-regulation debates counter that the rule-utilitarian defense of precautions does not escape the core problem of the precautionary principle. Cognitive biases or motivational distortions on the part of decision makers are just another type of risk; those biases and distortions can themselves appear on all sides of relevant issues.[97] The rule-utilitarian argument, on this rejoinder, replicates the fatally one-sided character of the precautionary principle, just one step removed – in the form of a second-order argument about the capacities of decision makers, rather than a first-order argument about the nature of the risks to be regulated.

In one set of examples, the very *same* bias appears on all sides; this is a second-order version of the perversity critique. If decision makers underweight soft unquantifiable variables, such as environmental values, this need not justify a precautionary principle in favor of regulation, because environmental values may also be harmed by excessive or misplaced regulation as well as by inadequate regulation. By the very logic of the rule-utilitarian argument, decision makers will also underweight the perverse effects of bad or misplaced regulation on soft variables. Likewise, if decision makers are excessively optimistic, the problem is that they may be excessively optimistic about the consequences of regulating as well as the consequences of failing to regulate.

In another set of examples, regulators may display one type of bias that favors inaction or under-regulation, but simultaneously display a different type of bias that favors action or over-regulation (or vice versa). As against

[97] Sunstein, *supra* note, at 51–53.

the argument that regulators underweight soft variables, for example, it has been argued that "ordinary thinking is actually warped against giving *quantitative* variables their due weight."[98] On this view, decision makers tend to overweigh vivid narratives and underweight pallid background facts of a statistical character.[99] More generally, given the proliferation of findings and putative findings about cognitive and motivational distortions that have emerged from the heuristics-and-biases program in psychology, it will often be the case that plausible arguments for "systematic bias" can be made on all sides of relevant issues.

A second-order version of the mature position, then, will consider all relevant systematic biases, both for and against regulation, that might afflict front-line decision makers. To be clear, a suitably mature second-order analysis might ultimately conclude that some version of the precautionary principle turns out, in fact, to be the best first-order decision procedure for regulators in a certain domain. This defense of precautionary principles has a perfectly valid theoretical structure; hence it cannot be ruled out, or in, on *a priori* grounds. Everything depends on what predictable biases and decision-making distortions regulators actually display. Yet one cannot justify such a conclusion by pointing in a one-sided fashion to the subset of biases that produce inadequate (or excessive) regulation. First-order precautionary decision-procedures can be justified only by second-order decision making that is itself mature, rather than precautionary. As I have argued at length elsewhere, the limits of reason – the information costs, cognitive biases, and other decisional pathologies that afflict first-order decision makers – should be taken into account by institutional designers,[100] but only in a way that considers all relevant limits on reason, not merely some skewed or biased subset of those limits that pull systematically for or against regulation of particular risks.

Structurally parallel points apply, with appropriate modifications, to constitutional law. I will confine myself to one example, the argument that anticipated political pathologies call for clear and strictly enforced rules of content neutrality and viewpoint neutrality in free speech law. Judges fear that in future periods of political pathology, cognitive biases or political pressures will cause their successors on the bench, or their future selves, to override free-speech protections; hence they attempt to precommit to a clear

98 Richard A. Posner, Economic Analysis of Law 403 (7th ed. 2007).

99 *See* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Science 1124, 1127–28 (1974).

100 *See* Adrian Vermeule, Law and the Limits of Reason (2009).

and rigid rule to compensate for the anticipated pathologies. This argument has the structure of the rule-utilitarian argument for precautions.

The parallel problem, however, is that pathologies can appear on all sides of the relevant issues. In particular, the rulemakers – here judges who craft free speech doctrine – may themselves display a *pathological fear of succumbing to pathological fear*, a kind of phobophobia. If so, they will prove pathologically unwilling to bend or break the rules and will decline to craft standards or exceptions that allow the rules to be overridden, even where such exceptions are socially desirable, all things considered.[101] To make things worse, if the judges' phobophobia produces a series of decisions that are so publicly unacceptable that they produce widespread disrespect for free speech protection, then the pathological perspective may prove self-defeating; the judges' concern for protecting free speech in the long run may actually undermine free speech in the long run.

In this light, it is inadequate to say that because there is a risk that judges will react fearfully to subversive advocacy, "second-order balancing" counsels in favor of a "pathological perspective," which in turn requires strong, rule-like precautionary protections in favor of free speech.[102] The problem is that fear can be present on all sides of the relevant issue, at the second level no less than the first. If some judges are irrationally fearful of subversive speech – where "irrationally" means "to a degree not warranted or justified by the evidence" – then other judges are irrationally fearful of governmental attempts to disrupt organizations that threaten force or violence. The latter judges are the mirror-image of the former; they are subject to a kind of "libertarian panic,"[103] driven by the salience of highly salient or lurid governmental abuses in the past, just as the former judges are obsessed by highly salient risks of terrorism or other harms by organized violent groups. The limits of reason appear on all sides of the equation; a mature calculus would weigh both risks and both types of decisional distortions on the part of judges and other officials. It is an open question what the result of that fully mature second-order decision making would be; doubtless the result would be highly contextual, varying with time and

101 *Cf.* Mark Tushnet, *The First Amendment and Political Risk*, 4. J. Legal Analysis 103 (2012).

102 Sunstein, *supra* note, at 218–21.

103 *See* Adrian Vermeule, *Libertarian Panics*, 36 Rutgers L.J. 871, 871 (2005) (arguing that "the mechanisms underlying security panics have no necessary or inherent pro-security valence"; rather, "[t]he very same mechanisms are equally capable of producing libertarian panics[, which are] episodes in which aroused publics become irrationally convinced that justified security measures represent unjustified attempts to curtail civil liberties").

circumstances. But it is clear that one cannot, in the abstract, invoke a one-sided analysis of second-order decision-making distortions to support a general precautionary approach to free speech.

Mature institutions and the allocation of decision-making competence. The mature position implies that the institutional system set up to design a new constitution, and the institutional system for interpreting and enforcing the constitution once it is in place, should take into account all relevant limits of reason on the part of first-order decision makers, and all relevant political risks, on all sides of relevant questions. That implication is pitched at a high level of generality; it is thus consistent with a wide range of allocations of decision-making competence across institutions.

To continue the last example, which institution(s) should be charged with considering all relevant risks of protecting or discouraging dangerous political speech, of the sort at issue in the *Dennis* case? Learned Hand's expected-harm test assumes that the judges should take all relevant risks into account, both the risks of prohibition and the time-discounted risks of failing to prohibit. Yet there is nothing inevitable about allocating this task *to judges*, even if one subscribes to the mature position. Another possibility is that judges should defer to the congressional judgment, embodied in the challenged statutes, that one set of risks outweighs the other. On this approach, a standard critique of *Dennis* – that it was too deferential to nonjudicial actors[104] – might get things backwards. Insofar as Hand's test assumes that judges should make an independent assessment of risks and choose optimal precautions, it allocates to the judiciary a power that might be better left in legislative hands.

Nothing in the mature position, of course, entails that a deferential approach in *Dennis* would indeed be superior. Whether that alternative is in fact superior or not will depend on judgments, largely empirical and predictive, about the motivations and epistemic capacities of officials in different institutions. Moreover, there are many possible ways to allocate the competence to assess political risks across institutions. Courts, for example, might be empowered to issue a constitutional decision that the legislature can then override, perhaps through special procedures or with special majorities – the sort of "weak-form judicial review" seen in many constitutional democracies.[105] All this implicates a well-known set

[104] *See, e.g.*, Edwin C. Baker, Human Liberty and Freedom of Speech 26 (1992).
[105] Mark Tushnet, *Weak-Form Judicial Review and "Core" Civil Liberties*, 41 Harv. C.R.-C.L. L. Rev. 1, 4–11 (2006).

of debates about how a system of judicial review should be designed,[106] debates that the mature position, by itself, cannot resolve. What the mature position adds is the caution that arguments for any particular allocation of competence to assess political risks should attend to the risks generated by constitutional precautions as well as the risks prevented by them.

The negative function of the mature position. Given all this, the mature position may seem a rather thin or even banal commitment; who can be opposed in principle to weighing all relevant risks? And if the mature position need have no particular implications for the allocation of competence to assess risks across institutions within the constitutional system, what turns on accepting or rejecting it?

I believe, however, that the mature position has an important negative function, both in the domain of ordinary regulation and in the domain of constitutional design and interpretation: it places tradeoffs on the "viewscreen"[107] and thereby excludes unconstrained demands for "maximal safety" or "security" against perceived risks. Proponents of the mature position in risk regulation call this a cognitive justification.[108] I prefer to emphasize its negative character as a filter that strains out certain types of bad arguments and obsessions with particular risks. Such an approach does not dictate any particular outcomes, but merely attempts to launder the inputs to decision making, to avoid obsessions, and thereby to improve the process of regulating (political) risks.[109]

In the domain of ordinary regulation, "availability cascades" based on highly salient risks can produce distorted regulation that focuses to excess on target risks while ignoring countervailing risks.[110] A similar problem arises in the constitutional domain. Episodes of constitution-making often take place after, and in part because of, the occurrence of

106 For references and a position in these debates, see Adrian Vermeule, Judging Under Uncertainty: An Institutional Theory of Legal Interpretation (2006) (arguing that legal interpretation is plagued by empirical uncertainty and, given their limited information and institutional competence, judges should exercise great restraint their interpretive undertakings), and Vermeule, *supra* note (arguing that legislators, who are more heterogeneous and politically accountable than judges, are better able to create socially desirable results via legal development).

107 Sunstein, *supra* note, at 118.

108 *Id*. at 129.

109 *Cf*. Jon Elster, Securities Against Misrule: Juries, Assemblies, Elections (2013), which argues that the main task of institutional design should be the negative one of weeding out self-interest, passion, prejudice and bias, rather than the positive one of producing good outcomes.

110 Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 Stan. L. Rev. 683, 715–36 (1999)

a highly salient political risk or a highly salient class of political abuses. Under such circumstances, a kind of constitutional availability cascade can occur: the politics of distrust, the hermeneutics of suspicion, and the spread of a paranoid political style[111] can produce ever-more stringent demands for constitutional provisions and structures that will protect the citizenry from recent and highly lurid forms of political risk or abuse, even if the precautions that are demanded would be rejected by any decision procedure that is even mildly sensitive to countervailing risks and collateral costs.[112]

Under such circumstances, the mature position may help to serve as a valuable intellectual corrective, by placing all relevant risks before constitutional designers, constitutional interpreters, and the public who ultimately judges both. The central place of the mature position in Publius's argument is an encouraging example. It shows that at least sometimes, the mature position may even carry the day against widespread, obsessive fears of particular political risks, such as the abolition of the states, tyranny and despotism, an oligarchy of elected representatives, or standing armies – the sort of fears that afflicted the Antifederalists.

To be sure, where constitutional politics reaches a fever pitch of suspicion, it may be that no set of arguments, and indeed no set of institutions, can prevent distorted constitutional regulation of political risks. Yet under imaginable political conditions, the rationality of the mature position – in a broad rather than technical sense of "rationality" – can have outsized influence. If, for example, different groups are obsessed by different target risks, then (under certain voting rules for the adoption of a new constitution) a small subset of mature and balanced risk assessors who attend to countervailing risks can have outsized influence on outcomes, by providing decisive votes for provisions that take optimal rather than "maximal"

[111] Richard Hofstadter, *The Paranoid Style in American Politics*, Harper's Mag., Nov. 1964, at 77.

[112] For classic exposés of the paranoid political style in the founding era, particularly among the Antifederalists, see Bernard Bailyn, The Ideological Origins of the American Revolution (1967); and Men of Little Faith: Selected Writings of Cecelia Kenyon (Stanley Elkins, Eric McKitrick & Leo Weinstein eds., 2002). Gordon Wood has observed that conspiracy theorizing and libertarian panic were widespread in the post-Enlightenment world, before it became widely understood that political action is pervasively subject to unintended consequences. *See* Gordon S. Wood, *Conspiracy and the Paranoid Style: Causality and Deceit in the Eighteenth Century*, *in* The Idea of America: Reflections on the Birth of the United States, 81, 81–125 (2011). Yet this does nothing to undermine the point that those forces were causally efficacious in American political life. Even if they operated elsewhere, they operated here as well.

or distorted precautions – a kind of miracle of aggregation[113] at the stage of constitution-making. This is merely a possibility. The larger point, however, it that it is hard to see how the constitution-making process can go worse overall if there are at least some public voices for the mature position.

TWO WAYS OF REGULATING POLITICAL RISK

In this chapter and the last, I have contrasted two general approaches to constitutional regulation of second-order political risks: precautionary constitutionalism on the one hand, and optimizing constitutionalism on the other. These approaches lie on a continuum, but for expository purposes a stylized contrast between them is useful, and the arguments apply in sliding-scale fashion as one moves along the continuum. I have argued that the theory and practice of constitution-making in the United States display a running debate between the two camps. From their inception, constitutional precautionary principles have faced critiques based on futility, jeopardy, and perversity – in modern terms, based on tradeoffs between and among multiple political risks, whether on the same dimension or on different dimensions. In light of these critiques, constitutional theorists and judges such as Story and Jackson developed a mature position that, in effect, calls for optimizing, balanced assessment of target risks and countervailing risks.

I believe that the mature position is correct, that it leaves open a wide range of institutional arrangements, but that it has a valuable negative function in laundering out bad arguments and in structuring second-order deliberation about the allocation of power across institutions. The public articulation of the mature position is no panacea for the paranoid political style that sometimes crops up in episodes of constitution-making, but it can hardly make things worse, and under imaginable conditions might even make the process of constitution-making better.

[113] Philip E. Converse, *Popular Representation and the Distribution of Information*, *in* Information and Democratic Processes 385 (John A. Ferejohn & James H. Kuklinski eds., 1990).