"Philemon, Marbury, and the Passive-Aggressive Assertion of Legal Authority"

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Law students learn the concept of judicial review by discussing Chief Justice John Marshall’s opinion for the Supreme Court of the United States in Marbury v. Madison,¹ the case that established the legitimacy and necessity of judicial review in the American legal system. Marbury is a foundational decision in American constitutional law, and it rightly has earned pride of place in any discussion of the subject of judicial review or, as it sometimes is called, the counter-majoritarian difficulty in constitutional law.² Chief Justice Marshall’s opinion in Marbury not only provides the classic exposition of the theory that a written constitution trumps all other forms of law, both written and unwritten, but also stands as a brilliant legal and political tour de force in how the judiciary could adopt that power without exposing itself to retaliation from the political branches. Writing in our salad days, Marshall firmly transplanted from Magna Carta to this nation the “rule of law”—the principle that government officials, like private parties, are subject to legal rules³—and established the Supreme Court as the symbolic and ultimate arbiter of

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that principle. The chief justice achieved that result in *Marbury* because he was able simultaneously to claim the right and duty to tell Congress and the president that each one had acted unlawfully, while also keeping them, to use the vernacular, from shoving that opinion down his throat.

The brilliance of Chief Justice Marshall’s passive-aggressive conduct in that case, however, has an ancient, if unattributed, antecedent in western civilization: The Apostle Paul’s Letter to Philemon. Written as a personal letter rather than a public essay, Paul’s one-page letter is a masterful example of the use of moral suasion in the face of legal and political powerlessness.

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4 See, *e.g.*, Edward Corbin, *The Constitution as Instrument and Symbol*, 30 AM. POL. SCI. REV. 1071 (1936); Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290 (1920); see also OLIVER WENDELL HOLMES, *COLLECTED LEGAL PAPERS* 270 (1920) (“We live by symbols.”).

5 Paul’s very short Letter to Philemon reads as follows:

(Philemon) Paul, a prisoner of Christ Jesus, and Timothy our brother, To Philemon our dear friend and co-worker, to Apphia our sister, to Archippus our fellow soldier, and to the church in your house: Grace to you and peace from God our Father and the Lord Jesus Christ. When I remember you in my prayers, I always thank my God because I hear of your love for all the saints and your faith toward the Lord Jesus. I pray that the sharing of your faith may become effective when you perceive all the good that we may do for Christ. I have indeed received much joy and encouragement from your love, because the hearts of the saints have been refreshed through you, my brother. For this reason, though I am bold enough in Christ to command you to do your duty, yet I would rather appeal to you on the basis of love—and I, Paul, do this as an old man, and now also as a prisoner of Christ Jesus. I am appealing to you for my child, Onesimus, whose father I have become during my imprisonment. Formerly he was useless to you, but now he is indeed useful both to you and to me. I am sending him, that is, my own heart, back to you. I wanted to keep him with me, so that he might be of service to me in your place during my imprisonment for the gospel; but I preferred to do nothing without your consent, in order that your good deed might be voluntary and not something forced. Perhaps this is the reason he was separated from you for a while, so that you might have him back forever no longer as a slave but more than a slave, a beloved brother—especially to me but how much more to you, both in the flesh and in the Lord. So if you consider me your partner, welcome him as you would welcome me. If he has wronged you in any way, or owes you anything, charge that to my account. I, Paul, am writing this with my own hand: I will repay it. I say nothing about your owing me even your own self. Yes, brother, let me have this benefit from you in the Lord! Refresh my heart in Christ. Confident of your obedience, I am writing to you, knowing that you will do even more than I say. One thing more—prepare a guest room for me, for I am hoping through your prayers to be restored to you. Epaphras, my fellow prisoner in Christ Jesus, sends greetings to you, and so do Mark, Aristarchus, Demas, and Luke, my fellow workers. The grace of the Lord Jesus Christ be with your spirit.

*Philem.* 1-25 (NRSV).
Paul wrote to Philemon, the owner of a runaway slave, Onesimus, who had escaped and made his way to Rome, where he found Paul. Paul was under house arrest in Rome awaiting trial on charges stemming from an incident in Syria where Paul brought Gentiles with him into the Temple, in violation of Jewish law.\(^6\) Paul said that he had become Onesimus’s “father” while the latter was in Rome and sought Philemon’s assistance on Onesimus’s behalf. Paul made a faint claim of possessing the legal authority to direct Philemon to be merciful to Onesimus, but Paul ultimately chose instead to rely on Philemon’s brotherhood and good will. To make the grant of charity as painless as possible, Paul offered to compensate Philemon for any loss he may have suffered from Onesimus’s decision to abscond and, perhaps, to steal from Philemon the money that he used to journey to Rome.

Paul’s letter to Philemon uses the same device that John Marshall later was to exercise in *Marbury*. Paul made a passing claim of enjoying the power to order Philemon to free Onesimus and hold him harmless, but Paul clearly did not rely on that office in his dealing with Philemon. Instead, to borrow a line from Spike Lee, Paul entreated Philemon to “do the right thing” and excuse Onesimus’s conduct. Claiming to have authority but refusing to invoke it was an especially savvy move on Paul’s part because he likely had no power to order Philemon to refrain from punishing Onesimus, or to do anything in that regard. \textit{Remember}: Paul was in custody in Rome at the time awaiting trial, and helping a runaway slave escape with his owner’s property was an offense under Roman law.\(^7\) So, if Roman officials wanted to punish Paul without offending his burgeoning religious movement, setting Onesimus free would have given the imperial authorities a ground to do so while avoiding a religiously and politically sticky issue. Paul therefore was quite sly in how he dealt with the problem of Onesimus: He subtly asserted the right to dictate what should be done, thereby establishing his place in the movement to Philemon and anyone else who learned of his letter, while clearly disclaiming any intent to command Philemon what to do by following the law and returning Onesimus to Philemon for the latter to address, hopefully not as a “slave,” but as a “beloved brother.” In sum, Paul’s letter is brilliant exercise of a grand assertion of moral authority by someone who, in all likelihood, lacked legal or political authority to do anything other than precisely what he did.

Flash forward seventeen centuries to *Marbury*. *Marbury* involved the famous tale of the “Midnight Judges.” In the waning days of his administration, Federalist President John Adams tried to appoint as many judges as he was able in order to see his party’s philosophy endure on the bench after Democratic-Republican President-Elect Thomas Jefferson took office. As often happens whenever people try to accomplish far too much in far too little time, the officials responsible for getting President’s Adams’s appointees into office made some mistakes. In William Marbury’s case, those officials did not physically give to him the legal commission that he needed to hold federal office before Jef-

\(^6\) See Acts 21-28 (NRSV).

\(^7\) See Justinian, \textit{The Digest of Roman Law: Theft, R ape, Damage and Insult} 119 (C.F. Kolbert trans. Penguin Classics 1979) (534). At one time, it was a federal crime to harbor a runaway slave in this country. See the Fugitive Slave Act of 1850 (Act of Sept. 18, 1850), § 7, ch. 60, 9 Stat. 462 (1850), repealed by Act of June 28, 1864, 13 Stat. 200 (1864)
ferson was inaugurated, and the officials appointed by now-President Jefferson refused to send Marbury the commission that Adams had granted him. Marbury sued Secretary of State James Madison, the officer responsible for issuing commissions to Executive Branch appointees (in 1803 the Secretary of State had quotidian duties that today’s secretaries do not have) in the Supreme Court under an act of Congress giving that court jurisdiction to issue a writ of mandamus in cases like Marbury’s. Marbury, however, lost. But that outcome is perhaps the least important part of that legendary case.

In Marbury, Chief Justice John Marshall wrote that President Jefferson had acted unlawfully in refusing to give Marbury the commission that Marbury was entitled to receive making him a judge. But the chief justice knew that President Jefferson would ignore him, which would demonstrate the powerlessness of the new Supreme Court and also might end whatever legacy the Federalists had hoped to preserve. So, Chief Justice Marshall used a brilliant ploy. He concluded that, although Marbury was entitled to receive his commission, the Supreme Court could not order Madison to award it to him. The reason was that the act of Congress giving the Supreme Court original jurisdiction over Marbury’s case was unconstitutional, because Congress could not enlarge the original jurisdiction of the Supreme Court beyond what Article III specified. The Supreme Court therefore denied Marbury’s request for a writ of mandamus by entering a judgment holding unconstitutional the federal statute that allowed the Court to entertain his case.

Marbury lost because he did not receive his commission, and Jefferson technically won because the Court refused to order him to correct his unlawful behavior by making Marbury a judge. But Jefferson symbolically lost more than he won because the Court

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8 See Marbury, 5 U.S. (1 Cranch.) at 154-55.
9 See Act of July 27, 1789, ch. 4, 1 Stat. 28.
10 See Marbury, 5 U.S. (1 Cranch.) at 157-62, 167-68. Marshall was certain that Marbury was entitled to receive the commission because he had signed other commissions before Jefferson became president. Marshall served as both Chief Justice and Secretary of State for a month until a replacement as secretary could be found. See, e.g., Mistretta v. United States, 388 U.S. 361, 399 n.22 (1989); 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 275 (Rev. ed. 1926); Alpheus Thomas Mason, Extrajudicial Work for Judges: The Views of Chief Justice Stone, 67 HARV. L. REV. 193, 193 (1953). That practice would seem odd (and perhaps improper) today, but Supreme Court justices throughout history have held nonjudicial positions in the federal government. See, e.g., Mistretta, 488 U.S. at 398-408; Peter Alan Bell, Note, The Extrajudicial Activities of Supreme Court Justices, 22 STAN. L. REV. 587 (1970).
11 See Marbury, 5 U.S. (1 Cranch.) at 175-80. The relevant portion of Article III provides as follows:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art. III, §2, cl. 3.
12 See Marbury, 5 U.S. (1 Cranch.) at 180.
said that Madison had acted unlawfully, and the Court claimed the right to order the president and his lieutenants to act in accordance with law. The Supreme Court turned out to be the true winner. John Marshall had assumed for the Court the mantle of a true “Supreme Court” of the new nation by deciding that the Court had the power to hold unconstitutional acts of Congress and to order the president to comply with the law, thereby asserting the Court’s right to overrule the acts of the other two branches of the new national government. The nation also won. Over time, the legitimacy, reasonableness, and criticality of the Court’s ruling in *Marbury* that it could declare invalid actions taken by the legislative and executive branches of the federal government has become so deeply ingrained into our legal and political culture that the institution of judicial review has become a bedrock element of the polity chartered in 1789. Yet, by strictly refusing to order Madison and Jefferson to do anything in that case, Marshall left Jefferson with nothing that he could do to undo Marshall’s asserted claim of primacy. Marshall could have been channeling the Apostle Paul in the masterful way that he handled America’s bedrock case in constitutional law.

*Marbury* certainly was not the last time that the Court has used the mechanism of dramatically declaring that it possessed plenary decisionmaking power that it then humbly declined to exercise in the case at hand. Consider a different Marshall opinion, this one by Justice Thurgood Marshall, for the Court in *United States v. Munoz-Flores*.13 *Munoz-Flores* involved a challenge to the Victims of Crime Act of 1984,14 which requires district courts to impose a $50 special assessment on defendants convicted of certain federal offenses.15 Munoz-Flores argued that the assessment imposed on him was unconstitutional because the Victims of Crime Act was a “Bil[l] for raising Revenue,” which, under the Origination Clause of the Constitution, must originate in the House of Representatives, and that act was born in the Senate.16 The Court rejected Munoz-Flores’s claim on the merits, concluding that the Victims of Crime Act was not a revenue bill.17 At the same time, the Court squarely rejected the government’s threshold argument that Origination Clause claims are nonjusticiabie political questions, ruling that the Court is as competent to adjudicate claims resting on that clause as ones raised by any other type of separation of powers dispute.18

It could be that the Court will never haul out its asserted power to decide whether a bill is a tax and whether it originated in the House of Representatives. Maybe the authority to make those calls will sit in the pantry like an unused fire extinguisher. But the

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16 See U.S. CONST. art. I, § 7, cl. 1 (“All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”).

17 See *Munoz-Flores*, 495 U.S. at 397-401.

18 See *id.* at 389-97.
Court’s reservation of the authority to decide how to characterize an act of Congress gives it a precedent that the Court can drag out as it deems necessary.19

What lesson should we take away from this practice? Perhaps, it is that sometimes what people say is more important than what they do. If it is true that “Talk is cheap” and that “Actions speak louder than words,” it also is the case that “The pen is mightier than the sword.” Politics is not always just the work of politicians; judges can engage in that enterprise too, through their opinions. Law students learn to distinguish the holding in a case from the reasoning that justifies that holding, as well as from the dicta that often litter an opinion, perhaps added by the author in an effort to garner the votes necessary for a majority,20 or perhaps inserted as a marker to be taken advantage of in future cases.21 But lay members of the public never receive that training, and most do

19 We may see the Origination Clause return to the Supreme Court in the near future. In Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012), the Supreme Court upheld the constitutionality of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010), on the ground that the statute was a valid exercise of Congress’s power to raise revenue through taxes. See U.S. CONST. art. I, § 8, cl. 1 (Congress has the power to “lay and collect Taxes.”). By deeming the PPACA a “tax,” the Court effectively invited parties to challenge the constitutionality of that law under the Origination Clause.


21 Consider in that regard Trop v. Dulles, 356 U.S. 86 (1958). Albert Trop was a soldier in the Army in 1944 stationed in French Morocco. He escaped from the stockade where he was being held for misconduct and was convicted in a court-martial of wartime desertion. Trop later lost his American citizenship under a federal law punishing that crime with forfeiture of citizenship. A plurality of the Court in an opinion by Chief Justice Earl Warren concluded that denationalization was a cruel and unusual punishment, in violation of the Eighth Amendment. Id. at 98-104 (plurality opinion). In so ruling, the plurality wrote that, although the Court had not defined the scope of the phrase “cruel and unusual punishment” in detail, because “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man,” that amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” Id. at 99-101 (plurality opinion).

Describing those remarks as ipse dixit gives them far more weight than they deserve. To start with, the text of the clause is concerned, not with “dignity,” but with “punishment,” which ordinarily is not dignified, intentionally so in order to bolster its deterrent effect. Just ask any inmate in one of the nation’s prisons.

The history of the clause also is bereft of the notion that punishment cannot be undignified and, more specifically, that denationalization is “cruel and unusual.” The background to the clause reveals that it prohibits hideously painful sanctions, such as boiling an offender in oil, penalties not authorized by positive law, or punishments that are grossly disproportionate to the offense. See, e.g., Harmelin v. Michigan, 501 U.S. 957, 967-73 & n.4, 979-85 (1991) (opinion of Scalia, J.); Gregg v. Georgia, 428 U.S. 153, 169-70 n.17 (1976) (lead opinion); Anthony F. Granucci, “Nor Cruel and Unusual Punishments Inflicted”: The Original Meaning, 57 CALIF. L. REV. 839 (1969). That should have ended the discussion. Indeed, the Trop plurality confessed three facts that a reasonable person would have concluded dictated that Trop should lose: (1) Congress expressly authorized the punishment of denationalization for wartime desertion, Trop, 358 U.S. at 88 & n.1 (plurality opinion)—and had authorized that sanction in one form or another since the Civil War, id. at 88-91 & nn. 2-7 (plurality opinion); (2) “wartime desertion is punisha-
not find that troublesome. Most people regard legal analysis as too professorial, if not downright Jesuitical, to be of any practical concern for them in their daily affairs. Perhaps, the public, by and large, is right. Maybe what politicians and judges say makes far less of a difference in their lives than what their employers, family, friends, and neighbors do and say. Or maybe the public has become so accustomed to being lied to by government officials that it now treats politicians and judges alike and entirely discounts whatever they may say.  

ble by death,” so “there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime,” id. at 99 (plurality opinion); and (3) denationalization “involved no physical mistreatment” and “no primitive torture,” id. at 101 (plurality opinion). That should have been three strikes for Trop. But the Trop plurality nevertheless concluded that denationalization was barbaric because it amounted to “the total destruction of the individual’s status in organized society,” id. (plurality opinion), and resulted in the supposedly intolerable situation in which “the expatriate has lost the right to have rights,” id. at 102 (plurality opinion). Of course, the plurality did not bother to explain why it was undeniably lawful to execute a wartime deserter—which, as an undeniable matter of biology, even if not law, would irreversibly strip him of “the right to have rights”—but it was unconstitutional merely to denationalize him. But perhaps that was because there was no logical answer to that question.

In sum, neither the text of the Cruel and Unusual Punishments Clause, the history explaining why that clause was adopted, nor simple logic supported the plurality’s conclusion that denationalization was an unconstitutional punishment, and the plurality made no effort to ground its “evolving standards of decency” maxim in any of those sources of law (or even in the Court’s precedents). Given that, a reasonable person ordinarily would believe that the Trop dictum would become, in Justice Frankfurter’s felicitous phrase, “a derelict on the waters of the law.” Lambert v. California, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting). But that person would be wrong. The Supreme Court has reiterated the “evolving standards of decency” remark on so many occasions that its frequency probably rivals that of Cicero’s famous admonition “Delenda est Carthago”—“Carthage must be destroyed”—which he uttered in every speech that he gave in the Senate during the Punic Wars. See, e.g., Miller v. Alabama, 132 S. Ct. 2455, 2463 (2012); Graham v. Florida, 560 U.S. 48, 58 (2010); Kennedy v. Louisiana, 554 U.S. 407, 419 (2008); Roper v. Simmons, 543 U.S. 551, 561 (2005); Ingraham v. Wright, 430 U.S. 651, 668 n.36 (1977); Gregg v. Georgia, 428 U.S. 153, 171, 173 (1976) (lead opinion); Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring); id. at 270 (Brennan, J., concurring); id. at 327 (Marshall, J., concurring).

For the most recent example, consider the repeated statements that President Obama made before and after passage of the PPACA that the law would cause no one to lose insurance coverage that he or she found desirable. For example in June 2009 the president told this to the American Medical Association:

So let me begin by saying this to you and to the American people: I know that there are millions of Americans who are content with their health care coverage—they like their plan and, most importantly, they value their relationship with their doctor. They trust you. And that means that no matter how we reform health care, we will keep this promise to the American people: If you like your doctor, you will be able to keep your doctor, period. If you like your health care plan, you'll be able to keep your health care plan, period. No one will take it away, no matter what. My view is that health care reform should be guided by a simple
If so, that is a mistake. Slavery was and is an odious practice, so we can and should praise Paul’s skillfulness in avoiding a risk of prosecution for encouraging Philemon to extend Onesimus mercy for his misdeeds and to grant him freedom. If Paul needed for some reason to make a fleeting assertion of authority in order to be able to persuade Philemon to take the morally just road, so be it. Paul was a private citizen seeking to have a slave released and held harmless for desertion. We can give Paul a pass if he claimed to be acting pursuant to authority that he did not possess as part of his plan to achieve freedom and safety for Onesimus. We also can laud Marshall’s asserted right to order other government officials to comply with legal dictates as a vital component of the rule of law. Refusing to follow through by ordering President Jefferson to award a judicial commission to Marbury denied the latter his rights under law, but may have preserved the Supreme Court as an institution dedicated to preserving those rights for others ever since. Yet, democratic self-government is hardly the same type of vile institution as slavery, and unjustified assertions by government officials of authority over private parties is not the same type of white lie that Paul uttered or that Marshall invoked. Accordingly, we should not automatically extend the admiration that we display for Paul’s and Marshall’s political skills to other government officials when they use the same technique.

principle: Fix what’s broken and build on what works. And that’s what we intend to do.

Remarks by the President at the Annual Conference of the American Medical Association, Hyatt Regency Chicago, Chicago, IL, June 15, 2009, available at http://www.whitehouse.gov/the-press-office/remarks-president-annual-conference-american-medical-association (last visited Nov. 19, 2013). See generally, e.g., “Insurance Fight: What Obama Has Said on ’You Can Keep It,’” WALL ST. J., Oct. 30, 2013, available at http://blogs.wsj.com/washwire/2013/10/30/transcript-obama-addresses-you-keep-it-criticism/ (last visited Nov. 19, 2013) (collecting the president’s statements to that effect). Those statements, to be polite, were fibs. The public surely believes that even if it is an impolitic point to say out loud. See, e.g., Andrew Rosenthal, Obama’s Health Care Promise, N.Y. TIMES, Nov. 14, 2013 (“Hovering over the press conference at the White House today was the question of whether Mr. Obama lied—whether he deliberately said what he knew not to be true with the intention of deceiving people—when he said repeatedly that Americans who like their policies would be able to keep them.”), available at http://takingnote.blogs.nytimes.com/2013/11/14/obamas-health-care-promise/?_r=0 (last visited Nov. 20, 2013). A similar—but potentially bigger—problem looms just over the horizon. See, e.g., Alex Altman, “’You Can Keep Your Doctor’: Obamacare’s Next Broken Promise?,” TIME, Nov. 19, 2013 (“Barack Obama’s broken promise that all Americans would be able to keep their health care plans after the implementation of the Affordable Care Act has infuriated people who took the President at his word and rattled even his staunchest supporters. [¶] But for the President, the real political pain may only be starting. Come 2014, the rest of the country may learn that another high-profile pledge was untrue. ‘No matter how we reform health care,’ Obama said in 2009, ‘we will keep this promise: if you like your doctor, you will be able to keep your doctor. Period.’ [¶] It’s not that simple. In order to participate in health-insurance exchanges, insurers needed to find a way to tamp down the high costs of premiums. As a result, many will narrow their networks, shrinking the range of doctors that are available to patients under their plan, experts say.”), available at http://swampland.time.com/2013/11/19/you-can-keep-your-doctor-obamacares-next-broken-promise/ (last visited Nov. 22, 2013).
That is especially true in the case of judges. The public treats courts with a respect and deference not afforded the political branches. The reason is that the public assumes that judges are dedicated to resolving legal disputes and dispensing justice without regard for the grimy deal-making, half-truths, and outright lies that are part of the warp and woof of politics. Judges draw a large degree of their legitimacy from reliance on precedent as authority. Precedent is a valuable basis on which to rest a claim of judicial power not only because it helps a judge decide a case correctly and preserves stability in the law, but also because it helps avoid the ever-present risk that the public will—unfortunately, but sometimes correctly—discern no legitimate basis for a court’s diktat other than “Because I’m the Daddy.” If the public ever comes to believe that judges are just politicians in black robes, we will have lost not only the necessary respect for the valuable institution of judicial review that the courts have built up ever since John Marshall wrote *Marbury* in 1803, but also an integral part of what has made the American experiment in constitutional self-government the successful enterprise it has proved to be for more than two centuries.

That does not mean that courts should shy away from responsibly exercising their power of judicial review. Judges properly deserve our praise when they enforce the law regardless of the potential political fallout that their judgments may bring. Yet, we always should be skeptical of assertions of authority that do not have any immediate consequences for judges. The aggressive claim that “I have the power to do X” when followed by the passive declination “But I will not do X in this case” can be less an exercise in judicial restraint than a disguised assertion of judicial overreaching. If so, that disguise, like the Guy Fawkes mask sometimes worn by protestors, should be exposed for what it is. Otherwise, we run the risk that we can become so accustomed to hearing such naked assertions of authority that we accept them as law even though they enjoy no textual support in the Constitution and the only precedent that could be said to exist as justification resides in the opinions containing the court’s own prior unsupported assertions. Rhetoric then would unjustifiably become reality. No engineer would pretend to con-

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24 The Supreme Court’s opinion in *Kungys v. United States*, 485 U.S. 759 (1988), makes that point in a roundabout and ironic way. After World War II, Kungys applied for admission to the United States and, later, to become a U.S. citizen. The federal government granted both applications in sequence. The government later sought to revoke Kungys’s citizenship and deport him on the ground (among others) that, in applying for his visa and in his naturalization petition, Kungys had made false statements with respect to his date and place of birth. Kungys admitted making false statements in that respect, but argued that they were immaterial. The Court ruled that Kungys’s falsehood in his immigration application as to his date and place of birth was immaterial and that it did not become material when he repeated the same falsehood in his citizenship application. See *id.* at 776 (“What must have a natural tendency to influence the official decision is the misrepresentation itself, not the failure to create an inconsistency with an earlier misrepresentation; the failure to state the truth, not the failure to state what had been stated earlier.”). The same point can be made here. Just as repetition of an immaterial falsehood does not render it material, so, too, repetition of a groundless claim of authority does not acquire support over time through reiteration.
struct a building on a mirage, but politicians, lawyers, and, yes even judges, do it all the time, because we let them get away with it.

The lesson then is that we always should be wary when a government official claims to possess authority that cannot be justified on the basis of positive law. Precedent has a legitimate role in legal and policy decisionmaking because it justifiably should cause us to be skeptical of abandoning a settled rule of law in favor of a theory that has never before been endorsed or examined and runs counter to a longstanding, settled, widely-endorsed principle. That type of humility—the recognition that we could be wrong or lack the power to take some action that we fervently believe will only benefit mankind—is one that policymakers seldom express. Yet, it is precisely because we may have become so accustomed to having government officials lie to us that we may no longer have the ability to separate the wheat from the chaff, or may have just given up trying.

That risk requires us to be especially vigilant today, given the massive size and complexity of our government, which makes knowledge of the metes and bounds of government authority utterly incomprehensible to most attorneys, let alone to non-lawyers.\textsuperscript{25} We need to step back whenever government officials tell us that they can make the world a better place if we only ignore the fact that they lack the constitutional authority to carry out what they have promised. We need to demand that government officials justify their asserted exercise of power on a ground other than their own ukase-like directives. We need to recognize that, in an era when even instant gratification is not fast enough for some, promised utopian solutions can have infernal consequences that take forever to undo. If we do not, if we fail to recognize what we are hearing, if we fail to demand a justification in law for whatever a government official claims the power to do, if we fail to say that the emperor has no clothes when he is standing there buck naked—if all that happens, we will have only ourselves to blame.