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Republican Virtue and Expert Discourse: A Response to Professor Rana

JOSEPH MARGULIES WITH LUKE HERRINE

In this Article, the authors note their agreement with Professor Rana's historical analysis of a major change in national security discourse and elaborate on their disagreement with his account of the theoretical underpinnings of this transition. They locate their difference on the line between liberal and republican theory, arguing that the historical shift is from democratic republicanism to aristocratic republicanism and not, as Rana suggests, between Lockean liberalism and Hobbesean authoritarianism. After establishing this theoretical framework, the authors draw out some of the implications of their account. They emphasize the role of practical reasoning, explore the differences in how aristocratic and democratic thinkers reason about national security decisions, and highlight the worrying tendency of the present Court to emphasize aristocratic reasoning without the traditional republican concerns about systemic corruption.

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Republican Virtue and Expert Discourse: A Response to Professor Rana

JOSEPH MARGULIES* WITH LUKE HERRINE**

If the discourse of experts is not coupled with democratic opinion- and will-formation, then the experts' perception of problems will prevail at the citizens' expense.

Jurgen Habermas[1]

I. INTRODUCTION

Aziz Rana's analysis of the elitist turn in American security discourse could not be timelier. Congress has passed, and the President has signed, a law that may authorize the indefinite detention of U.S. citizens arrested on U.S. soil;[2] Muslim and Arab-American communities continue to be targets for infiltration and surveillance;[3] and the public recently learned that

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* Clinical Professor, Northwestern University School of Law. Because this Article touches on elements of the post-September 11 world, I should disclose possible biases. I was counsel of record for the petitioners in *Rasul v. Bush*, 542 U.S. 466 (2004), involving detentions of foreign nationals at Guantánamo, and *Munaf v. Geren*, 553 U.S. 674 (2008), involving detentions of U.S. citizens in Iraq. Presently, I am counsel of record for Abu Zubaydah, for whose interrogation the infamous "torture memos" were written. These were legal memos written by attorneys with the Office of Legal Counsel at the Department of Justice which wrongly concluded that torture, when ordered by the President in his capacity as Commander in Chief, would not violate domestic or international law.

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[1] BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 351 (William Rehg trans., 1996).

[2] National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021, 125 Stat. 1298, 1562 (2011); *see also* Barack Obama, *Statement by the President on H.R. 1540*, WHITEHOUSE.GOV (Dec. 31, 2011), http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540 (providing President Obama's signing statement).

[3] Teresa Watanabe & Paloma Esquivel, *Muslims Say FBI Spying is Causing Anxiety; Use of an Informant in Orange County Leads Some to Shun Mosques*, L.A. TIMES, Mar. 1, 2009, at B1 (discussing how some Muslims avoided praying in mosques after 9/11 because they were being monitored heavily by the FBI); Matt Apuzzo & Adam Goldman, *Inside the Spy Unit that NYPD says Doesn't Exist*, ASSOCIATED PRESS, Aug. 31, 2011, *available at* http://www.ap.org/Content/AP-in-the-News/2011/Inside-the-spy-unit-that-NYPD-says-doesnt-exist (discussing how "New York Police Department officials and a veteran CIA officer built an intelligence-gathering program . . . to map the region's ethnic communities and dispatch teams of undercover officers to keep tabs on where Muslims shop, ate, and prayed"); Matt Apuzzo & Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, ASSOCIATED PRESS, Aug. 24, 2011, *available at* http://www.ap.org/Content/AP-in-the-News/2011/With-CIA-help-NYPD-moves-covertly-in-Muslim-areas (describing how after 9/11 the

thousands of New York's finest were treated to a training video that traded in the most vicious anti-Islamic tropes.[4] These and many other post-9/11 initiatives have been supported by an "expert" discourse that rose to prominence before the sun had set on September 11. Most Americans pay only the most distant attention to this chatter. They are vaguely aware of its presence but indifferent to its sound, like background music in a coffee shop. This is an unfortunate state of affairs, since the lesson of Rana's article is that the distant buzz in the air is the sound of policy being made and a nation being shaped. It behooves us all to pay it closer heed. Yet, as Rana notes, the literature on this subject is scant and must be multiplied. Indeed, after reading his thoughtful article, the authors have discovered several such unpublished volumes in their respective heads, of which only the briefest sampling can be offered here.

This Article examines the theoretical framework Rana uses in performing his analysis. In particular, it explores whether his focus on Locke and Hobbes is appropriate. In several places, it seems to have led him astray, or at least, to miss an opportunity for deeper insights. The remedy this Article proposes is to re-describe the political philosophy on display in the transition he describes. Arguably, the transformation is better viewed as from democratic to aristocratic republicanism than from Locke to Hobbes. Once these theoretical preliminaries are straightened out, the Article then draws some tentative historical and political conclusions, which we hope will serve as a friendly amendment to Rana's work.

II. LIBERAL OR REPUBLICAN?

Rana is correct when he locates the turning point from an open to a closed decision-making process in the centralizing reaction to the twin world crises of the 1930s and 40s.[5] The philosophy of the New Deal recoiled from the wreckage caused by an unrestrained market. Its proposed solution was a perhaps over-abundant, but well-intended, faith in the capacity of properly trained technocrats to apply the lessons of Keynesian economics in a way that would smooth out capitalism's boom and bust cycles. What began as an attempt to bring expertise to bear on the excesses of the market soon migrated, and a faith proliferated that the social sciences could be employed to improve all aspects of American life. Rana uses the writings of political scientist and bureaucrat Pendleton Herring as the prototype for the mindset of this era. Herring's role as

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New York Police Department dispatched undercover officers to "monitor[] daily life in bookstores, bars, cafes and nightclubs").

[4] Michael Powell, *In Police Training, a Dark Film on U.S. Muslims*, N.Y. TIMES, Jan. 24, 2012, at A1.

[5] Aziz Rana, *Who Decides on Security?*, 44 CONN. L. REV. 1417, 1475–77 (2012).

author[6] of the National Security Act of 1947[7] makes him an especially apt focal point. As an exemplar of New Deal thinking, he argued for a centralization of nearly all powers, but Rana's concern is mostly with Herring's effort to bring efficiency to a security apparatus suddenly confronted by totalitarian states that were unbridled by genuine public discourse. In a dangerous world that no longer cleaved neatly into "times of war and times of peace,"[8] Herring, Rana says, concluded that "reality had come to approximate the old Hobbesian image of endemic insecurity in a world of ideological antagonism, one utterly bereft of any shared moral framework."[9] To meet this challenge, Herring believed that decision-making authority for security questions had to be centralized in the executive branch, outside the reach of the manipulable rabble.[10]

Even if we agree that Herring was using Hobbesian language to describe the state of the world (and we are not sure that we do),[11] we would not feel compelled to conclude that he was using Hobbesian reasoning in

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[6] *Id.* at 7; *see also id.* at 42–44 (discussing Herring's explanation and conclusion regarding national security).

[7] National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified as amended at 50 U.S.C. § 401 (2006)).

[8] Rana, *supra* note 5, at 1458.

[9] *Id.*

[10] We leave aside, for now, the gap in Herring's reasoning. There is certainly nothing about a blurred distinction between war and peace that necessarily or logically counsels in favor of centralized decision-making about national security. Nor does it follow that the threat of totalitarianism—whether on the Right or the Left—makes centralized decision-making any better. In addition, if the test is the *quality* of the judgment, we cannot be comforted by the evidence that "experts" are equally susceptible to cognitive biases as us regular folk, as Dan Kahan and his collaborators at Yale's cultural cognition project have convincingly shown. *Cf.* Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115 (2007) (discussing the "cognitive bias" that prevents individuals from administering the law in accordance with the liberal ideals upon which the United States is founded); Dan M. Kahan et al., *Whose Eyes are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009) (positing that the Supreme Court suffers from "cognitively illiberal" bias which sometimes separates judicial ideals from real life which is highlighted in the *Scott v. Harris* decision). Furthermore, inasmuch as it is the public that bears the myriad personal and economic costs associated with expert miscalculations about security, there is a certain legitimacy that comes from letting the public decide when enough is enough. These, however, are matters for another day.

[11] Rana characterizes Herring's description of American discourse as "marked by uncertainty, public ignorance, and the near continuous condition of threat or crisis." Rana, *supra* note 5, at 1461. Public ignorance is accepted by a wide number of political theories; uncertainty is as well (at least when so vaguely delimited). *See, e.g.*, Barry C. Burden, *Everything but Death and Taxes: Uncertainty and American Politics*, *in* UNCERTAINTY IN AMERICAN POLITICS 3, 3–5 (Barry C. Burden ed., 2003) (describing the use of uncertainty in many theoretical fields including political science); Ilya Somin, *Foot Voting, Political Ignorance, and Constitutional Design*, 28 SOC. PHIL. & POL'Y 202, 202, 204 (2011) (arguing that constitutional federalism promotes "widespread political ignorance" and that "[s]cholars have long recognized that most citizens have little or no political knowledge"). A near continuous condition of threat or crisis is Hobbesian on a charitable reading, but what Herring has in mind is clearly not an anarchic "*bellum omnium contra omnes*." THOMAS HOBBES, ELEMENTA PHILOSOPHICA DE CIVE 2 (1742). Instead, he is considering a world with technologies and political systems especially effective at devastation.

arguing for the centralization of power and reliance on experts. To understand why not, let us turn to Rana's own description of Hobbes's position:

> [Hobbes's] epistemology is fundamentally egalitarian, and thoroughly rejects any distinction between elite and ordinary rationality. Hobbes argues that security knowledge eludes all individuals, regardless of social position, education, military background, or class standing. In effect, no science or expertise of security exists, one which would independently legitimate particular determinations of danger. The sovereign's judgments about preservation are thus qualitatively indistinct from those reached by the average person; they are simply opinions that we as members of the polity allow to gain the force of law. This suggests that the Leviathan need not be organized around a single executive or specialized body of decision-makers; such entities have no unique or higher knowledge.[12]

Compare this to his account of Herring's thinking:

> While individuals had an interest in their own physical protection, they had limited capacities to gauge the seriousness or immediacy of potential dangers. In order for such dangers to be assessed properly, government had to empower *professionals skilled in intelligence gathering, technological development, and military preparedness* . . . .
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> . . . .
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> Only members of the military had *the knowledge to make sense of specialized questions* of preparedness, questions essential to long-term strategic planning.[13]

For Hobbes, "all individuals" are equally unqualified.[14] For Herring, by contrast, only the *hoi polloi* face this difficulty.[15] Experts with libraries of knowledge and years of experience have the necessary skills to make

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[12] Rana, *supra* note 5, at 1429.

[13] *Id.* at 1457–58 (emphasis added).

[14] *Id.* at 1428.

[15] *Id.* at 1457.

intelligent decisions about security, or so Herring thought.[16] Hobbes argued that, because of our inherent (and universal) uncertainty, we have to rely on somebody or other to decide how the world works and what we should do about it.[17] We must all subordinate our behavior to this person simply out of the convenience of having *somebody* in charge, though he is no more qualified than anybody else to make such proclamations. In Hobbes's view, *nobody* is more qualified than anybody else.[18] Herring makes the more pedestrian point that people who are deeply informed about a topic make better judgments about it than those who are not.[19] The two do not argue for quite the same political arrangement, and, more importantly, their means of arguing for their preferred arrangements have almost nothing to do with each other. Herring's position, then, sounds much more aristocratic (in the classical sense) than Hobbesian.

The distinction is not purely technical, nor is it limited to a textual analysis of an unfairly forgotten New Deal theorist. Herring addressed the qualities a person must have to make responsible and rational political decisions, not whether people have the innate capacity to comprehend reality. What is at stake, in other words, is which portion of the people who live in the polis has the necessary *judgment* to participate in political decision-making. What Rana has identified is a movement away from faith in the virtue and reliability of an informed citizenry and towards a reliance on the über-informed elites.[20] This transformation is a trend more easily analyzed within the framework of the (lowercase "r") republican tradition than in the liberal framework provided by Hobbes and Locke.[21]

Having now named Herring's position as both aristocratic and republican, we should perhaps take some time to clarify our terminology. Like many philosophical traditions, republicanism is better defined by a contiguous series of thinkers rather than a discretely carved out theoretical space. Aristotle, Cicero, Augustine, Machiavelli, Rousseau, Montesquieu, Burke, Jefferson, and Arendt delimit the varied theorists who can justly be described as contributing to the republican tradition. They share several priorities in spite of their obvious differences. This Article focuses on their

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[16] *Id.* at 1457–58.

[17] *Id.* at 1428.

[18] *Id.* at 1429.

[19] *Id.* at 1457–58.

[20] *Id.* at 1422–23 (describing the trend towards trusting "[i]nsulated decision-makers in the executive branch" for national security decisions).

[21] These traditions have been heavily cross-pollinated, so we are not interested in drawing a bright line distinction here. *See* Mortimer Sellers, *Republicanism, Liberalism, and the Law*, 86 KY. L.J. 1, 21 (1998) ("Contemporary liberalism has . . . largely abandoned the fear of democracy that separated liberalism from republicanism in the early nineteenth century, and liberals now usually encourage the widespread political participation of a vigorous and informed citizen body."). The important point is simply that a republican perspective has a great deal of explanatory power for the facts in question, and so it should be added to the analysis.

common concern for the qualities that citizens and politicians must possess in order to be trusted to make decisions in the common interest. Whereas, for instance, liberal theorists are more concerned with the rights of the individual in contraposition to the state and the state's role in mediating conflict between individuals, republican theorists are more likely to view citizens as collective decision-makers striving together to create a just state. To truly be a *res publica* (public matter), then, a state cannot simply consist of structures that best allow private citizens to pursue their own projects; rather, it must consist of citizens and politicians who are *virtuous* and actively encourage the political participation of such individuals.

The difference between aristocratic and democratic republicans pivots on the question of whether citizens or politicians demonstrate greater virtue.[22] Democratic republicans believe that a polis is more just and effective when a higher percentage of the populous participates in its workings. They are wary of the corrupting tendency of centralized power and maintain that, if widespread political participation and an informed citizenry are nurtured, the people can be trusted to make their own judgments about the common good.[23] Aristocratic republicans contrarily contend that the general public is too easily corrupted and/or less naturally virtuous than competent leaders who have undergone extensive training.[24] Students of American history will quickly recognize the two republican positions as embodied in Jefferson and Hamilton, a democrat and aristocrat respectively. One might argue that much of American history can be told in terms of these competing tendencies.[25] We want to home in on a more

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[22] We are aware that our distinction between democratic and aristocratic republicans is somewhat idiosyncratic. Most republicans were democratic (relative to their political context), and, at least according to Isaac Kramnick, a modern definition of republicanism broad enough to encompass aristocratic theorists can be traced to Madison. Isaac Kramnick, *Introduction* to THE FEDERALIST PAPERS 40 (Penguin Classics 1987). Further complicating the picture is the fact that republicans generally favor mixed governments. *See, e.g.*, Zvi S. Rosen, *The Irony of Populism: The Republican Shift and the Inevitability of American Aristocracy*, 18 REGENT U. L. REV. 271, 273–76 (2006) (describing the prominence of mixed government in the development of republicanism). Still, we think that it is not at all unfair or even particularly original to consider republicans on a sliding scale between democratic and aristocratic.

[23] Machiavelli and Rousseau might be said to be of this sort of political thinkers. *See* NICCOLÒ MACHIAVELLI, DISCOURSES ON LIVY 31 (Julia Conaway Bondanella & Peter Bondanella trans., Oxford Univ. Press 1997) (1531) ("[S]ince the common people are set up as guardians of . . . liberty, it is reasonable to think that they will take better care of it [than the nobles]."); JEAN-JACQUES ROUSSEAU, *On Social Contract or Principles of Political Right, in* ROUSSEAU'S POLITICAL WRITINGS 84, 145 (Julia Conaway Bondanella trans., Alan Ritter ed., W.W. Norton & Co. 1988) (1762) ("[T]he moment a people gives itself to be representatives, it is no longer free; it no longer exists.").

[24] All three authors of the *Federalist Papers*, and, most especially Hamilton, fit this description, as does Burke. *See* WOOD, *supra* note 24, at 495–96 (discussing the Federalists aristocratic beliefs); *see also* EDMUND BURKE, *Speech to the Electors on His Arrival at Bristol and at the Conclusion of the Poll, in* THE POLITICAL TRACTS AND SPEECHES OF EDMUND BURKE 337, 343 (1777).

[25] Note that acknowledging the republican element of American political culture does not make it necessary for us to choose sides, or even wade into the dense academic underbrush of the debate over

limited question—*viz.*, how the republican tradition can help us understand some of the phenomena that Rana catalogs.

Let us first explore two of the Supreme Court decisions Rana discusses.[26] In *Mitchell v. Harmony* (1851), the Court held that a colonel in the U.S. army could not steal from a citizen simply by claiming that he acted in response to a military emergency unless the colonel presented evidence to a jury that the situation was, indeed, righteously emergent.[27] Writing for the Court, Chief Justice Taney rejected the colonel's argument that he had secret information linking the plaintiff to illegal activity, believing that whether the information did in fact incriminate the plaintiff was a matter to be decided by a jury in a public trial.[28] In short, the claimed existence of an emergency was a matter for the virtuous citizen to decide, not the professional soldier.

Nearly 160 years later, in the 2010 case *Holder v. Humanitarian Law Project*,[29] we find a nearly antipodal judgment. The Court considered

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the relative importance of liberalism and republicanism in American thought. *See* Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11, 38 (1992) (discussing the successes and failures of republicanism and its relationship to liberalism without judging its relative importance). Pushing back against treatments like LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA 3 (1955) ("[T]he outstanding thing about the American community . . . ought to be . . . that [it] is a liberal community."), historians began to point out the importance of republican ideas in early American history, which stressed the value of local, participatory democracy by a small, more or less homogenous community of civic-minded citizens who placed the welfare of the group over the success of the individual. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 58 ("What made the Whig conception of politics and republican emphasis on the whole collective welfare of the people comprehensible was the assumption that the people . . . were a homogenous body . . . . Since everyone in the community was linked organically to everyone else, what was good for the whole community was ultimately good for all the parts."). There is no question that republicanism has played an important and too often neglected role in American thought. Whether it plays more of a role than that, however, is a matter of dispute, as scholars disagree about the relative weight and enduring importance of the liberal and republican traditions. The debate seems to have died down of late as scholars have come to accept the wisdom of the historian Lance Banning's observation that intramural squabbles like these matter a great deal more to academics than to the people whose thought we purport to parse. Lance Banning, *"Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic,"* 43 WM. & MARY Q. 3, 12 (1986) ("Logically, it may be inconsistent to be simultaneously liberal and classical. Historically, it was not."). It requires no great stretch to suppose that a person can concern herself with both the rights of the individual and the welfare of the community without feeling a need either to weigh one value against the other, or to choose whether her thought processes are predominantly liberal or republican. *But see generally* CAROL HORTON, RACE AND THE MAKING OF AMERICAN LIBERALISM (2005) (insisting that republican thought became insignificant in the twentieth century).

[26] We leave out all of Frankfurter's decisions for simplicity of exposition and brevity of presentation. Our judgments about his decisions should not require much further information than what follows.

[27] Mitchell v. Harmony, 54 U.S. (13 How.) 115, 135 (1851) (holding that "he must show by proof the nature and character of the emergency, such as he had reasonable grounds to believe it to be, and it is then for a jury to say, whether it was so pressing as not to admit of delay").

[28] *Id.* at 143.

[29] 130 S. Ct. 2705 (2010).

whether the Humanitarian Law Project, which hoped to teach two groups that were allegedly involved in terrorist activities peaceful means of conflict resolution, could be prosecuted for providing material support to a terrorist organization on the theory that their aid was a fungible commodity which "free[d] up other resources within the organization [that may be] put to terrorist ends."[30] Writing for the majority, Chief Justice Roberts answered yes.[31] For our purposes, the most noteworthy part of the opinion was the Court's steadfast refusal to look behind the government's claim.[32] Indeed, the Court refused even to peer behind the curtain drawn by the government, saying instead that the Court lacked the competence to assess any evidence it might be given.[33]

The rationale of *Humanitarian Law Project* was that "evaluation of the facts [by the Executive], like Congress's assessment, is entitled to deference."[34] While Chief Justice Roberts insisted that "concerns of national security and foreign relations do not warrant abdication of the judicial role,"[35] he then abdicated the judicial role, claiming that "when it comes to collecting evidence and drawing factual inferences in this area, the lack of competence on the part of the courts is marked, and respect for the Government's conclusions is appropriate."[36] His reluctance to question elite officials signals a nearly faith-based respect for the views of experts in the Executive branch. Mere jurists like him cannot, apparently, fathom these esoterica.

The change of perspective illustrated in these two cases is clearly not a shift from Lockean to Hobbesian reasoning. Instead, it is a shift from democratic to aristocratic republicanism. Roberts seems to believe, with no evidence apart from a philosophical faith, that experts within the executive branch are preternaturally superior decision-makers when it comes to matters of national security.[37] He says nothing about whether material support counts as a security risk or whether resources really are fungible (or, for that matter, whether teaching peaceful means of conflict resolution counts as such a resource) when it comes to these particular organizations, nor does he remotely imply that this might be a matter for an

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[30] *Id.* at 2735.

[31] *See id.* at 2727.

[32] *See id.* at 2727 (holding that it did not fall within the provenance of the Court to examine this question; instead, decision of this issue was more rightly left up to the other branches of the Government).

[33] *Id.* ("[W]hen it comes to collecting evidence and drawing factual inferences in this area, the lack of competence on the part of the courts is marked.") (internal quotations omitted).

[34] *Id.* at 2711.

[35] *Id.* at 2727.

[36] *Id.* (internal quotations omitted).

[37] *Id.* (holding that the Executive's "evaluation of the facts," like the reasonable evaluation by the legislative branch, is "entitled to deference" by the judiciary).

informed citizenry[38] rather than government entities.[39] Yet he believes the relevant competency clearly exists, thus distinguishing him from Hobbes. He simply thinks the only people who have this competency are a small group of technocrats within the executive branch, whose judgment is conclusive. This reasoning is manifestly aristocratic.

On the other side of the ledger, Professor Rana describes Chief Justice Taney's reasoning in *Mitchell* as Lockean.[40] One can certainly detect such a strain, and for that reading, this Article cannot improve on Professor Rana's exegesis. Taney, however, also borrows heavily from democratic republicanism. The republican perspective is not just a better fit with the main thrust of Taney's opinion: it also affords a more instructive contrast with the later aristocratic turn in American security jurisprudence.

Some of the evidence for Taney's democratic republicanism is the same as the evidence for his Lockean liberalism, for the two views can certainly overlap. But to call Taney a Lockean liberal fails to account for parts of Rana's own account of his view and milieu. Take the following:

> Although soldiers and officials no doubt may have special training or experience with warfare, this training and experience did not provide them with uniquely useful insight regarding how to make initial sense of threats, interpret information, or reach policy determinations. Indeed, *given prevailing suspicions at the time* of standing armies, professional soldiers were often *viewed as institutionally liable to overemphasize perceived dangers or the need for emergency measures.*[41]

Here, Rana has fit Taney's opinion in with the "prevailing suspicions at the time," and found that this shared democratic Zeitgeist consists not just of a belief that the experts have no special ability to make decisions about the balance between liberty and expediency, but also of a conviction that these experts might actually be *worse* decision-makers because of the

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[38] *See id.* at 2727–28 ("The Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions.").

[39] *See id.* at 2733–34 (Breyer, J., dissenting) (opining that Roberts' refusal to consider the issue was a mistake because the executive branch has not proven itself to be any better of a decision-maker than any of the other branches, and there is no Constitutional or historical reason why the Court should not be considered competent enough to consider this question).

[40] *See* Rana, *supra* note 5, at 1421 (stating that Justice Taney subscribed to the Lockean "belief that individuals by and large understood the causes of their insecurity as well as the appropriate methods for responding to threats").

[41] *Id.* at 1446 (emphasis added).

corrupting influence of their roles.[42] This latter concern hews closely to that found throughout the democratic republican literature concerning the dangers of aristocratic political organization.[43] The republican tradition places an enormous value on the public airing of reasons—indeed, in Arendt's work, this political performativity gains a nearly transcendent place[44]—and so we should not be surprised to see Taney insisting on a relatively public (i.e., in front of a jury in an open courtroom) justification of what would otherwise be dismissed as "rumors and suspicions."[45] Depending on the republican, public discussion may produce different benefits, but it is certainly well within the tradition to justify it by claiming, as Taney does, that it will prevent corruption and allow the most reasonable assessment of the situation to prevail.[46]

The belief that the possible corruption of the few can be restrained by the empowerment of the many can be found elsewhere in Rana's account of the Jacksonian era.[47] He quotes an Indiana superintendent: "If we shall limit education of the masses, and trust to the extended education of the few for directive power and skill, we must expect to be ruled by monopolies, demagogues and partisans."[48] It is clear what is democratic about this statement, and, in any case, Rana well acknowledges the democratic credentials of both this school official and his fellow citizens of the era.[49] But the superintendent also concerns himself with the virtue of

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[42] *See id.* ("Thus, Taney . . . imagined citizens as fully equipped to reach conclusions about military necessity and—more broadly—to shape policies about war, peace, and common defense. For Taney, the subject of security was at root accessible to democratic deliberation . . . .").

[43] For example, Machiavelli's *Discourses on Livy* show some of this tendency. *See, e.g.*, MACHIAVELLI, *supra* note 23 at 104–11 (Julia Conaway Bondanella & Peter Bondanella trans., Oxford Univ. Press 1997) (1531). But various Anti-Federalists were much more unambiguous on this point. *See cf.* Saul Cornell, *Aristocracy Assailed: The Ideology of Backcountry Anti-Federalism*, 76 J. AM. HIST. 1148, 1148–50 (1990) (citing various authorities who have depicted the Federalists as distrustful of popularly elected government and as opponents of the democratization of American society).

[44] *See* HANNAH ARENDT, THE HUMAN CONDITION 22–27 (2d ed. 1998) (describing the importance of speech in the political sphere). This work also serves as a useful exegesis of this theme in Aristotle's and other classical authors' political works.

[45] Mitchell v. Harmony, 54 U.S. (13 How.) 115, 133 (1851).

[46] *See* Rana, *supra* note 5, at 1445 ("[Taney] viewed determinations of threat as ultimately rooted in shared and popularly accessible judgments about safety and survival—judgments that might reasonably be reached by a group of ordinary Americans drawn from a representative pool of citizens.").

[47] *See, e.g., id.* at 1439–42 (describing the Jacksonian view that institutional instruments such as education should be geared towards the increased intelligence of the masses—particularly in light of industrialization and the rise of specialized occupations, which threatened democracy by contributing to the segmentation of society into "distinct classes of learning and labor").

[48] *Id.* at 1441 (quoting NICK SALVATORE, EUGENE V. DEBS: CITIZEN AND SOCIALIST 10 (2nd ed. 2007)).

[49] *See id.* at 1441 n.73 ("[E]ducators, moral reformers, and labor activists commonly referred to creating a 'harmony of the head and the hand' as a means for elevating all citizens to the status of independent moral agents . . . . By combining labor and learning, they had the potential to assert their own political voice.").

decision-makers and not only as a corollary to a worry about the corruption of public officials, which is a concern shared by most every political theorist not "far gone in Utopian speculations,"[50] but, more pressingly, for their effect on the virtue of the masses.[51] If this superintendent had advocated for mass education by appealing to it as a basic right or a necessary precondition for the pursuit of happiness we would recognize his appeal as profoundly liberal. But he does not go this route. Instead, he argues that by educating the public, we create a more competent citizenry that will be better able to check the corrupting influences of the elite.[52] Similarly, when we turn to Lincoln's views, we find a Republican in more than name only. In describing Lincoln's perspective, Rana writes: "[T]he ideal of democratic self-government [takes] for granted the value of 'universal education,' in which all individuals [are] *raised to the level of deliberative and knowledgeable citizens.*"[53]

III. IMPLICATIONS

Now that we have cleared some conceptual brush, we can begin to explore our new interpretive path. We have emphasized the fact that republicans place a high value on virtue, but it is now worth exploring which qualities make a citizen virtuous. The most important of these—according to, for instance, Plato,[54] Aristotle,[55] and Cicero[56]—is wisdom. Among virtue theorists—and, indeed among many epistemologists—it is common to follow Aristotle in splitting wisdom into two types: *sophia*, or (factual) knowledge, and *phronesis*, or know-how.[57] Knowledge is a

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[50] THE FEDERALIST No. 6, at 23 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also id.* ("To presume a want of motives for such contests [between subdivisions in political confederacies] as an argument against their existence, would be to forget that men are ambitious, vindictive, and rapacious.").

[51] Rana, *supra* note 5, at 1441–42.

[52] *Id.* at 1441.

[53] *Id.* (emphasis added) (footnote omitted).

[54] PLATO, THE REPUBLIC, *passim* (Benjamin Jowett trans., Airmont 1968) (concluding that to be just, one must be wise).

[55] ARISTOTLE, NICOMACHEAN ETHICS, bk. I, at 32 (Martin Ostwald trans., 1962) [hereinafter ARISTOTLE, ETHICS] ("[W]e praise the wise man, too, for his characteristic, and praiseworthy characteristics are what we call virtue."); *id.* bk. X, at 289 ("Now everyone agrees that of all the activities that conform with virtue activity in conformity with the theoretical wisdom is the most pleasant.").

[56] CICERO, ON DUTIES bk. I, at 8 (M.T. Griffin & E.M. Atkins eds., 1991) [hereinafter ON DUTIES] ("We have divided the nature and power of that which is honourable under four headings. The first of these, that consisting of the learning of truth, most closely relates to human nature.").

[57] ARISTOTLE, ETHICS, *supra* note 55, bk. VI, at 171 ("[T]here exist two kinds of quality, cleverness and practical wisdom, in that part of us which forms opinions . . . ."); CICERO, *supra* note 56, bk. I, at 59 ("[T]he foremost of all virtues is wisdom that the Greeks call *sophia*. (Good sense, which they call *phronesis*, we realize is something distinct, that is the knowledge of things that one should pursue and avoid.)").

matter of pure learning, while know-how involves "a combination of intellect and character."[58] In both *Humanitarian Law Project* and *Mitchell*, only the latter is at stake. The Justices in these cases cared about whether the decision-makers—be they citizens or politicians—exhibited good judgment, and not whether they had in mind the relevant facts to evaluate the situation. This claim is worth fleshing out briefly.

Each activity requires its own sort of know-how, though some varieties of know-how apply across a variety of activities. Somebody who knows how to weave, for instance, might not know how to compose a sonnet, but both poets and sweater-makers know how to open a door. The Justices profiled in Rana's Article find themselves wrestling with the question of how rarified the skill of assessing the balance between liberty and military expediency might be. In *Mitchell*, Chief Justice Taney rejects the risk that a jury of non-specialist citizens will fail to understand what is at stake once presented with the necessary facts.[59] He thinks it a bit of *phronesis* almost on the level of common sense. Though the jury might be presented with information about trade and the rules of war—matters quite outside their ken—they need only draw on their basic reasoning capacities and comprehension of the law to render their judgments.[60]

In *Humanitarian Law Project*, by contrast, Chief Justice Roberts seems to believe that making these same judgments requires a great deal more specialized training.[61] The skill he has in mind is more like that of recognizing an obscure author by her writing style. Roberts has so much "respect" for the experts in the executive branch that he believed it would be "dangerous" even to ask them to defend their security assessments.[62] Even when presented with data that an expert would find ample to make a

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[58] ARISTOTLE, ETHICS, *supra* note 55, bk. VI, at 148–49.

[59] *See* Mitchell v. Harmony, 54 U.S. (13 How.) 115, 136 (1851) ("Indeed, we do not see any evidence in the record from which the jury could have found otherwise.").

[60] *See id.* at 131 ("[I]t [cannot] be objected upon the ground that the reasoning and opinion of the court upon the evidence may have undue and improper influence on the minds and judgment of the jury. For an objection of that kind questions their intelligence and independence, qualities which cannot be brought into doubt without taking from that tribunal the confidence and respect which so justly belong to it, in questions of fact.").

[61] The position asserted here is undecided on whether this is an artifact of Roberts's idiosyncrasies or of the world he lives in. It might be the case that in today's world, Taney would agree with Roberts. Perhaps threats faced by the United States have become so complicated that only a few geniuses can make sense of them, though we doubt it.

[62] Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2727–28 (2010) ("One reason for that respect is that national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess. The dissent slights these real constraints in demanding hard proof—with 'detail,' 'specific facts,' and 'specific evidence'—that plaintiffs' proposed activities will support terrorist attacks. . . . That would be a dangerous requirement. In this context, conclusions must often be based on informed judgment rather than concrete evidence, and that reality affects what we may reasonably insist on from the Government.").

competent judgment, a layman would be unable to make proper sense of it and might draw hazardous conclusions. The Chief Justice cannot be concerned that the Court lacks the proper information to make a reasoned and responsible decision. Quite the opposite. He worries that the Court might be presented with *too much* information and draw conclusions about it without the requisite competencies.[63] Having the information, then, is not the issue. The issue is the ability to make proper judgments about it. The Chief Justice is not so much interested in *how much one knows* about foreign threats, but rather whether one *knows how to interpret* that information. He cares about *phronesis*, not *sophia*.

Perhaps Roberts would object that what he actually cares about is the fact that the executive branch *knows* more about the threats facing America and thus can make more informed conclusions. In this, he would be following his New Deal predecessors who usually forewent the more traditionally republican language of virtue and judgment in favor of an appeal to technical expertise. Habermas named the parallel move in German politics "scientization."[64] Despite the cosmetic difference between old-fashioned and New Deal republicanism, the underlying reasoning is the same. When Roberts made the point that "information can be difficult to obtain, [and] the impact of certain conduct difficult to assess,"[65] he did not specify for whom. We must take the first part of the statement with a grain of salt, since one can (we are pretty sure) only make judgments on the information one has already obtained, but the second part seems to indicate that, even once such information is obtained, only somebody with the proper training can be counted on to draw conclusions from it. Since it would require nothing more than a court order for a judge to obtain the same information as the Executive, then what must be at issue is not the extent of the Executive's knowledge, but its superior judgmental abilities.

We worry (and it appears Rana shares in this concern) that the trend toward Roberts's way of thinking has led us in a dangerous direction.[66] To see why requires one first to take a closer look at the nature of the judgment demanded in each case and ask who might possess it. Ostensibly, the judgment required is the ability to discern whether a

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[63] *See id.* at 2727 ("That evaluation of the facts by the Executive, like Congress's assessment, is entitled to deference. This litigation implicates sensitive and weighty interests of national security and foreign affairs. . . . We have noted that neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. . . . It is vital in this context not to substitute . . . our own evaluation of evidence for a reasonable evaluation by the Legislative Branch.") (internal quotations omitted).

[64] JURGEN HABERMAS, TOWARD A RATIONAL SOCIETY: STUDENT PROTEST, SCIENCE, AND POLITICS 62 (Jeremy J. Shapiro trans., 1970).

[65] *Humanitarian Law Project*, 130 S. Ct. at 2711.

[66] *See* Rana, *supra* note 5, at 1473–74 (discussing the dangers involved in the idea that national security matters are "beyond the competence of the judiciary").

liberty-infringing action is justifiable in light of national security. Chief Justice Roberts claims that the know-how of security experts within the executive branch on these issues is unassailable, *even if a non-expert were presented with all the same information.*[67] To think this way one must assume that either (1) once one gains the proper technical knowledge, the judgment becomes so obvious that there is no question of its being biased or ideological (this is the "scientized" argument), or (2) the ability to make the moral/political judgment is something that only experts in the executive branch can do (this is traditional aristocratic republicanism).[68] Granting the first assumption is to proceed as if corruption is impossible (and thus to incur the wrath of republicans). It also turns a blind eye toward what are by now empirically well-established cognitive biases. To act as if questions that rely on fundamental opinions about how much power the central government should have to infringe on its citizens' liberties during wartime are of the same sort as questions that rely on opinions about the laws of thermodynamics is simply to misunderstand the sort of question being asked.

Granted, there are certainly *some* national security questions that should be left to the exclusive province of the executive branch, and we do not mean to suggest otherwise. The judicial branch need not review, for instance, the choice of troop formation in attacking a country on which we have lawfully declared war. We do not think *any* republican—democratic or aristocratic—would say otherwise. But is this the sort of judgment being made? As Chief Justice Taney clearly saw, "the question here is, whether the law permits [the infringement of rights vouchsafed by the Constitution] to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to undertake."[69] Even if this officer acts with "high and patriotic motives," "contribute[s] to the successful issue of the war,"[70] and has the specialized training to successfully judge threats and opportunities, not all of his opinions about the advisability of an action can be held above reproach and beyond review.[71] His expertise is in the conduct of war, not in the impact of that conduct on the rights and privileges of the citizenry he has been commissioned to defend. And the question of how much of an impact on these rights and privileges is tolerable is a value judgment that cannot be answered merely by analyzing the data properly.

The more traditionally aristocratic approach presents even more vexing

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[67] *See Humanitarian Law Project*, 130 S. Ct. at 2727–28 (discussing the need to respect the Government's conclusions in the area of foreign relations and national security).

[68] *See supra* Part II (discussing aristocratic republicanism).

[69] Mitchell v. Harmony, 54 U.S. (13 How.) 115, 135 (1851).

[70] *Id.*

[71] *Id.*

difficulties. As indicated, both *Mitchell* and *Humanitarian Law Project* are ostensibly about national security, which is the way they are almost always analyzed in the literature.[72] It is the easiest way to interpret decisions about the use of the military, and it lines up most closely with the political literature that shaped the minds of our Founders. But a closer examination of each case reveals that they actually deal with questions of national *interest*. Neither *Mitchell* nor *Humanitarian Law Project* involved situations in which U.S. security was endangered.[73] *Mitchell* occurred during the Mexican-American War, which was a straightforwardly expansionist venture on the part of the United States.[74] *Humanitarian Law Project* dealt with material support for the Kurdistan Workers Party and the Tamil Tigers, organizations whose alleged terrorist activities were not aimed at the United States but rather the governments of Turkey and Sri Lanka, respectively.[75] Each of these cases certainly implicated the national *interest* in that a ruling for the U.S. Government would increase its power, but it would take a good deal of rhetorical legerdemain to argue that either dealt with national *security*.

Rana does not make this distinction, but it is an important one. One of the reasons this Article shares Rana's worries about entrusting the sorts of decisions discussed herein to the executive branch's discretion is that the Executive increasingly papers over the very same distinction. If the questions addressed in these cases are viewed as orbiting around the narrow matter of security, one could at least take intellectual comfort in the fact that all citizens want to be safe in their persons and possessions, even if their levels of risk-aversion vary. An expert might be able to take these into account and make a relatively straightforward judgment on the best way to balance them. Citizens' *interests*, on the other hand, vary on countless dimensions. Whose interests should be taken into account when

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[72] *See, e.g.*, Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1395 (1989) (discussing the *Mitchell* Court's definition of lawful executive emergency power); Adam Liptak, *Justices Uphold a Ban on Aiding Terror Groups*, N.Y. TIMES, June 22, 2010, at A1 (describing *Humanitarian Law Project* as "a case pitting free speech against national security").

[73] *See* Rana, *supra* note 5, at 28–30 (describing the court's analysis of whether a national emergency existed in *Mitchell*); Liptak, *supra* note 72 (discussing the role national security concerns play in the court's decision in *Humanitarian Law Project*).

[74] *See* Richard Griswold del Castillo, *Manifest Destiny: The Mexican-American War and the Treaty of Guadalupe Hidalgo*, 5 SW. J.L. & TRADE IN AM. 31, 31–32 (1998) (describing the idea of Manifest Destiny, which was used to justify the territorial expansion of Mexican-American War).

[75] *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2708 (2010) (offering very brief descriptions of these organizations). Greg Bruno describes the PKK in a bit more detail on the Council on Foreign Relations website. Greg Bruno, *Inside the Kurdistan Workers Party (PKK)*, COUNCIL ON FOREIGN RELATIONS (Oct. 19, 2007), http://www.cfr.org/turkey/inside-kurdistan-workers-party-pkk/p14576. Preeti Bhattacharji does the same for the Tamil Tigers. Preeti Bhattacharji, *Liberation Tigers of Tamil Eelan (aka Tamil Tigers) (Sri Lanka, Separatists)*, COUNCIL ON FOREIGN RELATIONS (May 20, 2009), http://www.cfr.org/terrorist-organizations/liberation-tigers-tamil-eelam-aka-tamil-tigers-sri-lanka-separatists/p9242.

making decisions about civil liberties infringement and military deployment, and why should that judgment be entrusted solely to an aristocracy?

To reserve decisions about furthering the interests of the country to those in power[76] can make it quite difficult (for them and for us) to distinguish between their interests and those of the people they ostensibly serve. After all, answering the thorny question of whose interests count as the national interest is usually dealt with by pretending to ask how we can expand our power, and presuming the collective interest of the country to be its dominance.[77] When these lines begin to blur, the end is not necessarily corruption in the traditional sense. It is perfectly plausible to claim, with the purest heart, that in order for a country to further its collective interests it needs powerful leaders (in much the same way as it might be plausible to claim that what's good for General Motors is good for the country). But anybody at all in touch with republican worries about civic virtue should see that to let the powerful decide how much additional power they need in order for the country to be great is obviously a dangerous temptation. Even non-corrupt leaders run the risk of placing a thumb on their side of the scale when the considerations are skewed in this fashion.[78]

Combine the blurring of national interest and national security with deference towards the people who happen to hold power, and the support for rigidly aristocratic opinions, like Roberts' in *Humanitarian Law Project*, becomes even more precarious. We are confronted with a situation where one who seems to be trusting experts to analyze a set of complicated threats to our nation and the best means to combat them is really deferring judgments about the best way to expand our nation's geopolitical influence as determined conclusively by those in power. In

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[76] The astute reader will notice that we have failed to differentiate between an expert decision-maker and a powerful decision-maker. In so doing, we are following the Supreme Court. In *Holder v. Humanitarian Law Project*, Chief Justice Roberts noted that an expert is somebody who "begin[s] the day with briefings that may describe new and serious threats to our Nation and its people." *Humanitarian Law Project*, 130 S. Ct. at 2727 (citing Boumediene v. Bush, 553 U.S. 723, 797 (2008)). Never are we confronted with the fact that others who have spent their lives studying international relations, U.S. foreign policy, or the economics of terrorist and humanitarian organizations may also have opinions on the matter, and that they may differ from the administration's. These people are certainly "experts" on relevant matters in any reality-grazing sense of the word, but they are excluded from the realm of legitimacy. We cannot think of anything they lack that bureaucrats in the executive branch possess except for the imprimatur of power.

[77] *See* Samuel P. Huntington, *The Erosion of American National Interests*, 76 FOREIGN AFF. 28, 28–29, 35–37 (1997) (discussing the difficulties in defining the collective American national interest).

[78] We here set aside the objection that, for the leaders of a dominant international power like the United States, it can become hard to differentiate between national interest and national security. The conflation of national interest with national security might not be cynically opportunistic—it could be an artifact of how hegemons reason about security. Dealing with all that such an objection implies would lead us way too far afield, but it is a matter to which we hope to return.

this setting, the line between aristocratic republicanism and authoritarianism becomes a mite too fine. That, likely, is the real danger of the trend so astutely tracked by Rana, and the great value of his article is to have opened a clearing in which to discuss this risk.