A DUMÉZILIAN TRIFUNCTIONALIST ANALYSIS OF THE U.S. CONSTITUTION

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This article offers an interpretation of the United States' structure of government outlined in the Constitution of 1789 from an anthropological

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First, I'd like to thank my Ph.D. advisors – Professors Irene Burgers and Raymond Adema of the University of Groningen – for always encouraging me to academically grow and explore. Second, I thank William H. Byrnes, IV of Texas A&M University School of Law for being my mentor in law. Third, I'd like to thank Akiba Covitz for mentoring me as an undergraduate student. His Ph.D. dissertation still influences my thought today.

Finally, I'd like to thank the fantastic *Elon Law Review* team. Their efforts in helping this article come to life are unparalleled. I am infinitely thankful for their time and kindness. As the philosopher Friedrich Nietzsche wrote in his preface to *The Genealogy of Morals* (1887), "I allow no one to pass muster as knowing that book, unless every single word therein has at some time wrought in him a profound wound, and at some time exercised on him a profound enchantment: then and not till then can he enjoy the privilege of participating reverently in the halcyon element, from which that work is born, in its sunny brilliance, its distance, its spaciousness, its certainty." Likewise, I believe the law review has extensively reviewed every syllable of this article. For that, I am forever and eternally grateful.

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perspective. Simultaneously this article seeks to analyze and explain the continued three-part structure of the United States federal government as outlined in the Constitution. Subsequently, this article defines the three parts of the federal government—judiciary, executive, and legislative—as explained through the lens of the anthropologist Georges Dumézil's trifunctional hypothesis of the Proto-Indo-European paradigm of society. Dumézil's trifunctional hypothesis is broken into the following three functions: productivity, military, and sovereignty. This article aims to demonstrate that the productivity represents the legislative function, the military represents the executive function, and the sovereignty represents the judicial function in the U.S. system of government. This article draws from a previous article by this author titled A Structural Etiology of the U.S. Constitution.[1] *That article also provided a tripartite analysis of the U.S. Constitution. However, the analysis in that article occurred through the lens of the Ancient Greek philosopher Plato's tripartite conception of the soul where (logos = word = law), (thumos = external driving spirit = executive), and (eros = general welfare = legislative) extrapolated from Plato's dialogues – primarily the* Republic *and* Phaedrus*. This article swerves from that interpretation on Plato's* Republic*.*

The structure of this article is as follows: First, this article establishes a working understanding of the French anthropologist Georges Dumézil's (1898–1986) trifunctional hypothesis of prehistoric Proto-Indo-European society that applied to Indo-European society universally. Dumézil's trifunctional theory is the major premise, as in a syllogism. Second, the article lays out the generally accepted division of the U.S. Constitution of 1789 by laying out three parts to the federal government: the legislative as described in Article I, the executive as described in Article II, and the judicial

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I specifically extend thanks to William Altman for discussing Plato's *Republic* and discussing Polybius's *Histories* with me. I owe him a debt of gratitude for that. He also suggested discussing trifunctionalism appearing in the science fiction television show *Star Trek* as represented through the key commanders of the starship the USS Enterprise Captain Kirk representing thumos, Spock representing logos, and Dr. McCoy ("Bones") representing eros. My research timeline did not allow me to explore that paradigm, but such a comparison should be made.

I thank Wesley De Sena who read various drafts of this book even while he pursued his Master of Theological Studies at Harvard Divinity School. I thank Andrei N. Antonescu, Bethany C. Reed, Bryce R. Mullins, Christian C. Alexandrou, Hayden P. Bartley, Benjamin M. Willis, Andrew J. Uhlman, Julia D. Bradley, Kayla E. Harrington, Erik R. Lisowski, James M. Nichols, Jonathan J. Walters, James T. Ryffel, Mitchell A. Monthie, and William P. Brandt for excellent discussions of constitutional law over the years.

[1] Charles Lincoln, *A Structural Etiology of the U.S. Constitution*, 43 NOTRE DAME J. LEGIS. 122 (2016).

as described in Article III. This second part represents the minor premise syllogistically. Third, the syllogism completes by weaving in the major premise of Dumézil's conception of the trifunctional hypothesis into the minor premise of the three parts of the United States federal government. This third step of analysis suggests possible future evolution of the structure of the U.S. federal government.

This article fits into the broader issue of the functionally efficient and naturally adaptive structure of the U.S. federal government. Providing a historical and anthropological context to this structural analysis will serve as a framework for future research on the operation of the federal government. When the branches of the federal government step out of their roles, then the balance of the structure of the federal government becomes disrupted, occurring in liminal periods of paradigmatic change.

INTRODUCTION

This article argues that the tripartite system of government in the United States can be viewed through the Dumézilian trifunctional hypothesis. The major premise of this article is the definition and elements of the Dumézilian structure of the prehistoric Proto-Indo-European society as outlined in Georges Dumézil's anthropological hypothesis of a tripartite society found in Indo-European cultures. The minor premise of this article is that the United States federal government has three major parts: the judiciary, the executive, and the legislative. The syllogism and argument of this paper is that the three federal parts of U.S. government represent the Dumézilian structure of anthropological prehistoric Proto-Indo-European society: the judiciary as the sovereignty, the executive as the military, and the legislative as the productivity. This article will explore these concepts in greater depth. As a corollary, when the anthropological etiology of the polity—arguably archetypal structure—becomes unbalanced, then people become dissatisfied with the government. This occurs because the government does not fulfill its function administratively—as in acting in opposition to the laws—and in promoting justice. However, sometimes overstepping a role in the Dumézilian structure of the polity is a necessary change.

I. PREMISES AND STRUCTURES OF ANALYSIS

Assumed throughout this article is the acceptance of the premises Georges Dumézil wrote about and analyzed in his anthropological investigation into Proto-Indo-European society. Much of his anthropological writings have been critiqued to the satisfaction of the author.[2] Dumézil's accessible and readable style along with his employment of the tripartite system is the primary shared interest of this article. This article will rely significantly on secondary source written material by Covington Scott Littleton to interpret the primary material written by Dumézil. Specifically, it relies on *The New Comparative Mythology: An Anthropological Assessment of the Theories of Georges Dumézil* (1973),[3] as well as Claude Calame's *Myth and History in Ancient Greece: The Symbolic Creation of a Colony* (2003).[4]

Fundamentally, the validity of Dumézil's assertions is less interesting than the results that can come about from utilizing his paradigm of the tripartite system of society. Given that Dumézil's trifunctional hypothesis is not necessarily valid for its scientific accuracy but rather its interpretative value, this article is more an interpretation of the anthropological devices present in Dumézil's writings and analysis. The paradigm Dumézil provides in application to the structure of the U.S. Constitution uses literary analysis to interpret legal principles.[5] Thus, Dumézilian anthropological analysis and thought provides one possible way to read the U.S. Constitution. There may be many mutually exclusive ways to read the Constitution that are equally valid.[6] Likewise, it is just as important to focus on the primary sources of Dumézil's own writings to apply Dumézilian thought as an interpretative device. Thus, there is an even more important need to focus on the primary texts. Given that literature and stories can represent mythological constructs, such an analysis can ultimately have inverse

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[2] For example, in correspondence with Jaan Puhvel about his book *Epilecta Indoeuropea*, Puhvel wrote that the notion of a trifunctionalist Constitution "has some passing interest as a potential relic of engrained formulaic structure coinciding with inherent triplicity." Email from Jaan Puhvel, Professor of Classics, UCLA, to author (Jan. 9, 2023, 04:11:22 CST) (on file with author).

[3] C. SCOTT LITTLETON, THE NEW COMPARATIVE MYTHOLOGY: AN ANTHROPOLOGICAL ASSESSMENT OF THE THEORIES OF GEORGES DUMÉZIL (Univ. of Cal. Press ed. 1973).

[4] CLAUDE CALAME, MYTH AND HISTORY IN ANCIENT GREECE: THE SYMBOLIC CREATION OF A COLONY (Daniel W. Berman & Princeton Univ. Press trans. 2003).

[5] Lincoln, *supra* note 1, at 122.

[6] In the author's view, the equally valid yet mutually exclusive interpretations make the Constitution a great text in the spirit of the Great Books series of Mortimer J. Adler and Robert M. Hutchins. GREAT BOOKS OF THE WESTERN WORLD (Robert Maynard Hutchins et al. eds., 1952).

implications for society and anthropology—not through the validity of Dumézil's claims but through the interpretative value it has.[7]

Furthermore, presumed throughout this paper is that the world has an order based in a reason that reflects nature.[8] In connection with this foundational idea of an orderly and rational reflection of nature, Plato's *Timaeus* introduces the idea that nature is organized and thus comprehensible.[9] Relevant to Plato's substantive inquiry in the *Timaeus* order of nature, Plato inquires whether randomness or patterns are provable or real.[10] How do we even decide randomness exists if not through statistical or other mathematical analysis—namely, through inductive or deductive analysis?[11] Philosophically speaking, there could be a discrepancy between a series following a mathematical rule or being truly random. Ludwig Wittgenstein (an Austrian-born British philosopher)[12] in his *Philosophical Investigations* explained how randomness can really be explained in terms of the increasing complexity of following a rule.[13] But paradoxically,

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[7] *See generally* Charles Lincoln, *A Brief Historical Sketch of an Anthropological Analysis of the Development of International and Comparative Law*, 19 FLA. COASTAL L. REV. 221, 225 (2019) (approaching legal analysis through anthropological principles); Charles Edward Andrew Lincoln IV, *A Literary Lens into Constitutional Interpretation and a Possible Synthesis of Natural and Positive Law: The Silmarillion*, 41 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 101, 103–06 (2020) (analyzing the law through the lens of literary traditions).

[8] *See generally* CICERO, DE REPUBLICA (James E.G. Zetzel ed., Cambridge Univ. Press 1995) (c. 54 B.C.).

[9] PLATO, TIMAEUS AND CRITIAS 18–19 (Oxford Univ. Press, Inc. ed., Robin Waterfield trans. 2008) (c. 360 B.C.).

[10] For questions dealing with the notion of whether the demiurge (Ancient Greek: δημιουργός (*dēmiourgós*) to be interpreted as the handicraftsman creator of the universe) made the universe in order or in chaos, see *id.* at 16–18.

[11] *Id.*

[12] Ludwig Wittgenstein, in full Ludwig Josef Johann Wittgenstein (born April 26, 1889, Vienna, Austria-Hungary [now in Austria]—died April 29, 1951, Cambridge, Cambridgeshire, England):

> Wittgenstein is an Austrian-born British philosopher, regarded by many as the greatest philosopher of the 20th century. Wittgenstein's two major works, *Logisch-philosophische Abhandlung* (1921; *Tractatus Logico-Philosophicus*, 1922) and *Philosophische Untersuchungen* (published posthumously in 1953; Philosophical Investigations), have inspired a vast secondary literature and have done much to shape subsequent developments in philosophy, especially within the analytic tradition. His charismatic personality has, in addition, exerted a powerful fascination upon artists, playwrights, poets, novelists, musicians, and even filmmakers, so that his fame has spread far beyond the confines of academic life.

Ray Monk, *Ludwig Wittgenstein*, BRITANNICA, https://www.britannica.com/biography/Ludwig-Wittgenstein (Oct. 20, 2023).

[13] Alexander Miller & Olivia Sultanescu, *Rule-Following and Intentionality*, STAN. ENCYCLOPEDIA OF PHIL. (Apr. 12, 2022), https://plato.stanford.edu/entries/rule-following/.

according to Mr. Wittgenstein,[14] if everything can be shown to be following a rule it can also, at the same time, be shown not to follow a rule.[15] Wittgenstein says as much in the following way:

> This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here. It can be seen that there is a misunderstanding here from the mere fact that in the course of our argument we give one interpretation after another; as if each one contented us at least for a moment, until we thought of yet another standing behind it. What this shews is that there is a way of grasping a rule which is not an interpretation, but which is exhibited in what we call "obeying the rule" and "going against it" in actual cases. Hence there is an inclination to say: every action according to the rule is an interpretation. But we ought to restrict the term "interpretation" to the substitution of one expression of the rule for another.[16]

The alternative to this presumption is that there is no order to the universe or world and humans try to impose order onto it.[17] Lucretius in

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[14] David Foster Wallace, *Tense Present: Democracy, English, and the Wars over Usage*, HARPER'S MAG. 47 (Apr. 2001), https://harpers.org/wp-content/uploads/HarpersMagazine-2001-04-0070913.pdf. David Foster Wallace wrote:

> The point here is that the idea of a Private Language, like Private Colors and most of the other solipsistic conceits with which this particular reviewer has various times been afflicted, is both deluded and demonstrably false.
>
> In the case of Private Language, the delusion is usually based on the belief that a word such as pain has the meaning it does because it is somehow "connected" to a feeling in my knee. But as Mr. L. Wittgenstein's *Philosophical Investigations* proved in the 1950s, words actually have the meanings they do because of certain rules and verification tests that are imposed on us from outside our own subjectivities, viz., by the community in which we have to get along and communicate with other people. Wittgenstein's argument, which is admittedly very complex and gnomic and opaque, basically centers on the fact that a word like pain means what it does for me because of the way the community I'm part of tacitly agreed to use pain.

Id.

[15] LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 81 (G.E.M. Anscombe trans., 2d ed. 1953). This raises the question whether randomness really exists or if everything follows a set rule? *See, e.g.*, Ahilan T. Arulanantham, *Breaking the Rules?: Wittgenstein and Legal Realism*, 107 YALE L.J. 1853, 1869–71 (1998); Dennis Patterson, *Wittgenstein and Constitutional Theory*, 72 TEX. L. REV. 1837, 1851 (1994); Scott Hershovitz, *Wittgenstein on Rules: The Phantom Menace*, 22 OXFORD J. LEG. STUD. 619, 639–40 (2002).

[16] WITTGENSTEIN, *supra* note 15.

[17] Such an example can be seen in literature:

> Borges's *The Library of Babel* implicitly undercuts all the written structures – religion, science, art – through which human beings strive to impose order on an unruly world. It consists of a fantastic monologue in which a Librarian, who lives in a Library which is also the universe, tries unsuccessfully to describe the chaotic infinity (or near infinity) that surrounds him. According to the Librarian, the Library may or may not be endless; but it is certainly meaningless, being made up of numberless books in a Babel of tongues. Because it contains all the possible combinations of letters in all languages,

his *On the Nature of Things* introduced such a view.[18] Consequently, nature can represent itself in the structure of law, specifically the law of the United States.[19]

> many of the books contain only an intelligible word or two, or are only partially true copies of books contained in their proper form elsewhere in the Library. The Librarians spend their time, among other ways, searching for the true catalogue that would bring order and meaning to their incomprehensible collection.

Susan Mann, *The Universe and the Library: A Critique of James Boyd White as Writer and Reader*, 41 STAN. L. REV. 959, 965 (1989).

[18] *See* 12 GREAT BOOKS OF THE WESTERN WORLD (H. A. J. Munro trans., Robert Maynard Hutchins ed. 1952); *see also* Marion Hilligan et al., *Symposium Issue: World Views Collide: A Dialogue on State-Authored Embryonic Stem-Cell Research, Human Enhancements, Physician-Assisted Suicide and the Value of Life: Superhuman-Biotechnology's Emerging Impact on the Law*, 24 T.M. COOLEY L. REV. 1, 31 (2007). Here, the authors directly contrasting the Platonic theory of order the universe:

> The contrary materialist view characterizes archetypes as speculative constructs. Aristotle and Plato had their ancient Greek materialist counterparts in Epicurus, Democritus, and Lucretius, who in his *On the Nature of the Universe* wrote that all things began from "the purposeless congregation and coalescence of atoms." There are uniform and entirely natural causes in a closed system not ordered or otherwise affected by the presence of a higher mind capable of recognizing and ordering information. Thus Epicurus could hold that morality was merely a sensual matter of seeking pleasure and avoiding pain, not a sensitivity issue to any particular purpose or design. Aristotle's teleological universe was rejected for an atomistic universe without purpose or form in which biological forms and the ordered universe in which they exist were not the fixed product of information, intelligence, or design but of random accretion. Nobel Prize winning biologist George Wald, physicist Freeman Dyson, and astronomer George Greenstein explain the improbability of the universe's remarkable order by suggesting either that the universe did not exist until humans observed it and (in Wald's words) that "[t]he universe wants to be known."

Id.

[19] Such as the interlocutor suggests nature represented itself in Athens. PLATO, *supra* note 9, at 96; *see also* Robert Birmingham, *Proving Miracles and the First Amendment*, 5 GEO. MASON L. REV. 45, 60 n.78 (1996). This work suggests that there is an order to the world's structure:

> About fifty years ago a physicist called Paul Dirac asked himself why the number ten to the fortieth power keeps occurring. The square of this number, ten to the eightieth power, is the mass of the visible universe, measured in terms of the mass of the proton. The number itself, ten to the fortieth, is the present age of the universe, expressed in units of time it takes light to travel across a proton. And, get this, the constant that measures the strength of gravity in terms of the electrical force between two protons is ten to the fortieth times weaker! Also, ten to the fortieth to the one-fourth, or ten to the tenth, just about equals the number of stars in a galaxy, the number of galaxies in the universe, and the inverse of the weak fine structure constant!

Id.

A. Why a Structured Approach at All? A Philosophical-Anthropological Explanation

To understand why it is appropriate to analyze and compare the U.S. government with the anthropological Dumézilian conception of Proto-Indo European society, it is helpful to have some understanding of the context of philosophical-anthropological thought related to such conception. The following paragraph is a brief overview of relevant historical analysis to provide context related to structural and "trifunctionalist" analysis.

Many philosophical-anthropological theories exist for understanding the basic structures of societies and governments, from Claude Lévi-Strauss[20] on structuralism theories,[21] to Michel Foucault[22] on the impetus behind government function,[23] and Marvin Harris[24] on the materialist gift

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[20] Claude Lévi-Strauss (born November 28, 1908, Brussels, Belgium—died October 30, 2009, Paris, France):

[Lévi-Strauss] is a French social anthropologist and leading exponent of structuralism, a name applied to the analysis of cultural systems (e.g., kinship and mythical systems) in terms of the structural relations among their elements. Structuralism has influenced not only social science but also the study of philosophy, comparative religion, literature, and film. *Claude Lévi-Strauss*, BRITANNICA, https://www.britannica.com/biography/Claude-Levi-Strauss (Oct. 26, 2023).

[21] To illustrate the nature of structuralist theory, this discussion will concentrate on the work of Claude Lévi-Strauss :

> Lévi-Strauss has made the search for the fundamental properties of human thought the focus of his work. His basic objective is uncovering the universal, basic structure of human thought, which is deep below the surface but is manfested [*sic*] in myth, language, cooking, table manners, and the general structures of social life. This basic structure, which is termed 'deep structure,' will identify cross-cultural similarities.

Donald H. J. Hermann, *Phenomenology, Structuralism, Hermeneutics, and Legal Study: Applications of Contemporary Continental Thought to Legal Phenomena*, 36 U. MIA. L. REV. 379, 390–91 (1982).

[22] Gary Gutting, *Michel Foucault*, STAN. ENCYCLOPEDIA OF PHIL. (Aug. 5, 2022), https://plato.stanford.edu/archives/fall2022/entries/foucault/.

[23] Michel Foucault's compelling and poetic methodological manifesto describes the nature of "critique" and, thereby, the proper role of the critic. For Foucault, "critique" was more than a means to an end; criticism was itself an act of resistance and refusal. Toward this end, Foucault sought to decouple criticism from positive programs for social and political change. Criticism is, according to this view, a negative operation – "essays in refusal" - resisting and rejecting "what is" without regard for "what needs to be done." For this reason, Foucault's views have occasionally been labeled "rejectionist." Such "rejectionist" claims, in turn, exemplify the most feared aspects of a new challenge to traditional legal thought: postmodernism. Derek P. Jinks, *Essays in Refusal: Pre-Theoretical Commitments in Postmodern Anthropology and Critical Race Theory*, 107 YALE L.J. 499, 499–500 (1997); *see also* Tom Frost, *Agamben's Sovereign Legalization of Foucault*, 30 OXFORD J. LEGAL STUD. 545, 545–77 (2010) (discussing Foucault's ideas on law and sovereignty).

[24] "Marvin Harris (born August 18, 1927, New York, New York, U.S. – died October 25, 2001, Gainesville, Florida) is an American anthropological historian and theoretician known for his work on cultural materialism. His fieldwork in the Islas ('Islands') de la Bahía and other regions of Brazil and in Mozambique focused on the concept of culture." *Marvin Harris*, BRITANNICA, https://www.britannica.com/biography/Marvin-Harris (Oct. 21, 2023).

giving incentives in a society's structure.[25] Concurrently, the idea of a "tripartite" structure of society being inherent to human cultures is not new, having been written about extensively by Dumézil,[26] and discussed in Plato's dialogues regarding the soul.[27] Indicative of the universal nature of the "trifunctionalist" Dumézilian approach, it has even been applied to Pre-Columbian Yucatán Mayan societies.[28] Such an analysis to Mayan societies takes the universalist approach in Claude Lévi-Strauss's anthropological analysis and applies it, here, to Mayan society.[29] Poetically, in the Homeric Greek account of the Judgment of Paris, prior to the beginning of the Trojan War in Homer's *Iliad*, Paris of Troy is given a Dumézilian "choice." This choice takes the form of a beauty contest among three goddesses—Hera, Athena, and Aphrodite.[30] It seems fitting to apply the Ancient Greek concept of the Platonic Soul to governmental structure,

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[25] John W. Ragsdale, Jr., *The Rise and Fall of the Chacoan State*, 64 UMKC L. REV. 485, 528 (1996) ("The reciprocity concept justifies the assumption that one who gives will receive in return, though there are no hard promises as to timing, quality, or quantity."); *see also* BRONISLAW MALINOWSKI, ARGONAUTS OF THE WESTERN PACIFIC 178–81 (Project Gutenberg ed. 2017) (discussing gift giving cultures).

[26] According to Dumézil, the division of society—government—into three parts was inherent in all Indo-European societies. The trifunctional pattern (and implicit political separation of powers) is manifest among the Hindus in the original Castes: Brahmana (teachers, priests, keepers of the law), Ksatriya (Warrior Kings), and Vaisya (Farmers, Producers, Merchants and Doctors). For classic development of this so-called "tripartite hypothesis" concerning the division of social roles in Proto-Indo-European societies, see GEORGES DUMÉZIL, MITRA-VARUNA: AN ESSAY ON TWO INDO-EUROPEAN REPRESENTATIONS OF SOVEREIGNTY 14 (Derek Coltman trans., 2d ed.1988).

[27] Plato, *Phaedo*, MIT: INTERNET CLASSICS ARCHIVE, http://classics.mit.edu/Plato/phaedo.html (last visited Dec. 29, 2023).

[28] Charles E. Lincoln, Ethnicity and Social Organization at Chichen Itza, Yucatan, Mexico (May 1990) (Ph.D. dissertation, Harvard University) (on file with the University Microfilms International).

[29] *Id.*

[30] HOMER, THE ILIAD OF HOMER 710–14 (Project Gutenberg ed. 2006).

> [T]he well known Judgment of Paris, which Homer apparently knew. Although it is not directly recounted in the Iliad, there is a clear reference to it in Book 14, where Hera's displeasure with the other gods (i.e., gods who were urging Achilles to treat Hector's corpse with respect) was attributed to the Judgment of Paris: "because of the delusion of Paris / who insulted the goddesses when they came to him in his courtyard / and favoured her who supplied the lust that led to disaster." The myth of the Judgment of Paris began when Peleus and Thetis did not invite Eris, the goddess of discord, to their wedding. Eris, feeling snubbed, concocted one of literary history's most evil schemes. She procured a golden apple and inscribed it "For the fairest." She then crashed the wedding feast and tossed the apple onto the table. Three goddesses, Hera, Athena, and Aphrodite, each argued that it should be her's. They asked Zeus to decide. He refused because he feared his wife's anger in the event that he did not choose her. He passed the buck and suggested that the Trojan prince Paris, the son of Priam, act as arbiter.

See Russ VerSteeg, *A Contract Analysis of the Trojan War*, 40 ARIZ. L. REV. 173, 192 (1998).

because the "trifunctionalist" approach has origins in Ancient Greece but can also be identified in non-western civilizations as well.[31]

A balanced view of government may exist in the separation of powers as Montesquieu laid out: "that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."[32] Exploring this thought "[i]n The Federalist No. 47, Madison explained that while Montesquieu was correct in saying that the separation of the legislative, executive, and judicial powers was essential to liberty, that conclusion did not purport to tell us how strict the resultant separation had to be."[33] This author suggested in a previous article that "[b]ased on their education, the framers of the Constitution may have even had Plato's Soul in mind when they framed the Constitution."[34]

1. A Counter Argument to Trifunctionalism and the Law: Polybius's Account of the Roman Republic's Constitution

A concrete counter argument to the theory of trifunctionalism that this article argues for comes from the Ancient Greek author Polybius (Greek: Πολύβιος). In short, this book argues that the U.S. Constitution reflects a trifunctional nature mirrored in Dumézil's theory of trifunctionalism.[35] However, the counterargument emerges when examining Polybius's account of the Roman Republic in his *Histories* (Greek: *Ιστορίαι*).[36]

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[31] CHARLES LINCOLN, THE DIALECTICAL PATH OF LAW 33 (2021).

[32] BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 152 (Thomas Nugent trans. 1949).

[33] Lincoln, *supra* note 1, at 126.

[34] *Id.*

[35] A future article comparing Dumézil's theories to Polybius's account of Rome may prove fruitful because Dumézil wrote a book on the semi-legendary Marcus Furius Camillus that Polybius discusses in his *Histories* titled *Camillus: A Study of Indo-European Religion as Roman History*. *See generally* GEORGES DUMÉZIL & GEORGES EDMOND RAOUL DUMÉZIL, CAMILLUS: A STUDY OF INDO-EUROPEAN RELIGION AS ROMAN HISTORY (Univ. of Calif. Press 1980).

[36] *See generally* POLYBIUS, THE HISTORIES OF POLYBIUS (Evelyn S. Shuckburgh trans. 1962).

The authors of the Federalist Papers, writing under the pseudonym Publius,[37] frequently refer to Polybius in their letters and notes.[38] Such references explicitly indicate that the structure of the Roman Republic existed at the forefront of their thinking.[39] Moreover, the Federalist Papers frequently cited to Polybius's writings and his three-part outline of the Roman Republic as being an ideal republic. For example, Madison in 1787 almost explicitly outlines a trifunctional structure of the Roman Republic in his *Additional Memorandums on Ancient and Modern Confederacies, [ante 30 November] 1787*. Madison writes:

> Suffetes—like Consuls—and annual does not appear by whom chosen—assembled Senate presiding—proposing & collecting the votes—presided also in Judgmts. of most important affairs—sometimes commanded armies—at going out were made Pretors
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> Senate—composed of persons qualified by age—experience—birth—riches—were the Council of State—& the Soul of all public deliberation no. not known—must have been great since the 100 drawn out of it. Senate treated of great affrs—read letters of generals—recd. plaints of provinces—gave auds: to ambassrs—and decided peace and War† When Senate unanimous decided finally—in case of division people decided—Whilst Senate retained its authority says Polybius—wisdom & success marked every thing.
>
> People—at first gave way to Senate—at length intoxicated by wealth & conquests, they assumed all power—then cabals & factions prevailed & were one of the principal causes of the ruin of the State.[40]

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[37] The authors of the Federalist Papers did not pick the name Publius randomly. It had a long history in the study of republics. It especially related to the post-revolutionary period of the Roman Republic to which the authors wished to draw attention. On the history of the Roman Republic and Publius, Professor Beardman of Emory University School of Law writes that:

> While modern historiography has suggested that the Roman Republic emerged gradually from a series of modest institutional and legal reforms, the Framing Generation would have believed that it came about as the result of a violent revolution against the tyranny of the last king, Tarquinius Superbus. After the Roman nobility and people further repulsed an Etruscan attempt to reinstitute the monarchy, the Republic was on a firmer foundation. Indeed, the leading figure of the post-revolutionary period of the Roman Republic was the aristocrat Publius Valerius ("Poplicola"), a lawgiver as successful as Solon or Lycurgus, immortalized in Plutarch's Lives, and the pseudonym selected by Hamilton, Madison and Jay for their Federalist Papers.

David J. Bederman, *The Classical Constitution: Roman Republican Origins of the Habeas Suspension Clause*, 17 S. CAL. INTERDISC. L.J. 405, 412 (2008).

[38] James Madison especially discusses Polybius in one document. *See Notes on Ancient and Modern Confederacies, [April–June?] 1786*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-09-02-0001 (last visited Dec. 29, 2023).

[39] As well as being a persuasive authority for their readers.

[40] *Additional Memorandums on Ancient and Modern Confederacies, [ante 30 November] 1787*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-10-02-0183 (last visited Dec. 29, 2023).

Moreover, many of the Framers of the Constitution discuss Polybius in passing as an authority on the successes and failures of certain forms of government.[41] Alexander Hamilton, in Federalist No. 63, wrote in passing on Carthage's form of government that, "To these examples might be added that of Carthage, whose senate, according to the testimony of Polybius, instead of drawing all power into its vortex, had at the commencement of the second punic war, lost almost the whole of its original portion."[42]

Overall, there is evidence that the Framers of the 1787 Constitution referred to Polybius both in the context of what worked ideally for states and what did not.

In his *Histories*, Polybius outlined the Roman Republic as conforming in practice and theory to the Constitution of the Roman Republic in three parts: the Senate, consuls, and the people's assemblies.[43] Polybius

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[41] For a more comprehensive list of Federalist Papers that discuss Ancient Greek states and forms of government, see THE FEDERALIST NO. 4, at 49 (John Jay) (referring to the history of ancient Greek states); THE FEDERALIST NO. 6, at 54–55 (Alexander Hamilton) (discussing various Greek states); THE FEDERALIST NO. 34, at 206 (Alexander Hamilton) (discussing the legislative system in the Roman Republic); THE FEDERALIST NO. 38, at 231–33 (James Madison) (reviewing the foundation of Crete, the Locrians, Athens, Sparta, Rome, and the Achaean and Amphictyonic Leagues); THE FEDERALIST NO. 41, at 257 (James Madison) (discussing Rome's expansion); THE FEDERALIST NO. 63, at 385–89 (James Madison) (referring to the senates of Sparta, Rome, and Carthage and to putative representation in various ancient republics); THE FEDERALIST NO. 70, at 423, 425 (Alexander Hamilton) (referring to Roman dictators and consuls); THE FEDERALIST NO. 75, at 453 (Alexander Hamilton) (referring to the Roman tribuneship). This does not represent a complete list. *See also* Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEX. L. REV. 807, 817 n.51 (2002).

[42] THE FEDERALIST NO. 63 (James Madison). Compare with Professor Charles J. Reid of the University of Saint Thomas's discussion:

> Hamilton looked to historical sources to justify this proposition. Drawing deeply from classical antecedents, Hamilton observed that even "commercial republics"—he gave the examples of Athens and Carthage—fought wars with their neighbors. He feared, he confessed, "an infinity of little jealous, clashing, tumultuous commonwealths, the wretched nurseries of unceasing discord, and the miserable objects of universal pity or contempt." Without a strong union committing them to larger objectives, the leaders of the various states and regions were at risk of descending into just such a cacophony of mayhem and strife.

Charles J. Reid, *America's First Great Constitutional Controversy: Alexander Hamilton's Bank of the United States*, 14 U. ST. THOMAS L.J. 105, 126 (2018).

[43] Professor Ian Bartrum summarizes Polybius's analysis of Rome in the following way:

> Several centuries later, the Greek historian Polybius would describe Roman efforts to put these principles into practice in his influential and enduring Histories. Indeed, Polybius went beyond Aristotle to argue that the best constitution is a mixture of monarchy, aristocracy, and the people. This happy circumstance he claimed for Rome:

argued that the success of the Roman Republic came from the structure of the Roman government and the structure of the Roman Constitution.[44]

The counterargument comes in the following form: it is not that the U.S. Constitution as it was envisioned in 1787 necessarily reflects the concept of Montesquieu's French enlightenment thinking of the judiciary, the executive, and the legislative. Instead, the 1787 Constitution reflects the three parts of the Roman Republic's constitution laid out by Polybius. Polybius envisioned the Roman Republic as existing in three parts: the senate, councils, and the People's assemblies. The Senate was composed of the patricians, the wealthy in Rome. The consuls were temporary leaders tasked with carrying out the military and executive functions of the Roman Republic. The People's assemblies represented the plebeians and the free citizens of Rome, who were less wealthy than the Senate.[45]

Likewise, compared with the Constitution, with the separation of powers envisioned in 1787, the Federalists wished to see a strong judiciary. Instead, those parts that existed in 1789, when the new Constitution came

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> The three kinds of government . . . were all found united in the commonwealth of Rome. And so even was the balance between them all, and so regular the administration that resulted from their union, that it was no easy thing, even for the Romans themselves, to determine with assurance, whether the entire state was to be esteemed an aristocracy, a democracy, or a monarchy.
>
> In the Consuls, Polybius saw elements of monarchy, and in the Senate the hallmarks of aristocracy. The People and their Tribunes, too, had such a "share . . . in the administration of affairs" that one might consider the state democratic. Though he undoubtedly idealized the Roman constitution, Polybius's description of its structure, and the particular benefits thus derived, became mandatory reading for future theorists up to and including John Adams.

Ian Bartrum, *The People's Court: On the Intellectual Origins of American Judicial Power*, 125 DICK. L. REV. 283, 303–04 (2021).

[44] Polybius built off Aristotle's political philosophy. Professor Bartrum further writes:

> In particular, Polybius explored, as Aristotle had not, the specific powers that each part of the Roman regime exercised in government. The Consuls—the absolute military leaders in the field—also enjoyed substantial civil authority while in Rome: "For all other magistrates, the Tribunes alone excepted, are subject to them and bound to obey their commands." They summoned the Senate and popular assemblies and carried out their decisions and decrees, and they could draw funds from the treasury to meet their personal needs. The Senate controlled all other spending, conducted criminal investigations, issued laws and decrees, and exercised extensive control in foreign policy matters. It also controlled the purse strings while the Consuls conducted war, and could terminate or continue a Consul's command on a yearly basis. Finally, the people exercised control of elections and the law courts, decided matters of war and peace, and had final approval over laws and peace treaties.

Id. at 304.

[45] *See generally* Aditya Chakravarty, *What Role Did the Senate and Popular Assemblies Play in the Roman Republic?*, HIST. HIT (Jul. 3, 2019), https://www.historyhit.com/what-role-did-the-senate-and-popular-assemblies-play-in-the-roman-republic/.

into effect, were the House of Representatives, the Senate, and the Executive.

Again, Polybius viewed the Roman Republic's three parts without an explicit judicial function. Granted, outside the three parts of the Constitutional structure of the Roman Republic, tribunals could be set up for judges to hear cases.[46] However, those parts outlined by Polybius correlated to the three parts in the 1787 Constitution with no judiciary.

Polybius's formulation of the Roman Republic might bear more resemblance to the three branches of government–the Executive, the House of Representatives, and the Senate. This is the main counterargument: the U.S. Constitution does not resemble the three parts of Plato's *Republic* or Montesquieu's idea of the three parts of government. Instead, the U.S. Constitution of government reflects the Roman Republic's Constitution of classical antiquity.

Thus, the 1789 U.S. Constitution could reflect the Roman Republic's Constitution.[47] The 1789 Constitution had the House of Representatives,

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[46] One example of such tribunals was the court of the centumviri:

> The Roman jurists "held aloof from legal history;" "legal history remained a closed book;" "interest in legal history is shown only by two academic jurists, Pomponius and Gaius." The author is correct in stating that the extant writings on legal history per se are negligible, and that the jurists were not interested in historical jurisprudence for itself. But when he offers the story told by Gellius of the jurist who has no idea of the meaning of a word in the Twelve Tables, that "as a practising lawyer he was not called upon to cumber himself with the antiquated lumber of the Twelve Tables, which had long been abandoned in practice," he is a little unfair. For Koschaker, who uses the story to point up exactly the contrary idea, gives us the rest of the passage: "and [since] all this antiquity of the Twelve Tables was put to sleep by the enactment of the lex Aebutia, except for cases tried by legis actio procedure before the court of the centumviri, I ought only be interested in the study and science of the law and the statutes and their words, which we use." In other words, where historical institutions were of practical value, the jurist perforce made them part and parcel of his intellectual equipment.

A. Arthur Schiller, Book Review, 57 YALE L.J. 324, 329 (1947) (reviewing FRITZ SCHULZ, HISTORY OF ROMAN LEGAL SCIENCE (Clarendon Press 1946)). For a literary extrapolation of the centumviri, see Laurent de Sutter, *Legal Shandeism: The Law in Laurence Sterne's Tristram Shandy*, 23 L. & LITERATURE 224, 233 (2011).

[47] Indeed, the Founders maintained a strong veneration for the Roman Republic. As Professor Timothy G. Kearley, Emeritus of Law, University of Wyoming, College of Law wrote:

> [T]he Founders' esteem for the ancient Rome sometimes approached veneration. Most of them saw the Roman Republic's mixed constitutional system as ideal and viewed themselves as creating a similar republic in the New World. As Mortimer Sellers succinctly states it, "The Roman example gave Americans heroes, the vocabulary, architecture, and constitution for their revolutionary experiment in governing without a king." General Washington demonstrated his own veneration of Roman heroes when, in the dire circumstances at Valley Forge, he staged a reenactment of Cato the Younger's resistance to Caesar and his death at Utica trying to save the Roman Republic.

the Senate, and the Executive. These correlate to Polybius's outline of the Roman Republic of the People's Assemblies, the Roman Senate, and the Consuls. The House of Representatives and People's assemblies had a larger body representing the less wealthy free citizens. The Senate represented the wealthy interests with a more petite body than the House and People's Assemblies. The Executive and the Consuls were responsible for carrying out the role and were never permanent positions, constitutionally.[48]

This counterargument fits in the following way, as in Table 1, with no discussion of a judiciary:

Table 1

U.S. Constitution of 1789	Roman Republic, outlined by Polybius	Key Characteristics
House of Representatives	People's Assemblies	A larger body representing less wealthy free citizens
Senate	Roman Senate	More petite bodies representing the wealthy interests of free citizens
Executive	Consuls	Temporary roles for carrying out specific duties

As such, the critical key elements of the Roman Republic's constitutional framework lacked a judiciary. The U.S. Constitution provides for a judiciary, but it is not clear in 1787 that it formed one of the critical parts of government or its functions.[49]

Timothy G. Kearley, *From Rome to the Restatement: S.P. Scott, Fred Blume, Clyde Pharr, and Roman Law in Early Twentieth-Century America*, 108 L. LIBR. J. 55, 57–58 (2016).

[48] *See BRIA 8 4 b Democracy and Dictatorship in Ancient Rome*, TEACH DEMOCRACY, https://www.crf-usa.org/bill-of-rights-in-action/bria-8-4-b-democracy-and-dictatorship-in-ancient-rome (last visited Dec. 29, 2023) (consuls only held office for a year).

[49] Some scholars such as Professor Charles J. Reid have referred to this as the "Pre-Marbury" Constitution:

> Throughout, this Article will be sensitive to historical context. And that means chiefly that attention must be paid to the ways in which members of Congress and the executive branch viewed themselves as constitutional interpreters. It must be borne in mind that the debate over the Bank of the United States occurred twelve years before the United States Supreme Court handed down Marbury v. Madison. If we view the debate as the participants would have seen it, we must acknowledge that they could not have known whether a subsequent Supreme Court would claim for itself the implied power of judicial review. In that context, Congress was defining for itself what it meant to behave constitutionally, and the debate over the Bank was very much a part of that self-definition.

Reid, *supra* note 42, at 108.

Regarding the judiciary, Alexander Hamilton, famously writing in Federalist Paper No. 78, explicitly calls for judicial review and a strong judiciary.[50] Regarding judicial review and the judiciary, Hamilton writes:

> If it be said that the legislative body is themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.[51]

Hamilton further writes in Federalist Paper No. 78 on the "weak" nature of the judiciary in comparison with the other branches:

> The Executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[52]

However, there is no explicit textual reference to judicial review in the text of the Constitution similar to what Hamilton outlines in Federalist Paper No. 78.[53] Indeed, judicial review came about as a function of the midnight appointment of judges under the John Adams administration when there was a change of power from the Federalist party in the 1800 election to Thomas Jefferson.[54] Among the appointments John Adams made was William Marbury as Justice of the Peace of the District of Columbia.[55] However, Mabury never had his commission delivered to him.[56]

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[50] THE FEDERALIST NO. 78 (Alexander Hamilton).

[51] *Id.*

[52] *Id.*

[53] Judicial review did not explicitly exist, and thus the Surpeme Court in *Marbury v. Madison* had to establish judicial review. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173–74 (1803); *see also* THE FEDERALIST NO. 78 (Alexander Hamilton).

[54] Jed Glickstein, *After Midnight: The Circuit Judges and the Repeal of the Judiciary Act of 1801*, 24 YALE J.L. & HUMANS. 543, 543–44 (2012).

[55] Indeed, "[a]s the familiar story goes, right before the end of his term, President John Adams, together with the Senate, made a series of last-minute appointments, including naming William Marbury a justice of the peace for the District of Columbia." Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 25 (2021).

[56] As the story continues:

When Thomas Jefferson succeded Adams as President, Jefferson did not want the commission delivered. Jefferson thought the commission to be void. Jefferson informed James Madison, now the Secretary of State, to withhold the commission from Marbury. Marbury sued Madison for the commission.[57]

Furthermore, John Adams appointed Federalist John Marshall, Chief Justice of the Supreme Court.[58] In deciding the case of *Marbury v. Madison*, John Marshall argued from a staunchly Federalist perspective that judicial review was inherent in the Constitution.[59] However, no explicit text in the Judiciary Act of 1789 reference calls for judicial review. Thus, the function of judicial review comes about more through a judicial creation than a constitutional provision or legislative implementation.

However, there is a counterargument to the idea of judicial review. If the judiciary is tasked with interpreting the laws, which is not a far cry from interpreting such an idea from the Constitution, then how else would the Constitution be able to do this but for interpreting the laws and seeing what the law is as outlined in the case of *Marbury v. Madison*? This is a firm argument for the judicial branch inherently being part of the structure

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> Unfortunately for Marbury, Adams's Secretary of State—who was none other than John Marshall, already doubling as Chief Justice—failed to deliver Marbury's commission, and the new Secretary, James Madison, refused. After a ten-month wait, Marbury sought a writ of mandamus from the Supreme Court ordering Madison to deliver his commission. Under the act that created the office, Marbury's lawyer explained, the position was for a term of five years, full stop. The act gave the President no authority to remove justices of the peace in the middle of their terms, and thus none existed.

Id.

[57] This is the historically:

> [C]elebrated application of William Marbury, then pending before the Supreme Court, for a mandamus to compel the delivery to him by Secretary Madison, of the commission which had been signed by President Adams and sealed by Chief Justice Marshall as acting Secretary of State, appointing Marbury a justice of the peace for Washington County in the District of Columbia, and which commission had been by order of President Jefferson, who took office the day succeeding that on which the commission was sealed, retained in the Secretary's office.

Gordon E. Sherman, *The Case of John Chandler v. the Secretary of War*, 14 YALE L.J. 431, 436 (1905).

[58] John Marshall, as one of the "Midnight Judges," a label properly applied only to those appointed to the sixteen circuit judgeships, newly created by the Second Judiciary Act, which became law on February 13, 1801, and the judges and justices of the peace (of which Marbury was one) appointed under the statute establishing the District of Columbia, enacted February 27, 1801, less than a week before the end of President Adams's term of office. Marshall was nominated as Chief Justice (to succeed Oliver Ellsworth) on January 20 and took the oath of office on February 4, 1801. Telford Taylor, Book Review, 79 COLUM. L. REV. 1209, 1221–22 n.61 (1979) (reviewing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978)).

[59] 5 U.S. (1 Cranch) 137, 174–75 (1803).

of any government. Paradoxically, almost any actor in government—whether executive or legislative—has some authority to "say what the law is," from a minor instance of a police officer implementing the law to a law clerk officiating a marriage. In some sense, all actors in the executive and legislative branches of government "say what the law is," not only in carrying out the law, but as a type of interpretative role similar to what John Marshall articulated in *Marbury v. Madison*.

It is worth asking why the United States follows the idea of judicial review. Usually, courts do not critique or argue against judicial review. A rare instance of such critique arose in a dissenting opinion in 1825. The dissent in *Eakin v. Raub* provides the most explicit critique of judicial review in American judicial history.[60] The case is known for establishing judicial review in Pennsylvania.[61] One of the judges opposed that determination – Judge John Bannister Gibson. When Gibson's serious critique emerged in 1825, the concept of judicial review was taken as truth. Judge Gibson wrote in his dissenting opinion in 1825:

> But I may premise, that it is not a little remarkable, that although the right in question has all along been claimed by the judiciary, no judge has ventured to discuss it, except Chief Justice Marshall (in *Marbury v. Madison*, 1 Cranch 176); and if the argument of a jurist so distinguished for the strength of his ratiocinative powers be found inconclusive, it may fairly be set down to the weakness of the position which he attempts to defend; *si Pergama dextra defendi potuit, etiam hac defensa fuisset*. In saying this, I do not overlook the opinion of Judge Patterson, in *Vanhorne v. Dorrance* (2 Dall. 307), which abounds with beautiful figures in illustration of his doctrine; but, without intending disrespect, I submit, that metaphorical illustration is one thing, and argument another. Now, in questions of this sort, precedents ought to go for absolutely nothing. The constitution is a collection of fundamental laws, not to be departed from in practice, nor altered by judicial decision, and in the construction of it, nothing would be so alarming as the doctrine of communis error, which affords a ready justification for every usurpation that has not been resisted in limine. Instead, therefore, of resting on the fact, that the right in question has universally been assumed by the American courts, the judge who asserts it ought to be prepared to maintain it on the principles of the constitution.[62]

Judge Gibson continues in his dissent that:

> It may be alleged that no such power is claimed, and that the judiciary does no positive act, but merely refuses to be instrumental in giving effect to an unconstitutional law. This is nothing more than a repetition, in a different form of the argument–that an unconstitutional law is ipso facto void; for a refusal to act under the law must be founded on a right in each branch to judge of the acts of all the others, before it is bound to exercise its functions to give those acts effect. No such right

[60] 12 Serg. & Rawle 330 (Pa. 1825).
[61] *Id.* at 339 (Gibson, J., dissenting).
[62] *Id.* at 346 (Gibson, J., dissenting).

> is recognised in the different branches of the national government, except the judiciary (and that, too, on account of the peculiar provisions of the constitution), for it is now universally held, whatever doubts may have once existed, that congress is bound to provide for carrying a treaty into effect, although it may disapprove of the exercise of the treaty-making power in the particular instance. A government constructed on any other principle, would be in perpetual danger of standing still; for the right to decide on the constitutionality of the laws, would not be peculiar to the judiciary, but would equally reside in the person of every officer whose agency might be necessary to carry them into execution.[63]

The poignant challenge here to judicial review is that the idea that the government would be in constant danger of standing still trying to figure out what the laws are. Instead, every officer of the law needs to carry the laws out, requiring a modicum of analysis and interpretation. The person carrying out the law must interpret the law.[64] Gibson sees such a multitudinous interpretation of the law as an inevitable conclusion to Justice Marshall's pronouncement that "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."[65] But in this case, every agent of the law must interpret the law.

Judge Gibson argues that the logical conclusion for judicial review is that anyone holding any office—including those county clerks that grant routine activities as simple as marriage certificates—have the duty to interpret the law.[66] In other words, wouldn't every single person with authority in any branch of government in the United States have a duty to conduct some sort of "judicial review" or "review" of law? It would be their duty to decide whether a law is constitutional—or even just morally or legally correct. In short, "saying what the law is," according to John Marshall. In reading Judge Gibson's dissent, one wonders whether John Marshall would want the judiciary to accept legal concepts without questioning them.

Relevantly, Article III, Section 2, Clause 2 of the U.S. Constitution provides that:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned [within

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[63] *Id.* at 351 (Gibson, J., dissenting).

[64] *Marbury*, 5 U.S. (1 Cranch) at 178. One is reminded of the Roman satirist's quote "Quis custodiet ipsos custodes?". If those tasked with carrying out the laws need to interpret the law, then who and what theories guide their interpretation of the law? JUVENAL, *Satire VI*, *in* THE SATIRES ll. 347–48 (Niall Rudd trans., Clarendon Press 1991).

[65] *Eakins*, 12 Serg. & Rawle at 346, 350 (Gibson, J., dissenting); *Marbury*, 5 U.S. (1 Cranch) at 177.

[66] *Eakins*, 12 Serg. & Rawle at 353 (Gibson, J., dissenting).

> the judicial power of the United States], 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.[67]

In this crucial provision regarding the judiciary's function, there is no explicit textual reference to the powers of judicial review. However, another act regarding the judiciary came from section 13 of the Judiciary Act of 1789:

> The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts [...] and writs of mandamus [...] to any courts appointed, or persons holding office, under the authority of the United States.[68]

This passage also does not explicitly call for judicial review. However, if a court needs to hear a case and make a judicial decision, doesn't that imply that the court must "say what the law is" to decide the case?

On a related note, regarding constitutional powers, it is unclear whether the Judiciary Act of 1789 called for judicial review.[69] If that were so, could one branch of government give powers to another?[70] In other

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[67] U.S. CONST. art. III, § 3, cl. 2.

[68] Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73 (1789).

[69] *Cf.* Wallace Mendelson, *The Judiciary Act of 1789: The Formal Origin of Federal Judicial Review*, 76 JUDICATURE 133, 135 (1992). Consider alternate positions that argue perhaps judicial review was recognized by the Federalist controlled Congress prior to the Marbury Congress. Professor Wallace Mendelson of the University of Texas wrote in 1992 that of the question of judicial review that:

> At least two pre-Marbury Congresses—in the Judiciary Acts of 1789 and 1801— and the pre-Marbury Supreme Court, recognized judicial review as a constitutionally authorized power of the federal courts. What makes *Marbury v. Madison* outstanding is that in the classic age of American constitutional law it alone sought to rationalize and justify what all the other decisions and Congress had taken for granted. This is why it—an otherwise quite forgettable case29—appears in so much of the literature. The Court went out of its way to rationalize and justify because it was a crucial ploy in the complex and vicious contest between the Jeffersonians and the Federalists following the "revolution at the polls" in 1800.

Id.

Nonetheless, the fact that such a question of judicial review existed suggests the idea of judicial review was not firmly embedded in the constitutional framework of the nascent and fledging republic.

[70] This has been a hotly contested issue historically, for example, as Professor Ronald A. Cass Dean Emeritus of Boston University School of Law, wrote:

> The American Constitution designed structures intended to limit discretionary government power, checking assignments of discretionary power necessary for effective government (something the new Constitution was supposed to improve) by dividing them among different entities and different officials. The national government was granted limited powers; the states retained plenary powers not at odds with national powers; and the "vesting clauses" of Articles I, II, and III grant the entirety of the legislative, executive, and judicial

words, if three branches of government genuinely exist, could the executive give powers to the legislative?[71] Moreover, more specifically, in this case, could the legislature give powers to the judiciary?

The answer to the last question is that the legislature could give powers to the courts if the judiciary and the courts were indeed not a branch of government. In other words, if the U.S. Constitution conformed to the three branches of Polybius's conception of the Constitution – with a House of Representatives, Senate, and Executive mirroring the Peoples' Assemblies, the Roman Senate, and the Consuls – then the legislature could delegate some authority it already has to a judiciary. This is because the judiciary follows from legislative power, not executive. That is to say, in the same way the executive can delegate authority to executive agencies, the legislative could delegate legislative powers to other bodies, such as a judiciary.[72]

Alternatively, the creation of judicial review could be interpreted from the perspective of political practicalities. In 1800, Thomas Jefferson was elected President of the United States.[73] Jefferson represented the first

> powers of the national government to specific bodies and officers. That set of assignments long has been understood to preclude reassignment of those powers to others. Congress cannot, for example, claim for itself part of the President's power to appoint officers of the United States or to execute the laws, nor can it assign to non-Article III officers the judicial power of the United States.

Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 148–49 (2017).

[71] *Cf.* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1493 (2021). As Ilan Wurman, Associate Professor of Law at the Sandra Day O'Connor College of Law at Arizona State University, wrote recently in a 2021 *Yale Law Journal* article concerning this question:

> In a series of recent articles, scholars have cast doubt on originalist efforts to revive a robust nondelegation doctrine. In the most provocative of these, Julian Mortenson and Nicholas Bagley argue that there was no nondelegation doctrine at the Founding at all. According to their argument, the Founders agreed that although the legislative branch could not alienate its power–it could not give away its power for good–the legislative branch could delegate its power, so long as it had the ultimate authority to reclaim any legislative power that it had so delegated. Additionally, the Founding generation recognized governmental power to be "nonexclusive" to one particular branch; so long as Congress has authorized the Executive to take some action, that action could be characterized as executive and therefore permissible for the Executive to undertake. Turning away from Founding-era thought to legislative practice after 1789, Mortenson and Bagley argue that the legislation of the First Congress demonstrates that the Founding generation had no problem delegating vast, presumably legislative powers to the Executive. Summarizing their findings, they write, "There was no nondelegation doctrine at the Founding, and the question isn't close."

Id.

[72] *See* discussion *infra* Section II.B.

[73] Amy Tikkanen, *U.S. Presidential Election of 1800*, BRITANNICA, https://www.britannica.com/event/United-States-presidential-election-of-1800 (Nov. 15, 2023).

change in political power from political parties.[74] The Federalist Party had power over the government from George Washington to John Adams.[75] Jefferson's electoral victory represented the first time a party peacefully came to power in the U.S. through elections.[76]

As a Federalist Party member and an operative of the losing party, Marshall could have been trying to maintain Federalist ideological control of the judiciary. Marbury, a Federalist, sought appointment and writ of mandamus for support in the facts of the case *Marbury v. Madison*.[77] Marbury wished to be the Justice of the Peace of the District of Columbia.[78] In theory, John Adams had appointed Marbury through his so-called action of the "Midnight Judges Act," more formally known as the Judiciary Act of 1801.[79] In what is interpreted as a last effort to maintain Federalist Party control, John Adams and the Federalists appointed judges throughout the U.S.[80] William Marbury was one of those judges appointed by the Adams administration in the last moments of the Adams Presidency.[81] Marbury was granted the commission of the Justice of Peace of the District of Columbia. However, that commission was never delivered. Ultimately, Marshall ruled against Marbury, denying him commission.[82] The Federalist Party lost the battle. However, Marshall won the war of "judicial review."[83]

In the sense of Marshall winning on "judicial review," Marshall won a Federalist Party policy. Hamilton, in Federalist No. 78, explicitly called for judicial review.[84] Thus, the Federalists lost the battle for the justice of the peace, but they won the war for judicial review—to "say what the law is" and effectively change the U.S. forever. Because of that case, the U.S. firmly had a third section of government recognized as a distinct branch.[85]

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[74] *Federalist Party*, HISTORY (June 21, 2023) https://www.history.com/topics/early-us/federalist-party.

[75] *Id.*

[76] Sarah Pruitt, *How John Adams Established the Peaceful Transfer of Power*, HISTORY, (Jan. 14, 2021) https://www.history.com/news/peaceful-transfer-power-adams-jefferson.

[77] 5 U.S. (1 Cranch) 137, 154 (1803).

[78] *Id.*

[79] Melvin I. Urofsky, *Judiciary Act of 1801*, BRITANNICA, https://www.britannica.com/topic/Judiciary-Act-of-1801 (Feb. 19, 2018).

[80] *Id.*

[81] *Id.*

[82] *Marbury*, 5 U.S. at 180.

[83] Melvin I. Urofsky, *Marbury v. Madison*, BRITANNICA, https://www.britannica.com/event/Marbury-v-Madison (Nov. 6, 2023).

[84] THE FEDERALIST NO. 78 (Alexander Hamilton).

[85] *See Marbury*, 5 U.S. at 173–74.

Whether such an action by Marshall was proper is up for debate. However, it did bring the U.S. Constitution more in line with the concept of the three parts of government outlined in Montesquieu's *The Spirit of the Laws* (1748).[86] Whether what Marshall did was akin to seizing and expanding government power without a Constitutional Convention is debatable. However, history has generally accepted judicial review as a good move. And so does this author.

In conclusion, the counter argument against this article's trifunctional analysis is that the Constitution of 1787 came in the form of the President, the House of Representatives, and the Senate similar to the form of the Roman Republic's Constitution that the framers cited frequently.[87] But this article does not assume that premise. This article assumes and comments on the form of the Constitution created after the firm introduction of judicial review by John Marshall in *Marbury v. Madison*.

2. A Counter Argument to the Counter Argument: This is Not the Roman Republic's Constitution According to Polybius

Thus, this article does not analyze essentially what could be construed as the 1787 conception of the Constitution without a judiciary playing a key constitutional role through judicial review. Instead, this article focuses on a Constitutional framework with the existence of judicial review. Judicial review now exists as a third branch of government regardless of whether the Framers in 1787 intended such a branch to exist.

Granted, the Framers of the U.S. Constitution could not have known of Dumézil—a 20th century figure—or anthropological studies of Indo-European society. Given that Dumézil began writing almost a century and a half later and the study of anthropology in its modern form occurred about a century and a quarter later, there is evidence of knowledge of a tripartite paradigm reflected in government.[88] Whether such a paradigm was discussed at the Constitutional Convention is unknown; it at least impliedly

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[86] Matthew P. Bergman, *Montesquieu's Theory of Government and the Framing of the American Constitution*, 18 PEPP. L. REV. 1, 25 (1991). Moreover, James Madison in Federalist No. 47 discusses the nature of separation of power in the three branches of government. *See also* THE FEDERALIST NO. 47 (James Madison).

[87] Indeed, a future article could analyze the Roman Republic's Constitution laid out in Polybius's *Histories* from a Dumézilian perspective.

[88] *Module 6: Separation of Powers and Federalism*, NAT'L CONST. CTR., https://constitutioncenter.org/education/constitution-101-curriculum/6-separation-of-powers-and-federalism (last visited Dec. 29, 2023).

existed in their educations.[89] Indeed, James Madison's notes during the Constitutional Convention do not explicitly discuss Plato's *Republic*.

Even if the Framers did not have Plato's trifunctionalism in mind, the idea of Plato's Soul is arguably inherent in humans regardless of how it is defined.[90] Moreover, a structured approach to the philosophical underpinnings to a government can be assumed to have been in the framer's mind—whether consciously or subconsciously.[91] Dumézilian thought has similar methods of analysis.

B. Why Dumézil?

If one accepts the premises that structured and anthropological approaches are a reasonable mode of analysis of law, then why should one use Dumézil's approach specifically?

The idea of comparing a tripartite conception of the human society or mode of existence is not original. The idea of comparing the Platonic soul to the U.S. federal system of government has previously been written about by Akiba Covitz in *The Soul of the Polity*.[92] With the executive as logos and the legislature as eros, Covitz argued that the judiciary is thumos.[93] This article greatly appreciates Covitz's theory and writing. The predecessor to this article on the Platonic interpretation of the U.S. Constitution switched correspondences from thumos to logos for judiciary, logos to thumos for executive and maintains Covitz's conception of legislative as eros.[94] Covitz used a different terminology of 1) artifice; 2) nature; and 3) history/divinity/myth in lieu of logos, eros, and thumos, respectively.[95]

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[89] *Signers of the Constitution: Biographical Sketches*, NAT'L PARK SERV., (July 29, 2004), https://www.nps.gov/parkhistory/online_books/constitution/bio.htm; Gordon Lloyd & Jeff Sammon, *The Educational Background of the Framers*, TEACHING AM. HIST., https://teachingamericanhistory.org/resource/convention/delegates/education/ (last visited Dec. 29, 2023); *See generally* THOMAS E. RICKS, FIRST PRINCIPLES: WHAT AMERICA'S FOUNDERS LEARNED FROM THE GREEKS AND ROMANS AND HOW THAT SHAPED OUR COUNTRY (2020). Ricks explores the latest documentary evidence of the education of the main framers of the United States focusing on George Washington, Thomas Jefferson, John Adams, and James Madison. The book explores Greek and Roman ideals of virtue as well classical republicanism.

[90] *See* Lincoln, *supra* note 1.

[91] *Id.*

[92] Akiba J. Covitz, The Soul of the Polity: Beginnings of American Constitutional Thought (1999) (Ph.D. dissertation, University of Pennsylvania).

[93] *Id.* at 155.

[94] Lincoln, *supra* note 1, at 123.

[95] Covitz, *supra* note 92, at xxii, xxiii.

Covitz argues that the Constitution had a psychoanalytic dimension, and these Platonic elements largely represented this psychoanalysis.[96]

Professor Covitz sincerely wanted to explore what a constitution is. He asked "*ti esti*" or "what is?" translated from Greek.[97] This is a classic question that drove the Ancient Greeks in their purely innocent love of searching for knowledge.[98] This article has sourced inspiration from such an inquiry.

The inquiry here is what anthropological characteristics can be extrapolated from the U.S. Constitution using the Dumézilian paradigm of the human psyche. Ultimately, this is an experimental test that could lead to insights into the etiology or cause of the U.S. Constitution from a teleological perspective, but not direct practical inquires, much in the same way that in classical Graeco-Roman studies myths frequently are used as an interpretation for why a specific custom existed in Ancient Greece or Roman antiquity.

In his *Myth and History in Ancient Greece: The Symbolic Creation of a Colony* (2003), Claude Calame drew on work by Georges Dumézil arguing that the Ancient Greeks would not have viewed what we consider to be their mythology as fiction but rather the historical archeological basis of their society.[99] Likewise, the enshrining of the U.S. Constitution carries some mythological status through its interpretation in popular culture.[100] The Framers of the Constitution and the Constitution carry a cult following despite a more abundant aggregation of resources reflecting the actual nature of the Constitutional Convention of 1787, compared to events in Ancient Greece.[101] However, regardless of whether such an event is fictional, its representation as an etiology for the subsequent events in U.S. history is reasonable. Thus, analyzing the Constitution is much like investigating a myth brought down from antiquity. Additionally, it makes sense following the classical Graeco-Roman tradition of archeological analysis.

In returning to Covitz's initial inquiries of "what a constitution is," Covitz suggests an easy answer to these questions would be to "choose the

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[96] *Id.* at 37–39.

[97] *Id.* at iv.

[98] *Id.*

[99] *See* CALAME, *supra* note 4, at 116–18.

[100] Phillip E. Hammond, *Constitutional Faith, Legitimating Myth, Civil Religion*, 14 L. & SOC. INQUIRY 377, 382 (1989) (reviewing SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988)).

[101] *See also* DONALD KAGAN, NEW HISTORY OF THE PELOPONNESIAN WAR (Cornell Univ. Press 2013).

Constitution of the United States and a more contemporary and more straightforward text (at least in terms of form) such as Locke's *Second Treatise on Government*, or Montesquieu's *Spirit of the Laws*."[102] But Professor Covitz sought "more than a deeper understanding of the American Constitution; [he sought] its beginnings."[103]

Covitz followed the path of answering these questions through Platonic dialogues because if one is to understand the beginning of the U.S. Constitution, one must be familiar with not only the circumstances that gave its birth but also the great books that the authors of the Constitution read.[104] Covitz supports this point by writing, "[I]f one is to search out the theoretical beginnings of American constitutional thought, one must come to grips with the textual beginnings of the Western constitutional thought in which the American experience is itself framed."[105] This statement can be interpreted as the books and laws of which the Framers were most familiar. "[R]egardless of our views of Plato's tyrannical or democratic qualities [, i]mportant, underlying aspects of this broader realm of Western constitutional thought began in the dialogic pages and the constitutional theory of Plato's Republic."[106]

This article gained much inspiration from such inquiries. It seems reasonable, and in the spirit of Covitz's analysis, to pursue the Dumézilian paradigm. This analysis will extend beyond the works available to the Framers of the Constitution from 1789, specifically into the Dumézil trifunctionalist tradition.

II. THREE PARTS OF THE FEDERAL GOVERNMENT

A. The Judiciary

The role of judiciary, in large part, is to follow syllogistic and logical application of the law as found in the idea of *stare decisis et non quieta*

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[102] Covitz, *supra* note 92, at iv, 80–81.
[103] *Id.* at 81.
[104] *See id.* at 81–82, 159.
[105] *Id.* at 82.
[106] *Id.*

movere[107] to provide a system of legitimacy and predictability.[108] As the Ninth Circuit Court of Appeals stated, "Stare decisis is the policy of the court to stand by precedent; the term is but an abbreviation of stare decisis et non quieta movere – 'to stand by and adhere to decisions and not disturb what is settled.'"[109]

However, pure syllogistic thinking manifested in stare decisis does not always occur. Justice Rehnquist, writing for the majority in *Payne v. Tennessee*, admits, "*Stare decisis* is the preferred course because it

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[107] In the majority opinion, Chief Justice Kelly stated:

> *Stare decisis* is short for *stare decisis et non quieta movere*, which means "stand by the thing decided and do not disturb the calm." *Stare decisis* attempts to balance two competing considerations: the need of the community for stability in legal rules and decisions and the need of courts to correct past errors. This doctrine has been part of the American legal landscape since the country's formation.

Petersen v. Magna Corp., 484 Mich. 300, 314 (2009). The court further noted "[t]he doctrine can be traced back to medieval England." *Id.* at 314 n.34 (citing Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 56–62 (2001)).

The article itself notes that very few cases were recorded during the Anglo-Saxon period. However, there were many records of Anglo-Saxon and Norman history. *See, e.g.*, *Anglo-Saxon Chronicle (version D)*, *in* 2 ENGLISH HISTORICAL DOCUMENTS 103–215 (David C. Douglas & G.W. Greenway eds., S.I. Tucker trans., Routledge 2d ed. 1981) (1079). There are even visual representations, such as the Bayeux Tapestry. *See, e.g.*, *The Bayeux Tapestry*, *in* 2 ENGLISH HISTORICAL DOCUMENTS 247, 247–301 (David C. Douglas & G.W. Greenway eds., Routledge 2d ed. 1981).

But earlier Roman law was itself a compilation of cases in digests, which Roman lawyers would reference. *See* Shael Herman, *Legacy and Legend: The Continuity of Roman and English Regulation of the Jews*, 66 TUL. L. REV. 1781, 1797 (1992). Even as early as the 1st century B.C. "Cicero praised his friend, the jurist Servius Sulpicius Rufus for using dialectic and treating law as [a science]," indicating that—much like the modern method of using case law—Romans treated like cases alike. James Gordley, *The Method of Roman Jurists*, 87 TUL. L. REV. 933, 947 n.73 (2013); *see generally* PETER STEIN, REGULAE IURIS: FROM JURISTIC RULES TO LEGAL MAXIMS (1966).

By 1256 Henry de Bracton wrote of the importance of using past precedent he experienced to decide current cases before him, "if any new and unusual matters arise, which have not before been seen in the realm, if like matters arise let them be decided by like since the decision is a good one for proceeding a similibus ad similia." Healy, *supra*, at 56–57.

[108] Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 749–52 (1988).

[109] United States v. Osborne (*In re* Osborne), 76 F.3d 306, 309 (9th Cir. 1996). Moreover, the Court unpacked the etymology of *stare decisis*, writing:

> Consider the word "*decisis*." The word means, literally and legally, the decision. Nor is the doctrine *stare dictis*; it is not "to stand by or keep to what was said." Nor is the doctrine *stare rationibus decidendi* – "to keep to the *rationes decidendi* of past cases." Rather, under the doctrine of *stare decisis* a case is important only for what it decides - for the "what," not for the "why," and not for the "how." Insofar as precedent is concerned, *stare decisis* is important only for the decision, for the detailed legal consequence following a detailed set of facts.

Id.

promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[110] Moreover, regarding policy, Rehnquist writes, "Adhering to precedent 'is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.'"[111] However, he claims "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent,'" meaning, in other words, "[*s*]*tare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'"[112] He further indicates that not using *stare decisis* is "true in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'"[113]

Rehnquist's opinion on *stare decisis* has been affirmed and restated in several Supreme Court opinions. Recently in *Johnson v. United States*, Justice Scalia wrote in the majority opinion, "The doctrine of stare decisis allows us to revisit an earlier decision where experience with its application reveals that it is unworkable," showing how experience can inform application of *stare decisis*.[114]

At first, this move away from purely logical application toward using "experience" may seem like a contradiction of the purely non-emotional and non-pleasure seeking aspect of the ego in the Freudian psyche.[115] This move away from logical application is not akin to the *elegantia juris* using pure logic in law as envisioned by the Romans.[116] Rather, this move is more similar to Oliver Wendell Holmes's legal realism where he writes in his book *The Common Law*, "The life of the law has not been logic: it has been experience."[117] In a separate article, Holmes critiqued Christopher Columbus Langdell's purely scientific and logical approach, suggesting

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[110] Payne v. Tennessee, 501 U.S. 808, 827 (1991).
[111] *Id.*
[112] *Id.* at 827–28.
[113] *Id.* at 828.
[114] Johnson v. United States, 576 U.S. 591, 605 (2015).
[115] NICK RENNISON, FREUD AND PSYCHOANALYSIS 38–39 (2001).
[116] Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 861 (1989).
[117] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881).

that such a method eschews the emotional aspects of law.[118] Holmes suggested that Langdell:

> [C]ould be suspected of [not] ever having troubled himself about Hegel, [but] we might call him a Hegelian in disguise, [because] so entirely is he interested in the formal connection of things, or logic, as distinguished from the feelings which make the content of logic, and which have actually shaped the substance of the law.[119]

This mode of realism could come into action in judicial decisions, specifically with "sociological jurisprudence" proposed by Roscoe Pound, whereby courts could consider social factors in decision making.[120] Furthermore, Holmes wrote that even when decisions appear to be grounded in pure logical deductions, such decisions are just forms of policy; Holmes succinctly wrote:

> Perhaps one of the reasons why judges do not like to discuss questions of policy, or to put a decision in terms upon their views as law-makers, is that the moment you leave the path of merely logical deduction you

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[118] *Compare id.* (stating that "[t]he life of the law has not been logic: it has been experience"), *with* Andrew P. Morriss, *Codification and the Right Answers*, 74 CHI.-KENT L. REV. 355, 385 & n.161 (1999) (describing the purely scientifically logical methods proposed by Langdell).

Many legal scholars:

> [H]ave long viewed Christopher Columbus Langdell, the Dean of Harvard Law School from 1870 to 1895, as the prototypical American jurist of the late nineteenth century. He portrayed the common law as a conceptually-ordered scientific system in which rigorous logical reasoning trumped concerns about the just resolution of particular cases. In Langdell's Orthodoxy, probably the most influential modern article on Langdell, Thomas Grey dubbed this system of legal thought "classical orthodoxy." Others have labeled it "mechanical jurisprudence," "classical legal thought," "liberal legal science," or "Langdellian formalism." Whatever term they have preferred, scholars have long agreed that Gilded Age legal thinkers viewed the common law as a rigidly logical, amoral system.

Lewis A. Grossman, *Langdell Upside-Down: James Coolidge Carter and the Anticlassical Jurisprudence of Anticodification*, 19 YALE J.L. & HUMANS. 149, 150 (2007).

[119] Oliver W. Holmes, Jr., *Book Notices*, 14 AM. L. REV. 233, 234 (1880). Holmes continued a sentence later:

> The form of continuity has been kept up by reasonings [sic] purporting to reduce every thing [sic] to a logical sequence; but that form is nothing but the evening dress which the new-comer puts on to make itself presentable according to conventional requirements. The important phenomenon is the man underneath it, not the coat; the justice and reasonableness of a decision, not its consistency with previously held views … As a branch of anthropology, law is an object of science; the theory of legislation is a scientific study; but the effort to reduce the concrete details of an existing system to the merely logical consequences of simple postulates is always in danger of becoming unscientific, and of leading to a misapprehension of the nature of the problem and the data.

Id.

[120] Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 606 (1908).

> lose the illusion of certainty which makes legal reasoning seem like mathematics.[121]

However, when one picks policy as a premise for making a logical argument, and then uses logic, the legal reasoning still mirrors or can pretend to be based purely in logic – even such a decision reflects a chosen policy. Hence the perceived "certainty is only an illusion, nevertheless," as Holmes stated.[122]

B. The Executive

A prime example of the outline of the definition of the Executive branch's power is seen in *Youngstown Sheet & Tube Co. v. Sawyer*.[123] The case arose as a result of the steel strikes during the Korean War in the Truman administration.[124] President Truman sought to take executive control over the steel producers under the inherent powers doctrine.[125]

Writing for the majority opinion, Justice Black stated the Presidential and Executive Power "must stem either from an act of Congress or from the Constitution itself."[126] The Court's majority opinion stated that the Court could not:

> [W]ith faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.[127]

Furthermore, the Court declared that "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[128] This holding's assertion means that the Constitution limits the Executive's rulemaking force. Instead, the Court continues interpreting the Constitution so as to give power to the legislature to make rules:

> "All legislative Powers herein granted shall be vested in a Congress of the United States . . ." After granting many powers to the Congress, Article I goes on to provide that Congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing

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[121] Oliver W. Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 7 (1894).
[122] *Id.* at 7.
[123] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
[124] *Id.*
[125] *Id.* at 584.
[126] *Id.* at 585.
[127] *Id.* at 587.
[128] *Id.*

> Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[129]

Specifically in terms of taking of private property for public use, the Court stated only Congress is authorized for "the taking of private property for public use."[130]

Finally—perhaps in originalist interpretation fashion—the Court declared:

> The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand.[131]

In the concurring opinion, Justice Frankfurter wrote, "Loose and irresponsible use of adjectives colors all nonlegal and much legal discussion of presidential powers. 'Inherent' powers, 'implied' powers, 'incidental' powers, 'plenary' powers, 'war' powers and 'emergency' powers are used, often interchangeably and without fixed or ascertainable meanings."[132]

Discussing the separation of powers, Justice Frankfurter stated:

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.[133]

In relation to the thumos, *Youngstown Sheet & Tube Co.* represents how the Executive branch is limited in its functions of making laws, but it carries out these laws. The Executive may resolve conflicts through agencies.[134]

Through the *Chevron* deference doctrine, the Supreme Court decided that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations."[135]

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[129] *Id.* at 588.
[130] *Id.*
[131] *Id.* at 589.
[132] *Id.* at 646–47.
[133] *Id.* at 629.
[134] *Branches of Government*, U.S. HOUSE OF REP., https://www.house.gov/the-house-explained/branches-of-government (last visited Dec. 29, 2023).
[135] Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

Justice Stevens wrote, "In the Clean Air Act Amendments of 1977, . . . Congress enacted certain requirements applicable to States that had not achieved the national air quality standards established by the Environmental Protection Agency (EPA) pursuant to earlier legislation."[136] He continued, stating that, "[t]he amended Clean Air Act required these 'nonattainment' States to establish a permit program regulating 'new or modified major stationary sources' of air pollution."[137] Furthermore, the EPA required that plants comply with a certain level of conditions.[138] The issue of the case was "whether EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble' is based on a reasonable construction of the statutory term 'stationary source.'"[139]

The Court reasoned when reviewing an agency's construction of a statute, it must ask two questions.[140] The first question is "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[141] The second question arises if "Congress has not directly addressed the precise question at issue, ... the question for the court is whether the agency's answer is based on a permissible construction of the statute," meaning the court defers to an agency's interpretation.[142] If the agency does not have an interpretation, then the court would interpret the statute.[143]

The Court reasoned and "justified this new general rule of deference by positing that Congress has implicitly delegated interpretive authority to all agencies charged with enforcing federal law."[144] Indeed, "the decision [made] administrative actors the primary interpreters of federal statutes and relegated courts to the largely inert role of enforcing unambiguous statutory terms."[145]

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[136] *Id.* at 839–40 (citation omitted).
[137] *Id.* at 840.
[138] *See id.*
[139] *Id.*
[140] *Id.* at 842.
[141] *Id.* at 842–43.
[142] *Id.* at 843.
[143] *Id.*
[144] Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 969 (1992).
[145] *Id.* at 969–70.

C. The Legislative

With the example of the Eighteenth Amendment, Congress passed a law representing the *will* of portions of the country to not allow alcohol.[146] But it took the Twenty-First Amendment to realize that the Eighteenth Amendment did not accurately represent what people desired.[147] In a sense, the Eighteenth Amendment represented the soul of the polity going out of control.[148] This amendment was an unjust result, although deemed just at the time. Then Congress repealed it by deciding the Twenty-First Amendment was just and the Eighteenth unjust.[149]

The need to have rules of statutory interpretation indicates that there is a need to interpret often difficult-to-understand laws.[150] This need could be the effect of many things, such as quick drafting or the function of political maneuvering to gain enough votes.[151] Professor Gluck has pointed out that a large part of the problem with public outcry against the courts and the legislature is that the public does not have a clear idea of what the judiciary and the legislature should be doing:

> These moves have been grounded in a spectacular lack of theory about the role that courts should play in the legislative process itself – which is, after all, the fundamental constitutional question of the Court-Congress relationship in statutory cases. Should courts try to understand how Congress works, or is Congress too complex to understand? Should courts be "tough" on Congress, perhaps to incentivize Congress to draft better the next time, or should courts cut Congress some slack, and even correct enacted imperfections? Perhaps courts are best conceived as guardians of the U.S. Code, obligated to shape increasingly imperfect statutes into a more coherent product for the public, no matter how disconnected that result may be from Congress's own intentions. The Court has long resisted definitively answering these basic questions, even as the most difficult statutory cases turn on them.[152]

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[146] *Prohibition is Ratified by the States*, HISTORY (Nov. 24, 2009), https://www.history.com/this-day-in-history/prohibition-ratified.

[147] *21st Amendment is Ratified; Prohibition Ends*, HISTORY, https://www.history.com/this-day-in-history/prohibition-ends (Dec. 4, 2020).

[148] *Id.*

[149] *Id.*

[150] *See* Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 63 (2015).

[151] *See* Cristina Marcos & Sarah Ferris, *House Votes to Repeal ObamaCare*, THE HILL (Feb. 3, 2015, 5:07 AM), https://thehill.com/policy/healthcare/231638-house-votes-to-repeal-obamacare/.

[152] *See* Gluck, *supra* note 150.

The problem with the legislature not conforming to its theoretical role within the three branches of government has occurred in other branches as well, including the judiciary with the Supreme Court. Even "[t]he Warren Court understood the problems and the promises of politics from its own experience. The Court numbered among its members former senators, representatives, and state legislators, a former governor and a former mayor, and former cabinet members."[153]

Moreover, there does not seem to be a uniform system of interpreting statutes even despite its large importance for courts upholding the rules.[154] Others argue for adopting a uniform system of statutory interpretation.[155] There could be problems using different types of statutory analysis within courts because one method may work in one case, but not in another case; yet, the subsequent courts would be urged to use precedent from the former case.[156] Alternatively, others argue against a uniform system of statutory interpretation because such a system could lead to a rigid system of *stare decisis* for interpreting statutes.[157] However, despite several states having adopted "methodological" and "formalistic" *stare decisis*,[158] it is unclear whether the method produces equitable results.[159]

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[153] Pamela S. Karlan, *The Supreme Court 2011 Term: Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 5 (2012).

[154] *See generally* Carlos E. Gonzalez, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 590 (1996); *see also* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1753 (2010).

[155] Gluck, *supra* note 154, at 1754–55.

[156] Brian G. Slocum, *Overlooked Temporal Issues in Statutory Interpretation*, 81 TEMP. L. REV. 635, 637–39 (2008) (illustrating how usage of different types of statutory analysis in courts can be problematic because the same method does not work in every court).

[157] Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209, 214–15 (2015) (arguing against a uniform system of statutory interpretation).

[158] Professor Gluck expands on the terms methodological and formalistic:

> By "formalistic," I mean clearly defined, ex ante interpretive rules arranged to be applied in a consistent order. But the characteristics of the particular rules chosen (for instance, whether and when legislative history may be consulted) need not themselves be rigid. *Cf.* Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 638 (1999) ("Formalist strategies … entail three commitments: to promoting compliance with all applicable legal formalities (whether or not they make sense in the individual case), to ensuring rule-bound law … and to constraining the discretion of judges … .").

Gluck, *supra* note 154, at 1754 n.8.

[159] *See generally* Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1910 (2008).

Although the legislatures have utmost formality, such as with Robert's *Rules of Order*[160] or Thomas Jefferson's *Manual of Parliamentary Practice*,[161] statutes that come from Congress are often unclear.

III. DUMÉZILIAN TRIFUNCTIONALIST THEORY

A. Welcome to the Dumézilian Trifunctionalist Anthropological Theory of Proto-Indo European Society

Before understanding how the Dumézilian trifunctionalist theory functions within the United States federal government, a brief outline of Dumézilian conception of Proto-Indo European society is required.

Dumézil originated this theory as a formulation in the field of anthropology, specifically within the study of comparative mythology.[162] Dumézil's key formulation is that Indo-European societies, starting with Proto-Indo European societies, organize the realm of human social interaction into three functions.[163] Those three functions correspond to the religious, the warlike, and economic duties key for social organization.[164] Each of these functions operate separately.[165] This organization of human activity leads to a hierarchy.[166] The first function is the priestly function, which relates to the notions of the sacred but also relates to aspects of custom, law, and order.[167] The second function is the warlike function related to military activity and defense of society.[168] The third function is the productive function related to agricultural productivity.[169]

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[160] *See* Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 978, 982 (1989) (citing HENRY M. ROBERT III ET AL., ROBERT'S RULES OF ORDER NEWLY REVISED (11th ed. 2011)).

[161] THOMAS JEFFERSON, MANUAL OF PARLIAMENTARY PRACTICE (1801) *reprinted in* JOHN V. SULLIVAN, CONSTITUTION, JEFFERSON'S MANUAL, AND THE RULES OF THE HOUSE OF REPRESENTATIVES, H.R. Doc. No. 111–157, at 127–330 (2011).

[162] DANIEL DUBUISSON, TWENTIETH CENTURY MYTHOLOGIES: DUMÉZIL, LÉVI-STRAUSS, ELIADE 9 (Martha Cunningham trans., Routledge 2d ed. 2014) (1993).

[163] *Id.*

[164] *Id.*

[165] *See id.*

[166] *See id.*

[167] *Id.*

[168] *Id.*

[169] *See id.*

1. Mythological Examples of Dumézil's Trifunctional Hypothesis

Dumézil identifies the earliest manifestation of the tripartite distinction in Proto-Indo-European mythological constructs.[170] Each portion of society had a link to a god to represent that social group's function.[171] Dumézil identifies these functions in cross-mythological schemes.[172] Dumézil analyzes the myths as representations of the values in society, stating:

> These myths may be of diverse types. With respect to their origin, some are drawn from authentic events and actions in a more or less stylized fashion, embellished, and set forth as examples to imitate; others are literary fictions incarnating important concepts of the ideology in certain personages and translating the relations between these concepts into the connections between various figures. With respect to their settings and to the cosmic dimensions of the scenes, some are located outside the narrow confines and the few centuries of national experience; they adorn a remote past or future and inaccessible zones where gods, giants, monsters, and demons have their sport; others are content with ordinary men, with familiar places, and with plausible eras. But all these narratives have one and the same vital function.[173]

Such an idea is not unique to Dumézil.[174] Dumézil admits, "The comparative investigation of the oldest Indo-European civilizations which has been going on for about thirty years has had to take into account both this functional unity of the myths and this variety of mythic types." Interpreting myths or religion as a way to justify society relates to a long tradition of societal and anthropological analysis.

Dumézil writes on the importance of poetry and myth to justify the functions of society in the following way:

> "A land that has no more legends," says the poet, "is condemned to die of cold." This may well be true. But a people without myths is already dead. The function of that particular class of legends known as myths is to express dramatically the ideology under which a society lives; not only to hold out to its conscience the values it recognizes and the ideals it pursues from generation to generation, but above all to express its very being and structure, the elements, the connections, the balances, the tensions that constitute it; to justify the rules and traditional practices without which everything within a society would disintegrate.[175]

For the first function of the priestly activities, Dumézil identifies gods linked to Vedic India, the Mahābhārata, Norse Mythology, and Roman

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[170] *Id.* at 12.

[171] LITTLETON, *supra* note 3, at 4–5.

[172] *See* GEORGES DUMÉZIL, THE DESTINY OF THE WARRIOR, at x–xi (Alf Hiltebeitel trans., Univ. Chi. Press 1970) (1969).

[173] *Id.* at 3.

[174] *Id.*

[175] *Id.*

mythology. Dumézil compares all these Indo-European myths with each other where "[t]he oldest son representing sovereignty and moral virtue as they are connected with ... the Indo-European first function, is Yudhisthira, the son of . . . myth and epic: for instance, in Rome, Greece, and India."[176] Respectively, in Vedic India, the gods Mitra and Varuna relate to the priestly function of sovereignty relating to notions of sacred and magical activities.[177] Dumézil writes, "[a]t the first level of Vedic theology, the two principal sovereign gods, Varuna, the all-powerful magician, and Mitra, the contract personified, have created and organized the worlds, with their plan and their overall mechanisms."[178]

Professor C. Scott Littleton expands on Dumézil's idea writing that at "[t]he first or most important function (i.e., the priestly stratum) . . . appear the sovereign gods, Mitra and Varuna."[179] The priestly function also relates to justice and notions of law as outlined in contracts.[180] Likewise, in the Mahābhārata, the hero Yudhishthira relates to the priestly function.[181] In the Norse mythological tradition, Odin and Týr relate to the priestly function of law and a connection to the notion of the mystical or magical.[182]

Roman mythology directly reinforces the idea of a tripartite system of the Archaic Triad of the divine Roman mythology consisting of Jupiter, Mars, and Quirinus. Of the gods in the Archaic Triad, Jupiter is most closely associated with the sovereign function relating to law, justice, and the idea of the sacred.[183]

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[176] ALF HILTEBEITEL, THE RITUAL OF BATTLE: KRISHNA IN THE MAHĀBHĀRATA 27, 30 (1976).

[177] DUMÉZIL, *supra* note 172, at 4; LITTLETON, *supra* note 3, at 4, 8.

[178] DUMÉZIL, *supra* note 172, at 4.

[179] LITTLETON, *supra* note 3, at 4, 8.

[180] *Id.* Regarding the connection of the priestly function and contracts in a legal sense:

> A brief synopsis of Bergaigne and, in particular, Dumézil's thesis may be necessary before proceeding to re-establish the otherwise missing component of *Ṛta*. The Gods in themselves represent distinct functions. Mitra, the more peaceful and peacable of the two, performs the formal, juridical and priestly function of sovereignty. His concerns are with harmonious relationships and therefore with contract.

Piyel Haldar, *Sovereignty and Divinity in the Vedic Tradition: Mitra-Varuna, Prajā-Pati and RTA*, 115 DIVUS THOMAS 382, 389 (2012).

[181] LITTLETON, *supra* note 3, at 18; *see also* ANDERS HULTGÅRD, THE END OF THE WORLD IN SCANDINAVIAN MYTHOLOGY: A COMPARATIVE PERSPECTIVE ON RAGNARÖK 14 (2022) ("In the Mahābhārata, this is a fairly short period of time . . . . The good times that follow during the reign of Yudhishthira correspond to the renewal of the world in the Scandinavian myth.").

[182] LITTLETON, *supra* note 3, at 12.

[183] DUMÉZIL, *supra* note 172, at 6.

The second function deals with the military and defense of people relating to notions of physical activity and the idea of nobility. Dumézil notes that in Vedic India, the gods associated with this function are Indra and Vāyu.[184] Dumézil identifies the heroes Arjuna and Bhima as related to nobility and physical defense.[185] In Norse mythology, Dumézil identifies the god Thor as most closely related to the physical activity of warlike functions.[186] Finally, in the Roman pantheon, Mars in the Archaic Triad represents the warlike function.[187]

The third function relates to the idea of fertility in social activity. Specifically, this fertility function relates to farmers and agricultural activity[188] as well as to craftsmen and merchants. Likewise, in Vedic India, the two Ashvins relate to the fertility function.[189] In the Mahābhārata, the heroes Nakula and Sahadeva relate to the fertility function.[190] In Norse mythology, Dumézil identifies several gods related to the function of fertility. Those gods in the Norse mythological construct are Frey, Freyja,[191] Njord,

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[184] WOUTER W. BELIER, DECAYED GODS: ORIGIN AND DEVELOPMENT OF GEORGES DUMÉZIL'S "IDÉOLOGIE TRIPARTIE" 173–75 (1991).

[185] LITTLETON, *supra* note 3, at 124. Here in Dumézil's thought "they are connected with what Georges Dumézil has called the . . . warrior[] function are Bhīma and Arjuna, sons of Vāyu and Indra." HILTEBEITEL, *supra* note 176, at 27.

[186] LITTLETON, *supra* note 3, at 12, 76; Jens Peter Schjødt, Óðinn, Þórr and Freyr: Functions and Relations, in NEWS FROM OTHER WORLDS: STUDIES IN NORDIC FOLKLORE MYTHOLOGY AND CULTURE 64, 67, 78 (Merril Kaplan & Timothy R. Tangherlini eds., 2012) (regarding the Norse pantheon from an anthropological perspective "of three gods in such wise that the mightiest of them, Thor, . . . three functions of Dumézil, it is just that there are two gods . . . success in war, including strategic skills and warlike ecstasy.").

[187] LITTLETON, *supra* note 3, at 68–70 (describing Dumézil's approach of the Capitoline or archaic triad, consisting of Jupiter, Mars, and Quirinus as operating in the warlike function); 6 STRUCTURALISM IN MYTH: LÉVI-STRAUSS, BARTHES, DUMÉZIL, AND PROPP 53, 65, 80 (Robert A. Segal, ed. 1996) (interpreting the Roman pantheon as "Mars, and Quirinus, and this triad [*dieser Dreiverein*] of gods . . . is also very old, older than Rome, and the functional pair rex-. . . gods, but aligned with the circumstance, which is warlike.").

[188] DUMÉZIL, *supra* note 172, at 6.

[189] GEORGES DUMÉZIL, GODS OF THE ANCIENT NORTHMEN 16 (Einar Haugen ed. & trans., Univ. Cal. Press 1973) (1959).

[190] Zdenko Zlatar, *Approaches to the Ur-Mahabharata*, 15 SYDNEY STUD. IN SOC'Y & CULTURE 243, 252–53 (1997). Zlatar states:

> Dumézil showed that the group of five heroes of *The Mahabharata*, the Pandava brothers, "were duplications as to their characters, their actions, and their relationships (beginning with the very order of their birth) of the hierarchised group constituted in the earliest Vedic mythology by the gods of the three functions: the just king Yudhisthira is modelled on Mitra (simply rejuvenated as Dharma), the two kinds of warrior, Bhima and Arjuna, on Vāyu and Indra, and the two twins Nakula and Sahadeva on the Nasatya twins."

[191] "The fertility aspect which Heimdallr shares with Freyja is also appropriate here." Britt-Mari Näsström, *Freyja—a Goddess with Many Names*, *in* THE CONCEPT OF THE GODDESS 82–91 (Routledge 2002).

and the gods Vanir.[192] In the Roman Archaic Triad, the god Quirinus relates to the fertility function.[193]

2. Ancient Rome as an Example of Dumézil's Trifunctional Hypothesis

Dumézil argues that Ancient Roman society provides a unique insight into the trifunctional hypothesis.[194] In Ancient Roman society, Dumézil identified three classes: the flamen, the Roman citizens, and the residents and slaves.[195]

In outlining the structure of Roman society from a Dumézilian anthropological perspective, the Italian historian and professor of Classical Antiquity, Arnaldo Momigliano, provides a unique insight into Dumézil's description of Ancient Rome and the three classes.[196] Donald Kagan, Sterling Professor of Classics and History Professor of Yale University, described Momigliano as "the world's leading student of the writing of history in the ancient world."[197] Momigliano's outline is particularly insightful because the goal of his work overall aims to critique Dumézil's theories.[198] Therefore, such an accurate reflection of Dumézil's writings is even more compelling before Momigliano criticizes them.

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[192] Carl Lindahl, *Book Review: Gods of the Ancient Northmen by Georges Dumézil and Einar Haugen*, 93 J. OF AM. FOLKLORE 224, 224–25 (1980) ("When this schema is applied to Norse mythology, Dumézil identifies . . . Frey and Njord as the paired fertility deities of land and sea"). Vanes is translated to "Vanir" in English, and refers to the god Freyja. *See generally* Dieux Ases et Dieux Vanes: "délimite les positions respectives des grands dieux Odhmrc, Thôrr, Freyr dans la mythologie Scandinave et se complète par l'étude du mythe de Kvasir..." GEORGES DUMÉZIL, LES DIEUX DES GERMAINS: ESSAI SUR LA FORMATION DE LA RELIGION SCANDINAVE (1959).

[193] DUMÉZIL, *supra* note 189, at xii.

[194] Douglas J. Stewart, *"Mythomorphism" in Greco-Roman Historiography: The Case of the Royal "Gamos,"* 22 BUCKNELL REV. 186, 186 (1976).

[195] Arnaldo Momigliano, *Georges Dumézil and the Trifunctional Approach to Roman Civilization*, 23 HIST. & THEORY 312, 316–17 (1984); *see generally* BELIER, *supra* note 184; Littleton, *supra* note 3.

[196] *See generally* Momigliano, *supra* note 195, at 316–17.

[197] Donald Kagan, *The Human Sources of History: A Review of The Classical Foundations of Modern Historiography (Sather Classical Lectures) by Arnaldo Momigliano*, NEW CRITERION, https://newcriterion.com/issues/1992/3/the-human-sources-of-history (last visited Dec. 29 2023).

[198] *See generally* Momigliano, *supra* note 195, at 322–24.

Dumézil identifies the flamen as the priests of the Ancient Roman religion.[199] The flamen did not have explicit political power.[200] In relation to the nature of the flamen's political authority, Professor Momigliano writes that "[i]n Ouranos-Varuna Dumézil studies the god of sovereignty, and in Flamen-Brahman he tackles the relation between priest and sacrifice at that precise point in which the priest acts in support of sovereignty." Historian Charles Goldeberg writes that the flamen's "duties severely curtailed or prohibited outright the ability of these priests to hold political office."[201] Yet at the same time, the flamen were those who managed and regulated the state-sponsored religion in Rome that helped legitimize the current regime of political power.[202] The emperors including Octavian would ask the priestly class to provide legitimacy to the new emperor's regime.[203]

Dumézil describes the Roman citizens as consisting of the second class.[204] Professor Momigliano discusses Dumézil's interpretation of the legends of Camillus and Coriolanus as preserving the trifunctionalist mentality.[205] The absence of the second function is deliberate because Coriolanus himself represents the second function.[206] Discussing the second class in Ancient Rome, Momigliano writes:

> [I]n his latest stage Dumézil attributes more importance to the legends of Camillus and Coriolanus, in both of which he recognizes the preservation of the trifunctional Indo-European mentality. Camillus and Coriolanus would be antithetic heroes: Camillus saves Rome, Coriolanus betrays Rome. In the episode of the siege of Rome by the Gauls, in which Camillus is ultimately involved as the savior, three episodes discourage the Gauls and give courage to the Romans. The geese repel the Gauls; the Romans throw bread from the besieged Capitol to show that they have plenty to eat; and a member of the Fabian gens goes down from the Capitol to fulfill religious duties and is not molested, which may be a miracle. In the attempt to persuade Coriolanus not to attack Rome, there is a sequence of three embassies: the first by Roman notables; the second by priests; the third by ladies, including Coriolanus's mother: needless to say, the success is with the Roman ladies, "matronae." Dumézil has no particular difficulty in showing that in the Camillus story the geese may represent the

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[199] *See* J. Gonda, *Dumézil's Tripartite Ideology: Some Critical Observations*, 34 J. OF ASIAN STUD. 139, 148 (1974). Dumézil identifies "the Latin flamen 'priest [as part] of a special deity, member of a group of fifteen priests.'"

[200] *See* Momigliano, *supra* note 195, at 315–16, 320.

[201] Charles Goldberg, *Priests and Politicians: Rex Sacrorum and Flamen Dialis in the Middle Republic*, 69 PHX. 334, 334 (2015).

[202] *See* GREG WOOLF, RELIGION AND POWER: DIVINE KINSHIP IN THE ANCIENT WORLD AND BEYOND 238, 241–42 (Nicole Brisch ed. 2008).

[203] *Id.* at 238, 242.

[204] *See* Momigliano, *supra* note 195, at 316, 325–26.

[205] *Id.* at 324–25.

[206] *Id.* at 325.

> military function, the bread is evidently third function, and the godly Fabius who performs a sacrifice is first function par excellence. Things are not so simple for Dumézil in the story of Coriolanus because Dumézil is not prepared to admit that the first embassy of the notables represents the Roman army, that is the second function, while of course the priests and women of the other delegations easily fit the roles of the first and of the third function. Dumézil prefers to believe that both the first and the second embassy represent the first function in its bipartition of magic and law. Why then is the second function missing? Dumézil has a wonderful solution to his own difficulty. If the second function does not appear in the embassies it is because the second function was embodied in Coriolanus, and Coriolanus is now, so to speak, on the other side. Those who composed the legend of Coriolanus knew so much about the three functions that they could intentionally eliminate the second function from the embassies.[207]

However, the citizens of Rome did not mean residents of Rome.[208] To become a senator or an emperor in Ancient Rome, a person had to be a citizen.[209] Regarding eligibility of Roman citizenship, the American historian Bruce Bartlett writes that distinctions existed within Rome for government benefits and namely that "[e]ligibility consisted mainly of Roman citizenship, actual residence in Rome, and was restricted to males over the age of fourteen. Senators and other government employees generally were prohibited from receiving grain."[210] A citizen in Ancient Rome meant a free man.[211] As Jane F. Gardner wrote, "[s]ome Roman citizens were in fact born free, but not as citizens, and these included not only free foreigners granted citizenship, but also freed slaves."[212]

Finally, the residents and non-citizens—often consisting of Roman slaves—were the third class.[213] In analyzing Dumézil's writings, Momigliano writes of the third class of Rome:

> [T]he recent views of Dumézil on Roman Law, contained in his book on *Mariages indo-europeiens*. In this work Dumézil partly depends on the late Lucien Gerschel, but has also received help at various stages from specialists of Roman Law of the eminence of the late Pierre Noailles and of Andre Magdelain.

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[207] *Id.* at 324–25.

[208] *See* JANE F. GARDNER, BEING A ROMAN CITIZEN 1 (2010); SETH KENDALL, THE STRUGGLE FOR ROMAN CITIZENSHIP: ROMAN, ALLIES, AND THE WARS 91-77 BCE 30 (2013).

[209] *See generally* Andrew Wallace-Hadrill, *Civilis Princeps: Between Citizen and King*, 72 J. OF ROMAN STUD. 32 (1982). "Since Caracalla's edict of AD 212 virtually all the subjects of the empire had possessed the Roman citizenship." WAR AND SOCIETY IN THE ROMAN WORLD 7 (John Rich & Graham Shipley eds., 1993).

[210] Bruce Bartlett, *How Excessive Government Killed Ancient Rome*, 14 CATO J. 287, 290 (1994).

[211] *See* GARDNER, *supra* note 208, at 3.

[212] *Id.*

[213] *See* Momigliano, *supra* note 195, at 326–27.

> Dumézil argues that the three Roman forms of marriage (by *confarreatio*, by *usus*, and by *coemptio*), the three forms of testament (before the *comitia curiata*, *in procinctu*, and *per aes et libram*) and finally the three forms of manumission of slaves (*vindicta*, *censu*, and *testamenti*) reflect the trifunctional structure of Roman society with its Indo-European roots. Taken literally, this statement would mean that Roman society was divided into priests, warriors, and peasants and that each group had its own peculiar form of marriage, of testament, and of manumission of slaves. Thus the priests would marry by *confarreatio*, by sharing a sort of cake. They would make their testament at stated dates (perhaps twice a year) before the whole assembly of the *comitia curiata*, and would liberate their slaves by the complex and symbolic ceremony of the *vindicta*. The soldiers in their turn would marry informally by simple cohabitation (*usus*), would make their own testament in the presence of their own comrades just before a battle (*in procinctu*), and would free their slaves by inserting their names into the lists of Roman citizens during a *census*. The workers would buy their wives (*coemptio*), would make their testament in the form of a fictitious sale of their own property (*per aes et libram*), and would free their slaves by testament only. Of course, none of this is true, or almost none. It is possible that the marriage by *confarreatio* was originally confined to patricians; it was certainly not confined to priests. All the rest was anarchically left to individual choice. It was for the individual citizen to choose what form of testament he preferred. It is also obvious that the testament on the battlefield was an emergency measure for those who had not made a testament either before the *comitia curiata* or in the complex form of a fictitious sale. In later periods there were in fact even more than three forms of testament. Societies are apt to provide alternative forms of doing the same thing.[214]

Bartlett describes the conditions of this separate class by stating that "grain was available only to adult male Roman citizens, thus excluding the large number of women, children, slaves, foreigners, and other non-citizens living in Rome."[215] Here, Bartlett indicates that those who were not Roman citizens did not have as many rights as Roman citizens.[216] For this specific analysis of Roman history, Dumézil received criticism.[217] For example, Momigliano argued that such an understanding of Ancient Roman society was incorrect.[218] Such criticisms seem thorough, well thought out, concise, and germane. Again, this article does not argue that Dumézil's analysis is true or factually accurate.[219] Rather, this article hopes to deploy it as a useful heuristic in analyzing law, namely the U.S. Constitution.

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[214] *Id.*

[215] Bartlett, *supra* note 210, at 290.

[216] *See id.*

[217] Arnaldo Momigliano, *An Interim Report on the Origins of Rome*, 53 J. ROMAN STUD. 95, 133 (1963). Again, this law article does not take a position on whether Dumézilian theory is correct.

[218] *Id.* at 133–34.

[219] *Cf.* BRUCE LINCOLN, THEORIZING MYTH: NARRATIVE, IDEOLOGY, AND SCHOLARSHIP 123–24 (1999). Here, Professor Bruce Lincoln, Caroline E. Haskell Distinguished Service Professor Emeritus of the History of Religions in the Divinity School; also in the Center

3. The End of Indo-European Trifunctionalism

Dumézil argued that the three functions of Indo-European society lasted naturally from the Middle Ages until 1789 when the French Revolution led to the abolishment of the tripartite Ancien Régime.[220] The Estates General had three formal class distinctions in the French kingdom at the time.[221] The clergy made up the First Estate.[222] The nobility consisted of the Second Estate.[223] The commoners formed the Third Estate. [224] These three Estates aligned perfectly with Dumézil's trifunctionalist hypothesis.[225] Dumézil argues that the Estates General of 1789 led to the end of the tripartite system.[226]

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for Middle Eastern Studies and Committee on Medieval Studies; Associate Faculty in the Departments of Anthropology and Classics of the University of Chicago, wrote:

> Dumézil's [scholarship] won him virtually universal admiration. [He was a] scholar of extraordinary abilities and erudition . . . Among his other gifts, he was master of countless languages: virtually all the Indo-European family, including some of its more obscure members (Armenian, Ossetic), as well as most of the Caucasian languages, one of which (Oubykh) he saved from extinction, and a few outliers like Quechua, which he seems to have acquired simply for fun. His oeuvre spanned six decades and includes more than fifty books, all of which are marked by extraordinary lucidity, ingenuity, rigor, and intelligence. His accomplishments have won wide acclaim among philologians, historians of religions, and anthropologists.

Id.

[220] Dumézil argues that the Estates General of 1789 led to the end of the tripartite system. Sverre Bagge, *Old Norse Theories of Society from Rígspula to Konungs Skuggsiá*, UNIV. OF BERGEN OPEN RSRCH. ARCHIVE 7 (2000), https://bora.uib.no/bora-xmlui/bitstream/handle/1956/674/Old%20Norse%20Theories%20of%20Society.pdf.

[221] Andrea Bierstein, *Millennium Approaches: The Future of the Voting Rights Act After Shaw, De Grandy, and Holder*, 46 HASTINGS L.J. 1457, 1472 n.51 (1995) ("The Estates General in France, too, consisted of representatives of the three estates recognized in society, the clergy, the nobility, and the common people.").

[222] *See id.*

[223] *See id.*

[224] *See id.*

[225] *See* Joseph A. Dane, *The Three Estates and Other Mediaeval Trinities*, 3 FLORILEGIUM 283, 284 (1981).

[226] Dumézil expressly wrote, "[L]e schéma tripartite est mort en Occident avec les États généraux de 1789, quand la noblesse et le clergé ont baissé le pavillon devant le tiers état. On a enfin répondu à la question : qu'est-ce que le tiers état ? Eh bien, c'était la ruine du système trifonctionnel." Georges Dumézil, *Le Parcours Initiatique d'un "Parasite" des Sciences Humaines*, *in* PASSION DU PASSÉ 54, 56–57 (1987).

More recently, Thomas Piketty, the French economist,[227] adopted Dumézil's trifunctional approach in his *Capital and Ideology* (2019) book on wealth and income inequality in the modern world.[228] Piketty writes:

> In 1939, the anthropologist and linguist Georges Dumézil published *Mythes et dieux des Germains* (*Myths and Gods of the Germans*), an "essay of comparative interpret-ation," in which he analyzes the relationship of ancient German mythology to Indo-European religious concepts and representations. In the 1980s Dumézil was caught up in a nasty polemic in which he was accused of conniving with Nazis or at the very least participating in an anthropological justification of the warrior spirit said to have come from the East. In reality, he was a French conservative of monarchical leanings who could not really be accused of Hitlerist sympathies or Germanophilia. In his book on tri-functional ideology he sought to show that ancient Germanic myths were structurally unbalanced by hypertrophy of the warrior class and an absence of a true sacerdotal or intellectual class (in contrast to the Indian case, for example, where the Brahmins generally dominated the Kshatriyas).
>
> These references to trifunctional logics in the interwar years may seem surprising. Once again, they illustrate the need to make sense of structures of inequality and the way they evolve, in this case, through the emergence of a new warrior order in Europe. They also remind us that proprietarian ideology never really stopped trying to justify inequality in the trifunctional key. Europe's economic takeoff owed little to its virtuous and peaceful proprietarian institutions . . . It owed much more to the ability of European states to maintain order to their advantage at the international level as they relied both on military domination and on their supposed intellectual and civilizational superiority. [229]

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[227] Thomas Piketty (born May 7, 1971, Clichy, France):

> [Piketty] is a French economist who was best known for Le Capital au XXIe siècle (Capital in the Twenty-first Century (2013)). Piketty was born to militant Trotskyite parents and was later politically affiliated with the French Socialist Party. After he took the baccalauréat examination, he spent two years preparing for the École Normale Supérieure (ENS) entrance examination. From the ENS he received (1990) an M.Sc. degree in mathematics. In 1993 he was awarded a Ph.D. in economics from the École des Hautes Études en Sciences Sociales (EHESS) and the London School of Economics European doctoral program for a dissertation on the theory of the redistribution of wealth. After Piketty taught (1993–95) at the Massachusetts Institute of Technology, he returned to France as a research fellow (1995–2000) at the Centre National de la Recherche Scientifique. He became professor of economics at the EHESS (2000) and also at the Paris School of Economics (2007), of which he was the founding director. He was the author of numerous other books and articles and, in collaboration with French American economist Emmanuel Saez, British economist Anthony B. Atkinson, and Facundo Alvaredo of Argentina, was a compiler of the World Top Incomes Database.

Martin L. White, *Thomas Piketty*, BRITANNICA, https://www.britannica.com/biography/Thomas-Piketty (Nov. 13, 2023).

[228] THOMAS PIKETTY, CAPITAL AND IDEOLOGY 478 (Arthur Goldhammer trans., Harv. Univ. Press 2020).

[229] *Id.*

Reviewing Piketty's work in *The New Yorker* magazine, Idrees Kahloon writes, "[a]dopting a theory of the French philologist Georges Dumézil, Piketty writes that early societies were 'trifunctional'—in ways largely determined by birth, you were a member of the clergy, the warrior-nobility, or the peasantry."[230] Piketty further summarizes Dumézil's:

> [G]eneral thesis (founded on the analysis of ancient myths, a method that, as we saw in the case of India, is not always well suited to analyzing sociohistorical change and that tends to petrify supposed civilizational differences) was that Germano-Scandinavian myths and religions were excessively focused on the warrior cult and neglected the trifunctional equilibrium that one finds in both the Italo-Celtic and Indo-Iranian worlds.[231]

Kahloon points out that Piketty compares the notion of Dumézilian trifunctionalism as "similar, he notes, [as that which] can be seen in 'Planet of the Apes' and 'Star Wars.'"[232] Kahloon further identifies that Piketty notes that "[d]uring this period of limited mobility, inequality was justified by the notion that the castes were interdependent—like the limbs of the body."[233] Piketty's serious treatment of Dumézil's theories shows that such analysis is warranted and makes sense within the conception of constitutional interpretation.

Concurrently, a society has all three parts within itself. One might expect that such a society acts justly if all the parts of the society act as each is meant to act. This is not always so.

4. Summary of Dumézil's Theory of Trifunctionalism

The following is this author's summary of the structure of Dumézil's trifunctionalist hypothesis. Table 2 only uses examples that Dumézil wrote and discussed.

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[230] Idrees Kahloon, *Thomas Piketty Goes Global*, NEW YORKER (Mar. 2, 2020), https://www.newyorker.com/magazine/2020/03/09/thomas-piketty-goes-global.

[231] PIKETTY, *supra* note 228, at 478 n.92 (citing DIDIER ERIBON, FAUT-IL BRÜLER DUMÉZIL? 185–206 (Flammarion 1992)).

[232] Kahloon, *supra* note 230.

[233] *Id.*

Table 2

	First	**Second**	**Third**
	Priestly – Sovereign Function	**Warlike – Military Function**	**Productivity – Fertility Function**
Vedic India	Mitra & Varuna	Indra & Vāyu	The two Ashvins
Mahābārata	Yudhishthira	Arjuna & Bhima	Nakula & Sahadeva
Norse Mythology	Odin & Týr	Thor	Freyr, Freyja, Njord, & the gods Vanir
Roman Mythology – focusing on the Archaic Triad	Jupiter	Mars	Quirinus
Estates of the *Ancien Régime*	First Estate (clergy)	Second Estate (nobility)	Third Estate (commoners)
Ancient Rome	Flamen	Roman citizens	Roman residents

5. Freudian Psychoanalysis as an Example of Dumézil's Trifunctional Hypothesis

Sigmund Freud was an Austrian neurologist known as the founder of psychoanalysis.[234] Freud developed a paradigm that divides the human

[234] Sigmund Freud (born May 6, 1856, Freiberg, Moravia, Austrian Empire [now Příbor, Czech Republic]—died September 23, 1939, London, England):

> [Freud] is an Austrian neurologist and the founder of psychoanalysis. Freud may justly be called the most influential intellectual legislator of his age. His creation of psychoanalysis was at once a theory of the human psyche, a therapy for the relief of its ills, and an optic for the interpretation of culture and society. Despite repeated criticisms, attempted refutations, and qualifications of Freud's work, its spell remained powerful well after his death and in fields far removed from psychology as it is narrowly defined. If, as the American sociologist Philip Rieff once contended, "psychological man" replaced such earlier notions as political, religious, or economic man as the 20th century's dominant self-image, it is in no small measure due to the power of Freud's vision and the seeming inexhaustibility of the intellectual legacy he left behind.

Martin Evan Jay, *Sigmund Freud*, BRITANNICA, https://www.britannica.com/biography/Sigmund-Freud (Nov. 9, 2023).

psyche into three parts.[235] Winfried Brugger, the Professor of Public Law, Philosophy of Law and Theory of State at Heidelberg University in Germany, outlined the Freudian psyche and its philosophical basis in the following way:

> According to Kant, humans are influenced but not necessarily determined by their urges and inclinations, which is why they can and should be responsive to social and legal norms that can be scrutinized and approved of by everyone concerned, using the categorical imperative. Thus, according to Kant, humans have the task to discipline, cultivate, civilize, and moralize their empirical inclinations. Psychoanalysis is one of the disciplines that has systematized the main drift of these ideas. Sigmund Freud speaks of the configuration of the human psyche in the categories of Id, Ego, and Super-Ego. The Id is our animalistic nature pressuring the ego "from below," representing our most basic human needs and their desire for satisfaction. The norms and ideals of what is beautiful, good, just, and transcendent, herald "from above," visually and metaphorically speaking. These highest ideals - fostered in all individuals through their socialization and enculturation - expand or delimit the basic needs "from below" and turn the human eye "forward" toward the future.[236]

Freud wrote that the psyche (ψυχή) consists of three parts; the ego (the more logical and self-sustaining force),[237] the super-ego (the force often pressing down as a sort of moral force),[238] and the id (the more emotional and erotically chaotic part of the psyche).[239] Regarding the super-ego, Freud wrote:

> [A] child's super-ego is in fact constructed on the model not of its parents but of its parents' super-ego; the contents which fill it are the same and it becomes the vehicle of tradition and of all the time-resisting judgments of value which have propagated themselves in this manner from generation to generation.[240]

Concurrently, a person has all three parts within themselves and acts justly if all the parts of the psyche act as they are supposed to act.[241] If

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[235] Winfried Brugger, *Dignity, Rights, and Legal Philosophy Within the Anthropological Cross of Decision-Making*, 9 GERM. L.J. 1243, 1246 (2008).

[236] *Id.* at 1246–47.

[237] Freud wrote that "the ego is that part of the id which has been modified by the direct influence of the external world . . . The ego represents what may be called reason and common sense, in contrast to the id, which contains the passions." SIGMUND FREUD, THE EGO AND THE ID 25 (James Strachey ed. 1923). It is like a tug of war, with the difference that in the tug of war the teams fight against one another in equality, while the ego is against the much stronger "id." *Id.*

[238] SIGMUND FREUD, NEW INTRODUCTORY LECTURES ON PSYCHOANALYSIS 4669 (1933).

[239] *Id.* at 4682.

[240] *Id.* at 4676.

[241] *superego*, BRITANNICA, https://www.britannica.com/science/superego (Oct. 10, 2023).

each part of the psyche and each part of the polity or political union conduct their activities according to their mode of existence, then the person could reach some psychological stability in their mind.[242]

Essentially, the Freudian psyche overall consists of three parts: the ego, id, and super-ego. Each part represents a key part of the human mind's psyche for Freud, and each part works in conjunction with the other parts and is essential for their healthy functioning. In a sense, a balance must exist between all three parts.

Arguably, the most vivid and compelling artistic representation of Freud's paradigm comes from the philosopher and psychoanalytic social critic Slavoj Žižek's interpretation from his 2009 documentary titled *The Pervert's Guide to Cinema*.[243] Of the three layers of the house in Alfred Hitchcock's 1960 movie from golden age classic Hollywood cinema, *Psycho*,[244] he observes that the main house in *Psycho* has three levels and contends that each level corresponds a part of the human psyche postulated by Freudian psychoanalysis.[245] According to Žižek's, the top floor represents the super-ego where Norman Bates' mother resides entirely in the movie; the ground floor represents the Freudian ego where all the normal seeming activity of the movie occurs; and the basement/fruit cellar

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> [The] super-ego, in the psychoanalytic theory of Sigmund Freud, the latest developing of three agencies (with the id and ego) of the human personality. The super-ego is the ethical component of the personality and provides the moral standards by which the ego operates. The super-ego's criticisms, prohibitions, and inhibitions form a person's conscience, and its positive aspirations and ideals represent one's idealized self-image, or "ego ideal."

Id.

[242] *id,* BRITANNICA, https://www.britannica.com/science/id-psychology (Aug. 18, 2023).

> Id, in Freudian psychoanalytic theory, [is] one of the three agencies of the human personality, along with the ego and super-ego. The oldest of these psychic realms in development, the id contains the psychic content related to the primitive instincts of the body, notably sex and aggression, as well as all psychic material that is inherited and present at birth. The id (Latin for 'it') is oblivious of the external world and unaware of the passage of time. Devoid of organization, knowing neither logic nor reason, it has the ability to harbour acutely conflicting or mutually contradictory impulses side by side. It functions entirely according to the pleasure-pain principle, its impulses either seeking immediate fulfillment or settling for a compromise fulfillment. The id supplies the energy for the development and continued functioning of conscious mental life, though the working processes of the id itself are completely unconscious in the adult (less unconscious in the child). In waking life it belies its content in slips of the tongue, wit, art, and other at least partly nonrational modes of expression. The primary methods for unmasking its content, according to Freud, are the analysis of dreams and free association.

Id.

[243] THE PERVERT'S GUIDE TO CINEMA (Amoeba Film et al. 2009).

[244] *Id.*

[245] *Id.*

represents the id; where the mother's corpse is finally discovered in the film.[246] Žižek describes the id as the reservoir of emotions and chaos.[247] In the movie, Bates moves his mother's corpse from the top floor to the cellar.[248] He further suggests this represents a deep connection in Freudian psychoanalysis between the id and super-ego.[249] Then, he proposes this connection exists because the super-ego usually represents a pressing and controlling force on the psyche but often with terms of "obscenity."[250] Žižek supports this connection of the super-ego and the id by observing the somewhat "obscene" language the mother uses to command Bates to act in a way that fulfills the needs of the id.[251] Thus, the three levels of the Bates house in Hitchcock's *Psycho* as described by Žižek in *The Pervert's Guide to Cinema* arguably represent the most accurate depiction of the Freudian paradigm of the psyche in the human mind.

Fundamentally, the validity of Freud's assertions is less interesting than the results that can come about from utilizing his paradigm of the psyche. Given that Freudian psychoanalysis is not necessarily valid for its scientific accuracy but rather its literary value, this article is more an interpretation of the literary devices present in Freud.

Moreover, it is clear that Dumézil himself did not see the trifunctional analysis as going beyond Indo-European society. On the other hand, Freud wrote of his psyche as applying universally to all individuals regardless of society.[252]

As articulated in the introduction of a 1973 translation of Dumézil's work, C. Scott Littleton summarizes the three Dumézilian functions in the following way:

> As presently formulated, the salient features of this model can be summarized as follows: The common Indo-European ideology, derived ultimately from one characteristic of the Proto-Indo-European community, was composed of three fundamental principles: (1) maintenance of cosmic and juridical order, (2) the exercise of physical prowess, and (3) the promotion of physical well-being. Each of these principles forms the basis for what Dumézil terms a fonction, or "function:" that is, a complex whole that includes both the ideological principle itself and its numerous manifestations in the several ancient Indo-European social and supernatural systems. The first function was thus expressed in the presence of distinct

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[246] *Id.*
[247] *Id.*
[248] *Id.*
[249] *Id.*
[250] *Id.*
[251] *Id.*
[252] C. Scott Littleton & Udo Strutynski, *Introduction* to GEORGES DUMÉZIL, GODS OF THE ANCIENT NORTHMEN, at xviii (Einar Haugen ed. & trans., Univ. of Cal. Press 1973) (1959).

> priest classes (e.g., the Indic Brahmans), which inevitably stood at the apex of their respective social systems and which were collectively represented, in the Durkheimian sense, by a pair of sovereign gods, such as Mitra and Varuna in Vedic India, Jupiter and Dius Fidius at Rome, and Odin and Tər in ancient Scandinavia. Moreover, there was a clear division of labor between these two co-sovereigns: one, let us call him the "Varuna figure," had charge of cosmic matters, the other, who may be termed the "Mitra figure," was principally concerned with the maintenance of proper juridical relationships among men. Together they stood at the apex of the supernatural system, just as the priests were at the top of the social hierarchy.[253]

Littleton continues focusing on the second function providing that through a comparative mythological approach:

> The second function was reflected in the presence of a warrior-class, such as the Indic Kşatriyas, whose basic role was to exercise force in defense of the society (or to further its imperialistic ambitions, as well as in the collective representations of this class, such great Vedic warrior divinity Indra, the Roman god Mars, and the Norse war god Thor. The third function was reflected by the society, the herders and cultivators upon whom the priests triors depended for their sustenance (e.g., the Indic Vaiśyas); the principle was collectively represented by yet another stratum of divinities. In the majority of cases the principal occupants of this third divine stratum were conceived as a pair of closely related kins-men, the most usual relationship being that of a set of twins? (e.g., the Greek Dioscuri, the Vedic Aśvins).[254]

Littleton's analysis that only focuses on Indo-European society should not limit our analysis. As indicated earlier, there has been scholarship in applying Dumézilian trifunctionalism to Pre-Columbian Yucatán Mayan societies—a society with no recognizably common roots with Indo-European culture and society given the divide of the Americas and no connection between Asia and the Americas.[255] Likewise, taking a universalist approach is in line with Claude Lévi-Strauss's anthropological analysis and to Mayan society.[256] In such a manner, it seems feasible to at least compare Freud's theories with Dumézil's theories. Given that there exists scholarship applying Dumézil's trifunctionalist theories more universally, such analysis does not amount to using numerology where all theories with three parts relate. Rather such analysis consists of taking like ideas and comparing them.

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[253] *Id.* at xi.

[254] *Id.* at xi–xii.

[255] *See* Lincoln, *supra* note 31*; see also* CHARLES E. LINCOLN, THE CHRONOLOGY OF CHICHEN ITZA: A REVIEW OF THE LITERATURE 141–56 (Jeremy A. Sabloff & E. Wyllys Andrews V eds., 1986) [hereinafter THE CHRONOLOGY OF CHICHEN ITZA].

[256] *See* Lincoln, *supra* note 31; THE CHRONOLOGY OF CHICHEN ITZA, *supra* note 255; *but cf.* Elena K. Lincoln, Yucatec Maya Marriage and Political Alliances (2000) (Ph.D. dissertation, University of California, Los Angeles).

Analogously, the super-ego could be seen as the Dumézilian first function. Like the ego that provides a type of morality, the priestly function can be seen as the purveyor of morality in the community, and operated as the most educated class.[257] Furthermore, this class worked with the written word more than any other class.[258]

For the second function, the ego seems most closely associated with the conception of the warlike and military function. The super-ego often is based on forces and morality that help sustain an individual. Much like warlike and military functions focus on winning military engagements, the super-ego operates in a similar manner to sustain the individual.

For the third function, the id appears to be the most consistent force in providing for fertility. In the Freudian conception of the soul, the id relates to the more emotional and erotically chaotic parts of the psyche.[259] Likewise, these erotic feelings most closely resemble the production and agrarian society. Such a comparison does not perfectly fit with the Freudian and Dumézilian theories. However, by process of elimination and by process of the most comparability in the ideas, the cohesion of the third function and the notion of the Freudian id most closely resemble each other. Table 3 summarizes below.

Table 3

	First	**Second**	**Third**
	Priestly – Sovereign Function	**Warlike – Military Function**	**Productivity – Fertility Function**
Freudian Psychoanalytic Tripartite *Psyche*	Super-ego	Ego	Id

6. Plato's Soul as An Example of Dumézil's Trifunctional Hypothesis

In parallel to Dumézilian thought, the Platonic soul (ψυχή) consists of three parts: the λογιστικόν (logical), the θυμοειδές (thymotic/spirit) and the ἐπιθυμητικόν (appetitive/erotic). Each part represents an integral part

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[257] Littleton & Strutynski, *supra* note 252, at ix, xi.

[258] *See* C. Scott Littleton, *The Comparative Indo-European Mythology of Georges Dumézil*, 1 J. OF FOLKLORE INST. 147, 148–51 (1964).

[259] Elizabeth Lunbeck et al., *Sigmund Freud's The Ego and the Id*, JSTOR DAILY (Sept. 21, 2019), https://daily.jstor.org/virtual-roundtable-on-the-ego-and-the-id/.

to how societies function anthropologically. But a balance between the parts is necessary for justice to exist.

Specifically, in relation to the military function, the logos (λογιστικόν)[260] in the Platonic sense represents the part of the soul that loves knowledge and the search for knowledge.[261] It emphasizes the moral calculation of consequences, as opposed to "blind passion."[262] This idea can be compared to the section in the Platonic dialogue *Phaedrus* where "Socrates compares the soul to a charioteer who controls two horses - one white and docile, the other black and intemperate. These three figures echo the division of the soul into reason, emotion, and appetite in Book IV of the Republic."[263] The charioteer is logos keeping control of the two horses.

Compared to the Platonic paradigm, the productivity or fertility function is eros. Eros, in the Platonic sense, represents what Socrates says is "that with which it loves, hungers, thirsts, and feels the flutter and titillation of other desires, the irrational and appetitive—companion of various repletions [sic] and pleasures."[264] This, too, seems akin to Freud's conception of the id. Thus, it gives further credence to the theory that the Platonic conception of the soul and Freud's structure of the psyche run in tandem with Dumézil's anthropological analysis of Indo-European society. This author has written previously about the parallel nature of the Platonic system of the soul in relation to the U.S. Constitution.[265]

In the Platonic conception of the soul, the Dumézilian priestly function compares most closely with thumos, which represents the "spirit"

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[260] Etymologically speaking, The Liddell & Scott's A Greek-English Lexicon defines the word as, "λογιστικός from λογιστής 1 I.skilled or practised in calculating, Xen., Plat.:— ἡ λογιστική (sc. τέχνη), arithmetic, Plat. II.endued with reason, rational, Arist.:— τὸ λ. the reasoning faculty, Plat. 2.using one's reason, reasonable, Xen." HENRY GEORGE LIDDELL & ROBERT SCOTT, AN INTERMEDIATE GREEK-ENGLISH LEXICON (1889), http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.04.0058%3Aentry%3Dlogistiko%2Fs.

[261] *See* PLATO, REPUBLIC bk. IV, at 435e (Paul Shorey trans., Harv. Univ. Press 1969) (c. 375 B.C.), https://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0168%3Abook%3D4%3Asection%3D435e.

[262] This can be compared to "*Crito* 46 B (one of the passages which the Christian apologists used to prove that Socrates knew the λόγος), *Theaetetus* 186 C ἀναλογίσματα πρός τε οὐσίαν καὶ ὠφέλειαν, and *Laws* 644 D. Aristotle *Eth.* 1139 a 12 somewhat differently." *Id.* at 439d & n.8, http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0168%3Abook%3D4%3Apage%3D439.

[263] Kenji Yoshino, *The City and the Poet*, 114 YALE L.J. 1835, 1856 (2005).

[264] PLATO, *supra* note 261, at 439d.

[265] *See generally* Lincoln, *supra* note 1; LINCOLN, *supra* note 31*; see, e.g.*, Robert C. Bordone et al., *The Negotiation Within: The Impact of Internal Conflict over Identity and Role on Across-the-Table Negotiations*, 2014 J. OF DISP. RESOL. 175, 180 (2014).

unifying with the logos but resisting the erotic part of the soul.[266] This spirit has been described in a:

> [D]istinctively Platonic sense of θυμός as the power of noble wrath, which, unless perverted by a bad education, is naturally the ally of the reason, though as mere angry passion it might seem to belong to the irrational part of the soul, and so, as Glaucon suggets, be akin to appetite, with which it is associated in the mortal soul of the Timaeus 69 D. In Laws 731 B-C Plato tells us again that the soul cannot combat injustice without the capacity for righteous indignation. The Stoics affected to deprecate anger always, and the difference remained a theme of controversy between them and the Platonists. Cf. Schmidt, Ethik der Griechen, ii. pp. 321 ff., Seneca, De ira, i. 9, and passim. Moralists are still divided on the point. Cf. Bagehot, Lord Brougham: "Another faculty of Brougham . . . is the faculty of easy anger. The supine placidity of civilization is not favorable to animosity [Bacon's word for θυμός]." Leslie Stephen, Science of Ethics, pp. 60 ff. and p. 62, seems to contradict Plato: "The supposed conflict between reason and passion is, as I hold, meaningless if it is taken to imply that the reason is a faculty separate from the emotions," etc. But this is only his metaphysics. On the practical ethical issue he is with Plato.[267]

Again, Freud's conception of the super-ego is something that is passed down from a person's parents. Thus, it represents a societal force brought down to an individual level into the psyche similar to that of the Dumézilian priestly function representing and passing down the morals of society. Often these morals passed by the priestly function are those that are most matieralistically relevant and practically valuable for society to support the effective and efficient functioning of society. Table 4 summarizes below.

Table 4

	First	**Second**	**Third**
	Priestly – Sovereign Function	**Warlike – Military Function**	**Productivity – Fertility Function**
Plato's Conception of the Soul in *The Republic* & *Phaedrus*	Thumos	Ego	Eros

B. A Summary and Examples to Support Dumézil's Trifunctionalist Hypothesis

So far, this section of the article explored Dumézil's trifunctionalist hypothesis. This section provides the evidence that Dumézil wrote and

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[266] *See* PLATO, *supra* note 261, at 439e.

[267] *Id.* at 439e n.11.

found for the trifunctionalist hypothesis. Dumézil's evidence included his analysis of mythology from various Indo-European sources.[268] The author added two other tripartite theories, namely those of Plato's soul and Freud's psychoanalytic theories. Both Freud's and Plato's theories mirror each other.

Table 5 represents the theories outlined so far in the article as they parallel each other:

Table 5

	First	**Second**	**Third**
	Priestly – Sovereign Function	**Warlike – Military Function**	**Productivity – Fertility Function**
Vedic India	Mitra, Varuna	Indra & Vāyu	The two Ashvins
Mahābārata	Yudhishthira	Arjuna & Bhima	Nakula & Sahadeva
Norse Mythology	Odin & Týr	Thor	Freyr, Freyja, Njord, & the gods Vanes
Roman Mythology – focusing on the Archaic Triad	Jupiter	Mars	Quirinus
Estates of the *Ancien Régime*	First Estate (clergy)	Second Estate (nobility)	Third Estate (commoners)
Ancient Rome	Flamen	Roman citizens	Roman residents
Theories in addition to Dumézil's theories			
Freudian Psychoanalytic Tripartite *Psyche*	Super-ego	Ego	Id
Plato's Conception of the Soul in *The Republic* and *Phaedrus*	Ego	Thumos	Eros

[268]GEORGES DUMÉZIL, THE DESTINY OF A KING, 10–15 (Alf Hiltebeitel trans., Univ. Chi. Press 1973) (1971).

IV. COMPARING THE STRUCTURE OF THE FEDERAL GOVERNMENT TO THE DUMÉZILIAN TRIFUNCTIONALIST CONCEPTION OF INDO-EUROPEAN SOCIETY

A. The Judiciary as the Dumézilian First Function

The judiciary[269] in this article's paradigm represents the Dumézilian first function. As Chief Justice Marshall stated in *Marbury v. Madison*:

> [T]he particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.[270]

The judicial function is outlined in Article III of the U.S. Constitution. Article III provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[271] Article III judges—as intended by the Framers of the Constitution—were not and are not politicians seeking re-election. But rather, judges are aloof from the political system seeking to interpret, apply, and provide rationality for the law. Such a description of modern judges appears similar to the description of the flamen priestly class in Ancient Rome. Moreover, like the flamen chiefly dealing with written words and the word as manifested in religion, so, too, does the judiciary function. This logical analysis—which can be informed with the other elements of the soul—is the guiding principal of the judiciary. The judiciary represents the first function.

1. Cases and Examples Showing Why the Judiciary Represents the Dumézilian First Function

Dumézil represents the first function as that which interprets what is needed to maintain the consistency of the society. Likewise, Chief Justice Marshall said, "it is emphatically the province and duty of the judicial department to say what the law is."[272] The Supreme Court uses judicial review and interprets the Constitution and legislatively passed statutes to keep them in check much like the analogy of the rider being the ego in Plato's *Phaedrus*.

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[269] U.S. CONST. art. III, § 1.
[270] 5 U.S. (1 Cranch) 137, 180 (1803).
[271] U.S. CONST. art. III, § 1.
[272] *Marbury*, 5 U.S. at 177; *accord* United States v. Nixon, 418 U.S. 683, 703 (1974).

When constituent parts of the first function become imbalanced, then unjust results arise, such as *Plessy v. Ferguson*.[273] However, imbalance and stepping out of a role in the separate powers may lead to more just and fair results, such as *Brown v. Board of Education*.[274]

In *Plessy v. Ferguson*,[275] the Supreme Court stepped out of its judicial authority and took on a legislative function but with an unjust result. The Court declared that a "State, shall provide equal but separate accommodations" for members of different races.[276]

In *Brown v. Board of Education*,[277] the Supreme Court stepped out of its judicial authority and took on a legislative function—in other words, the Supreme Court legislated from the bench—but with a just result. In *Brown v. Board of Education*, the Court noted that "[t]he doctrine of 'separate but equal' did not make its appearance in this Court until 1896 in the case of *Plessy v. Ferguson* . . . involving not education but transportation,"[278] showing that the Court in *Plessy* stepped out of its mode of *stare decisis* and made law based on no previous law.

More recently, in *Obergefell v. Hodges*,[279] the Supreme Court took on a legislative role in deciding the case as Professor Kenji Yoshino writes:

> While Obergefell's most immediate effect was to legalize same-sex marriage across the land, its long-term impact could extend far beyond this context. To see this point, consider how much more narrowly the opinion could have been written. It could have invoked the equal protection and due process guarantees without specifying a formal level of review, and then observed that none of the state justifications survived even a deferential form of scrutiny. The Court had adopted this strategy in prior gay rights cases.[280]

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[273] 163 U.S. 537 (1896).

[274] 347 U.S. 483 (1954).

[275] 163 U.S. 537.

[276] *Id.* at 540 (internal quotation marks omitted).

[277] 347 U.S. 483.

[278] *Id.* at 490–91.

[279] 576 U.S. 644 (2015).

[280] Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 147 (2015). Illustrating the differences of originalist and evolutionary document theories of interpreting the Constitution, Andrew W. Schwartz writes discussing the *Obergerfell* case:

> The majority and dissenting opinions in *Obergefell v. Hodges*, the Supreme Court's recent decision finding that same-sex marriage is a constitutional right, offer a lucid comparison of originalism with evolutionary document theories of interpretation. The majority point out that the institution of marriage "has evolved over time." *Obergefell v. Hodges*, No. 14-556, slip op. at 6 (U.S. June 26, 2015). Finding that the right to marry the person of one's choice, regardless of their gender, was compelled by the due process clause of the Fourteenth Amendment, the majority described its task as interpreting a constitutional provision that sets forth broad principles rather than specific requirements.

Professor Laurence Tribe supports this position by stating:

> Professor Kenji Yoshino's splendid Comment makes clear just how misguided these glib detractions are, and eloquently elaborates the important doctrinal work done by Justice Kennedy's decision, which represents the culmination of a decades-long project that has revolutionized the Court's fundamental rights jurisprudence. As Yoshino demonstrates, *Obergefell* has definitively replaced *Washington v. Glucksberg*'s wooden three-prong test focused on tradition, specificity, and negativity with the more holistic inquiry of Justice Harlan's justly famous 1961 dissent in *Poe v. Ullman*, a mode of inquiry that was embodied in key opinions from the mid-1960s to the early 1970s.[281]

Over time, society may come to a consensus of whether the Court decided any case correctly or incorrectly, but such cases currently serve as an example of a Court decision stepping out of the bounds of the role of the judiciary and acting in a legislative capacity with an unclear or clear result of justice.

Although ideally the Court would follow the first function, the catch is that the members of the Court are not purely guided by the first function. In the Freudian conception, the idea of a three-part psyche may be intended to understand the basic functions of an aspect of government, each member has an entire psyche governing their mind. This leads to more nuanced decisions, not only in the judiciary but all three branches of the government.

Justice from the judiciary comes in various forms. In this instance, the Dumézilian first function likely guides to just results by keeping

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> History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present. The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all person to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed. *Id.* at 10-11 (citations omitted). In sharp contrast, Chief Justice Roberts and Associate Justice Alito, in their dissenting opinions, refused to recognize contemporary views of marriage, asserting that the notion of marriage as solely between a man and a woman is "deeply rooted in this Nation's history and tradition." *Id.* at 14 (Roberts, C.J., dissenting); *id.* at 2 (Alito, J., dissenting) (quoting Washington v. Glucksberg, 521 U.S. 701, 720–21 (1997)). Justice Scalia, in a separate dissent, relied on the public understanding of the meaning of marriage at the time the due process clause was ratified in 1868, which, he argued, universally confined marriage to a man and a woman. *Id.* at 4 (Scalia, J., dissenting).

Andrew W. Schwartz, *No Competing Theory of Constitutional Interpretation Justifies Regulatory Takings Ideology*, 34 STAN. ENV'T L.J. 247, 259 n.43 (2015).

[281] Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 16 (2015).

emotional aspects in check. Here, the judiciary is represented through the Dumézilian second function functioning as a repressive force to keep emotions in check.

B. The Executive as the Dumézilian Second Function

In this article, the executive[282] represents the Dumézilian second function. Analogous to the ego in the Freudian structure that represents a societal force that represses the desires of the id but through mediation of the super-ego. Likewise, the Dumézilian second function operates to stabilize and provide a force that governs society. In the same way, the executive branch of government provides a way to stabilize society and support sovereignty. In this manner, the president is a type of Dumézilian first function where the president supports the notions of sovereignty in the country.

As such, the function of the executive indicates that one will likely turn to politics while in the tension of the Dumézilian first function, the judiciary, and second function. In this sense, the most widely known politician nationwide is usually the president.[283] In Freudian terms, the ego is a force that mediates between the two opposing elements of the id and the super-ego. As such, the ego is more akin to the President, rather than a member of the judiciary, who, in all likelihood, is in search of honors and recognition much like other politicians. Such recognition of a politician's psyche is not necessarily a negative characteristic for the executive. If the executive of the country did not seek honor or maintain some haughtiness, other politicians and world leaders would take advantage. As President, one must be a decisive president, not merely following the dictates of another Dumézilian function but operating as that of the Dumézilian second function. Yet, each function operates within the context of the other Dumézilian functions.

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[282] The Executive Branch's source of power is derived from the Article II of the United States Constitution. *See* U.S. CONST. art. II, § 1, cl. 1.

[283] Medical exams in the United States consider the idea of who the president is so ubiquitous that it is used as a basis for establishing whether one has cognitive function orienting them to the present day. In other words, asking who the Senator or Representative from one's state is would likely not be as universally helpful as asking who the President. *See* Jeff Hersh, *What Questions are Asked on a Mental Status Exam?*, TAUNTON DAILY GAZETTE (October 30, 2023, 6:21 PM), https://www.tauntongazette.com/story/lifestyle/health-fitness/2020/07/23/whats-up-doc-what-questions-are-asked-on-mental-status-exam/114523550/. Such an inquiry in itself is fairly philosophical as an assumption—the zeitgeist of the country is known and that is a test of basic consciousness as seen through the president of the United States.

1. Cases and Examples Showing Why the Executive Represents the Dumézilian Second Function

Here, the Dumézilian second function manifests itself where a part of the Executive branch of government, such as the EPA, would interpret a statute from the legislature and implement it. This occurs through the rules laid out by the Supreme Court and the judiciary as seen in the *Chevron* case.

Frequently, the President issues executive orders.[284] Conversely, Courts of Appeals frequently declare the executive orders unconstitutional. Regardless of whether the executive orders are eventually upheld as constitutional, they represent the Executive branch acting within the justification that executive orders are in line with societal values as solutions to various problems. In this sense, executive orders act as a Dumézilian second function giving legitimacy to an action. If the orders are upheld as constitutional, then the judiciary or the legislature will deem them to have been the most effective approach at the time to avoid a greater disaster later. If the orders are not upheld to be constitutional, then the judiciary or the legislature will have deemed them not the most effective approach at the time.

Because the executive, and the legislature in certain contexts, are charged with carrying out the daily activities of the nation, international relations, between spirited leaders who repress the immediate instincts of pleasure, are of paramount importance. This spirited leadership is represented by the Dumézilian third function. Thus, the leadership and executive actions may or may not be based in the Dumézilian first or third function, but through the regulating force of the Dumézilian second function, which this article argues fits into the paradigm of the executive branch of government in the U.S. Constitution.

C. The Legislature as the Dumézilian Third Function

In this paper, the legislature[285] represents the third function. The Dumézilian third function represents the part of society most closely associated with productivity and agricultural production. In theory, Congress

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[284] *The Executive Branch*, WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/our-government/the-executive-branch/ (last visited Dec. 29, 2023); *see Executive Orders (Beginning with J.Q. Adams)*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/presidential-documents-archive-guidebook/executive-orders-beginning-with-jq-adams (last visited Dec. 29, 2023).

[285] The power of the Legislative Branch generally emanates from Article I of the United States Constitution. *See* U.S. CONST. art. 1.

acts according to the will of the people and is the closest interaction most of the population can have with the three main branches of government—arguably other than through taxation that the legislature has and the authority to collect taxes in the executive branch. Thus, many proposals in Congress can represent more emotional responses to issues. Some proposals are passed, and some of those passed proposals are thwarted by the other branches of government.

One of the most difficult things to discern is the legislative intent of a Congressional act. Much like the Dumézilian third function, an act of Congress can exhibit contradictory aims at the same time.

D. Summary of the Parallel Comparison of the Dumézilian Three Functions

Table 6 summarizes the comparison of the Dumézilian functions as compared to the three parts of the U.S. federal government.

Table 6

Category	**U.S. Branch of Government**	**Dumézilian Trifunctionalist Category**
Functionality Division:	Judiciary	First Function – Priestly – Sovereignty
	Executive	Second Function – Warrior – Military
	Legislative	Third Function – Farmers/Commoners/Tradesmen – Productivity

CONCLUSION

This article interprets the problems and eventual purpose of the United States government, while simultaneously explaining its continued existence, by analyzing its three-part structure as outlined in the Constitution. Through the lens of the Dumézilian structural paradigm of anthropological prehistoric Proto-Indo-European society, this article subsequently interprets all three parts of the government: the judiciary being the sovereignty, the executive being the military, and the legislative being the productivity. The major premise of the article is Dumézil's tripartite structure of society. The minor premise of the article is the three-part structure of the United States government. The syllogism is the analysis in the article that attempts to show how each part of the Dumézilian anthropological represents itself in the three branches of the federal government: the judiciary as the first function, the executive as the second function, and the legislative as the third function.

Overall, this Dumézilian anthropological analysis of the Constitution's structure and function could add to the dialogue of Constitutional analysis. There are arguments for living constitution, purposivism in constitutional interpretation, and political process theory, but there also seems to be a basis for a Dumézilian interpretation of the Constitution. In line with balanced societal notions of the polity and a balanced government, each part of government would not reach into another's duties in line with the outline of Federalist No. 47.[286]

Returning to the parallel analogy of Freudian psychoanalysis, there could be parallels in thought that inform each theory respectively. As Freud outlined his theory, each person, has the three parts of the psyche. Although an individual may act in one part of the federal government, each person has all three parts of the Freudian structure operating within their psyche. Thus, it is to be expected that different parts of the psyche would manifest in a different part of the federal government from various individuals.

Regardless of the correct formulation of the Dumézilian paradigm, there is an archetype of government that seems suited for long-term existence. Plato touched upon this archetype, and perhaps Freud illuminated it in the individual sense through his theory of psychoanalysis.[287] From a Freudian perspective, it is fair to say that the best government, at least in part, represents the individual or the psyche of the individual. Likewise, it seems fair to say that a firm structure of society or government in Dumézilian terms appears to function in accord with a Jungian archetype of government – based on the studies of one of Freud's students, Carl Jung. The topic of a Jungian archetype or other archetypal type of government would fall into the scope of a different article and further research.

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[286] THE FEDERALIST NO. 47, at 303 (James Madison).

[287] LINCOLN, *supra* note 31, at viii.