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BOOK REVIEWS

Articles

Sovereign and State: A Democratic Theory of Sovereign Immunity

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Sovereign immunity is an old idea, rooted in monarchy: the king cannot be sued without consent in his own courts. The American Constitution, by contrast, is committed to popular sovereignty and democratic self-rule. It is hardly surprising, then, that sovereign immunity doctrine comes riddled with confusion when awkwardly transplanted to a democratic context. But scholars have so far overlooked a cure for these confusions—to revisit the fundamental question of sovereignty in a democracy. In this Article, we aim to reconcile the doctrine of sovereign immunity with the Constitution's core commitment to democracy. On our view, a state is rightly immune from suit when it acts as the democratic sovereign. This includes the authority to make what we will call "sovereign mistakes." For a plaintiff to raid the treasury to pay for losses stemming from public policy decisions, even in error, vitiates the sovereign power of the purse. But a necessary condition for democratic legitimacy is that the sovereign must respect citizens' fundamental constitutional rights. And so when the state violates these rights, it no longer acts as the democratic sovereign, and it does not enjoy immunity from suit. The mantle of democratic sovereignty passes to the citizen–plaintiff instead. Part I considers and rejects the all-or-nothing approaches to sovereign immunity doctrine that dominate the literature. Part II then develops our democratic alternative. Parts III and IV apply this democratic principle of sovereign immunity to breathe new life into the doctrine—providing a normative justification for immunity where it lies while also carving out its limits.

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Introduction

Few areas of doctrine have sown as much confusion over the past two centuries as the Supreme Court's sovereign immunity jurisprudence.[1] And today it appears to occupy a kind of twilight zone in constitutional theory. Its defenders, who tend towards conservative originalism, invoke a broad principle of sovereign dignity that finds no home in the constitutional text.[2] Its liberal detractors, who favor expansive interpretations of rights and powers under the Constitution, instead call for a narrow reading of the Eleventh Amendment in isolation.[3] We argue that much of this confusion stems from a failure to appreciate the theoretical question at the core of the doctrine: how can we reconcile it with democracy?

What does it mean to say that the sovereign is immune from suit in a system of popular sovereignty? The answer to this question cannot rest in some excursion to the doctrine's historical and monarchical roots. But neither can it be wholesale rejection of the doctrine—a system of popular sovereignty is not a system that lacks sovereignty altogether. To solve this apparent morass, we offer a *democratic* account of sovereignty, one that

1. *See generally* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 841–43 (6th ed. 2009) (recounting the evolving doctrine of sovereign immunity in early Supreme Court decisions and British common law).

2. *See infra* notes 9–11 and accompanying text.

3. *See infra* notes 12–24 and accompanying text.

both registers the importance of collective decision making and respects the fundamental rights of citizens. We therefore tie the seemingly confused doctrine of sovereign immunity to the more generalized democratic ambitions of the Constitution as a whole. We begin with the fundamental question at the heart of sovereign immunity: when may citizens sue a democratic state? Consider the following cases:

- A prison guard sexually assaults an inmate, who then sues the federal government as his employer.[4]
- A state college bookstore receives preferential transfers from a debtor who has filed for bankruptcy, and the court-appointed trustee sues to recover them to distribute them fairly.[5]
- A federal statute requires states to negotiate with Native American tribes over the operation of gaming facilities.[6] One tribe sues the State of Florida for breach of this duty, seeking to compel negotiations.[7]
- After finding a pattern of racial segregation, a federal court orders the Governor of Michigan to fund remedial education programs as part of the desegregation decree.[8]

These cases trace just a few of the many wrinkles in the law of sovereign immunity. They turn on subtle conceptual and doctrinal distinctions. Yet the dominant theories of sovereign immunity cannot adequately distinguish them. These theoretical approaches either offer a blanket defense of the doctrine or reject sovereign immunity altogether.

In particular, "monarchical" defenses of sovereign immunity see the state as a sovereign monarch, above the people and incapable of error. The traditional monarchical view is therefore one of the sovereign as immune from suit.[9] Indeed, in this Article we contend that critics of the Court's

4. Millbrook v. United States, 133 S. Ct. 1441, 1444–46 (2013) (holding that the Federal Tort Claims Act waives federal sovereign immunity for intentional torts committed by law enforcement officers within the scope of their employment).

5. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 369–73 (2006) (concluding that the Bankruptcy Clause waives sovereign immunity for state creditors in in rem bankruptcy proceedings).

6. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996).

7. *Id.* at 51–52, 72–73 (rejecting Congress's power to abrogate state sovereign immunity under the Commerce Clause).

8. Millikin v. Bradley (*Millikin II*), 433 U.S. 267, 289–90 (1977) (holding that the Eleventh Amendment does not bar such prospective relief, despite its impact on the state's treasury). *But cf.* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 107 (1984) (stating that the "general criterion for determining when a suit is in fact against the sovereign" and therefore barred "is the *effect* of the relief sought").

9. *See* Alden v. Maine, 527 U.S. 706, 715 (1999) ("When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its own courts."). In *Alden*, Justice Kennedy connects residual state sovereign immunity to Justice

sovereign immunity doctrine are correct to claim that both the jurisprudence of sovereign immunity in constitutional law and the theoretical literature on the topic, which attempts to defend the doctrine, have an unjustifiably anti-democratic character. These defenses have come in two distinctly unacceptable forms. On the first, originalists have argued that the Constitution incorporates a prior doctrine of sovereign immunity present in English common law.[10] On the second, in contrast, proponents of the doctrine have suggested that it perpetuates a respect for the "state's dignity," which they claim is inherent in the very concept of the state.[11] We argue here that neither of these views is democratic. Any contemporary defense of sovereign immunity in America must, unlike these two views, make sense of the doctrine as a distinctly democratic practice.

Some democrats, however, tend to reject the monarchical view and with it the entire doctrine of sovereign immunity.[12] On one version of the view of sovereign immunity, the people as a whole are sovereign, and thus all have a right to sue the state.[13] According to what we will call the "populist" view of sovereign immunity, the doctrine should be scrapped altogether as a vestige of monarchy, incompatible with the values of a

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Iredell's influential dissent in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), and its exposition of English Practice. *Alden*, 527 U.S. at 715–16, 720–21, 734. Indeed, Justice Kennedy goes on to quote Blackstone on "the prerogatives of the Crown" and to unpack the close and necessary relationship understood to exist between sovereignty and immunity from suit: "And, first, the law ascribes to the king the attribute of sovereignty, or pre-eminence . . . . Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power . . . ." *Id.* at 715 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *241–42). Justice Holmes makes the same Blackstonian conflation between state and sovereign because the state is the source of law for the underlying action: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polybank, 205 U.S. 349, 353 (1907).

10. *See, e.g.*, *Alden*, 527 U.S. at 715–16 (drawing on English common law sources, such as Blackstone); Nevada v. Hall, 440 U.S. 410, 414–16 (1979) (explaining sovereign immunity's origins in the English feudal system and noting that "[t]he immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries"); *infra* subpart I(A).

11. *See, e.g.*, Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1923–26 (2003) (discussing the role that dignity plays in the doctrine of sovereign immunity); *infra* subpart I(B).

12. *See, e.g.*, Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1202 (2001) ("The United States was founded on a rejection of a monarchy . . . . American government is based on the fundamental recognition that the government . . . can do wrong . . . . Sovereign immunity undermines that basic notion.").

13. *See, e.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1427 (1987) (arguing that "true sovereignty in our system lies only in the People of the United States" and that "whenever a government entity transgresses the limits of its delegation . . . it ceases to act in the name of the sovereign, and surrenders any derivative 'sovereign' immunity it might otherwise possess").

democratic republic.[14] According to this argument, the monarchical state was sovereign because the king was an infallible entity above the people.[15] In virtue of this infallibility, he could not be sued for wrongdoing.[16] When sovereignty lies with the people, however, many argue that the people should be free to sue a state that wrongs them.[17] It is necessary that they retain this right in order to ensure that no state entity is seen as above the people.[18] On such democratic theories, sovereign immunity, including the Eleventh Amendment guarantee, is a mere vestige of monarchy that should be abandoned.[19]

Textualists adopt yet another absolute approach, rejecting a century's worth of doctrinal development[20] as inconsistent with the text, structure, and history of the Constitution. They observe that the text of the Eleventh Amendment does not shield states from suits by their own citizens.[21] And they urge that this text merely limits federal courts' diversity jurisdiction, which is based on the status of the parties.[22] This leaves Article III's

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14. Chemerinsky, *supra* note 12, at 1202 ("A doctrine derived from the premise that 'the King can do no wrong' deserves no place in American law. The United States was founded on a rejection of a monarchy and of royal prerogatives."). This view dates back to *Chisholm*, where the Court heard, in original jurisdiction, an assumpsit action by a South Carolinian against the State of Georgia. 2 U.S. (2 Dall.) at 420. In his opinion, Chief Justice Jay stressed that "the sovereignties in Europe, and particularly in England, exist on feudal principles. That system considers the Prince as the sovereign, and the people as his subjects." *Id.* at 471 (emphasis omitted). Because the King was the source of all law, no judgment of any court could bind him. But, by contrast, "[n]o such ideas obtain here; at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country." *Id.* To bar the door to federal courts based on a false theory of state sovereignty "would contradict and do violence to the great and leading principles of a free and equal national government, one of the great objects of which is, to ensure justice to all." *Id.* at 477.

15. *Cf.* Chemerinsky, *supra* note 12, at 1201 n.1 (discussing the possible meanings of "the King can do no wrong").

16. *Id.* at 1201.

17. *See, e.g.*, Amar, *supra* note 13, at 1427 (arguing that in many cases only governmental liability can assure that victims of unconstitutional acts by government entities are made whole).

18. *See id.* at 1435 (arguing that governments could be sovereign if they act within the limitations of their charters, but true sovereignty resides in the people themselves).

19. *See id.* at 1475 (arguing that the Eleventh Amendment was not "meant to enshrine the general immunity of state 'sovereigns' from private suits in federal courts").

20. The noteworthy landmark is *Hans v. Louisiana*, 134 U.S. 1 (1890), which held that a broad principle of sovereign immunity bars a citizen's claim under the Contracts Clause against his own state. *Id.* at 20–21.

21. The text of the amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

22. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 101 (1996) (Souter, J., dissenting) ("The adoption of the Eleventh Amendment soon changed the result in *Chisholm*, not by mentioning sovereign immunity, but by eliminating citizen-state diversity jurisdiction over cases with state defendants."); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 301 (1985) (Brennan, J., dissenting) (asserting that the purpose of the Eleventh Amendment was to reestablish

subject matter jurisdiction untouched so that any citizen claiming a federal right may sue a state in federal court.[23] On this account, sovereign immunity is merely a creature of federal common law that can be easily displaced by federal statute.[24] But, despite these objections from text and history, the Court has repeatedly invoked sovereign immunity as a structural principle that is deeply embedded in the Constitution, on par with federalism and the separation of powers.[25]

In this Article, we reject the all-or-nothing approach that is common to both monarchists and populists, as well as the skepticism of textualists who resist sovereign immunity as a constitutional principle. In contrast to these three dominant views, we look to democratic theory to propose a principled basis for why and when the state qua state must enjoy *some* immunity from suit. In enforcing the law and administering government, its agents commit innumerable acts that would otherwise be private torts—trespass, battery, etc. We invoke democratic theory to suggest why such actions should often be regarded as sovereign and why immunity is often required in these instances by democratic legitimacy. But at the same time, citizens must sometimes be able to hale a state into court without its consent. If not, then states could violate their constitutional and federal rights with impunity. The Supreme Court's jurisprudence has rightly eschewed all-or-nothing thinking on the question of sovereign immunity.[26]

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sovereign immunity in "state-law causes of action based on the state-citizen and state-alien diversity clauses").

23. *See, e.g.*, *Seminole Tribe*, 517 U.S. at 100 (Souter, J., dissenting) (arguing that the Eleventh Amendment has no relevance where federal jurisdiction is based on the existence of a federal question). The definitive and original articulation of this view by the Court's liberal dissenters is in *Atascadero*, 473 U.S. at 234, 290 (Brennan, J., dissenting). Justice Brennan's dissent draws from a substantial well of scholarship. *Id.* at 258 n.11; *cf.* Amar, *supra* note 13, at 1510–11 (discussing the theory that state courts should be given unreviewable power to hold federal conduct unconstitutional—that the "role of states is solely to provide victims of constitutional wrongs with the chance to have their federal rights defined and fully protected in federal court"). Liberal dissenters on the Court have continued to invoke this theory. *See* Coleman v. Court of Appeals of Md., 132 S. Ct. 1327, 1339 n.1 (2012) (Ginsburg, J., dissenting). But sovereign immunity doctrine may have achieved some measure of settlement with the newest additions to the Court's liberal wing. In *Coleman*, Justices Sotomayor and Kagan joined Justice Ginsburg's principal dissent, except with respect to the first footnote—which endorsed this broad critique of sovereign immunity. *Id.* at 1339 & n.1. Such a signal from the two most recent liberal appointees may suggest that the Court's significant sovereign immunity precedents are here to stay.

24. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 332–36 (2005) (suggesting that states' immunity has no constitutional basis and is instead part of the federal common law); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 78–79 (1988) (arguing that neither the text nor the framers' intent support sovereign immunity as a constitutional requirement).

25. *E.g.*, Alden v. Maine, 527 U.S. 706, 714–15 (1999); *Seminole Tribe*, 517 U.S. at 54; *Hans*, 134 U.S. at 10–16.

26. *See, e.g.*, *Seminole Tribe*, 517 U.S. at 54–57 (noting the balance between the Eleventh Amendment's grant of state sovereign immunity and Congress's power to abrogate it).

Our account is a constructive one,[27] identifying the core principle that animates sovereign immunity doctrine and promises to cure its confusions. On our democratic conception of sovereignty, immunity extends as far as (but no further than) democratic legitimacy warrants. Otherwise, many legitimate democratic decisions cannot take effect. But the mantle of democratic sovereignty requires that a state pursue the public good, obey the rule of law, and respect its citizens' fundamental democratic rights. Its decisions must be both *by* the people and *for* the people. When a state's actions fail to meet these conditions, it does not act as a democratic sovereign, and so the democratic conception of sovereign immunity will provide no shelter.

We argue that sovereign immunity jurisprudence can be made defensible and coherent by clarifying and theorizing the meaning of sovereignty in a democracy. Our account explains and justifies the importance and the scope of sovereign immunity in a democracy—delineating the boundaries of democratic sovereignty, properly understood. When a democratic state rightly exercises its sovereign authority, it is immune from suit. Otherwise, any collective self-government would prove impossible, bled to death by a thousand cuts. But the extent of democratic sovereignty is not an all-or-nothing proposition. It depends, in part, on observing citizens' fundamental democratic rights.

Specifically, we propose and develop a distinction between "state action" and "sovereign action." We argue that the state acts in accordance with its status as a sovereign when two criteria are met. First, the state must act "for the people" within a framework that respects the rights of citizens and in which its powers are limited so as to meet this need. Second, the state must act "by the people" by deriving its power from the consent of the governed through their representatives. While some government action meets these two criteria, some does not. The question of immunity, we argue, should hinge on whether the state is acting as a sovereign or merely as a government entity. Where the two criteria are met, the government acts in the instant as a state but not a sovereign, and thus receives no

27. In other words, we attempt to articulate a principle that both "fits" and "justifies" the existing body of legal materials as a coherent whole. These include not only the text, structure, and history of the Constitution but also the decades of case law that have developed its meaning. This pursuit of coherence in the law will invariably identify some interpretations as mistaken. But the wholesale rejection of a century's worth of Eleventh Amendment doctrine, as advocated by the textualists, comes at great cost to the integrity of our constitutional law. Our account avoids this costly slash-and-burn approach by identifying a normatively attractive defense of the sovereign immunity principle, rooted in democratic political theory. For further description of the philosophical underpinnings of "constructive interpretation," see RONALD DWORKIN, LAW'S EMPIRE 52–53 (1986), which elaborates on constructive interpretation as "a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong." For a discussion of Dworkin's related "moral reading" of the United States Constitution, see generally RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE CONSTITUTION (1996) [hereinafter DWORKIN, FREEDOM'S LAW].

immunity.[28] But when the state acts qua sovereign, it rightfully is immune from suit.

We argue that it is sovereign action that triggers immunity. When the sovereign state makes policy (and when its agents implement those policies), democratic legitimacy confers a power to act in ways that extend beyond what a private citizen may do. In particular, we define the category of "sovereign mistakes" as actions that (1) are committed by the sovereign, (2) do not constitute fundamental rights violations,[29] but (3) nonetheless cause harm that would give rise to liability if they were committed by a private actor. When the state acts as sovereign, it enjoys sovereign immunity—and that means it is not liable for sovereign mistakes.

For instance, the state can tax an individual within its legitimate powers, while an individual who coercively extracts payment for services or protection commits extortion and racketeering. Furthermore, these powers include the legitimate authority to make mistakes. A state may squander its resources on a "bridge to nowhere," undertake ill-advised military adventures, or implement a flawed stimulus package. So long as the state acts within its sovereign powers, there is no civil liability for any injury that results. Importantly, however, what we call legitimate "sovereign mistakes" do not extend to violations of fundamental democratic rights, such as those protected in the Constitution. In order to satisfy the conditions of democratic legitimacy and for democratic sovereignty to obtain, a state must respect those rights.[30] The structure of the Fourteenth

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28. We do not suggest that the state as a whole loses its sovereignty but rather that the particular action loses its sovereign character.

29. As we will discuss, the second element is logically entailed by the first. A state cannot act as a legitimate democratic sovereign when it violates fundamental rights.

30. This proposition is essential to a wide range of democratic theories. Substantive accounts of democracy often directly tie rights protections to democratic legitimacy. *See, e.g.*, COREY BRETTSCHNEIDER, DEMOCRATIC RIGHTS 26–27 (2007) (arguing that while "[d]emocratic theory traditionally has emphasized the importance of procedure in contrast to individual rights," other rights protections such as "equality of interests, political autonomy, and reciprocity provide an underlying justification of democratic procedure and are rightly regarded as the core values of democracy"); DWORKIN, FREEDOM'S LAW, *supra* note 27, at 15 (arguing for a reinterpretation of the traditional belief that democracy must be compromised in order to protect values like individual rights); JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY 3 (2006) (developing a theory that "firmly connects privacy or autonomy to the substance and structures of constitutional democracy"). Dualist conceptions of democracy, found in Bruce Ackerman's theory of constitutional moments and implicit in a number of originalist accounts, also insist on protecting certain entrenched constitutional rights as a condition of democratic legitimacy. 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6–15 (1991); *see also* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 135–42 (1999) (discussing democratic dualism and the tendency of political agents to "emerge at particular historic moments to deliberate on constitutional issues and to provide binding expressions of their will, which are to serve as fundamental law in the future when the sovereign is absent"). Even procedural accounts of democracy, such as John Hart Ely's defense of judicial review, identify procedural rights such as the freedom of speech as a necessary condition for democracy. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 105 (1980) (arguing that rights such as the freedom of speech must

Amendment guarantees the right of the individual to be free from illegitimate state action in areas such as privacy, criminal justice, and equal protection. State actions that violate these rights can never be sovereign actions. This means that a state action that violates Fourteenth Amendment rights should be subject to suit, and the state can never be immune from such claims.

Our view, in contrast to populist and monarchist approaches to sovereign immunity, is "democratic." It recognizes both the by the people and for the people elements of democracy. The by the people element of democracy is recognized through immunities in instances of "legitimate mistakes" and common law rights that derive from the state itself. Specifically, we argue that the ideal of rule "by the people" refers to the collective ability of citizens to make laws on matters of fiscal policy. To retain this ability, states must have the "power of the purse," not only formally but also actually. Retention of the power of the purse requires immunity from suits that could bankrupt or imperil states from pursuing ends decided upon by the people.[31] But the power to enact law is always limited in a democratic account of sovereignty by recognition that this power does not extend to violations of basic individual rights in matters like due process or equal protection. This rights-based, for the people element of democracy entails denying the state immunity in cases of fundamental rights violations, which fail to satisfy the conditions of democratic legitimacy and negates democratic sovereignty. No democratic sovereign can violate fundamental rights, and we argue that tort law remains an important way to address rights violations that go beyond the sovereign capacity of state governments.

Our key contribution is to frame inquiries into sovereign immunity as ones about fundamental democratic rights. Sovereign immunity is nothing more than the power to make a sovereign mistake without impeding other sovereign functions, in the way that liability undermines the sovereign power of the purse. We argue that, in a democracy, the presence of this power—and of democratic sovereignty generally—depends on whether a state has violated its citizens' fundamental democratic rights. When this breach of democratic sovereignty occurs, the state is not immune, and the mantle of democratic sovereignty passes to the citizen–plaintiff instead.

This concept of a "fundamental democratic right" operates with a very specific meaning in our theory. These rights are the substantive requirements necessary for democratic legitimacy, the minimum in order to

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be zealously protected because "they are critical to the functioning of an open and effective democratic process").

31. *Cf.* Thomas H. Lee, *International Law and Institutions and the American Constitution in War and Peace*, 31 BERKELEY J. INT'L L. 291, 305–06 (2013) (discussing civil liability for sovereign debt as "infring[ing] upon the fiscal autonomy of debtor states").

justify the coercive power of the state to free and equal citizens. We cannot provide an exhaustive catalogue of which rights count as fundamental in this way. Rather, our claim is that this inquiry is essential to understanding both the concept and the doctrine of sovereign immunity.

The Fourteenth Amendment serves as a broad (but not perfect[32]) guide to the meaning of fundamental democratic rights. It enshrines the core democratic ideal of free and equal citizenship into law. The Court's doctrine of "selective incorporation" of the Bill of Rights under the Due Process Clause of the Fourteenth Amendment inquires into "whether a right is among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"[33] In addition, the Fourteenth Amendment guarantees "the equal protection of the laws" and provides for the protection of other unenumerated freedoms as instances of basic "liberty" through substantive due process.[34] Using these textual and doctrinal sources as a starting point, we understand the concept of fundamental democratic rights to include, for example, the rights against racial discrimination[35] and cruel and unusual punishment,[36] as well as the rights to the freedom of political speech[37] and to criminal counsel for indigent defendants.[38] Ultimately, however, our approach requires both a positive review of constitutional law and a normative assessment "of the very essence of a scheme of ordered liberty."[39]

We follow the post-*Lochner*-era Court's distinction between market rights and personal liberty, where only the latter are fundamental to democracy. In our view the Court was right to reject the early-twentieth-century notion that economic matters should be walled off by the Constitution from the intervention of the democratic people, working

32. We acknowledge that some other provisions might also house fundamental democratic rights. We are not formalist about the concept. Rather we think we must engage in an inquiry into the importance of such a right in particular instances. *See infra* text accompanying notes 262–69.

33. Duncan v. Louisiana, 391 U.S. 145, 148 (1968) (quoting Powell v. Alabama, 287 U.S. 45, 67 (1932)). For discussion of several doctrinal approaches the Court has taken to cognize fundamental rights (and skepticism that it uniformly applies strict scrutiny to protect them), see generally Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227 (2006).

34. U.S. CONST. amend. XIV, § 1. Examples of well-established unenumerated rights protections abound. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (intimate sexual relationships); Eisenstadt v. Baird, 405 U.S. 438 (1972) (procreative freedom); Griswold v. Connecticut, 381 U.S. 479 (1965) (marital privacy); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (association).

35. *E.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

36. *E.g.*, Roper v. Simmons, 543 U.S. 551, 560 (2005); Robinson v. California, 370 U.S. 660, 667 (1962).

37. *E.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 300–01 (1964).

38. *E.g.*, Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963).

39. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

through Congress, the President, and state legislatures. Congress's power to regulate matters, such as labor relations, minimum wage legislation, and workers' rights generally, were necessary in a legitimate democratic nation attentive to the basic interests of its members. On our view this rejection of the notion that economic regulation is a limit on liberty has a direct implication for the issue of sovereign immunity. Just as the government should have the power to regulate the economy, so too should it have the power to be free from suits where that power causes economic harm not linked to the fundamental rights of democratic citizens. Such violations might be called "rights" by plaintiffs, but they are the result of a state with the power to modify the common law and regulate the structure of economic activity. Economic costs caused by government regulation (and the resulting benefits of protecting citizens' welfare) will likely happen at both the federal and state level. Progressive interventions into the economy took and take place both within the states and at the level of congressional legislation.[40] In this Article we defend the notion of immunity as a kind of government power at both levels of government. We reject the notion of *Lochner*-era rights and the claim that citizen–plaintiffs have the right to sue in all economic matters. To the contrary, the power of the sovereign to intervene in the economic domain extends to its powers to make mistakes in economic matters and to be free from suit without its consent.

But although we draw on the post-*Lochner* distinction between private market rights and other fundamental rights, we do not slavishly follow the Court's existing precedents—rather, it ultimately depends on a normative argument of political theory.[41] In other areas, we criticize the Court for its unduly narrow conception of rights, as in *Board of Trustees of the University of Alabama v. Garrett*.[42] In these cases, Congress has an important role to play in articulating the substance of fundamental democratic rights.

Having clarified our meaning of fundamental democratic rights, we should also note that this is not the place for a full-fledged defense of this particular conception. One of us has done that in another place.[43] Rather, we stipulate that many of these rights are fundamental in order to highlight our main point: that sovereign immunity in a democracy depends on whether these fundamental rights are respected. Our argument is not meant to do anything more than reframe debates over sovereign immunity in this way. By focusing on this link between fundamental rights and democratic

40. *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE ch. 3 (1996) (examining the development of economic regulation at both levels of government in the nineteenth century); CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS 67–73 (2004) (discussing the New Deal vision of positive economic and social rights).

41. *See infra* notes 313–28 and accompanying text.

42. 531 U.S. 356 (2001); *see also infra* notes 292–308 and accompanying text.

43. BRETTSCHNEIDER, *supra* note 30.

sovereignty, it also clarifies a number of doctrinal confusions. Some might be daunted by our approach, as it places questions of immunity in the contested realm of constitutional values and rights. But on our review of the doctrine, this ship has long sailed already. Most importantly, our approach is conceptually the only way to grasp the issue of whether the state acts or does not act as sovereign. This term is one grounded in political theory—and this theorizing cannot and should not be avoided.

Our account explains and justifies the idea of sovereign immunity within a constitutional democracy. But, just as importantly, it also sheds light on the contours of the Court's sovereign immunity jurisprudence. It illuminates the doctrine of abrogation[44] by refocusing the question on the conditions of democratic legitimacy and Congress's role in protecting fundamental rights. It enriches our understanding of the doctrine of waiver by introducing a parallel consideration alongside the "federalism costs" of implied waiver: a presumption in favor of democratic legitimacy. And it defends the much-maligned "fiction" of *Ex parte Young*[45] and *Edelman v. Jordan*,[46] locating it at the center of a democratic conception of sovereign immunity. We offer a democratic conception of sovereign immunity that pulls these areas of the doctrine together. With this unified account of democratic sovereignty, we can resolve difficult and disparate questions of federal and state power and immunity for federal officers at the same time. In sum, the state is authorized to make mistakes when it acts as the democratic sovereign. Its sovereign power of the purse gives rise to immunity from suits that would raid the public fisc. But this immunity does not extend to instances when the state violates fundamental rights because observing these rights is a necessary requirement for legitimate democratic sovereignty. Indeed, our view suggests that states must compensate the victims of fundamental rights violations—not simply as a matter of corrective justice but also to maintain their standing as legitimate democratic sovereigns. These insights lend clarity to a wide variety of doctrinal areas. The theory is both a normatively appealing account of democracy and one with explanatory force.

We begin by examining flawed monarchical conceptions of sovereign immunity and then go on to propose an alternative conception grounded in democratic authority. We proceed to examine why our democratic model of sovereign immunity can explain the key distinction between the way the Court has treated the waiver of sovereign immunity under the Fourteenth

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44. *See generally* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 65–66 (1996) (rejecting Congressional power to abrogate sovereign immunity under the Commerce Clause); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (upholding this power under the Fourteenth Amendment).

45. 209 U.S. 123 (1908).

46. 415 U.S. 651 (1974); *see infra* subparts III(A)–(B). Akhil Amar, for example, criticizes the "various doctrinal gymnastics and legal fictions" of *Young* and *Edelman* for their "obvious lack of principle." Amar, *supra* note 13, at 1478–80.

Amendment and the way it has treated sovereign immunity under other provisions of the Constitution, such as the Commerce Clause and the Indian Commerce Clause. Finally, we examine the relationship between our theory and current constitutional law, making some suggestions for reform but leaving intact many of its basic premises.

I. Existing Defenses of Sovereign Immunity Doctrine

This Part reviews the prevailing theories that judges and scholars have invoked to justify sovereign immunity as it has developed. We conclude that these approaches violate core principles of self-government and in some cases retain vestiges of monarchism. Originalism fails because it cannot deliver sufficient textual and historical evidence. The dignitary view falters because it abandons the Constitution's core commitment to democratic self-government.

A. The Flaws of Originalist Theories and Their Textualist Critics

Much of the scholarship over the past thirty years has debated the existence of a freestanding principle of sovereign immunity extending beyond the text of the Eleventh Amendment. Of course, its forty-three words make no mention of a state's immunity from *its own* citizens.[47] Rather, originalists argue that the Eleventh Amendment simply reaffirms a principle of sovereign immunity that was already hardwired into the original Constitution as ratified.[48] Such an argument would inoculate originalists against the charge that the doctrine of sovereign immunity is anti-democratic because the principle would then enjoy the highest democratic pedigree. If sovereign immunity is a deep structural feature of the Constitution, then it is the supreme law of the land ratified by the people themselves.[49]

Originalists seek to uncover the original public meaning of the Constitution with close study of its text, structure, and history.[50] Sovereign immunity flows, they suggest, from the notion of federalism inherent in the

47. U.S. CONST. amend. XI.

48. *See Seminole Tribe*, 517 U.S. at 54 (arguing that the correct understanding of the Eleventh Amendment is that it confirms the presupposition of sovereign immunity found in the Constitution).

49. *See supra* note 25 and accompanying text.

50. *See* AMAR, *supra* note 24, at 465–70 (explaining the relationship between originalism and a textualist understanding of the Constitution); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 119, 139 (1997) (discussing the originalist approach to interpretation and the accompanying considerations, canons, and presumptions therein); WHITTINGTON, *supra* note 30, at 3 (advocating originalism as the method best suited to interpret Constitutional text). For an account attempting to reconcile this originalist methodology with living constitutionalism, see generally JACK M. BALKIN, LIVING ORIGINALISM (2011).

Tenth Amendment, as well as the very structure of the Constitution itself.[51] Most importantly, the originalist defense of blanket sovereign immunity looks to preconstitutional history, emphasizing the English maxim that the King could not be sued in his own courts.[52] The founders, they argue, meant to incorporate this common law notion, translating it into a broader principle that states are immune from suit without their consent.[53] But this move is too quick: we have already seen that it defies the Constitution's core commitment to popular sovereignty to countenance such raw monarchism. We must instead consider how the notion that a sovereign cannot be sued in its own courts translates into the context of a constitutional democracy.

The originalist case then turns to the history of the Eleventh Amendment and its enactment. This history, they argue, merely illustrates an attempt to correct a misunderstanding of sovereign immunity's centrality to American constitutional law.[54] The 1793 case of *Chisholm v. Georgia*[55] was in many ways the Court's original "blockbuster" decision. The executor of a South Carolinian merchant's estate brought an assumpsit action against the State of Georgia, attempting to recover for breach of a contract over war supplies.[56] Georgia refused to appear, arguing in its answer that the Court lacked jurisdiction under Article III.[57] As a sovereign state, it argued that it was immune from being haled into court by a mere citizen.[58] The Supreme Court's decision in *Chisholm* rejected this sweeping conception of sovereign immunity.[59] Four Justices, in seriatim opinions, stressed that the language of Article III symmetrically permitted states to sue citizens of other states and vice versa.[60] Justice Wilson emphasized that Georgia's claim of sovereign immunity reached for a relic of the King's courts—one that was incompatible with the republican commitment to

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51. In *Alden v. Maine*, the Court notes the founding-era "postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention." 527 U.S. 706, 729 (1999) (quoting Principality of Monaco v. Mississippi, 292 U.S. 313, 322–23 (1934)) (internal quotation marks omitted). Justice Kennedy's opinion observes that this logic of reserved sovereign immunity does not depend on the text of the Eleventh Amendment or even "the scope of the judicial power established by Article III." *Id.* at 730. Rather, state sovereign immunity rests on a "separate and distinct structural principle" that "inheres in the system of federalism established by the Constitution." *Id.*

52. *See supra* notes 9–10 and accompanying text.

53. Hans v. Louisiana, 134 U.S. 1, 15–16 (1890).

54. SCALIA, *supra* note 50, at 78 n.25.

55. 2 U.S. (2 Dall.) 419 (1793).

56. *Id.* at 420.

57. *Id.* at 419.

58. *Id.* at 420.

59. *Id.* at 425–26.

60. *Id.* at 450–51 (opinion of Blair, J.); *id.* at 456–57 (opinion of Wilson, J.); *id.* at 466–67 (opinion of Cushing, J.); *id.* at 475–76 (opinion of Jay, C.J.).

popular sovereignty.[61] And Chief Justice Jay decried sovereign immunity as a "feudal" concept of old Europe that "considers the Prince as the sovereign, and the people as his subjects."[62] But after the American Revolution, "sovereignty devolved on the people, and they are truly the sovereigns of the country," able to hold the states to account for their wrongs.[63]

Only Justice Iredell dissented, arguing that first principles would not permit "a compulsory suit for the recovery of money against a state."[64] No sovereign state could be sued without its consent.[65] In response to what the Court would later call "a shock of surprise," the Eleventh Amendment was quickly presented and ratified.[66] This immediate wave of criticism from state legislatures and the public included the concern that such suits could bankrupt states.[67] The Amendment's text explicitly protects states against lawsuits by citizens of other states, but more significant to the originalist case is the background principle of state sovereign immunity that the Amendment affirms. On the originalist conception, the Eleventh Amendment was not new law but merely an instance in which the American public corrected a decision in which the Supreme Court had mistakenly strayed from the Constitution.[68]

Undoubtedly, originalists are correct that the founding generation was well acquainted with the concept of sovereign immunity, from Blackstone and beyond. As Hamilton noted in Federalist 81: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."[69] Hamilton further assured Antifederalist skeptics of the proposed Constitution that its system of federal courts would not jeopardize states' sovereign policy-making power at the behest of private creditors.[70] Ratification would not serve as a blanket waiver of sovereign immunity: "[T]here is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the

61. *Id.* at 458 (opinion of Wilson, J.).

62. *Id.* at 471 (opinion of Jay, J.) (emphasis omitted).

63. *Id.*

64. *Id.* at 434 (opinion of Iredell, J.).

65. *Id.* at 434–35.

66. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 69 (1996) (quoting Principality of Monaco v. Mississippi, 292 U.S. 313, 325 (1934)) (internal quotation marks omitted).

67. William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372, 1381 (1989); John V. Orth, *State Debts & Federal Jurisdiction*, 7 DUKE J. CONST. L. & PUB. POL'Y (SPECIAL ISSUE) 1, 3 (2012).

68. Hans v. Louisiana, 134 U.S. 1, 11, 14–16 (1890).

69. THE FEDERALIST NO. 81, at 486 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis omitted).

70. *Id.* at 487.

obligations of good faith."[71] The originalist case in favor of *some* residual sovereign immunity is then fairly strong. Article III's initial text left open the possibility of private creditors suing other states in federal court. The swift reaction against *Chisholm* closed this gap, and it points to the existence of a background principle of sovereign immunity.

But neither the facts of *Chisholm* nor Hamilton's imagined scenario speaks to two critical questions: may a citizen (1) sue her own state or (2) file a *federal* cause of action against a state in federal court without that state's consent? A century later, in *Hans v. Louisiana*,[72] the Court expanded the principle of sovereign immunity to bar both of these kinds of suits against states.[73] In 1879, with Reconstruction waning and many Southern states in financial turmoil, Louisiana passed a constitutional amendment repudiating debt owed under a series of bonds that were to come due the next year.[74] The plaintiff, a citizen of Louisiana, sued the state in federal court, claiming that this breach violated the Contracts Clause.[75] Relying on these originalist sources and the enactment history of the Eleventh Amendment, the Court articulated an expansive conception of sovereign immunity. After recounting this historical evidence, Justice Bradley boldly claimed that "[i]t is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. . . . It is enough for us to declare its existence."[76] But can originalism deliver the textual and historical evidence to establish this broad conception of state sovereign immunity?

Many scholars are skeptical that it can. For the purposes of this particular disagreement, we will label these critics "textualists." They argue for a narrow reading of the Eleventh Amendment, and they deny that state

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71. *Id.*

72. 134 U.S. 1 (1890). For an illuminating discussion of the historical background of *Hans*, see generally Orth, *supra* note 67.

73. *Hans*, 134 U.S. at 20–21.

74. *Id.* at 1–3.

75. *Id.* On our view, *Hans* was correctly decided, although the correct reasoning is somewhat obscured in the opinion. The case was properly dismissed but not because the doctrine of sovereign immunity imposes a blanket jurisdictional bar against even constitutional claims; rather, the plaintiff's complaint failed to state a cause of action because the Contracts Clause does not apply to sovereign debt. *See infra* notes 162–75 and accompanying text.

76. *Hans*, 134 U.S. at 9, 21. One might think that such an examination is precisely the duty of a judge in adjudication: publicly justifying the application of law to a particular case. *See* OWEN FISS, THE LAW AS IT COULD BE 11–12 (2003) (discussing the structure of judicial power and judges' obligation to give public reasons for their decision); STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM 162 (1990) (articulating the duty of public justification in the judiciary and other democratic institutions). But at the end of his opinion in *Hans*, Justice Bradley offers a justification for sovereign immunity that points to the same guiding principle that we offer: democracy. *Hans*, 134 U.S. at 21; *see infra* text accompanying notes 157–60.

sovereign immunity enjoys constitutional stature as a background legal principle.[77] First, the textualists point to the narrow language of the Eleventh Amendment—not only that its words do not cover suits between citizens and their own states but also that it offers a mere rule of construction.[78] The Amendment proclaims that "[t]he Judicial power of the United States," laid out in Article III, "shall not be construed to extend" to suits against states.[79] This language is far more modest than the initial drafts making the rounds after *Chisholm* came down, which stated that "no state shall be liable to be made a party defendant."[80]

The importance of this distinction becomes clear in the textualists' second argument: that the Eleventh Amendment only curbs the federal courts' diversity jurisdiction, leaving open any suit against a state for violating federal law. Article III, Section Two divides federal jurisdiction into nine categories of "cases" and "controversies" over which "[t]he judicial power shall extend."[81] The first three depend on the subject matter of a particular case—including, most importantly, cases "arising under" the Constitution, federal laws, and treaties.[82] The remaining categories are triggered by the status of the parties in controversy.[83] Together, these categories form what we often refer to as "diversity jurisdiction," over cases where federal courts provide the best forum *despite the absence of a question of federal law*.[84] At the time of ratification, this list included "Controversies . . . between a State and Citizens of another State."[85] The

77. For prominent examples of this view, see Alden v. Maine, 527 U.S. 706, 762–64 (1999) (Souter, J., dissenting); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 78, 93 (1996) (Stevens, J., dissenting); Atascadero State Hosp., v. Scanlon, 473 U.S. 234, 247, 258–59 (1985) (Brennan, J., dissenting); Amar, *supra* note 13, at 1475; William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1034 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1894 (1983); Jackson, *supra* note 24, at 5. For a different, more structural form of skepticism about "the traditional trappings of sovereignty and separate spheres," Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1889 (2014). *See generally* Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044 (2014).

78. Amar, *supra* note 13, at 1475; Gibbons, *supra* note 77, at 1894; Jackson, *supra* note 24, at 3, 8–13; *see also* John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1748–50 (2004) (suggesting that Article V's supermajoritarian thresholds require a narrow reading of the Eleventh Amendment).

79. U.S. CONST. amend. XI.

80. Amar, *supra* note 13, at 1481–82.

81. U.S. CONST. art. III, § 2, cl. 1. For further discussion on Article III jurisdiction, see generally Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985).

82. U.S. CONST. art. III, § 2, cl. 1.

83. *Id.*

84. James M. Underwood, *The Late Great Diversity Jurisdiction*, 57 CASE W. RES. L. REV. 179, 179 (2006).

85. U.S. CONST. art. III, § 2, cl. 1.

Chisholm Court read this provision to permit a suit by a private creditor against a state, and the Eleventh Amendment effectively overturned that construction.[86] But recall that *Chisholm* only involved a question of pure state law: a common law action of assumpsit for breach of contract.[87] The Eleventh Amendment's alteration to the second half of Article III diversity jurisdiction left open the judicial power to hear cases arising under federal law—including cases where states are the defendant.

Third, textualists do acknowledge that some form of the principle of state sovereign immunity exists. But they insist that it is a common law doctrine, rather than a feature of the Constitution—more like the principles of equity than structural principles such as federalism or the separation of powers.[88] As a result, Congress may freely displace this common law doctrine by statute, and a plaintiff may pierce the veil of sovereign immunity by invoking the Constitution or a federal law.[89]

These textualist objections raise considerable uncertainty about the originalists' case for the broad sovereign immunity found under our current doctrine. Textualists have effectively beaten the originalists at their own game, explaining the historical evidence and providing a more sophisticated reading of the text and structure of the document. The original meaning of the Constitution and the enactment history of the Eleventh Amendment will not, by themselves, establish a basis for the expansion of sovereign immunity under *Hans*.

But the failure of the originalist case does not necessarily mean that the textualist skeptics win the day. Suppose that there really did exist some broad principle of sovereign immunity embedded as a deep constitutional principle. Then the skeptical case against current doctrine would falter

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86. Moreover, its language closely tracks the language of Article III. *Compare* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."), *with* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State . . . .").

87. *See supra* note 56 and accompanying text. Following this point, Amar argues that the problem with *Chisholm* is that the majority opinion decides the underlying contract claim by drawing on general federal common law. Amar, *supra* note 13, at 1470. Much later, the Court would expressly invalidate this form of judge-made law as anathema to the proper constitutional balance between the structural principle federalism and the supremacy of federal law. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77–78 (1938). Georgia's claimed immunity was then a function of state common law, which could not trump the Constitution or some hypothetical federal statute.

88. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 100–02 (1996) (Souter, J., dissenting) (asserting that the majority's reliance on the Eleventh Amendment is only relevant if the Court adopts the court-made, common law construction developed in *Hans*, as a reliance on the actual Amendment is incorrect).

89. *See id.* at 100 (noting how the Eleventh Amendment does not bar congressional authority when it is treated as a common law doctrine). *But see* Jackson, *supra* note 24, at 40–44 (critiquing the argument that states can be subject to federal adjudication because Congress can abrogate immunity).

because, by hypothesis, there is some other basis for constitutional sovereign immunity besides the historical materials. In other words, notwithstanding the textualist arguments that we must read the Eleventh Amendment narrowly, some freestanding justification may support constitutional sovereign immunity. After all, the principle that the *federal* government enjoys sovereign immunity is nowhere mentioned in the Constitution, either. The task, then, is to identify and articulate a principle that can justify the doctrine and reconcile it with the Constitution as a whole.[90] We should not turn our back on a century of doctrine until we conclude that no such principle exists.

B. The Problematic State Dignity Principle

Canvassing the Court's majority opinions since the beginning of the "federalism revolution" in the 1990s,[91] we find that the Justices often defend sovereign immunity (and its expansion) in terms of the dignity of the states. In the rest of this subpart we reject the "state dignity view" as it has been invoked in doctrine by originalist and non-originalist proponents. If sovereign immunity jurisprudence is to be saved in some form, we argue, it must be based on a principle other than state dignity.

The state dignity view of sovereign immunity holds that there is something intrinsic to a state that entails immunity from lawsuits brought by individuals. As we have suggested, we can see why this might be thought to be true on *some* conceptions of the relationship between states and individuals. In a monarchy, for instance, to sue the king without his consent would be to challenge the monarch's absolute authority and thus the entire basis of monarchical government. On this conception, the dignity of the sovereign would preclude unconsented private suits against the state. But as a defense of sovereign immunity doctrine the state dignity view goes beyond claims about the dignity of any particular kind of state or under any particular political theory. Instead, its proponents suggest that states generally have an inherent dignity that must be respected by protecting them from lawsuits. For a private individual to hale a state into court without its consent—in any context—is to treat the sovereign like a common person. And, for any state, that is to suffer an unconscionable indignity.

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90. *See supra* text accompanying note 28.

91. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 715 (1999) ("The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity."); *Seminole Tribe*, 517 U.S. at 58 (asserting that the Eleventh Amendment exists, in part, to avoid the "indignity" of subjecting a state to the judicial process by the actions of private parties (quoting P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993)) (internal quotation marks omitted)).

We can see this view on full display in Justice Kennedy's majority opinion in *Alden v. Maine*.[92] Employees of the State of Maine sought to enforce federal overtime regulations in state court,[93] but the Court found their efforts to be an impermissible affront to the state's dignity.[94] States, Justice Kennedy insisted, "are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty."[95] The founding generation "considered immunity from private suits central to sovereign dignity."[96] In other words, states are subject to valid federal law under the Supremacy Clause. But even where their authority is vacant, the inherent dignity that states retain shields them from any accountability—either in federal *or* state court. "Private suits against nonconsenting States . . . present 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties,' regardless of the forum."[97] In *Federal Maritime Commission v. South Carolina State Ports Authority*,[98] Justice Thomas declared that "[t]he *preeminent* purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."[99] Beyond protecting state treasuries, state sovereign immunity exists primarily to protect states from the indignity of being haled into court to account for its wrongs.[100] For it is "neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons."[101] As a result, the Court extended the dignity rationale so far as to protect South Carolina from having to appear before a federal administrative hearing.[102]

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92. 527 U.S. 706, 711 (1999).

93. *Id.* at 711–12. The Court held in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), that Congress possessed the power under Article I to regulate the wages and hours of state employees. *Id.* at 530–31. Its subsequent ruling in *Seminole Tribe* (rejecting Article I abrogation power) leaves plaintiffs no venue other than state court to vindicate these rights. 517 U.S. at 47.

94. *Alden*, 527 U.S. at 712.

95. *Id.* at 715.

96. *Id.*

97. *Id.* at 749 (quoting *In re* Ayres, 123 U.S. 443, 505 (1887)) (citations omitted).

98. 535 U.S. 743 (2002).

99. *Id.* at 747, 760 (emphasis added).

100. *Id.*

101. *Id.* (quoting *Ayres*, 123 U.S. at 505) (internal quotation marks omitted).

102. *Id.* at 769. Curiously, the literature defending the Court's sovereign dignity theory is far thinner and more hesitant than one might expect, given the fervor with which five justices have advanced it. The most vigorous scholarly defense can be found in Scott Dodson, *Dignity: The New Frontier of State Sovereignty*, 56 OKLA. L. REV. 777 (2003), which argues that because the state dignity rationale lacks grounding in the Constitution the Court has the ability to create a more coherent state sovereign immunity doctrine using the dignity rationale to do so. *Id.* at 831; *see also* Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81, 82 (2001) (exploring the possibility that the Court's references to state dignity are

There are a number of problems with inherent state dignity as a rationale for sovereign immunity. First, even if we grant, at face value, that inherent state dignity exists and that it requires immunity from suit, this justification fails to explain a number of key features of sovereign immunity jurisprudence.[103] As we will discuss later in Part IV, the doctrine of *Ex parte Young* permits individual plaintiffs to seek injunctive relief against state officials for ongoing violations of their federal rights. But *Edelman v. Jordan*, its predecessors, and its progeny make clear that this relief cannot extend to monetary damages,[104] retrospective relief,[105] or their functional equivalents.[106] It is not obvious why a damages award would offend a state's sovereign dignity, while an injunction commanding the state to perform certain conduct does not.[107] Additionally, Congress's enforcement powers under the Reconstruction Amendments enable it to abrogate state sovereign immunity in order to protect citizens' constitutional rights.[108] In effect, if the inherent state dignity view is correct, then Congress may strip states of that very dignity under certain conditions. It can forcibly subject states to the ignominy of a private lawsuit, like a child forced to play nicely under the watchful and chastening eye of his mother.

For that matter, a broad swathe of remedies for constitutional violations would seem to disparage states' inherent dignity. Congress may force certain states to preclear changes to their election procedures.[109] The Supreme Court may order a state to fundamentally rework its entire prison system.[110] States may not even enjoy the quiet dignity of choosing their

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not just "rhetorical flourishes" but rather are a reflection of the concern for "expressive harms"); Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 7 (2003) (questioning whether sovereign dignity has any application to state sovereign immunity and suggesting that Congress should have the authority to abrogate the states' immunity).

103. *See* Daniel J. Meltzer, Essay, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1038–41 (2000) (questioning broad notions of state dignity and noting that the federal government still has the power to impose unwanted duties on the states and to block the states' regulatory authority through preemption).

104. Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464 (1945).

105. Edelman v. Jordan, 415 U.S. 651, 659 (1974).

106. Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 281 (1997).

107. Our view, by contrast, does explain this key feature of sovereign immunity jurisprudence. *See infra* Part IV.

108. Fitzpatrick v. Bitzer, 427 U.S. 445, 455–56 (1976).

109. Section Five of the Voting Rights Act of 1965 imposes these preclearance requirements, which the Court has repeatedly upheld as an appropriate exercise of Section Two of the Fifteenth Amendment. City of Rome v. United States, 446 U.S. 156, 162–66, 173 (1980); South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966). The Court's recent decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), strikes down the formula determining which states are subject to preclearance (Section Four of the Voting Rights Act) but leaves preclearance power itself intact. *Id.* at 2631.

110. *See* Brown v. Plata, 131 S. Ct. 1910, 1947 (2011) (finding that the relief of reducing the prison population ordered by the lower courts was constitutionally required). The dissent characterized the order as "perhaps the most radical injunction issued by a court in our Nation's history: an order requiring California to release the staggering number of 46,000 convicted

own religion![111] And they must put up with waves upon waves of dissenting speech that criticizes the government.[112] It is no answer to say that state dignity does not extend so far as to countenance constitutional violations. For such "dignity" would no longer be inherent, and conditional dignity makes for a curious bird.

Additionally, the link between state dignity and immunity from suit lacks a compelling theory. The justices often recite the disgraceful ordeal of being haled into court by a private citizen,[113] as though the state were some scofflaw recently rounded up or a prisoner in an orange jumpsuit and chains. But it is unclear why adjudication would at all demean the dignity of a democratic state. Indeed, an adversarial proceeding before an impartial decision maker provides a way to hold states accountable to the rule of law while allowing them the opportunity to explain and justify their actions.[114]

But the most significant problem with the state dignity view is its central premise that some inherent property of state dignity exists at all. There is nothing inherent in a state as such that makes it deserving of dignity. Indeed, many state regimes have committed evils that make them worthy of neither respect nor dignity. What dignity can a state command, for example, as an authoritarian dictatorship that violates human rights? Thus, in order to avoid the normatively indefensible attribution of dignity to states per se, any good theory of sovereign immunity must feature a distinction. It must distinguish between the mere recognition of a state as an empirically constituted entity and the normative evaluation that a state possesses a particular kind of sovereignty that entitles it to respect or dignity. Perhaps unsurprisingly, a theory of sovereign immunity must include a theory of sovereignty. The doctrine, after all, is one of sovereign immunity not state immunity. In particular we distinguish between the multiplicity of state actions and those state actions that respect the limits of sovereignty.

Democratic self-government is the core commitment of our Constitution. We therefore should develop a democratic account of sovereignty and of sovereign immunity. Simply put, democratic sovereignty requires that government *of* the people (coercive state action) must be both *by* the people (involving their participation in its procedures) and *for* the people

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criminals." *Id.* at 1950 (Scalia, J., dissenting). Note that Justice Kennedy, one of the fiercest proponents of the state dignity view, is the author of the majority opinion. *Id.* at 1922 (majority opinion).

111. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (explaining that the Establishment Clause prohibits a state from "set[ting] up a church").

112. *See, e.g.*, Cohen v. California, 403 U.S. 15, 26 (1971) (protecting profane political speech).

113. *See supra* notes 92–101 and accompanying text.

114. *See* Resnik & Suk, *supra* note 11, at 1928 ("[R]equiring sovereigns to account for actions through orderly dialogue between individuals, entities, and governments ought not be understood to be an insult to status.").

(promoting the common good and respecting substantive democratic rights). It then follows that state action is *not* sovereign action unless it satisfies both the procedural and the substantive conditions of democratic legitimacy.

When the state acts as sovereign, it will sometimes make mistakes, even very costly ones. The state may even intentionally commit private wrongs, such as breaching a contract. Democratic sovereignty requires that states be immune from liability for these actions unless they consent to be sued. Otherwise, rather than serve the public good through a process of collective decision making, the treasury would serve to remedy private grievances instead. A thicket of potential liability would arrest state action entirely. Such sovereign actions (as opposed to all actions by the state) are rightly protected by immunity from suit. It is not the state as such that deserves dignity but rather a respect for a notion that some government actions are authorized by the people.

But the state does not always act as sovereign. Some actions of the state are not only mistaken, they violate a constitutionally protected individual right, such as the guarantees of due process or equal protection enshrined in the Fourteenth Amendment. Violations of fundamental constitutional rights, we argue, are not sovereign actions, although they are state actions and thus should not trigger sovereign immunity. In fact, in such actions the sovereignty rests with the individual enforcing the Constitution. The Fourteenth Amendment recognizes the people's sovereignty by limiting government and ensuring that states respect citizens' fundamental rights. Lawsuits against the states that violate these rights are fundamental to the meaning of sovereignty after the passage of the Fourteenth Amendment.

It should be clear now how our view contrasts with the state dignity approach to sovereign immunity. While that approach cannot explain differences in immunities in cases that involve constitutional rights violations and other private wrongs, the democratic view we have sketched makes that distinction fundamental. But the democratic view also contrasts greatly with the populist understanding of sovereign immunity. The populist understanding outlined by the Court in *Chisholm* claims that states should never be immune from suit. The problem with this view, however, is that it fails to recognize the multiplicity of fundamental ways in which the state, even the democratic state, is different than the citizenry.

To illustrate this distinction, consider the following two scenarios. If my neighbor takes my money and buys a TV, that neighbor commits the crime of larceny as well as the private tort of conversion. But if the state taxes me and buys a monitor for the local stadium, it performs a fundamental sovereign function. As these examples illustrate, the state can exercise legitimate coercion where individuals cannot. We will argue too

that, when fundamental rights are not at issue, the state is also immune from liability stemming from other private wrongs.

In the next Part, we will attempt to carve out such an account, which avoids the pitfalls of both a monarchist defense of sovereign immunity and a conflation of states and sovereigns.

II. Democratic Authority and Sovereign Immunity

A. The Substance and Procedure of Democracy

Our aim in this subpart is to provide a democratic alternative to the overly statist conceptions of sovereign immunity discussed in the previous Part as well as to the populist rejection of sovereign immunity. On our view, in the American constitutional regime, any discussion of sovereignty must begin with an account not of the state as such but with the notion that the *people* are sovereign. In particular, democratic sovereignty has two features, which one of us has outlined in a previous book and that can be applied to the case of American democracy.[115]

First, in a democracy the sovereignty of the people has a procedural element of rule *by* the people. Law is authorized by the people acting through their representatives.[116] This component of democratic sovereignty courses throughout the text and structure of the American Constitution—empowering the elected branches of the federal government under Articles I and II, securing participation at the state level through the Tenth Amendment and the Republican Guarantee Clause, and expanding and protecting the right to vote through a number of provisions.[117]

Second, in a democracy the sovereignty of the people entails the respect for citizens' fundamental rights.[118] Part of what it means to respect

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115. *See generally* BRETTSCHNEIDER, *supra* note 30.

116. *See* JEREMY WALDRON, LAW AND DISAGREEMENT 156 (1999) ("[*A*]*ll* (adult, sane) individuals have the right to participate, either directly or through elected and accountable representatives, in making laws and other decisions about the structure of their society.").

117. *See* U.S. CONST. amend. XIV (guaranteeing equal protection in the right to vote); U.S. CONST. amend. XV (forbidding voting restrictions based on race); U.S. CONST. amend. XIX (forbidding voting restrictions based on sex); U.S. CONST. amend. XXIV (prohibiting poll taxes); U.S. CONST. amend. XXVI (forbidding voting restrictions based on age for citizens eighteen or older). Akhil Amar discusses the connections between these provisions in AMAR, *supra* note 24, at chs. 10–12. For an illuminating tour of the procedural nature of the U.S. Constitution, see generally ELY, *supra* note 30, at 88–101.

118. *See* DWORKIN, FREEDOM'S LAW, *supra* note 27, at 2–12 (offering a substantive account of democracy and arguing that the Bill of Rights commits the U.S. to respecting individual rights such as freedoms of speech and religion); CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 82 (2001) (noting the theory that "democracy presupposes that individuals enjoy an attractive . . . package of rights—rights that enable them to participate effectively in political life, or that guarantee them the benefits they would have enjoyed in some ideal, consensual, but practically unrealizable polity"); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 120–23 (William Rehg

the people as a collective is to recognize that each individual's sovereignty must be respected. This entails a variety of substantive rights at both the state and federal level that are essential to democracy. The Fourteenth Amendment in particular guarantees that while sovereignty leads in part to the authorization of democratic lawmaking, it is also limited when it comes to a variety of entitlements including equal protection and substantive due process.

It is thus characteristic of a regime that respects democratic sovereignty that it wield democratic authority to act coercively but that such power must also be limited, both by an account of rights and by an account of power which is derived from a democratic process. Thus, the democratic state, subject to certain conditions, has a kind of authority over individual citizens. This authority is subject to certain limits, of the sort we have just laid out, and thus its authority is only legitimate when it acts within certain bounds.

B. State Action and Democratic Sovereignty

It is helpful to distinguish, following the notions of rule by and for the people, between sovereign and non-sovereign acts of government. More specifically, when the state coerces its citizens, it does so legitimately and within its authority when legislative acts are passed by representatives of the people. Some of these acts might remain sovereign but still might be mistaken. For example, a state may choose to cut spending during an economic recession, substantially increasing unemployment levels. These policy decisions may well be mistaken or even negligent—courses of action that a reasonable policymaker would not have taken. And they may cause considerable injury to private individuals. But these decisions, made on behalf of all the people, violate no fundamental rights. They do not undermine citizens' free and equal status or flout the substantive requirements of democratic legitimacy. In contrast, some government actions violate constitutional rights. In these cases, the government acts in a way that exceeds its sovereign authority. As one of us has argued elsewhere, such acts are rightly struck down by the Supreme Court both on constitutional grounds and on grounds of democratic sovereignty.[119] Such acts of government undermine the basis of its very legitimacy. We link the two prongs of our view of sovereign immunity to the procedural and substantive aspects of democratic sovereignty in the next two subsections. First, where the state commits a sovereign mistake, on our theory it is immune from private suit. Its actions are legitimately authorized by the procedures of democracy. Second, when a state violates a fundamental

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trans., 1996) (identifying citizens' fused roles as authors and addressees of the law as a source of their rights).

119. BRETTSCHNEIDER, *supra* note 30, at 1–3.

democratic right, the suit must go through—because in that instance, sovereignty resides with the citizen–plaintiff instead.

1. Sovereign Mistakes and Pure Private Rights.—To understand sovereign immunity in a democracy, we should appeal directly to an account of democratic sovereignty. On our view, the overarching premise of modern sovereign immunity jurisprudence is correct. For private wrongs where no fundamental right is at stake, sovereign states should be constitutionally immune from suit without their consent. These cases are those in which the state acts wrongly but legitimately—as a democratic sovereign, both *by* and *for* the people. It acts *by* the people by enacting the will of the people through legislation, albeit enacting policy that might be mistaken. It also respects the *for* the people aspect of democracy by not violating basic rights. Just as budgetary or other legislative mistakes are legitimate instances of authorized law, mistakes that result in lawsuits also should be "forgiven" by immunity as long as they do not violate any basic constitutional rights. Otherwise, a democratic state could not exercise its sovereign authority in a wide range of pressing policy issues—not without the risk of opening up the public treasury to private litigation.

In such instances, there is reason for the state to be treated differently than a private actor. It is part of the essential nature of an account of democratic authority that the state is empowered to force citizens to act against their will and that it might at times do so mistakenly. But because of the authority vested in a democratic state, it cannot be the case that all such instances are ripe for rectification. Just as the citizen who suffers as a result of a poor economic decision must accept that the action was legitimate, so too the citizen who suffers as a result of a state mistake that does not implicate a basic right must recognize that they have no claim. In both cases, the state acts within its authority and thus legitimately.

State actors commit what we would otherwise categorize as torts on countless occasions every day. But so long as their actions are sovereign, subject to the constraints of democratic legitimacy, then the state cannot be held liable for any resulting harm. Such private wrongs are simply sovereign mistakes, and they are legitimate.

For example, if she has a warrant and probable cause, an agent of the state may forcibly enter your home (trespass to land), threaten you with physical harm (assault), search your person by touching you without consent (battery), remove certain personal property (trespass to chattels), place you under arrest, and detain you. And even if you are completely innocent and never charged with a crime, you cannot recover for any of these wrongs unless the mistakes were unreasonable. Sovereign immunity creates a zone of discretion where a state can err and violate its citizens' private rights—such as common law actions in tort, contract, and property. Otherwise, the state could not act without encountering a thicket of liability.

But suppose that the officer committed those actions *without* a warrant and probable cause. One theory of recovery might simply be under the common law of torts. The officer could not claim immunity because her actions were unreasonable, unconstitutional, and therefore beyond her authority. Another promising theory would demand compensation for violating your constitutional rights—either through an implied cause of action under the Fourth Amendment[120] or a § 1983 suit.[121] Either way, whether she committed those intentional torts is not in issue. (She did, beyond question.) What matters is whether she acted *reasonably* because that is the trigger for the relevant substantive right under the Fourth Amendment.[122] Similarly, a state may commit a property tort, such as a postal truck backing into your car. And unless the state has waived its immunity,[123] you will not be able to recover in an ordinary court. But, crucially, a state may not deprive you of your property without due process of law because that is a fundamental democratic right grounded in the Constitution.[124]

A state and its laws are the source of all private rights. Under the police powers that flow from democratic sovereignty, the state determines the metes and bounds of its citizens' rights of contract, tort, and property. It cannot, therefore, be sued for violating these rights without its consent. The democratic conception of sovereign immunity will not permit it. By contrast, a state cannot violate its citizens' fundamental democratic rights and retain its democratic sovereignty. There can be no immunity for such a violation.

The relationship between budgetary matters and sovereign immunity is no mere analogy. Suits against states impose a significant risk on the public coffers.[125] Moreover, such suits cut at the tax base available to provide for

120. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971). For other causes of action implied under the Constitution, see cases cited *infra* note 285. Note that our view would require *Bivens* actions for *every* fundamental right violation—not just for that limited list. Additionally, alongside these claims, a federal court would have supplemental jurisdiction over an ordinary state law claim. United Mine Workers v. Gibbs, 383 U.S. 715, 721, 729 (1966).

121. Monroe v. Pape, 365 U.S. 167, 171–72 (1961).

122. Whren v. United States, 517 U.S. 806, 809, 813–14 (1996).

123. For further discussion of waiver, see *infra* subpart III(D).

124. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 261 (1970) (finding a right to a pre-termination hearing for welfare benefits under the Due Process Clause). Note that "deprivation" requires more than negligence and that postdeprivation process will satisfy the Constitution in many instances. Parratt v. Taylor, 451 U.S. 527, 538, 543–44 (1981).

125. For a harrowing description of the potential danger in the context of the Great Recession and dauntingly unfunded pensions, see generally Ernest A. Young, *Its Hour Come Round at Last? State Sovereign Immunity and the Great State Debt Crisis of the Early Twenty-First Century*, 35 HARV. J.L. & PUB. POL'Y 593 (2012). Young surveys the historical foundations of sovereign immunity doctrine, concluding that much of its development was influenced by the context of state debt crises after the Revolutionary and Civil Wars. *Id.* at 597–601. For further discussion of the dismal status of the financial condition of many states, see generally MICHAEL S. GREVE, AM.

the public welfare. Indeed, given that it is the states and not the federal government that provide for basic welfare in the contemporary American polity, these suits endanger the ability of the government to provide for the common welfare. Just as taxation and spending are core parts of rule by the people, so too is the ability to make mistakes that will not undermine, through tort, the ability of the state to pursue its core obligation to provide for the general welfare.

The core democratic principle behind sovereign immunity goes to the heart of the state's ability to control its own budgetary matters, which are central to a government's ability to function. Denying that ability is not the denial of any ordinary function. Thus, allowing the federal government to order that states be subject to suit goes well beyond any of the mere instances of "commandeering" that the Supreme Court has previously rejected. The legislative mandate in *New York v. United States*[126] and the requirements on state law enforcement officers in *Printz v. United States*[127] were limited in scope and concerned ordinary functions like environmental regulation and law enforcement.[128] But sovereign immunity preserves some of a state's most important government functions by protecting states' control over their own budgetary decisions. Imagine, for instance, a federal order to not tax or to limit state spending. Such requirement would undermine the state's ability to function as a sovereign government entity. Similarly, abrogating state sovereign immunity for private wrongs—forcing a wave of litigation that could imperil a state's budget and paralyze its efforts to serve the general welfare—would also undermine a core sovereign function.

2. Fundamental Democratic Rights.—However, some lawsuits concern instances in which state actions are not just wrong but also in violation of the fundamental rights of citizens. In these cases the state's coercion is illegitimate. While such actions are state actions, meaning that they are performed by the state and its agents, they are not sovereign actions because they fail the conditions of democratic legitimacy. Such actions violate the *for* the people aspect of democratic sovereignty. Unlike the legitimate mistakes categorized in the previous section, which rightly retain sovereign authority, these mistakes are of a different kind. No democratic state, regardless of the process that has led to its decision, can legitimately violate the fundamental rights of citizens. These violations are not—and cannot be—the actions of a democratic sovereign, and so sovereign immunity will

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ENTER. INST., BAILOUTS OR BANKRUPTCY: ARE STATES TOO BIG TO FAIL? (2011), *available at* http://www.aei.org/wp-content/uploads/2011/10/LO-2011-03-No-1-g.pdf, *archived at* http://perma.cc/KNF5-RAXY.

126. 505 U.S. 144 (1992).

127. 521 U.S. 898 (1997).

128. *Printz*, 521 U.S. at 902; *New York*, 505 U.S. at 149.

not shield the state from liability. In these cases, citizens may assert their constitutional rights and hold the state accountable for exceeding its sovereign authority. In other words, when fundamental constitutional rights are at stake, democratic sovereignty aligns with the citizen *against* the state.

We can think of fundamental rights and sovereign immunity as inversely related. When citizens retain rights, they can assert them against the state without the impediment of sovereign immunity. A citizen's rights claim is itself an assertion of the sovereignty of the people over and against a state that is meant to be subservient to these rights. On the other hand, there are times when citizens transfer authority to the state and thus lack rights as individuals. Just as these instances of transfer give up some individual authority to the state, so too is transferred sovereignty of action. When the state acts legitimately under democratic authority, it cannot be sued even when it makes mistakes. We might then think of the relationship as consisting of the following corollaries[129]:

Right → No Immunity
No Power → No Immunity
No Right + Power → Immunity

When the state violates a fundamental individual right or acts beyond its enumerated powers, it exceeds its sovereignty and loses immunity. In all other cases, when the state acts within its enumerated powers and respects individual rights, it is rightly immune from suit due to its democratic sovereign authority.

On our account, an individual right entails that the state cannot rightfully intervene and, moreover, that the individual is entitled to compensation in the case of state intervention. But the absence of a right allows for the possibility that the state has a legitimate power to act with

129. This set of corollary relationships is inspired by Wesley Newcomb Hohfeld's famous conceptual analysis of rights. WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 11–13 (David Campbell & Phillip Thomas eds., Dartmouth Publ'g Co. 2001) (1919). In particular, Hohfeldian right claims encompass *all* rights rather than the fundamental democratic rights that are the object of our analysis. *Id.* at 53. We will turn to the problem of distinguishing ordinary private rights from fundamental rights (a necessary requirement for democratic legitimacy) in the next subpart. For Hohfeld, "rights" correlate with "duties," which imply the absence of a "privilege." *Id.* at 13–14. If you have a right to *X*, then someone owes you a duty to *X*, which means they lack a privilege to not *X*. *Id.* A similar corollary relationship exists between "powers," "liabilities," and "immunities." *Id.* at 12. For a full discussion of the history and philosophy associated with rights, see generally Lief Wenar, *The Nature of Rights*, 33 PHIL. & PUB. AFF. 223 (2005); *Rights*, STANFORD ENCYCLOPEDIA PHIL. (July 2, 2011), http://plato.stanford.edu/archives/fall2011/entries/rights/, *archived at* http://perma.cc/VY7Z-4W67. For our purposes, the Hohfeldian typology simply illustrates the conceptual interrelatedness of fundamental rights and sovereign immunity—that sovereign immunity extends only so far as the democratic sovereign respects fundamental rights.

democratic authority, and in such cases the individual has given up the right to sue, along with the transfer of power implied by democratic legitimacy.

The arguments that we have raised concerning federal usurpation of state authority do not hold when it comes to torts that implicate fundamental constitutional rights. The structure of the Fourteenth Amendment is such that individual entitlements to these rights are guaranteed regardless of the level of government. The federal government, when it waives or abrogates immunity in these cases, is merely following its constitutional duty to protect these rights at all levels of government. It acts on behalf of the individual against state or federal government actions that stray from sovereign authority. The states themselves also possess a co-extensive duty to remedy fundamental rights violations. Compensating victims takes on a special urgency, as it is necessary for states to restore their good standing as legitimate democratic sovereigns.[130]

An account of democratic sovereign immunity therefore recognizes that the state can exceed its sovereign authority and therefore is rightly subject to suit in instances of constitutional rights violations. Moreover, it recognizes that the state sometimes acts wrongly but in a particular way which is within the limits of legitimacy and its sovereign authority. In such instances, the democratic state rightly retains immunity as a result of its power in ways that it does not when it violates a right.

C. *Identifying Fundamental Democratic Rights*

Of course, the question remains as to how to draw the line between lawsuits in defense of rights that are fundamental to the sovereignty of the people and lawsuits that merely identify mistakes made by the government. Much of the rest of this Article will be devoted to addressing this question. We do, however, want to reject a way of thinking about rights that would be in tension with the very distinction between sovereign rights and mistakes. Some might argue that all tort suits are about rights basic to sovereignty. Such arguments would most likely come from a libertarian camp that would see any economic harm as a fundamental rights violation. Property-rights libertarians thus might reject the distinction between suits involving fundamental rights and those involving private wrongs or sovereign mistakes.

In our constitutional tradition, however, the extreme libertarian line has been rejected after *West Coast Hotel v. Parrish*.[131] While personal liberties in areas such as privacy, equal protection, or matters related to imprisonment are regarded as basic constitutional rights, attempts to turn all economic interests into rights have been rejected along with *Lochner*-era

130. *See infra* notes 193–95 and accompanying text.

131. 300 U.S. 379 (1937).

jurisprudence. Modern constitutional law rejects the notion that all economic harm is a rights violation. We largely draw on and endorse that view throughout the rest of the Article.[132]

The libertarian political theory of *Lochner v. New York*[133] and other cases of its era is committed to a central notion: that states must protect private market rights in order to be legitimate. The traditional common law rights of contract, property, and tort give structure to a system of voluntary market exchange—reflecting and preserving a prepolitical right to natural liberty. Any interference by the government outside these well-carved channels of common law rules should be met with heightened scrutiny, for they risk violating citizens' fundamental rights. Courts must strike down broad regulation as unconstitutional even when those laws are duly passed through a democratic process. Indeed, they do so to preserve democracy, for these laws violate the necessary requirements for democratic legitimacy. *Lochner*-era courts understood the promise of the Fourteenth Amendment to protect free and equal citizens primarily in their capacity as market participants, free to contract their labor and exchange their property without impediment by the state.

In *Lochner*, the Court struck down a New York maximum hour law for bakers, finding that the statute's aims veered too far from states' traditional police powers to justify violating the "right to purchase or to sell labor."[134] Such a stretch of regulatory power to violate a fundamental right deprived the bakers (and their employers) of their liberty and property interests without due process of law. Similarly, in *Ives v. South Buffalo Railway Co.*,[135] the New York Court of Appeals extended this substantive due process logic beyond contract and property into the common law of torts.[136] The court held that New York's workers' compensation law violated the due process clauses of both the New York and federal constitutions by holding employers liable without fault.[137] Judge Werner argued that the Constitution was enacted with traditional negligence doctrines that would prevent a defendant from being held liable without a showing of fault.[138] These common law doctrines gave rise to a vested property interest, and New York's strict liability insurance scheme violated this right without due

132. For a full substantive argument, see BRETTSCHNEIDER, *supra* note 30, at ch. 6. Chapter 6 of that book argues that the contractualist project of mutually justifying fair terms for a system of social cooperation requires basic guarantees of each citizen's welfare.

133. 198 U.S. 45, 53 (1905). While there have been some recent efforts to revive *Lochner*'s reputation, DAVID E. BERNSTEIN, REHABILITATING LOCHNER (2011), its anticanonical stature has endured.

134. *Lochner*, 198 U.S. at 53.

135. 94 N.E. 431 (N.Y. 1911).

136. *Id.* at 444.

137. *Id.* at 439–41.

138. *Id.* at 439.

process of law.[139] In other words, citizens' fundamental constitutional rights to market freedom entitle them to the traditional common law rules of property, contract, and tort that provide security for those rights.[140] Any attempt by the state to significantly alter those rights is democratically illegitimate because it disrupts that fundamental freedom.

But, as the Court has articulated since 1937, the Constitution recognizes government's sovereign power to regulate economic activity and even adjust the market allocation of rights and goods. Article I, Section Eight gives Congress broad powers over areas in which individual states are incompetent to act, and the states also enjoy extensive police powers to pursue the public welfare.[141] This is not simply a matter of historical precedent or doctrinal contingency but the product of a normative argument about what rights are fundamental to democracy. As we have suggested, the powers of democratic sovereignty are not limitless—they do not extend to violations of the fundamental rights that are necessary for democratic legitimacy.[142] Such fundamental rights include the freedom of speech, equal protection, liberty of conscience, and autonomy in intimate relationships.[143] Respecting these substantive commitments is a necessary requirement for a state to recognize its citizens' free and equal status, to legitimately exercise democratic power in their name. But the market rights of the *Lochner*-era cases do not register this same fundamental status. No one is entitled to any particular arrangement of the contract, property, and tort rules that shape market transactions, just as no one is entitled to the pre-tax income from the fruits of her labor.[144] The reason is that markets cannot function or even exist without some prior (chronologically and conceptually) system of cooperation, such as a state. The question of democratic legitimacy, then, is how that system of cooperation can be justifiable to its participants. The claim that market rights or common law rules are fundamental is mistaken because it puts the cart before the horse.

The Court during the New Deal period recognized the need for government to operate in the economic realm unencumbered by crippling

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139. *Id.* at 441.

140. *But see* N.Y. Cent. R.R. Co. v. White, 243 U.S. 188, 197–98 (1917). There, the Court recognized: "The close relation of the rules governing responsibility as between employer and employee to the fundamental rights of liberty and property." *Id.* But it insisted that "those rules, as guides of conduct, are not beyond alteration by legislation in the public interest. No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." *Id.* at 198. Ultimately, this understanding of the common law as subject to legislative revision prevailed alongside the New Deal's progressive reforms. Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1357 (1983).

141. U.S. CONST. art. I, § 8; U.S. CONST. amend. X.

142. *See supra* notes 33–34 and accompanying text.

143. *See supra* notes 35–38 and accompanying text.

144. LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP 9 (2002).

property rights jurisprudence.[145] We think the rejection of *Lochner*-like market rights as fundamental to democracy has a clear implication for sovereign immunity doctrine. Purely economic harms caused by government action are not, by themselves, basic rights violations. Indeed, when the state acts in its sovereign capacity to regulate and give structure to important social institutions like the market, it is natural to expect that some private actors may be worse off as a result. The owner of a hotel may have to pay his workers a minimum wage,[146] and he may also be unable to exclude guests based on their race.[147] A bondholder may lose money when an energy crisis drives a state to subsidize public transit with toll revenue (repealing a statutory covenant to the contrary).[148] Such economic harms might even run afoul of the common law of tort or contract, but they are the inevitable consequence of a state given the power to intervene in the economy and the power to revise the common law through legislation. Many of these instances are thus legitimate costs of allowing government intervention into the economy in order to better the lives of democratic citizens. But if these damages stem from mistakes that are a result of legitimate government functions, it follows that the state should be entitled to immunity when its agents are negligent or break contracts in pursuing the general welfare. In other words the sovereign mistake is the inevitable result of government powers of intervention into the economy. Just as these powers are not themselves rights violations, neither should their consequences be viewed as violations. A state should not be forced to answer the purely private claims of a plaintiff seeking to raid the public treasury in compensation for the results of actions that have been duly authorized by the democratic sovereign. Such instances are sovereign mistakes and should be protected by sovereign immunity. Taking democracy seriously demands no less.

Some readers who are sympathetic to a libertarian vision of the Constitution may not be persuaded by our argument that a particular arrangement of market rights cannot be a fundamental requirement of democratic legitimacy. Indeed, this should come as little surprise, as there

145. *See* SUNSTEIN, *supra* note 40, at 3 (exploring the rejection of private property rights during the New Deal era). Indeed, we believe that there is a deep connection between the government's sovereign power to regulate the national economy—along with the immunity accompanying that power—and the best conception of the fundamental democratic rights of free and equal citizenship.

146. W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 388, 400 (1937).

147. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 243 (1964).

148. *But see* U.S. Trust v. New Jersey, 431 U.S. 1, 13–14, 32 (1977) (invalidating such a repeal under the Contracts Clause). We endorse Justice Brennan's dissenting opinion, which has important implications for the democratic theory underlying sovereign immunity doctrine. *See supra* notes 174–78 and accompanying text.

is substantial disagreement about fundamental rights.[149] And, although settled precedents and court doctrine may cabin this disagreement somewhat, we do not hold the view that the Supreme Court has the final word on what the Constitution means.[150] But our theory of democratic sovereign immunity does not depend on any claim about which rights in particular are fundamental to democracy.

D. Hans *and the Principle of Democratic Sovereignty*

We can see this distinction between pure private rights and fundamental democratic rights by examining *Hans v. Louisiana*, the seminal case for modern sovereign immunity doctrine, and situating it in the context of the jurisprudence of the post-New Deal era.[151] After Reconstruction and the immense toll of the Civil War, a number of Southern states were in danger of default and even insolvency.[152] In 1874, Louisiana passed a constitutional amendment repudiating debt owed on certain bonds that were soon to come due.[153] Hans, a bondholder from Louisiana, sued to recover his debt, claiming that the amendment violated the Contracts Clause of the federal Constitution.[154] The Court upheld the dismissal of the plaintiff's claim, articulating a broad structural principle of sovereign immunity beyond the text of the Eleventh Amendment.[155]

Hans might seem to pose a problem for our view, as a case in which the sovereign immunity principle defeats a claim of constitutional right. Democratic sovereignty does not extend, we have suggested, to state actions that violate fundamental constitutional rights because these rights are a necessary requirement for democratic legitimacy.[156] We argue that *Hans* was correctly decided, however, because such an expansive Contracts Clause claim is implausible as a fundamental democratic right. As we have suggested, the libertarian premises of *Lochner*ism—that all economic harm triggers a fundamental rights violation and that citizens may hold states hostage to the inherited rules of the English common law—find no basis in constitutional law or political theory.[157] The *Hans* opinion is hardly a

149. *See* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1366–69 (2006) (discussing the plausibility of the assumption that even a society that takes rights seriously will feature substantial disagreement about the content of those rights).

150. Compare the substantial body of "popular constitutionalist" literature, for example LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 8 (2004).

151. *See, e.g.*, FALLON, JR. ET AL., *supra* note 1, at 878–85 (discussing the importance and impact of the *Hans* case on sovereign immunity doctrine).

152. *Id.* at 881; Orth, *supra* note 67, at 7.

153. Hans v. Louisiana, 134 U.S. 1, 1–2 (1890).

154. *Id.* at 3.

155. *Id.* at 15–21.

156. *See supra* section II(B)(2).

157. *See supra* subpart II(C).

sweeping rejection of *Lochner*-era jurisprudence,[158] but it stands for two key propositions: first, that sovereign immunity shields state action when fundamental rights are not at stake and, second, that there is no fundamental right against interference with government contracts.[159] Indeed, the core logic of the opinion is that a democratic principle of sovereign immunity requires a narrow reading of the Contracts Clause so that it does not apply to government contracts.[160]

Many scholars and jurists have focused on Justice Bradley's language suggesting that federal courts lack jurisdiction to hear *any* suit against a nonconsenting state.[161] This is too broad an interpretation of the sovereign immunity principle, and it misreads the holding in *Hans*. Rather than imposing a blanket jurisdictional bar against any suit where a state is the defendant, the sovereign immunity principle decides this case *on the merits*. The Court implicitly recognizes that if a fundamental right were at issue, the suit could go through. It is therefore at pains to explain why there is no such right to sue a state for violating its contractual agreements. The Court concludes that the Contracts Clause simply does not apply to government contracts,[162] whose "obligations . . . cannot be made the subjects of judicial

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158. In *Hans*, the Court stated:

> While the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts, may be judicially resisted, and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment.

134 U.S. at 20–21.

159. *Id.* at 13.

160. *See id.* at 10, 13 ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*." (quoting THE FEDERALIST NO. 81, at 846 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (internal quotation marks omitted)).

161. For example, in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the court cited *Hans* for the twin propositions

> that each State is a sovereign entity in our federal system; and second, that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent . . . ." For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States."

Id. at 54 (quoting *Hans*, 134 U.S. at 13, 15) (citations omitted).

162. There is considerable historical evidence that the founding generation was primarily concerned with state interference with *private* contracts. In his dissent in *U.S. Trust Co. v. New Jersey*, 431 U.S. 1 (1977), Justice Brennan cites a number of prominent scholars for the proposition that "the Framers of our Constitution conceived of the Contract Clause primarily as protection for economic transactions entered into by purely private parties, rather than obligations involving the State itself." *Id.* at 45 (Brennan, J., dissenting) (citing GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 604 (9th ed. 1975); 2 BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: THE RIGHTS OF PROPERTY 274 (1965); BENJAMIN FLETCHER WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION 15–16 (1938). Admittedly, this interpretation runs counter to a number of landmark decisions, dating back to *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137–39 (1810). But Justice Brennan persuasively synthesizes the founding-era history with the modern constitutional context of the post-New Deal

cognizance unless the state consents to be sued."[163] As a result, the case was properly dismissed for *failure to state a cause of action*,[164] much the same as if Hans had claimed that his neighbor's dog had violated the Contracts Clause. A sovereign state cannot be sued for defaulting on its contracts with private parties—which is to say that no such fundamental right protecting government contracts exists. Importantly, we see in Justice Bradley's opinion that the ultimate justification for this reading of the Contracts Clause is an account of democratic sovereignty. For a "legislative department of a state represents its polity and its will," and even though states should generally honor their private obligations to citizens, "to deprive the legislature of the power of judging what the honor and safety of the state may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause."[165]

The Court implicitly assumes that there are fundamental rights under the Contracts Clause protecting private contracts and that those claims would therefore evade immunity.[166] For reasons discussed in the previous subpart, we would deny that the right to contract is a fundamental right of citizenship, whether it is with the government or a private party. But the important point for our purposes is that the extent of sovereign immunity depends on whether the right in question is fundamental to democracy—and if it is not, then sovereign democratic action is immune from suit.

Perhaps the best way to appreciate this reading of *Hans* is to re-examine its claim—a damages action for default on a government contract—in light of the Court's post-*Lochner* jurisprudence. After *Hans*, few suits against states involving government contracts would reach the Court. But a noteworthy exception is *United States Trust Co. v. New Jersey*.[167] New Jersey and New York had previously passed laws preventing Port Authority toll revenue from funding passenger service, in order to reassure bondholders.[168] But in the wake of the energy crisis, in the 1970s, New Jersey repealed this law in order to keep its public transportation system functioning.[169] The bondholders sued under the Contracts Clause, and the Court found in their favor.[170] But Justice

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era. He anchors this synthesis with an attractive account of the core constitutional value of democratic accountability. *See infra* notes 171–75 and accompanying text.

163. *Hans*, 134 U.S. at 20.

164. *Id.* at 20–21; *see also* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 299–300 (1985) (Brennan, J., dissenting) (affirming this reading of *Hans*).

165. *Hans*, 134 U.S. at 21.

166. *Id.* at 9–11.

167. 431 U.S. 1 (1977).

168. *Id.* at 3.

169. *Id.* at 13–14.

170. *Id.* at 3, 32.

Brennan's dissent explains why the democratic sovereignty principle exempts government contracts from the protections of the Contracts Clause. This provision cannot "bind[] a State to contracts limiting the authority of successor legislatures to enact laws in furtherance of the health, safety, and similar collective interests of the polity."[171] The "lawful exercises of a State's police powers stand paramount to private rights held under contract,"[172] and to suggest otherwise raises the specter of *Lochner*. By turning government contracts into "a constitutional safe haven for property rights," the decision "substantially distorts modern constitutional jurisprudence governing regulation of private economic interests."[173] Brennan chides the majority for failing to appreciate the "serious and growing environmental, energy, and transportation problems" facing the state[174] or the democratic force of its efforts to solve these problems:

> One of the fundamental premises of our popular democracy is that each generation of representatives can and will remain responsive to the needs and desires of those whom they represent. Crucial to this end is the assurance that new legislators will not automatically be bound by the policies and undertakings of earlier days.[175]

Constitutionally entrenching previous policies through binding government contracts eviscerates democratic accountability by breaking this representative link. The democratic sovereign, when it acts as sovereign and respects its citizens' fundamental rights, cannot be sued for altering the arrangement of pure private market rights.

Although *United States Trust* focuses on the Contracts Clause, it also suggests a principled defense of our view of sovereign immunity. Brennan elaborates nicely why government contracts cannot bind future actions of the state lest they erode the state's basic sovereign functions. But more generally the case demonstrates why, absent a fundamental right, the state should be immune from lawsuits that eviscerate its core sovereign functions.

In sum, we have proposed a democratic way of understanding sovereign immunity within the general contours of democratic authority. In a democracy, citizens grant the state the power to act, even in ways that may at times be contrary to the common good. At the same time, citizens

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171. *Id.* at 33 (Brennan, J., dissenting).

172. *Id.*

173. *Id.*

174. *Id.* at 38.

175. *Id.* at 45; *see also supra* note 162. For further discussion of the state's inalienable sovereign functions, see *Stone v. Mississippi*, 101 U.S. 814 (1879). The Court held that even though the state issued a charter for a corporation to conduct a lottery, and that corporation paid substantial consideration into the state treasury, the charter did not constitute a binding contract. *Id.* at 817, 821. Mississippi could not contract away its sovereign police powers, and its citizens retained the sovereign power to amend their constitution to ban lotteries. *Id.* at 820–21.

ensure that there are limits to this authority with respect to basic rights. Yet when the state acts within its power and does not violate basic rights, it retains the latitude to act wrongly and the right not to be sued for its mistaken actions. Prerogatives that would otherwise be retained by the people are, in such instances, transferred to the state.

We have so far provided broad contours for understanding sovereign immunity in a democratic regime. The challenge in discerning when the state should be immune from suit is to parse out the set of basic rights that when violated are state but not sovereign actions. A respect for rights is precisely what distinguishes a democratic account of authority from a monarchical account. A respect for sovereign actions of the state is what distinguishes a democratic from a populist account of sovereign immunity.

In the following Parts, we go on to examine these areas in greater depth. We argue that the structure of sovereign immunity means that the state can never be immune when rights are at stake. The state that violates rights does not act as a "sovereign," although it can act as a non-sovereign state. This is essentially the theory behind the ultra vires doctrine announced in *Ex parte Young*. We argue that the logic of the state–sovereign distinction extends to allow abrogation of immunity in legislation passed with Congress's enforcement powers under the Reconstruction Amendments, powers that should be read more expansively than they often are. We then argue in the subsequent Part that, in contrast to rights violations in which the state is not sovereign and thus cannot claim immunity, the government often acts in a sovereign way that is merely mistaken and does not violate constitutional rights. In such cases, the state has acted wrongly yet legitimately, and it is thus immune from suit.

III. Immunity for Democratic Self-Government: The Sovereign Spending Power

A. The State–Sovereign Distinction

In this subpart we develop the state–sovereign distinction and show its relevance for two crucial areas of law. First, we demonstrate how it explains the much-maligned fiction of *Ex parte Young*—that proper pleading requires that plaintiffs name state officials rather than the government. The structure of pleading has symbolic value. Citizens may seek to enjoin state officers from prospectively violating federal law. And when fundamental democratic rights are at stake, a citizen–plaintiff alleges that the agent of the state acts without its sovereign authority. In these cases, the government should be ultimately and substantively responsible for making the plaintiff whole, even when the state is not named as a party. The practice of indemnification fits this theory. But when state officials make a sovereign mistake—where there is no fundamental rights violation—this allegation fails, and the state treasury is immune from this

purely private claim. Second, we show that the deep logic of *Young* is present in two classic cases of federal sovereign immunity.

1. Proper Pleading: Injunctions Under Ex parte Young *and Damages Under § 1983.—Ex parte Young* carves out an exception to sovereign immunity that is often thought to be incoherent.[176] According to the doctrine announced there, state officials cannot claim immunity from an injunction that seeks to prevent ongoing rights violations.[177] The fiction of *Young* is that when state officials are sued, they are sued as individuals not officials.[178] This distinction is often criticized because it tries to avoid the issue of sovereign immunity with mere semantics about pleading.[179] The actions for which injunctions are sought under *Ex parte Young* are not about actions that officials pursue in their personal capacities but rather actions they pursue as state officials.[180] As critics point out, however, in reality it is the state that is sued no matter what is contended in the pleadings.[181]

On our view, however, the *Ex parte Young* doctrine gets at a crucial conceptual distinction in democratic theory. Namely, it rests on a premise that not all *state* acts are *sovereign* acts.[182] The reason why plaintiffs must sue state officials rather than the government itself goes to the very essence of their claims. In other words, a complaint of this kind must necessarily allege that while the official has acted on behalf of the state, he or she acts without the authority of the sovereign. In instances where a suit is allowed to go through, and there is no sovereign immunity, it is the plaintiff that is the sovereign citizen and the state official that has acted without authority. But in instances of a sovereign mistake, the official has acted with the authority of the democratic sovereign. At this stage of pleading, there is merely an accusation that the state official has acted without sovereign authority.

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176. *See, e.g*, Amar, *supra* note 13, at 1478–80 (describing the Court's Eleventh Amendment case law as "incoherent" due to the "legal fiction" codified in *Young* and the case law that followed).

177. *Ex parte* Young, 209 U.S. 123, 159–60 (1908).

178. *Id.* at 155–56, 159–60.

179. *Id.* at 155–56, 159–60; FALLON, JR. ET AL., *supra* note 1, at 892 (stating that "the doctrine and rationale of Ex Parte Young require plaintiffs to sue state officials, not the state in its own name, in order to avoid the Eleventh Amendment's prohibitions"). Akhil Amar characterizes *Ex parte Young* as a legal fiction that permits citizens to sue a state by "pretending to sue a state official" and engaging in legal gymnastics. Amar, *supra* note 13, at 1478–79.

180. *Young*, 209 U.S. at 157.

181. *See, e.g.*, Amar, *supra* note 13, at 1479 ("The fiction that such suits are merely brought against individuals . . . is transparent. The 'state' itself, after all, is an artificial juridical person and can act only through state officials. If these women and men are enjoined in their official capacities then, as a practical matter, the state itself is enjoined.").

182. *See Young*, 209 U.S. at 159–60 (distinguishing between acts by state officials and acts imbued with the power of the state's sovereign governmental capacity).

Indeed, the distinction between the "government" and the "sovereign" is fundamental in the history of liberal democratic theory. Jean-Jacques Rousseau famously relied on the distinction as the basis for his theory of legitimacy. On Rousseau's account, a state acting in accordance with a "general will" will always respect individual rights.[183] In contrast to this ideal, actual governments often stray from legitimate action. They violate rights in the pursuit of public policy goals they find laudable. They also violate rights in the pursuit of the self-interested officials that run the government. But it is crucial then to distinguish between government action done in the name of the state and government action that is legitimate.

Ex parte Young should be understood as making a similar distinction between state and sovereign. It recognizes that officials make all sorts of mistakes in the name of the state government, including violations of federal rights.[184] It recognizes, moreover, that there have to be mechanisms in place to stop these officials from straying from sovereign action.[185] The most direct and important way to avoid such state, non-sovereign action is to allow injunctions against state officials.[186] The fiction recognizes that the reason for not making states immune from injunctions is to avoid suggesting that these actions are rightful actions performed on behalf of the sovereign.[187]

As a result, the state–sovereign distinction captures the key democratic insight of *Young*. When a state official violates the Constitution, he commits state action for the purposes of the Fourteenth Amendment.[188] But

183. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 74 (Betty Radice & Robert Baldick eds., Penguin Books 1968) (1762); *see also* JOSHUA COHEN, ROUSSEAU: A FREE COMMUNITY OF EQUALS 146 (2010) ("[T]he existence of a general will implies the existence of rights, for it implies a shared recognition of the requirement that those interests be protected. Fundamental rights are, so to speak, implicit in the ideal of a society of the general will . . . ."). *See generally* Corey Brettschneider, *Rights Within the Social Contract: Rousseau on Punishment*, *in* LAW AS PUNISHMENT/LAW AS REGULATION 50 (Austin Sarat et al., eds. 2011) (analyzing Rousseau's theory of punishment and the social contract, including the rights of criminals).

184. *See Young*, 209 U.S. at 159 (recognizing that a state official may "attempt[] . . . [to] use the name of the State to enforce a legislative enactment which is void because [it is] unconstitutional").

185. *See id.* (explaining that an injunction prohibits an official from doing an act which he has no legal right to do).

186. On several occasions, the Court "has held that mandamus actions are not barred by sovereign immunity" at the federal level, perhaps for similar reasons. For further discussion, see FALLON, JR. ET AL., *supra* note 1, at 854–55.

187. *See Young*, 209 U.S. at 60 (explaining that an official acting in violation of the constitution is "stripped of his official or representative character" and "[t]he State has no power to impart to him any immunity from responsibility to the supreme authority of the United States").

188. *See* Home Tel. & Tel. Co. v. City of L.A., 227 U.S. 278, 286–87 (1913) ("[T]he . . . Amendment . . . [is] addressed . . . to the States, but also to every person whether natural or juridical who is the repository of state power. By this construction the reach of the Amendment is shown to be coextensive with any exercise by a State of power, in whatever form exerted.").

he does *not* act as the democratic sovereign, and sovereign immunity will not shield his action. Rather, democratic sovereignty lies with the citizen–plaintiff vindicating her constitutional rights. This is no fiction—it goes to the very root of a democratic conception of sovereignty.

Citizens do not sue the state for these violations: as a matter of proper pleading, they must sue the officers themselves.[189] This is not so shocking, as in the end they are one and the same—a state can only act through its agents. Plaintiffs may sue officers in their personal capacity to seek damages, and they may sue officers in their official capacity to seek an injunction under *Young*. As the Court explains in *Kentucky v. Graham*:[190] "Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'"[191] Looking past the formalities of pleading, the state itself is the "real party in interest" in official-capacity suits.[192] But the state does not enjoy immunity when it does not act, through its agents, as the sovereign.

As we will discuss in the next subpart, this insight helps explain why the *Hans* "exception" permits official-capacity suits for prospective injunctions but not retroactive relief—unless the federal right in question is a fundamental constitutional right. Additionally, officers sued in their personal capacity will, in almost all cases, be contractually indemnified by the state for any damages award. A recent study by Joanna Schwartz concludes that "[p]olice officers are virtually always indemnified," with state governments paying approximately 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement.[193] As a result, the coupling of § 1983, *Ex parte Young*, and the practice of indemnification ensures that states do in fact pay damages when they commit constitutional torts—just as our theory suggests they should. When states commit constitutional wrongs, they do not act as democratic sovereigns, and sovereign immunity will not shield their

189. Alabama v. Pugh, 438 U.S. 781, 781–82 (1978) (per curiam).

190. 473 U.S. 159 (1985).

191. *Id.* at 165–66 (citation omitted) (quoting Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 n.55 (1978)); *accord* Hafer v. Melo, 502 U.S. 21, 27 (1991) (explaining the distinction between personal-capacity suits and official-capacity suits).

192. *Graham*, 473 U.S. at 166.

193. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014). Officers rarely and minimally contributed to judgments against them, even when they were sanctioned by the state and when government policy nominally precluded indemnification. *Id.* at 890. For a similar conclusion, see John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 49–50 (1998). *But see* PETER H. SCHUCK, SUING GOVERNMENT 85 (1983) (concluding that indemnification of government agencies is "neither certain nor universal").

treasuries from what justice requires.[194] Our account explains why these de facto money damages paid out of state coffers, which would otherwise violate the principle of democratic sovereignty, are instead required by it. Indeed, we can explain why *each* of those three elements—the *Ex parte Young* fiction, § 1983 liability, and widespread indemnification—is not merely coincidental. Rather, they flow from a unified account of democratic sovereignty. The fiction of *Ex parte Young* is necessary to recognize the conceptual gap between state action and sovereign action. Liability under § 1983, like congressional abrogation of state sovereign immunity, is an instance of Congress pursuing its duty to enforce the guarantees of the Fourteenth Amendment. And state indemnification for officer suits is required by a similar duty incumbent upon states—a backstop to ensure that the victims of fundamental rights violations receive compensation, even when the officers who commit those violations do not have deep pockets. This compensation is necessary in order to restore the conditions of states' democratic sovereignty.[195]

2. The Theory of Sovereign Mistake in Federal Sovereign Immunity.— To further understand the state–sovereign distinction and the idea of

194. One complication here is that § 1983 serves as a cause of action for statutory violations as well as constitutional torts. Maine v. Thiboutot, 448 U.S. 1, 4 (1980). But the subsequent doctrine has made it far more difficult to pursue these statutory claims than their constitutional cousins. *See, e.g.*, Blessing v. Freestone, 520 U.S. 329, 333 (1997) (denying a § 1983 cause of action to enforce agency compliance with Title IV-D of the Social Security Act); Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20 (1981) (finding that the specific statutory remedies under the Federal Water Pollution Control Act and Marine Protection, Research, and Sanctuaries Act of 1972 displaced the cause of action under § 1983). Additionally, this doctrine has caused significant confusion. *See, e.g.*, George D. Brown, *Whither* Thiboutot*? Section 1983, Private Enforcement, and the Damages Dilemma*, 33 DEPAUL L. REV. 31, 33 (1983) (indicating that the contradicting decisions in this area of jurisprudence have created inconsistent rulings in the lower courts). One possible compromise might mirror our interpretation of *Ex parte Young*—permitting prospective injunctions, but not money damages, for statutory suits. *See supra* notes 177, 185–87 and accompanying text.

195. A significant complication here is qualified immunity for officer suits under § 1983, a topic that exceeds the scope of this Article. But our argument here provides a strong case for limiting the scope of qualified immunity, which limits liability for violations of legal rules that were not "clearly established" at the time. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The traditional justifications for qualified immunity are to prevent unfairness to the officers and to avoid overdeterring zealous law enforcement. Scheuer v. Rhodes, 416 U.S. 232, 239–40 (1974). But, as Schwartz notes, these justifications are much weaker against the background of near-universal indemnification. Schwartz, *supra* note 193, at 894–95. And, in any case, the doctrine of qualified immunity is a matter of statutory construction—and the democratic conception of sovereign immunity is a deeper constitutional principle that militates against it. One possibility to rescue the doctrine of qualified immunity is to pair it with a different mechanism to ensure mandatory compensation for fundamental rights violations: one based not on contractual indemnification for officers (the status quo) but rather on vicarious liability for the state on behalf of its agents. Under this scheme, qualified immunity might rightly determine whether it is fair for the officer or the state to pay, depending on whether the right was clearly established at the time. But either way, the innocent victim must be compensated for a fundamental rights violation in order to restore the conditions of democratic sovereignty.

immunity for sovereign mistakes, it is useful to compare sovereign immunity for the federal government. As the Court has long recognized, the same operative concept of sovereignty is at play at both the federal and state levels.[196] The analogy is complicated somewhat by the nested nature of sovereignty in a federal scheme—in the federal government's powers stemming from various constitutional grants, states' sovereign police powers, and in citizens' fundamental constitutional rights. But part of the explanatory power of our account is to integrate these facets of complex sovereignty under a single, democratic account. An important aspect of that account is the notion of sovereign mistakes.

In *Larson v. Domestic & Foreign Commerce Corp.*,[197] a corporation sued the head of the War Assets Administration for breach of contract, claiming that the Administration refused to deliver and then resold the coal that the plaintiff had purchased.[198] The plaintiff sought specific performance against the agency head, enjoining him from selling or delivering the coal to any other party.[199] The Court held that sovereign immunity barred the suit, noting that "the sovereign can act only through agents and, when an agent's actions are restrained, the sovereign itself may, through him, be restrained."[200]

The corporation argued that the breach of contract was not sovereign action because it was tortious and therefore "illegal."[201] Because illegal actions are never authorized, the agency head necessarily was acting ultra vires, and an injunction would therefore not offend the sovereign immunity principle.[202] The Court rejected this contention "that an officer given the power to make decisions is only given the power to make correct decisions" and that any mistake "is beyond his authority and not the action of the sovereign."[203]

Instead, the Court held that a sovereign mistake, even one that violates pure private common law rights, is still sovereign action that is immune from suit.[204] "[I]f the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law."[205] The only instances in which a citizen may seek an injunction against the agent of the sovereign is where the official exceeds her specific statutory authority or acts

196. *E.g.*, United States v. Lee, 106 U.S. 196, 204–07 (1882).
197. 337 U.S. 682 (1949).
198. *Id.* at 684.
199. *Id.*
200. *Id.* at 688–89.
201. *Id.* at 692.
202. *Id.* at 689.
203. *Id.* at 695.
204. *Id.*
205. *Id.*

unconstitutionally.[206] In both of these types of cases, the democratic theory of sovereign immunity explains and justifies the result. When a government violates citizens' fundamental constitutional rights, it does not act as a democratic sovereign. Nor does the official act as sovereign when she violates a statutory command. In both of these cases, citizen suits reinforce democratic sovereignty rather than hinder it.

Chief Justice Vinson distinguished the result in *Larson* from *United States v. Lee*,[207] where the heirs of Robert E. Lee's estate sued to eject federal agents from what had become Arlington National Cemetery.[208] Although the United States intervened as the party in interest, the Court held that sovereign immunity did not bar the ejectment action because there was a colorable Takings Clause claim.[209]

> On that assumption, and only on that assumption, the defendants' possession of the property was an unconstitutional use of their power and was, therefore, not validly authorized by the sovereign. For that reason, a suit for specific relief, to obtain the property, was not a suit against the sovereign and could be maintained against the defendants as individuals.[210]

Indeed, in a later case, *Malone v. Bowdoin*,[211] the Court found that sovereign immunity barred a virtually identical ejectment action against a federal forest service officer over land with a disputed title.[212] What distinguishes the Court's treatment of these cases is the absence of a fundamental constitutional property right after the end of the *Lochner* era.[213]

In sum, the much-maligned fiction whereby plaintiffs sue the officer of the state rather than the state can be explained by the state–sovereign distinction. This rule of pleading expresses the idea that the official, while still acting for the state, does not act for the sovereign. Thus, in such suits the sovereignty rests with the citizen that is suing not the state official. But in cases of sovereign mistake—such as in *Larson*, where the official violated a mere common law rule rather than a fundamental democratic right—this allegation fails. In these cases, the state acts as sovereign and it enjoys immunity from suit.

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206. *Id.* at 701–02.
207. 106 U.S. 196 (1882).
208. *Id.* at 197.
209. *Id.* at 197, 218–19.
210. *Larson*, 337 U.S. at 697.
211. 369 U.S. 643 (1962).
212. *Id.* at 643–45.
213. *See infra* notes 226–47 and accompanying text.

B. *Prospectivity Under* Edelman *and the Sovereign Spending Power*

The state–sovereign distinction can also help illuminate why the *Ex parte Young* exception to sovereign immunity does not apply to retrospective suits for money damages in cases that do not involve violations of fundamental individual rights. *Edelman v. Jordan* distinguishes between prospective injunctive relief and retroactive awards equivalent to damages.[214] While a purely negative injunction requiring a state official to cease illegal conduct is clearly allowable under *Young* and does not trigger sovereign immunity, relief that requires expenditures is barred. In *Edelman*, the plaintiffs sought an injunction requiring the state to provide a retroactive award for previous underpayment under the disability provisions of the Social Security Act.[215] Although *Ex parte Young* permits prospective injunctions against ongoing violations of federal law, the Court held that this requirement to dip into the state treasury to compensate for past harms exceeded the *Young* exception in violation of sovereign immunity.[216]

States commit a variety of harms that can give rise to lawsuits looking not for injunctions to prevent ongoing harms but rather recovery from past injuries. Such retrospective harms are not covered by the *Ex parte Young* exception. The distinction between no immunity for prospective injunctions and retrospective immunity for money damages might be thought part of the Court's incoherence on the sovereign immunity question. Indeed, we do not believe any of the other theories advanced on behalf of sovereign immunity can account for it. But the democratic theory of sovereign immunity can explain this essential part of the doctrine.

According to the state–sovereign distinction, there is an important difference between prospective injunctions and backward-looking compensation—the equivalent of money damages. The risk that the state will continue the ongoing violation of a federal right is significant enough that, in the name of sovereignty and federal supremacy, state officials can be enjoined. But in retrospect the lack of time pressure allows us to make a more fine-grained distinction between different types of state action. Namely, not all state action that is mistaken violates sovereignty. Recall our earlier point about tax squandering. Imagine that the state uses its resources to build a bridge to nowhere that serves no one's interest. The decision to build the bridge was a mistake and is recognized as such by the polity and the legislature that funded it. But is it a violation of sovereignty? We think it is not. The state ceases to be a sovereign when it fails to abide by a set of democratic procedures or when it violates fundamental rights.

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214. 415 U.S. 651, 666–69 (1974).

215. *Id.* at 653–56.

216. *Id.* at 664–68.

The example in consideration involves neither such failure. Accordingly, we would label it a "sovereign mistake."

In suits for retroactive relief, the state might be at fault, but when the state acts as sovereign it should retain its immunity for the same reasons it does in the budget case. The state is not any kind of actor, and its mistakes are not any kind of mistake. When it acts in a way that is indeed sovereign, it is authorized by the people to do so and thus should be protected in its basic capacities to spend and serve the public good. Retroactive relief—a court order to spend monies from the public treasury as compensation, such as the back pay sought in *Edelman*—threatens those basic sovereign capacities.

Still, this explanation of the distinction is incomplete. And, indeed, the Court's treatment of what remedies count as prospective has generated considerable confusion.[217] In *Milliken II*,[218] the Court approved of a desegregation decree requiring Detroit to implement remedial education programs to compensate for years of racially segregated schools.[219] And in *Hutto v. Finney*,[220] the Court permitted a substantial award of attorneys' fees along with a series of injunctions to restructure Arkansas's prison system according to the Eighth Amendment.[221] Don't these remedies raid the treasury in exactly the same way as *Edelman*?[222] But our democratic account of sovereign immunity can explain this feature of the doctrine as well.

Our view reconciles and synthesizes three insights, which together explain the results in this messy area of doctrine. First, begin with the idea that federal rights—whether statutory or constitutional—are the supreme law of the land, and federal courts must vindicate them. This is the central premise of *Young*.[223] But second, as we have shown, the sovereign function of a state includes its integrity in its ability to spend money on public goods. And just as retrospective damages can imperil that sovereign function, so too can prospective requirements to spend money. In short, the power of the purse is a sovereign function that must be preserved, regardless of whatever the court chooses to call it. Third and finally, as in the case of money damages, sovereignty does not include immunity for cases that

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217. *See, e.g.*, FALLON, JR. ET AL., *supra* note 1, at 895–96 (discussing the distinction's "elusiveness").

218. 433 U.S. 267 (1977).

219. *Id.* at 269, 286–88.

220. 437 U.S. 678 (1978).

221. *Id.* at 680–81, 685.

222. For discussion of this issue, see Papasan v. Allain, 478 U.S. 265, 278–81 (1986) and *infra* notes 240–47 and accompanying text.

223. *See, e.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984) ("[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" (quoting *Ex Parte Young*, 209 U.S. 123, 160 (1908)).

involve payments for constitutional injuries in matters of basic democratic rights (as distinct from ordinary statutory rights).[224] Taking these insights together, we can distinguish four kinds of cases broken down by two cross-cutting distinctions. In some cases, fundamental constitutional rights—necessary requirements for legitimate democratic sovereignty—are at stake, while other federal statutory rights are not so fundamental. The other distinction occurs at the level of remedy. Some relief requires spending monies from the public coffers, including both damages and retroactive orders for expenditures. By contrast, other forms of relief are only prospective and require no expenditures, such as a purely negative injunction.

In short, our theory of democratic sovereignty explains what many believe unexplainable. Our account offers a way to see why there is never state sovereign immunity in cases involving injunctions where no money is at stake. Simply put, in these cases there is no sovereign function threatened by these suits. They merely involve compliance with federal law with no loss to a state's ability to act in the future according to how its people decide together. In our terms these are not instances of sovereign mistakes because no sovereign function is imperiled. The state is straying from acting as it is obligated to act as a matter of sovereign law either because it is violating a fundamental right or flouting federal law.

By contrast, in cases that involve either money damages or injunctions that cost the state money, there is a sovereign function that is threatened—the sovereign power of the purse. As Justice Brennan argued in *United States Trust*, these cases endanger states' future ability to pursue basic policy goals requiring revenue.[225] In order to preserve these functions, we should therefore recognize in these cases that although the state has acted wrongly, it has still acted as sovereign. It has made a sovereign mistake.

But cases involving fundamental right violations are different. There is never an entitlement of a sovereign state to violate fundamental rights. Such cases involve the state straying from its sovereign power. They are not instances of sovereign mistake. Indeed, in such cases the state loses its sovereignty, and democratic sovereignty is best understood as lying instead with the citizen bringing the suit. This is why it is essential that there not be sovereign immunity in the face of suits involving basic rights, whether the issue is a supposed prospective injunction or claim for retrospective relief.

A democratic theory of sovereign immunity explains the Court's results in decisions across all of these categories, as shown in the table below. *Young* permits all forms of negative prospective injunctions against

224. We leave open the conceptual possibility that a statutory right could reflect a fundamental necessary requirement for democratic legitimacy or that it could reflect Congress's interpretation and enforcement of a constitutional guarantee. *See infra* note 298.

225. *See supra* notes 174–78 and accompanying text.

ongoing violations of federal rights, whether they are fundamental or ordinary statutory rights. These measures ensure federal supremacy and do not implicate states' sovereign spending power. And the *Young–Edelman* doctrine also permits relief requiring expenditures (such as through indemnification and § 1983 suits) in cases where the state has violated fundamental constitutional rights. In other words, *Milliken* and *Hutto* are unlike *Edelman*, a mere statutory case, because fundamental constitutional rights against racial discrimination and cruel and unusual punishment are at stake.[226] When states violate constitutional rights, they do not act as democratic sovereigns, and they do not enjoy the budgetary protection that sovereign immunity affords. It is only in the final of the four categories—relief for ordinary federal rights that requires expenditures—that *Edelman* bars the remedy because it implicates democratic sovereignty.

226. *Compare* Milliken v. Bradley (Milliken II), 433 U.S. 267, 289–90 & n.22 (1977) (holding that a decree requiring state officials to eliminate a de jure segregated school system fit squarely in the prospective-compliance exception to *Edelman* due to the continuing effects of the district's unconstitutional conduct), *and Hutto*, 437 U.S. at 680, 690–92 (determining that imposing a fine was appropriate and ancillary to the Court's power to impose injunctive relief in spite of the state's Eleventh Amendment protection in a suit alleging cruel and unusual punishment), *with* Edelman v. Jordan, 415 U.S. 651, 675–78 (1974) (recognizing that the Eleventh Amendment granted the State immunity from retroactive monetary relief where the underlying suit was based on a violation of the Social Security Act).

Immunity for Rights and Remedies under *Young–Edelman*

	Fundamental Right	**No Fundamental Right**
Remedy Requires Spending	***No Immunity:*** ▪ § 1983 damages plus indemnification[227] ▪ Retroactive relief for past segregation[228] ▪ Attorneys' fees for Eighth Amendment violation[229]	***Immunity:*** ▪ Retroactive relief under statutory entitlement[230] ▪ Damages for common law claim[231] ▪ "Backdoor" injunction requiring spending[232]
Injunction with No Spending Required	***No Immunity:*** ▪ Officer suit enjoining enforcement of unconstitutional law[233]	***No Immunity:*** ▪ Injunction against imminent enforcement violating federal statutory right[234]

We can see these distinctions at work in the table above. When a fundamental constitutional right such as equal protection is at stake, a citizen–plaintiff can obtain a prospective injunction against the ongoing violation, as in *Young*. But, because the state action in this case is not sovereign, the state cannot invoke its sovereign responsibility to protect the treasury. Therefore, a citizen–plaintiff in a constitutional rights case can also obtain relief that requires the state to spend money. This can take the form of a structural injunction[235] in the form of a desegregation decree, or indemnification in a § 1983 suit.[236] But when other federal statutory rights that are not fundamental to democracy are at stake, the state does still have a legitimate claim to manage the public purse and shield it from private litigation. Of course, the state must not violate the supreme federal law, but

227. *See supra* section III(A)(1).
228. *See supra* notes 218–19 and accompanying text.
229. *See supra* notes 220–21 and accompanying text.
230. *See supra* subpart III(B).
231. *See infra* notes 240–47 and accompanying text.
232. *See infra* note 239 and accompanying text.
233. Roe v. Wade, 410 U.S. 113, 120 (1973).
234. *See infra* notes 237–38 and accompanying text.
235. *See generally* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 7 (1978) (defining "structural injunction" as one "seek[ing] to effectuate the reorganization of an ongoing social institution").
236. *See supra* notes 193–94 and accompanying text.

prospective injunctions are sufficient to end these violations and secure federal supremacy. This was the case in *Verizon v. Public Services Commission of Maryland*,[237] when the Court upheld a request for an injunction preventing a state agency from issuing an order contrary to the federal Telecommunications Act.[238] This distinction between prospective injunctions and retroactive relief is not arbitrary or formalistic—an injunction cannot go so far as to reach the state treasury through the back door.[239]

The democratic theory of sovereign immunity offers a sophisticated conception of democratic sovereignty, one that explains these cases that are difficult to reconcile under a more formalistic approach. The best illustration can be found in *Papasan v. Allain*.[240] A class of schoolchildren and school officials challenged Mississippi's distribution of education funding on two different theories.[241] First, they argued that the maldistribution of funds violated the Equal Protection Clause.[242] Second, they claimed that the state had violated its fiduciary duties stemming from a perpetual trust created by federal land grants for the benefit of public schools.[243] The Court held that the sovereign immunity doctrine barred this second, federal common law claim because relief would necessarily require expenditures from the state treasury.[244] But it did not bar the constitutional claim under the Equal Protection Clause.[245] The Court's explicit reasoning turned solely on the distinction between prospectivity and retroactivity: "[T]he essence of the equal protection allegation is the present disparity in the distribution of the benefits of state-held assets and not the past actions of the State."[246] But an important consideration that better explains the result, we believe, is that only the constitutional claim invoked a fundamental right—just as was the case in *Milliken*.[247]

Our theory captures these distinctions in ways that other views fail to grasp. Textualist skeptics cannot distinguish constitutional from statutory

237. 535 U.S. 635 (2002).

238. *Id.* at 648.

239. *See* Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 287–88 (1997) (finding that, should the Court decide against state sovereignty, the effect on the state's sovereign interest in the disputed lands would be as intrusive as a retroactive levy on state funds, and therefore the exception to *Young* did not apply); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 58 (1996) (recognizing that the Eleventh Amendment has the effect of, in part, preventing state treasuries from being used to pay federal court judgments).

240. 478 U.S. 265 (1986).

241. *Id.* at 274.

242. *Id.* at 282–83.

243. *Id.* at 279.

244. *Id.* at 281.

245. *Id.* at 282.

246. *Id.*

247. *See supra* note 226 and accompanying text.

cases, preferring to jettison sovereign immunity as a constitutional principle altogether. And proponents of federalism fail to see that the core property of democratic sovereignty is the power to spend and set the contours of private law. As a result, injunctions forcing compliance with federal law do not offend democratic sovereignty.

C. *Abrogation Violating Democratic Sovereignty*

The democratic theory of sovereignty has both normative and explanatory power, especially in the area of Congress's power to abrogate sovereign immunity. Under the doctrine of abrogation, Congress may, by statute, forcibly subject states to suit in federal court even without their waiver or consent.[248] This statutory end run around the general principle of sovereign immunity has puzzled some critics: if immunity really is a constitutional requirement, then how can Congress override this guarantee by mere legislation?[249] But a democratic account of sovereign immunity makes the extent of the abrogation power perfectly clear. Congress has the power to abrogate a state's claimed immunity if and only if the state is not acting as sovereign—if it violates the necessary requirements for democratic legitimacy.

This account explains the logic of the Court's jurisprudence, which distinguishes between constitutional abrogation when Congress invokes its enforcement powers under the Reconstruction Amendments[250] and unconstitutional abrogation when Congress acts under Article I provisions, such as the Commerce Clause.[251] As we understand this distinction, the jurisprudence dictates that when fundamental rights are at stake, the Court does not recognize state sovereign immunity. We will argue in the next Part that this is consistent with the state–sovereign distinction because a state that violates fundamental rights is not a democratic sovereign. But when the state merely makes a mistake it retains both its sovereignty and its immunity.

Consider, for instance, the core precedent of *Seminole Tribe of Florida v. Florida*.[252] The Seminole Tribe sued Florida under a federal statute requiring states to negotiate in good faith with tribes over the operation of gaming facilities.[253] Let us stipulate for the purpose of argument that the state did breach its statutory duties. The question, however, is what kind of a wrong the state committed. In particular, was it the kind of wrong that

248. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). But this waiver must be in express terms. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985).

249. *E.g.*, Jeffries, *supra* note 193, at 48.

250. *Fitzpatrick*, 427 U.S. at 455–56.

251. Seminole Tribe of Fla. V. Florida, 517 U.S. 44, 72–73 (1996).

252. 517 U.S. 44 (1996).

253. *Id.* at 47.

implicates fundamental rights or the necessary requirements for democratic legitimacy? We think that although there was a wrong in this case, it was not of the kind of fundamental right protected by the Constitution. Indeed, the right in question is not one of individual citizenship but rather is economic in nature, an instrument of Congress's regulatory ambitions. Using the abrogation power to enforce this right merely allows private litigants to raid state treasuries and alter state policy through the federal courts.[254] Of course, states may not ignore federal law with impunity, as it is supreme under the Constitution. But in our federal system, the states may also exercise democratic sovereignty. And when they do so—when their actions are both *by* and *for* the people—sovereign states must enjoy some zone of discretion immune from private suits.[255] Otherwise, states could never escape the shadow of liability, paralyzed in their sovereign responsibility to pursue the public welfare. The claim in *Seminole Tribe* does not implicate the kind of wrong that strips a state of its democratic sovereignty, such that it should be subject to money damages. Failing to negotiate with the Seminole Tribe only caused economic injury. This kind of mistake is a mistake of a democratic sovereign.[256]

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,[257] a private bank in Princeton, New Jersey, sued an entity of the Florida government for patent infringement.[258] Congress had expressly abrogated sovereign immunity from patent infringement claims as an instrument in enforcing its regulatory scheme.[259] Again, even if we stipulate a legal wrong, there is no right violation here other than pure economic harm. No fundamental right of democratic citizenship is at stake.

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254. Using similar reasoning, the Court also held that the litigants could not pursue a prospective injunction under *Ex parte Young* because an order to negotiate was equally violative of state sovereignty. *Id.* at 74–76; *cf.* Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 281–82 (1997) (holding a tribe's request for jurisdiction over territory in dispute with the State of Idaho was barred by the Eleventh Amendment because of the "special sovereignty interests" involved in the control of land).

255. Note that the result would be different if the United States had intervened. *Compare Coeur d'Alene*, 521 U.S. at 281, 287–88 (holding the *Ex Parte Young* exception to sovereign immunity inapplicable to the Coeur d'Alene Tribe's quiet title action against the State of Idaho), *with* Idaho v. United States, 533 U.S. 262, 265 (2001) (holding that the United States, in its own quiet title action for the disputed land, held title to land in trust for the Coeur d'Alene Tribe). *See* FED. R. CIV. P. 24(b)(2) (permitting a federal governmental agency to intervene in a party's claim based on a statute or executive order). We can easily explain this facet of the doctrine: as a national institution, the Justice Department's representative claim to democratic sovereignty is superior to that of a single state.

256. In holding that sovereign immunity cannot be abrogated under Article 1, *Seminole Tribe*, 517 U.S. at 72–73, on our view, the *Seminole* Court correctly overturned *Pennsylvania v. Union Gas Co.*, in which a plurality of the court held that Congress could abrogate state sovereign immunity under Article 1, 491 U.S. 1, 5 (1989) (plurality opinion).

257. 527 U.S. 666 (1999).

258. *Id.* at 670–71.

259. *Id.* at 670.

Indeed, the argument that Congress abrogated immunity under its Fourteenth Amendment enforcement powers, preventing states from depriving the bank's property without due process, smacks of *Lochner*ism.[260] Thus, although the state has perpetrated a kind of harm, it is not of the variety that undercuts its sovereign status. We thus think the Supreme Court was right in this case to have ruled that the patent clause does not permit the federal government to abrogate state sovereign immunity.[261]

In *Central Virginia Community College v. Katz*,[262] the Court considered whether Congress could abrogate sovereign immunity under the bankruptcy power.[263] A state bookstore had received a preferential transfer from an insolvent creditor, and the court-appointed trustee sued to recover the assets.[264] In his opinion affirming Congress's power to abrogate, Justice Stevens attempted to distinguish *Seminole Tribe* by noting that bankruptcy actions are in rem rather than in personam.[265] He also emphasized the particular need for a uniform and comprehensive federal bankruptcy policy, arguing that state immunity would undercut such a policy.[266] But these distinctions are ultimately spurious. The fact that the subject of the suit is the state's property as a mere matter of pleading does not mitigate any effect on the treasury. And the need for comprehensive federal regulation underwrites virtually all of Congress's powers under Article I, Section Eight—especially the commerce power.[267]

In our view, *Katz* is wrongly decided because the rights at stake are, as in the other cases, purely private. This is a case of economic harm, not fundamental constitutional rights, and the Court could not find to the contrary without *Lochner*izing. Sovereign states are simply not like other private creditors, and even if state immunity interferes with the efficient administration of federal policy, this is yet another instance of a sovereign mistake. Federalism, including sovereign immunity, might often result in

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260. Plaintiff's parallel procedural due process claim suffered from problems similar to those noted *supra* earlier. *See supra* note 124.

261. *College Savings Bank*, 527 U.S. at 691.

262. 546 U.S. 356 (2006).

263. *Id.* at 359.

264. *Id.* at 360.

265. *Id.* at 359, 369.

266. *Id.* at 262, 375–78.

267. *See* Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 5–6 (2010) (advocating a broad conception of Congress's Commerce Clause power as it would have been understood in the eighteenth century, which incorporated a strong social construct to economic interchange and authorized Congress to regulate problems or activities that concern more than one state); Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 117–19 (2010) (arguing that Article I, Section Eight powers were written in response to the states' collective-action problem under the Articles of Confederation and therefore were intended to give Congress comprehensive federal regulatory power).

inefficiencies, but that is the cost of a system in which we have multiple levels of government. Sovereign functions will often pose constraints on efficiency, but that is the price we pay for the democratic value of federalism.

The private rights at issue in *Seminole Tribe* and *Katz* do not rise to the level of a democratic right and thus are not enough to authorize abrogating sovereign immunity. One might feel sympathy for these private actors, viewing the state as an outsized market participant that should not receive the additional protections of immunity as it engages in granting loans and deal making. But this picture is flawed for two reasons. First, inexperienced state officials might mistakenly trade away a state's future financial operating ability in negotiating with more savvy financial actors.[268] But such mistakes could have grave consequences for the entire population of the state moving forward, and immunity helps to protect what needs to be an ongoing sovereign capacity to operate a state budget and to ensure adequate revenue flows. Second, and relatedly, what is at issue in these cases is a default rule.[269] States have the capacity to waive their own immunity in such negotiations. Our point is rather that they should not be required to do so as a matter of federal law, as this would impede a sovereign democratic function.

These accounts of *Seminole Tribe*, *Florida Prepaid*, and *Katz* constitute the basis of the right kind of sovereign immunity, as they preserve the entitlement of the democratic polity to make certain kinds of mistakes. Not all mistakes are of a kind that should not be subject to suit, however, and thus we turn in the next subpart to instances where the harm perpetrated by the state undermines the state's status as sovereign.

D. Waiver as a Sovereign Function

When a state acts as a democratic sovereign—when it fulfills the substantive and procedural requirements of democratic legitimacy—it enjoys immunity from suit. This constitutional principle applies to federal and state governments alike, and it cannot be abrogated by a mere act of Congress. But, of course, the mere fact that a state is immune from liability for its sovereign mistakes does not mean that the state should assert that immunity in every case. Indeed, states often should and often do assume

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268. For a remarkable example of one state being taken for a ride—or, at the very least, exhibiting poor judgment in a significant financial transaction—see Matt Bai, *Thrown for a Curve in Rhode Island*, N.Y. TIMES, Apr. 20, 2013, http://www.nytimes.com/2013/04/21/business/curt-schilling-rhode-island-and-the-fall-of-38-studios.html?pagewanted=all, *archived at* http://perma.cc/T4N5-KWVE.

269. *See generally* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) (discussing various ways in which courts and legislatures should adopt default rules to apply when parties to a contract have failed to address certain issues).

responsibility for their mistakes, waiving sovereign immunity under certain defined circumstances. The key point here is that, insofar as the state acts as a democratic sovereign, the decision of whether and how to consent to private suit remains a democratic one. So long as fundamental constitutional rights are not at stake, that policy question is one for legislatures to determine.[270]

For example, the federal government has constructed a latticework of statutes that provide for liability in certain private suits under certain conditions. In 1855, Congress created the Court of Claims, replacing the cumbersome process of petitions for private bills.[271] The Tucker Act of 1887 then expanded the Court's jurisdiction to include all cases involving government contracts or for damages "not sounding in tort."[272] Notably, while the statute also extended jurisdiction to cover claims arising out of federal law, it expressly excluded pension cases.[273] Subsequent statutes would then later fill other significant gaps. The Federal Tort Claims Act of 1946 (FTCA) waived immunity for private torts committed by the agents of the federal government.[274] Federal district courts possessed exclusive jurisdiction, and the United States would substitute in for the defendant.[275] Importantly, however, the FTCA created a number of significant procedures and exceptions. For a plaintiff to file suit, she must first exhaust all opportunities for administrative settlement.[276] The statute also expressly retains immunity under a number of exceptions, including liability for official activity pursuant to some "discretionary function."[277] It also denies plaintiffs any opportunity for punitive damages.[278] Finally, in 1976, Congress amended the Administrative Procedure Act to permit suits against agencies or officials for relief other than money damages.[279]

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270. Of course, states can also waive immunity through other mechanisms, such as through express contract or through its conduct during litigation. For further discussion, see generally Christina Bohannan, *Beyond Abrogation of Sovereign Immunity: State Waivers, Private Contracts, and Federal Incentives*, 77 N.Y.U. L. REV. 273 (2002). Note that the legislative or executive decision to waive immunity enjoys some democratic pedigree and, in our view, reflects democratic sovereignty.

271. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612 (codified as amended in scattered sections of 28 U.S.C.).

272. Act of Mar. 3, 1887, ch. 359, 24 Stat. 505 (codified as amended at 28 U.S.C. §§ 1346, 1491 (2012)).

273. *Id.*

274. Federal Tort Claims Act (FTCA), Pub. L. No. 79-601, § 410, 60 Stat. 842, 843–44 (1946) (codified as amended at 28 U.S.C. §§ 1346(b)(1), 2674–2676 (2012)).

275. *Id.* § 410(a) (codified as amended at 28 U.S.C. §§ 1346(b)(1), 2674 (2012)).

276. *Id.* § 410(b), 60 Stat. at 844 (codified as amended at 28 U.S.C. §§ 2575, 2676 (2012)).

277. *Id.* § 421(a), 60 Stat. at 845 (codified as amended at 28 U.S.C. § 2680(a) (2012)).

278. *Id.* § 410(a), 60 Stat. at 843–44 (codified as amended at 28 U.S.C. §§ 1346(b)(1), 2674 (2012)).

279. Act of Oct. 21, 1976, Pub. L. No. 94-574, § 702, 90 Stat. 2721, 2721 (codified as amended at 5 U.S.C. § 702 (2012)).

Although this patchwork of statutes permits a broad range of suits against the sovereign, it also channels and constrains this liability in significant ways that depart from ordinary suits against private parties. Our account of democratic sovereignty can explain and justify these constraints in a way that sweeping critics of sovereign immunity cannot. We distinguish between sovereign mistakes, where the federal government retains its immunity, from fundamental rights violations, where it does not.

States have emulated this federal structure to a significant extent, relinquishing immunity from a wide range of private suits while carving out special constraints. Like the federal government, many states retain immunity under broad categorical exceptions, such as the discretionary function exception.[280] Many states also preserve immunity against suits claiming punitive damages or damage totals exceeding a certain cap.[281] Plaintiffs may also often seek administrative review of official action, but these actions may face special procedural hurdles, such as shortened statutes of limitations.[282] Our theory can account for this system of partial waiver. Where purely private rights are at stake and a state meets the conditions of democratic legitimacy, that state enjoys immunity from suit. In the interest of fairness, the state may waive this immunity, subject to the various policy considerations that best preserve its other collective decisions. As we will see in the next Part, this is different in kind from cases where fundamental constitutional rights are on the line.

It would be therefore wrong to characterize the issue of immunity just in terms of the individual's right to sue or not. The issue is control by the state over its own budget and in its decision of how much of the public fisc to spend on these individual claims. No state chooses to never pay for any tortious action. The question is instead whether to allow states to control how much they pay. We have argued that this is a primary sovereign function of the states, essential for them to preserve their ongoing sovereignty. In the next Part, we will discuss why this same concern does not apply when the government has strayed from its sovereign function—going beyond a sovereign mistake to commit a fundamental constitutional rights violation.

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280. JAIME RALL, NAT'L CONFERENCE OF STATE LEGISLATURES, WEATHER OR NOT? STATE LIABILITY AND ROAD WEATHER INFORMATION SYSTEMS 56–63 app. B (2010), *available at* http://www.ncsl.org/documents/transportation/Weather_or_Not_App_B_Rall_04.30.10.pdf, *archived at* https://perma.cc/YQ68-KYHA?type=pdf.

281. *Id.*

282. *E.g.*, 735 Ill. COMP. STAT. ANN. 10/8-101 (West 2010). For a more detailed discussion of the procedural hurdles to administrative review, see Daniel C. Theveny, Sr., *Sovereign Immunity in the Midwest*, COZEN O'CONNOR 2 (Jan. 13, 2006), *available at* http://www.cozen.com/admin/files/publications/Sovereign%20Immunity%20in%20the%20Midwest.PDF, *archived at* http://perma.cc/FWH5-NJ8S.

IV. Democratic Rights and the Limits of Sovereign Immunity

In the previous Part we argued that the sovereign should not be subject to suit when it violates some private rights or causes mere economic injury. In contrast, in this Part we argue that when the state violates fundamental rights, it does not act as sovereign. On our view, while the sovereign can err in some ways in the American constitutional regime, errors that violate fundamental constitutional rights are never sovereign decisions. This distinction between the sovereign and the state, we will argue, helps elucidate a defensible logic of the Court's willingness to allow abrogation of sovereign immunity in matters arising under Congress's power to enforce the Reconstruction Amendments but not in other matters.

A. Abrogation to Preserve Democratic Sovereignty

As currently construed, the Court's doctrine allows for abrogation of sovereign immunity by the federal government when Congress acts under its Section Five powers, a doctrine sometimes regarded as "well-recognized irony."[283] On the one hand, state action is required to trigger the federal government's power to enforce the Fourteenth Amendment. But the very fact that the state has acted suggests a state interest in sovereignty. We want to contend, however, that this apparent paradox can be resolved by distinguishing between two types of state action. At times, the state acts within its sovereign powers to pursue policy goals, but at others, it acts in ways that violate fundamental rights. While the former type of state action is consistent with its legitimate authority and thus deserves immunity, the latter is incompatible with democratic sovereignty, and in these cases there should be no constitutional guarantee of immunity.

We begin with a defense of the idea that Section Five legislation should be viewed as an abrogation of state sovereign immunity. Legitimate state action, we have argued, should be authorized by the people consistent with enumerated state powers. But state power is rightly limited, not only to enumerated powers, but also by the individual rights protected under the Fifth and Fourteenth Amendments. These rights cut through the sovereign power of both the federal government and states to act.[284] In short, there can be no legitimate authority for any government actor to violate these fundamental democratic rights. Thus, in instances in which a state actor commits such a violation, it does so not under the guise of sovereignty but with the mere power of the state apparatus. Because the action violates the

283. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984) (quoting Fla. Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 685 (1982) (plurality opinion)) (internal quotation marks omitted).

284. *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) ("[I]t would be unthinkable that the same Constitution [that prohibits the states from maintaining racially segregated public schools] would impose a lesser duty on the Federal Government.").

necessary requirements for democratic legitimacy, it cannot be the act of the democratic sovereign, and it should not be protected by sovereign immunity.

A major question remains, of course, as to how these rights should be delineated. We can identify fundamental rights, in part, by looking to the Court's Fourteenth Amendment jurisprudence and its doctrines of substantive rights and individual protection. However, the legislature also plays a role through its enforcement powers in protecting individual rights. This provision of the Fourteenth Amendment gives Congress broad power to secure citizens' freedom and equality. One essential way of protecting these rights has been under § 1983, which provides citizens a cause of action against state officials when their rights have been violated.[285] Suits of this type, for instance, might involve the alleged violations of basic rights, such as equal protection or due process. Suits under Section Five legislation have a particular kind of character. They are not challenges to the state's sovereign power but rather contentions that a particular state action lacks sovereign authority because it violates a fundamental right. Thus, such cases should not be defended against on the grounds of sovereign immunity. The supposed irony that the Court sees in such suits, namely that there is clearly state action which might be thought at the same time to trigger sovereign immunity, is in reality not an irony at all. Such action is, indeed, state action, but it is not sovereign action.

In *Fitzpatrick v. Bitzer*,[286] the Court implicitly relied on the state–sovereign distinction in holding that Congress had the power to abrogate state sovereign immunity under Section Five. In 1972, Congress amended Title VII of the Civil Rights Act to prohibit employment discrimination by state governments.[287] Just as the earlier provision created a cause of action against race- or sex-based discrimination in private workplaces, victims could now demand compensation from state employers as well.[288] A class of male employees sued the State of Connecticut, claiming that its pension system discriminated against them on the basis of sex.[289] The state invoked

285. 42 U.S.C. § 1983 (2012). Additionally, *Ex parte Young* suggests that the Constitution gives rise to a cause of action for ongoing violations of fundamental rights. For discussion, see FALLON, JR. ET AL., *supra* note 1, at 891. *But see* John Harrison, *Ex Parte* Young, 60 STAN. L. REV. 989, 990–91 (2008) (offering a dissenting view on the issue). The Court has also found implied causes of action directly under the Constitution against federal agents in a number of cases. *See* Carlson v. Green, 446 U.S. 14, 16, 19–20 (1980) (Eighth Amendment); Davis v. Passman, 442 U.S. 228, 242 (1979) (Fifth Amendment); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (Fourth Amendment). But § 1983 actions are limited: states, for example, are not "persons" for the purposes of the statute. Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989).

286. 427 U.S. 445 (1976).

287. *Id.* at 447–49.

288. *Id.*

289. *Id.* at 448.

sovereign immunity, arguing that Congress lacked any power to force states into federal court and open their treasuries to private litigation.[290] But Justice Rehnquist upheld Congress's abrogation power under Section Five in order to enforce the guarantees of the Fourteenth Amendment.[291] Noting the historical context of the Reconstruction Amendments, Justice Rehnquist concluded that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment[,] . . . whose other sections by their own terms embody limitations on state authority."[292] But twenty years later, in *Seminole Tribe*, now-Chief Justice Rehnquist would hold that Congress lacked that same abrogation power under the Indian Commerce Clause.[293]

One way to understand this distinction is simply chronological: because the Eleventh Amendment came after Article I, the sovereign immunity principle necessarily limits the commerce power—rather than the opposite. Therefore, the Commerce Clause cannot empower abrogation. But, by the same token, the Fourteenth Amendment limits the application of the Eleventh because it came later in time. The Court has signaled that it favors this interpretation of *Fitzpatrick*,[294] but we find it overly formalistic and ultimately incoherent. One problem is that sovereign immunity doctrine rests on a structural principle that extends beyond the text of the Eleventh Amendment. But such an overarching principle, like the separation of powers or federalism, would be present from the beginning and not take chronological priority after Article I. Additionally, this formalistic reading fails to interpret the Constitution as a whole, over-emphasizing the practice of appending each new amendment to the end of the document.[295]

By contrast, the democratic theory of sovereignty offers a substantive explanation for the distinction between *Fitzpatrick* and *Seminole Tribe*. Congress has the power to abrogate state sovereign immunity in cases (and only those cases) where states violate citizens' fundamental rights because the state does not act as the democratic sovereign. The textual basis for this distinction is, of course, the Fourteenth Amendment, but it is not a matter of

290. *Id.* at 451.

291. *Id.* at 455–56.

292. *Id.* at 456 (citation omitted).

293. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 53 (1996).

294. *Id.* at 65–66.

295. Many scholars criticize the Court's distinction between Article I and Section Five abrogation, suggesting that they should stand and fall together. *See, e.g.*, John Harrison, *State Sovereign Immunity and Congress's Enforcement Powers*, 2006 SUP. CT. REV. 353, 393–400 (criticizing the Court's explanation of the distinction as "not so clear"); Daniel J. Meltzer, *The* Seminole *Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 20–24 (criticizing the *Seminole* Court's distinction as "not well supported"). Not only does our view explain this distinction, it also offers normative justification, rooted in substantive democratic theory.

mere chronology. Rather, as Justice Rehnquist notes in *Fitzpatrick*, it is because the Civil War and the Reconstruction Amendments forged a new theory of sovereignty, federalism, and citizenship.[296] The Fourteenth Amendment created national citizenship under the Constitution, guaranteeing those free and equal citizens certain fundamental rights. It "carved out" states' power to violate those rights, just as it conferred congressional power to enforce them.[297] Crucially, the Fourteenth Amendment does not eliminate state sovereignty. Rather, it insists that when a state violates a citizen's fundamental rights, it does not act as the sovereign.

Applying the state–sovereign distinction in this way looks to the substance of the right at stake, rather than its constitutional time stamp. Typically, legislation passed pursuant to Section Five enforces fundamental rights, while the exercise of Article I power typically does not. But this need not always be the case. Suppose, for example, that Congress abrogated sovereign immunity in order to implement Article I, Section Ten's limitations on state power, prohibiting bills of attainder, ex post facto laws, and titles of nobility. To the extent that these provisions secure fundamental democratic rights, this is a valid exercise of power. Other fundamental rights protections might even stem from the Commerce Clause.[298]

Earlier, we saw that the state–sovereign distinction helps us to understand what sort of officer suits against state officials are permissible under *Ex parte Young* and § 1983, as well as what sort of remedies are available.[299] Plaintiffs may seek injunctive relief against any violation of federal law or the federal Constitution,[300] so long as it does not encroach on sovereign functions like states' spending power.[301] But when a state

296. *Fitzpatrick*, 427 U.S. at 447, 453–56.

297. *Id.* (quoting *Ex parte* Virginia, 100 U.S. 339, 346, 347–48 (1880)).

298. A number of scholars have suggested that landmark legislation (much of which was passed pursuant to Congress's Article I powers) has taken on quasi-constitutional status. *See* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 269–70 (1998) ("[T]he transformative opinions handed down by the New Deal Court function as *amendment-analogues* that anchor constitutional meaning in the same symbolically potent way achieved by Article Five amendments."); WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES 7 (2010) ("Some of the nation's entrenched governance structures and normative commitments are derived directly from the Constitution, but most are found in superstatutes enacted by Congress, executive-legislative partnerships, and consensus of state legislatures."); SUNSTEIN, *supra* note 40, at 61–62 (characterizing the New Deal legislation as redefining "constitutive commitments," defined as "constitutional rights . . . understood to be encompassed by the Constitution's terms"). If these rights have constitutional force, one theory to justify these accounts is that these statutory guarantees satisfy substantive requirement for democratic legitimacy and therefore democratic sovereignty. Abrogation to enforce these guarantees would similarly not violate democratic sovereignty, as with any other enforcement of a fundamental right.

299. *See supra* subpart III(B).

300. *See supra* note 216 and accompanying text.

301. *See supra* notes 215–16 and accompanying text.

violates citizens' fundamental democratic rights, it no longer acts as the sovereign. To restore its sovereign status, the state must reach into its coffers to compensate the citizen–plaintiff for whatever harm that fundamental right violation has caused. It must pay damages or the equivalent in order to make the citizen–plaintiff whole. This is obviously the case when Congress abrogates states' sovereign immunity to protect fundamental democratic rights, as in *Fitzpatrick*. It is also the case for officer suits under § 1983 with the near-universal practice of indemnification—so long as the state pays, the citizen–plaintiff is sure to receive compensation from the sovereign.[302] A principal advantage of our account is that it illuminates these connections between otherwise disparate areas of the doctrine. What matters for sovereign immunity, unsurprisingly, is whether the state acts as the democratic sovereign. And that is ultimately a question about the substance of fundamental democratic rights.

B. Congressional Power to Protect Fundamental Rights

Broadly, then, our theory accounts for why we should distinguish between Eleventh Amendment cases that involve statutes designed to vindicate core constitutional rights under the Fourteenth Amendment and those that only involve torts enacted into law under the Commerce Clause. This is not to say, however, that we wish merely to endorse the current state of affairs of the Court's jurisprudence. In particular, the Court's decision in *Quern v. Jordan*[303] to require explicit consent for abrogation of sovereign immunity in Fourteenth Amendment cases seems to risk incoherence in a way that its previous jurisprudence did not.[304] When Congress acts under its Section Five power, it is by definition acting to protect a fundamental right. Thus, it need not explicitly state that it wishes to abrogate sovereign immunity, for the abrogation is inherent in its action. For the Supreme Court to require an explicit act of consensual abrogation risks misunderstanding the relationship between sovereignty and individual rights. By definition, the state cannot act in its sovereign capacity to violate fundamental democratic rights. So, to require explicit abrogation of sovereign immunity misunderstands the particular character of the Fourteenth Amendment that allows for abrogation in the first place, in a way that the Commerce Clause does not. The requirement in *Quern*, however, is largely a formal one with which Congress now often complies.[305]

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302. *See supra* notes 193–95 and accompanying text.

303. 440 U.S. 332 (1979).

304. *Id.* at 345; *accord* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242–46 (1985) (holding that the Rehabilitation Act does not possess the specific congressional intent required to abrogate the Eleventh Amendment).

305. All of the significant abrogation cases following *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), involve statutes with express abrogation provisions. The issue in *Seminole Tribe*

In *Tennessee v. Lane*[306] and *Nevada v. Hibbs*,[307] Congress explicitly recognized the need to abrogate state immunity to enforce provisions of the Americans with Disabilities Act (ADA) and the Family Medical Leave Act (FMLA). In both cases, the Court recognized that Congress was fulfilling its mandate under Section Five to defend fundamental rights to equal protection and due process. In *Lane*, a paraplegic criminal defendant had been unable to access the second floor of a state courthouse.[308] He sued under Title II of the ADA, which requires public entities to provide accommodations for disabled individuals to participate in the public services they provide.[309] The Court found a widespread history of state discrimination against the disabled and held that abrogation was within Congress's powers to enforce disabled citizens' fundamental right to access the courts.[310] Similarly, in *Hibbs*, the Court upheld Congress's abrogation power in the family-care provision of the FMLA.[311] The Court concluded that this exercise of power was a valid response to a long history of gender discrimination and stereotyping by state governments.[312] On our view, mistakes that violate these rights are not construed as sovereign action and should be subject to suit.

It is worth pausing here to note that none of the arguments usually offered in defense of sovereign immunity can explain these exceptions. The state dignity view cannot distinguish between violations of sovereignty such as these and other kinds of state mistakes. Thus, on that view, these decisions would be wrongly decided. Originalists, on the other hand, who see sovereign immunity as part of the originally enacted structure of the Constitution, would also be hard pressed to explain these cases. After all, there was no wide limit on state sovereignty recognized at the founding or in the Constitution. Originalists might argue that these limits were part of the meaning of the Fourteenth Amendment and thus restructured the Constitution, a view in line with our own account. But a greater challenge is to explain how the robust rights protected here are part of that original meaning.[313]

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and its progeny is whether those provisions are unconstitutional. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 57–58 (1996).

306. 541 U.S. 509 (2004).

307. 538 U.S. 721 (2003).

308. *Lane*, 541 U.S. at 513–14.

309. *Id.* at 513, 517.

310. *Id.* at 529.

311. *Hibbs*, 538 U.S. at 725.

312. *Id.* at 725–28.

313. Many self-styled liberal originalists, such as Akhil Amar, are skeptical that sovereign immunity is a constitutional principle at all. *See supra* notes 20–24, 77–90 and accompanying text. We have labeled these scholars and jurists "textualists" for the purposes of the Eleventh Amendment. *See supra* notes 20–21, 77 and accompanying text. The difficulty with this view is that it rends a significant area of our constitutional law without first considering whether there is a

Although the opinions in *Lane* and *Hibbs* are consistent with our account, other decisions in *Kimel v. Florida Board of Regents*,[314] *Board of Trustees of the University of Alabama v. Garrett*, and *Coleman v. Court of Appeals of Maryland*[315] are in tension with it. In those cases the Court recognized that, although Congress could abrogate sovereign immunity under *Fitzpatrick*, it could only do so to enforce the particular set of rights guaranteed by Section One.[316] In *Kimel* and *Garrett*, the Court cites *City of Boerne v. Flores*,[317] arguing that discrimination based on age and disability was outside the constitutional protections enshrined in the Fourteenth Amendment.[318] The problem with these decisions lies in the Court's interpretation of its *Boerne* precedent, and unpacking the state–sovereign distinction requires a closer examination of that case and how it should be understood.

In *Boerne*, the Court struck down the Religious Freedom Restoration Act (RFRA), which attempted to force the Court to return to a strict scrutiny standard in assessing free exercise claims triggered by general legislation that adversely effected individual religious belief or practice.[319] In the controversial case *Employment Division v. Smith*,[320] the Court had rejected strict scrutiny in such matters, reversing its previous approach to free exercise.[321] Congress then passed the RFRA in response, invoking its Section Five power to prohibit any level of government from burdening religious exercise unless it satisfied strict scrutiny, rather than the Court's more deferential *Smith* test.[322] *Boerne* concerned whether Congress could instruct the Court to return to its previous standard.[323] The Court invalidated RFRA as it applied to state and local governments, holding that the strict scrutiny requirement was not "proportional[] or congruen[t]" to remedy this constitutional violation.[324] Thus, RFRA exceeded Congress's Section Five power.[325] There are two ways to understand *Boerne*. The first

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limited and normatively attractive account of sovereign immunity as a constitutional principle. Our democratic theory of sovereign immunity provides just such an account.

314. 528 U.S. 62 (2000).

315. 132 S. Ct. 1327 (2012).

316. *Id.* at 1333–34; Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 364–65 (2001); *Kimel*, 528 U.S. at 80.

317. 521 U.S. 507 (1997).

318. *Garrett*, 531 U.S. at 372–74; *Kimel*, 528 U.S. at 80–84.

319. 521 U.S. at 533–36.

320. 494 U.S. 872 (1990).

321. *Compare id.* at 888–89 (rejecting heightened scrutiny over a free exercise claim), *with* Sherbert v. Verner, 374 U.S. 398, 403–09 (1963) (applying heightened scrutiny to a free exercise claim).

322. *Boerne*, 521 U.S. at 512–16.

323. *Id.* at 512.

324. *Id.* at 533–36.

325. *Id.* at 536.

is a narrow reading that would suggest that, when the Court has reached the right conclusion in interpreting fundamental rights, Congress cannot instruct the Court to reverse its course in future rulings. The second, broader reading suggests that Congress cannot broaden the meaning of Section One rights even in the exercise of its own legislative power or in matters that the Court has not yet ruled on. On this broader reading, Congress has no interpretive power at all.

In *Kimel*, *Garret*, and *Coleman*, the Court took the second approach. The Court held that Congress lacked the power to abrogate state sovereign immunity.[326] These rulings suggest that Congress cannot abrogate immunity to protect fundamental rights if its characterization of those rights goes beyond clearly articulated Court precedent. The problem with such an understanding is that it is judicial supremacy in the extreme.[327] It seems to suggest that the Court has the sole authority to interpret the Fourteenth Amendment and that even when Congress expands the meaning of Section One in a way that the Court might later recognize as legitimate, Congress has no right to act. This is a flawed understanding of judicial authority on our view. While *Boerne* concerned issues of conflict between Congress and the Court on an issue of judicial interpretation, these rulings suggest that the Court has the sole authority to identify constitutional rights enshrined in Section One. This account of judicial supremacy disregards the notion that the Constitution's meaning generally, including Section One, exists independently of what any one actor has said about it.[328] Indeed, it precludes the possibility that Congress or anyone is capable of giving a correct interpretation of the Fourteenth Amendment if the Court has not spoken first. The Court in these cases disregards what is a congressional obligation under the Constitution to interpret and defend the rights under Section One.

Such point is even more salient in the case of sovereign immunity than it would be if the matter were the constitutionality of any act of Congress that might be in tension with other rights. In particular, the line between sovereign action and state action will often be ambiguous. The question here is whether a mistake by the state is the kind of mistake that violates a fundamental right. But such discernment is precisely the kind of specific question that is left to Congress under Section Five. Both Congress and the Court have the responsibility to enforce the Fourteenth Amendment, which

326. Coleman v. Court of Appeals of Md., 132 S. Ct. 1327, 1338 (2012); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000).

327. For a trenchant historical and normative critique of judicial supremacy, *see generally* KRAMER, *supra* note 150, at ch. 5.

328. For an elaboration of this point, see generally Corey Brettschneider, *Popular Constitutionalism and the Case for Judicial Review*, 34 POL. THEORY 516 (2006).

creates a one-way ratchet to offer citizens' fundamental rights the utmost protection.[329]

The case for an expansive role for Congress's Section Five power is particularly strong and important when it comes to issues of sovereign immunity. Sovereign immunity involves a loss of the private rights of individuals on grounds that they have democratically authorized the actions of the sovereign state. But we have shown that these actions do not extend to constitutional rights violations.[330] In delineating the line between private suits against the government for fundamental rights violations and other private wrongs, an asymmetry develops in favor of protecting rights to ensure that the government (as opposed to the sovereign[331]) enjoy an illegitimate advantage in these suits. Thus, we think the default in all cases should be in favor of the body that wishes to expand rather than contract rights. In the cases of sovereign immunity there is thus good reason to give Congress a one-way ratchet to up the level of rights protections in its Section Five power by abrogating sovereign immunity. The ratchet test has been rejected by the *Boerne* Court in many matters, but given the inherent loss of rights that comes with sovereign immunity, the expansion of Congress's Section Five powers in regard to abrogation of sovereign immunity is essential.

V. Objections and Responses

One objection to the argument that we have sketched so far could point to Congress's supposed discretion in deciding whether or not to use its Section Five power. It might be argued that legislation under Section Five does not establish an individual right because it is discretionary as to whether or not Congress wishes to use this power in a way that is distinct from the actual establishment of rights under the Fourteenth Amendment. Namely, in interpreting what our basic rights are under Section One, it might be argued, courts have no similar discretion. They are charged merely with articulating rights, not with creating them.[332]

We think this contention, however, suffers from a mistaken assumption of judicial supremacy and overly disanalogizes the role of courts and Congress in interpreting the Constitution. Congress's charge under Section Five is to enforce, through legislation, the rights guaranteed

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329. *See* Katzenbach v. Morgan, 384 U.S. 641, 648–50 (1966) (explaining the roles of the Court and Congress in enforcing the Equal Protection Clause). For further defense of Justice Brennan's notion of a "one-way ratchet" in protection of fundamental rights, see Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 826 (1999). For additional historical and theoretical criticism of *Boerne*, see generally Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153 (1997).

330. *See supra* note 108 and accompanying text.

331. *See supra* note 187 and accompanying text.

332. We thank Professor Lawrence Lessig for pressing this point.

by Section One. This constitutes a clear constitutional obligation of Congress to act. When it fails to protect these rights by abrogating sovereign immunity, it is failing a fundamental constitutional duty. But the role is discretionary, however, in that the Constitution does not tell Congress how or when to enforce Section One rights, and it does not purport to elaborate in depth each of these rights. Congressional discretion therefore is necessary given the difficulty of discerning precisely how far to expand the meaning of Section One. But, of course, this is true of the Court's role as well. The United States Constitution does not explain that the Court, for instance, should protect the right to an abortion. Rather, as the Court's role has unfolded, it has come to establish these rights. The same is true, we argue, of the congressionally established rights under Section Five. Their establishment and definition is under the discretion of Congress.

Another objection might target our contention that federal statutes protecting fundamental democratic rights may abrogate state sovereign immunity while other federal statutes cannot. In particular an opponent of our view might attempt to use our theory against us: because federal law is democratically enacted, it should trump the presumptive sovereign immunity of states. Our opponent might argue that if a national majority wishes to create rights of actions for private parties to sue a state, a democratic theory of sovereignty should permit this result. Especially in light of the supremacy of federal law enshrined in the Constitution,[333] federal majorities should trump the sovereignty interests of any particular state. Just as in instances where federal law preempts state law,[334] so too should all federal tort statutes trump state claims to immunity.

On our view, however, even though democracy sometimes requires deference to majorities, it does not always require such deference.[335] An attempt by a democratic majority at the federal level to revoke other sovereign functions would not be constitutionally legitimate. For instance, imagine a federal statute that attempted to withdraw the taxation power of the states. Such a statute would rightly be regarded as a violation of the Tenth Amendment and would exceed the powers of the federal government. Just as there would be no such power in that case, we also think the

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333. U.S. CONST. art. VI, cl. 2.

334. *See, e.g.*, Mut. Pharm. Co. v. Bartlett, 133 S. Ct. 2466, 2470 (2013) ("Under the Supremacy Clause, state laws that require a private party to violate federal law are pre-empted . . . ."); Pliva, Inc. v. Mensing, 131 S. Ct. 2567, 2577–81 (2011) (holding that Federal Drug Administration regulations preempt a conflicting duty to warn under state tort law); *cf.* Wyeth v. Levine, 555 U.S. 555, 565 (2009) (identifying the two "cornerstones of . . . pre-emption jurisprudence" as Congressional intent and "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress" (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)) (internal quotation marks omitted)).

335. *See supra* notes 30, 118 and accompanying text.

integrity of state budgets important enough to immunize it from liability except where fundamental democratic rights are at stake. Some functions of the state are essential to what it means to be a government. Immunity from suit is tied to the basic economic integrity and ability of the state to function and to set its own priorities. Deferring to federal law in every instance of abrogating sovereign immunity would potentially render states incapable of retaining the ability to set their own priorities and govern at all. Some of this logic protects small states from threats by corporations who seek to outmaneuver them.[336]

Moreover, nothing in recognizing sovereign immunity undercuts the vast other means the federal government has at its disposal for furthering its own ends. Federal courts may issue injunctions against the state officers to prevent violations of federal law, either when the remedy does not require the expenditure of funds or when a fundamental right is at stake.[337] Congress may also tax citizens of any state directly and allocate the funds as it wishes.[338] It can create financial incentives for states to act through the spending power.[339] But as the Court has recognized, Congress cannot strip the most basic sovereign functions of states away from them. It cannot direct them where to locate their capitals.[340] It cannot compel states to enact particular legislation on pain of assuming liability if they do not.[341] Similarly, Congress cannot take away states' basic sovereign spending power and it cannot force them to be subject to suit where fundamental democratic rights are at stake—so long as the state truly acts as the sovereign. Nothing in protecting this sovereign capacity undercuts the supremacy or vastly superior power of the federal government.

A third objection might ask why it is that immunity in these cases is limited to the states rather than to any municipality.[342] One response to this objection is to point to the text of the Tenth and Eleventh Amendments, which clearly provide for some sovereign powers and status to the states not provided for local and municipal government. These textual grants confer sovereign status to the states in a way that is, as we have shown, entirely derivative of popular sovereignty.[343] Like the federal government, when states act in ways that are both *by* and *for* the people, they are properly

336. *See supra* note 268 and accompanying text.

337. *See supra* subpart III(B).

338. U.S. CONST. art. I, § 8, cl. 1; U.S. CONST. amend. XVI.

339 *E.g.*, South Dakota v. Dole, 483 U.S. 203, 211–12 (1987). Congress may not, however, employ its spending power past the point of coercion. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2660 (2012) ("Congress effectively engages in this impermissible compulsion when state participation in a federal spending program is coerced, so that the States' choice whether to enact or administer a federal regulatory program is rendered illusory.").

340. Coyle v. Smith, 221 U.S. 559, 562, 579 (1911).

341. New York v. United States, 505 U.S. 144, 188 (1992).

342. Lincoln Cnty. v. Luning, 133 U.S. 529, 530 (1890).

343. *See supra* notes 106–07 and accompanying text.

immune from suit—but this immunity does not extend to fundamental rights violations. In the same way that state sovereignty derives from popular sovereignty, local authority under the American system of federalism is entirely derivative of state sovereignty.[344] As a result, there exists no blanket immunity barring plaintiffs from suing municipalities for violating state or federal law in state or federal court.

There may well be ample normative justification for this distinction. Many sovereign functions are currently provided for by the states, in particular the constitutional duty to provide for the general welfare. States in the contemporary polity have largely taken on this role in areas ranging from health care to employment benefits. Allowing them not to be sued preserves their ability to perform this sovereign function without serious incursions on their already limited tax base. Local municipalities have less of a fundamental role in these areas and thus their protection in their treasuries is less important.

But one implication of our view is that, to the extent that local governments carry out sovereign functions and promote popular sovereignty, they should be immune from suits as well. The important point is that, just as with states, nothing in the need to pursue this welfare function authorizes government at any level to violate fundamental democratic rights. Here they lose their sovereign status and become subject to suit.

Conclusion

Discussions of sovereign immunity have tended to view the practice as either a vestige of monarchy that perverts the understanding of the state as subservient to the people or as a necessary defense of the intrinsic dignity of the state. In this Article we have suggested why neither of these two views accurately accounts for the specific role of democratic authority in legitimate states. The state can at times act coercively with the authorization of the people, but we have suggested, this authorization is limited by individual rights. Under this conception, the state may at times act wrongly and yet legitimately. Drawing on this general conception of democratic legitimacy, we have argued that sovereign immunity attaches to the legitimate acts of the state, but it is rightly limited, as is legitimate action itself, by individual rights.

This theoretical account of immunity has support within the Court's own jurisprudence and helps to render coherent a series of cases often thought to be inconsistent. Namely, the Court has traditionally considered abrogation of sovereign immunity under the Fourteenth Amendment as

344. For discussion of this descriptive proposition, see Richard Briffault, *Our Localism: Part I–The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 7–8 (1990) and Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1105–17 (1980).

valid but not abrogation under the Commerce Clause. While this jurisprudence has appeared inconsistent to many commentators, we argue that it reflects the concern to not allow for instances of democratic authority to infringe on individual rights. While the state can and does infringe on individual rights at times, it cannot do so in its sovereign capacity. Such violations are instances of state action not sovereign action. With this distinction between state and sovereign action, we have therefore accounted for the supposed irony present in Fourteenth Amendment abrogation of sovereign immunity. Some have thought that because the Fourteenth Amendment only has rights provisions triggered when the state acts, the same action could be thought to trigger sovereign immunity. But, we have argued, the type of state action triggered under the Fourteenth Amendment is not sovereign action and, thus, does not trigger sovereign immunity. What appeared to be a contradiction in the Court's jurisprudence can thus be solved by appeal to a conception of democratic legitimacy and authority. This same account of democratic sovereignty also explains the equally puzzling areas of officer suits under *Ex parte Young* and the distinction between prospective and retroactive relief under *Edelman v. Jordan*. State officials do not act in the name of the sovereign when they violate fundamental rights, and so those actions are not shielded by sovereign immunity. We argued too that what is essential in cases of fundamental rights violations is that the state is ultimately held responsible, whether through indemnification or some other means. We also argued that there is symbolic value in allowing only suits against state officials not the state itself. When a state or its agents violate fundamental rights, it has acted beyond its sovereign capacity, and its sovereign functions are not immune.

The problem of how to understand the nature of sovereignty in a democratic republic is an old one. But by revisiting this puzzle, we can explain the doctrine while providing a normatively attractive account of when and why the state should be immune from ordinary suit.

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On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees

By Steven G. Calabresi* & Sofía M. Vickery**

The debate as to what unenumerated rights, if any, are protected by the Constitution is directly relevant to the most controversial issues in constitutional law today—from gay marriage, to gun-control measures, to substance-control regulation, to specific personal liberties, and finally to property regulation, to name just a few. Much of the unenumerated rights debate centers on the U.S. Supreme Court's substantive Due Process Clause case law interpreting the Fourteenth Amendment. These cases address the question of which specific rights are implicated by the protection of life, liberty, and property in the Due Process Clause of the Fourteenth Amendment. Some Justices on the U.S. Supreme Court have written or joined opinions that argue that the answer to this question can be found by looking for rights that are deeply rooted in American history and tradition at the most specific level of generality available. State constitutional case law from 1776 up to 1868 is thus potentially of great relevance to understanding American history and tradition because by 1868, the year the Fourteenth Amendment was ratified, two-thirds of the existing state constitutions contained what we refer to as "Lockean Natural Rights Guarantees," provisions protecting life, liberty, and property and guaranteeing inalienable, natural, or inherent rights of an unenumerated rights type. In this Article, we identify and exhaustively analyze nearly a century of state case law from the time of the Founding until 1868, in which state courts interpret and apply state constitutional Lockean Natural Rights Guarantees to an enormous variety of issues. From this robust body of state constitutional case law, we conclude that the Lockean Natural Rights Guarantees in most state constitutions had great significance with respect to the abolition of slavery and the extension of civil and political rights to individuals and minority-group members living in the northern states. At the same time, with respect to property regulation, state courts struggled to give concrete meaning to the Lockean Natural Rights Guarantees in their state constitutions, and while not discounting the possibility that some regulations could violate the Guarantees, the state courts generally deferred to the legislature. This evidence suggests that "liberty," in the context of the Fourteenth Amendment, is best understood broadly to encompass natural

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rights and to require that civil and political rights be extended to minorities, a finding of particular relevance to the debate on gay marriage. However, the range of issues potentially implicated by the Lockean Natural Rights Guarantees and inconsistent rulings in many areas also suggest that determining which specific rights are implicated by the protection of liberty posed the same challenge to state courts between 1776 and 1868 that present courts face today, and that the quest to identify unenumerated rights that are deeply rooted in American history and tradition is itself somewhat quixotic.

I. Introduction

Over the last fifty years, some of the most widely debated Supreme Court decisions have been those which spoke of the presence or absence of unenumerated rights. This has been true of the Supreme Court's decisions in *Griswold v. Connecticut*;[1] in *Roe v. Wade*;[2] in *Lawrence v. Texas*;[3] and, most recently, in *United States v. Windsor*.[4] Today, the debate as to exactly what rights the Constitution protects continues on a wide array of topics including gay marriage, gun-control legislation, substance-control legislation, and property regulation.[5] Those who claim the Fourteenth Amendment protects unenumerated rights base their claim either on the doctrine of substantive due process or, more recently, on the Privileges or Immunities Clause of the Fourteenth Amendment.[6] They claim that some unenumerated rights are fundamental rights substantively protected by the Due Process Clause or that they are privileges or immunities of citizenship.[7] Many opponents argue that the Fourteenth Amendment does not protect any rights other than those that are specifically enumerated either in the Bill of Rights or in other parts of the Constitution. Other opponents concede that the Fourteenth Amendment protects unenumerated rights but debate which particular rights are protected.

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1. 381 U.S. 479, 484–86 (1965).
2. 410 U.S. 113, 129, 152–54 (1973).
3. 539 U.S. 558, 562, 564, 575 (2003).
4. 133 S. Ct. 2675, 2693–96 (2013).
5. *See, e.g.*, McDonald v. City of Chi., 561 U.S. 742, 767, 778 (2010) (finding that the Second Amendment "right to keep and bear arms is fundamental to [the nation's] scheme of ordered liberty"); Gonzales v. Raich, 545 U.S. 1, 8 (2005) (analyzing constitutional claims regarding the use of medical marijuana); Robert J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 557 (1997) (addressing the "open question" of the status of fundamental property rights); Adam Liptak, *Supreme Court to Decide Marriage Rights for Gay Couples Nationwide*, N.Y. TIMES, Jan. 16, 2015, http://www.nytimes.com/2015/01/17/us/supreme-court-to-decide-whether-gays-nationwide-can-marry.html, *archived at* http://perma.cc/KC28-A7Q4 (reporting on the Supreme Court's recent grant of certiorari to cases regarding whether gay marriage is a fundamental right).
6. *See infra* notes 10–12 and accompanying text.
7. *See infra* notes 10–12 and accompanying text.

The Supreme Court Justices opposing the expansion of unenumerated rights have rallied in recent years around the position that the only unenumerated, fundamental liberty interests that the Fourteenth Amendment protects are those that are deeply rooted in the nation's history and traditions. Thus, in *Washington v. Glucksberg*,[8] former Chief Justice William Rehnquist wrote for five Justices that the Due Process Clause of the Fourteenth Amendment protected only fundamental liberty rights that are "objectively, deeply rooted in this Nation's history and tradition."[9] More recently, in *McDonald v. City of Chicago*,[10] Chief Justice John Roberts and Justices Antonin Scalia, Anthony Kennedy, and Samuel Alito took the view that Second Amendment gun rights were protected against state abridgment by the Fourteenth Amendment because the right to keep and bear arms is deeply rooted in our nation's history and tradition.[11] These four conservative advocates of substantive due process received a critical fifth vote from Justice Clarence Thomas, who wrote that the Privileges or Immunities Clause of the Fourteenth Amendment protected the right to keep and bear arms but only on the ground that it was deeply rooted in American history and tradition.[12]

The endorsement in *McDonald* of unenumerated liberty rights that are deeply rooted in history and tradition urgently raises the question of *which* rights are rooted deeply in history and tradition. This question is made especially pressing because one of the five conservative Justices—Justice Anthony M. Kennedy—has on two occasions taken a more philosophical approach to the derivation of constitutionally protected liberty rights. Justice Kennedy wrote of the Due Process Clause's protection of liberty as a transcendental concept that includes "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[13] Justice Kennedy embraced this view in the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[14] and in *Lawrence v. Texas*, where the Court struck down sodomy laws as violating the right to privacy even though the existence of those laws is without any doubt deeply rooted in history and tradition.[15] Justice Kennedy seems to have thought in this case that the Texas law in question was more than a "mere meddlesome interference[] with the rights of the individual" and that it was an

8. 521 U.S. 702 (1997).

9. *Id.* at 720–21 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)) (internal quotation marks omitted).

10. 561 U.S. 742 (2010).

11. *Id.* at 767.

12. *Id.* at 806, 822–23 (Thomas, J., concurring in part and concurring in judgment).

13. Lawrence v. Texas, 539 U.S. 558, 574 (2003) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (plurality opinion)) (internal quotation marks omitted).

14. *Casey*, 505 U.S. at 851.

15. *Lawrence*, 539 U.S. at 574, 577–79.

unreasonable "exercise of the police power" as those phrases are used in *Lochner v. New York*.[16] That in turn raises a question as to whether *Lochner*-style substantive due process is deeply rooted in American history and tradition and whether unenumerated rights cases like *Pierce v. Society of Sisters*[17] and *Meyer v. Nebraska*[18] were correctly decided, as well as *Skinner v. Oklahoma*,[19] which seems to have quite correctly displaced *Buck v. Bell*.[20]

The conundrum over whether the Fourteenth Amendment protects unenumerated rights is augmented by a survey that Professor Steven Calabresi and Sarah Agudo did several years ago as to what individual rights were protected in state bills of rights in 1868 when the Fourteenth Amendment was finally ratified.[21] Professor Calabresi and Ms. Agudo's research was relied on by Justice Alito in his plurality opinion in *McDonald v. City of Chicago*.[22] Professor Calabresi and Ms. Agudo found that in 1868, twenty-four of the thirty-seven state constitutions existing at that time, nearly a two-thirds majority, contained provisions guaranteeing inalienable, natural, or inherent rights of an unenumerated rights type.[23] Thus, in 1868, approximately 67% of all Americans then living resided in states that constitutionally protected unenumerated individual liberty rights.[24] Throughout this Article, we use the term "Lockean Natural Rights

16. 198 U.S. 45, 61 (1905); *see Lawrence*, 539 U.S. at 578–79 (holding that the Texas statute does not further a legitimate state interest that can justify its restriction on personal liberty).

17. 268 U.S. 510 (1925).

18. 262 U.S. 390 (1923).

19. 316 U.S. 535 (1942).

20. 274 U.S. 200 (1927); *see Skinner*, 316 U.S. at 538 (declining to distinguish the statute at issue from *Buck v. Bell* under due process and, instead, holding that the statute failed the requirements of the Equal Protection Clause).

21. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEXAS L. REV. 7, 15–18 (2008). The understanding of unenumerated rights in the states is especially relevant to the meaning of the Fourteenth Amendment if one accepts the premise that "the original intent relevant to constitutional discourse" is the intent "of the parties to the constitutional compact—the states as political entities." H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 888 (1985). *But see id.* at 945–48 (explaining that by the outbreak of the Civil War, the understanding of "intent" shifted to focusing on the personal intent of individual Framers).

22. 561 U.S. 742, 777 & n.26 (2010).

23. *See* Calabresi & Agudo, *supra* note 21, at 88 (listing twenty-seven of the thirty-seven state constitutions as including provisions guaranteeing unenumerated rights). That article included three additional states on the list: Connecticut, Rhode Island, and Texas. *Id.* at 20 & nn.48–49. However, as explained *infra*, the Connecticut, Rhode Island, and Texas Guarantees were so atypical that it is not fully accurate to group them with the twenty-four true Lockean Natural Rights Guarantees.

24. The 67% reflects the population that resided in the twenty-four states with true Lockean Natural Rights Guarantees as of the 1870 census. This percentage was calculated from data available from the U.S. CENSUS BUREAU, POPULATION: 1790 TO 1990, at 27 tbl.16, *available at* http://www.census.gov/population/www/censusdata/files/table-16.pdf, *archived at* http://perma.cc/T6UJ-4FLW.

Guarantees" (or "the Guarantees") to refer to these unenumerated individual-liberty-rights guarantees.[25]

Our goal in this Article is to uncover the original understanding of the Lockean Natural Rights Guarantees urgently, in 1868, when the Fourteenth Amendment was adopted. Were the Lockean Natural Rights Guarantees understood broadly enough to support arguments for the existence of something like the right to marry a partner of one's own choosing or the personal liberties at issue in *Pierce*, *Meyer*, or *Skinner*? Or were the Lockean Natural Rights Guarantees essentially empty rhetorical flourishes that meant little or nothing? Our conclusion after exhaustively studying the case law applying the Lockean Natural Rights Guarantees from the founding of the Republic until 1868 is that the Guarantees protected rights grounded in natural law, and in the Northern States, the Guarantees required that civil and political rights be extended to minority group members, a particularly relevant finding if one accepts the premise that, in 1868, the Fourteenth Amendment reflected the views of the Northern States. The Guarantees also suggested that a broad reading ought to be given to enumerated rights and to unenumerated, but deeply rooted, liberties enjoyed by Englishmen under that country's ancient constitution, which predated the Norman Conquest. At the same time, particularly with respect to property regulation, state courts struggled to give concrete meaning to the Lockean Natural Rights Guarantees, and while not discounting the possibility that some regulations could violate the Guarantees, the state courts generally deferred to the legislature. In this respect, the Lockean Natural Rights Guarantees were remarkably similar to Justice Kennedy's so-called "sweet mystery of life" language in *Lawrence v. Texas*,[26] which rightly or wrongly has been ignored by lower federal and state courts in post-*Lawrence* substantive due process cases.[27] As Professor Calabresi has previously argued, this "sweet mystery of life" language is unintelligible and thus unenforceable.[28] The same thing may be true of the grandly phrased Lockean Natural Rights Guarantees, at least as they are applied to the protection of property.

The twenty-four Lockean Natural Rights Guarantees existing in 1868 used very similar language in protecting enumerated and unenumerated individual rights. The typical Lockean Natural Rights Guarantee included

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25. See *infra* Appendix A, for a chart of the twenty-four Lockean Natural Rights Guarantees and three quasi-Guarantees existing in 1868.

26. Lawrence v. Texas, 539 U.S. 558, 574 (2003) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)); *id.* at 588 (Scalia, J., dissenting).

27. Steven G. Calabresi, *Substantive Due Process After* Gonzales v. Carhart, 106 MICH. L. REV. 1517, 1527 (2008).

28. *See id.* at 1518 (arguing that the *Lawrence* opinion is "void for vagueness").

three parts or elements. First, it affirmed the freedom or equality of men (or both), stating that all men are born "free and equal" or "free and independent."[29] Sir Edward Coke might well have said that this was an inherent right of Englishmen, and Lord Mansfield held as much in *Somerset's Case*[30] in 1772, a case holding that slavery was illegal in England because liberty was the natural state of man and that only express positive law could deprive a person of his freedom.[31] There being no express, positive law in England that authorized the holding of a slave on board a ship in the River Thames in London, the slave was declared free under the common law in a writ of habeas corpus.[32]

Second, the typical Lockean Natural Rights Guarantee guaranteed inalienable, inherent, or natural rights. Sir Edward Coke would have identified such rights with the common law of England and with the ancient constitution, which had produced it. For this reason, Coke held that royal grants of monopolies, which prevented a person from pursuing his occupational freedom, were issued in violation of the common law and that such grants of monopoly were therefore legally void.[33]

And third, the typical Lockean Natural Rights Guarantee guaranteed a right to enjoy life, liberty, and property. It is possible that the enjoyment of life and liberty might be expressed by wanting to work at a job more than sixty hours a week, the right to educate one's child in a private school, or the right to procreate. If so, the Lockean Natural Rights Guarantees might support the holdings in *Lochner*, *Pierce*, *Meyer*, and *Skinner*. Many of the Guarantees further specified that the property right included specific rights for "acquiring, possessing, and protecting property," language that might implicate gun rights.[34] Several Guarantees went even further and constitutionally protected the right to pursue and obtain happiness or safety.[35] This language, too, could be read as protecting fundamental liberties. The

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29. *E.g.*, FLA. CONST. of 1868, declaration of rights, § 1 (using the "free and equal" language); ME. CONST. art. 1, § 1 (amended 1988) (using the "free and independent" language); *see also infra* Appendix A.

30. Somerset v. Stewart, (1772) 98 Eng. Rep. 499 (K.B.); Lofft 1.

31. *Id.* at 510; Lofft at 18–19.

32. *Id.*

33. The Case of the Monopolies, (1602) 77 Eng. Rep. 1260 (Q.B.) 1266; 11 Co. Rep. 84 b, 88 b.

34. *E.g.*, CAL. CONST. of 1849, art. I, § 1 ("All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.").

35. *E.g.*, ALA. CONST. of 1868, art. I, § 1 ("That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness."); CAL. CONST. of 1849, art. I, § 1 ("All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.").

Virginia Lockean Natural Rights Guarantee exemplifies the typical Guarantee, and contains all three elements:

> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.[36]

Nineteen of the twenty-four historical constitutions contain typical Guarantees, with each of these nineteen Guarantees including all three elements or parts. Fifteen of the nineteen typical Lockean Natural Rights Guarantees—the California,[37] Florida,[38] Illinois,[39] Iowa,[40] Kansas,[41]

36. VA. BILL OF RIGHTS of 1864, § 1 ("That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.").

37. CAL. CONST. of 1849, art. I, § 1 ("All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.").

38. FLA. CONST. of 1868, declaration of rights, § 1 ("All men are by nature free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.").

39. ILL. CONST. of 1847, art. XIII, § 1 ("That all men are born equally free and independent, and have certain inherent and indefeasible rights; among which are those of enjoying and defending life and liberty, and of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness.").

40. IOWA CONST. art. I, § 1 (amended 1988) ("All men are, by nature, free and equal, and have certain inalienable rights among—which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.").

41. KAN. CONST. bill of rights, § 1 ("All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.").

Louisiana,[42] Maine,[43] Massachusetts,[44] Nevada,[45] New Jersey,[46] Ohio,[47] Pennsylvania,[48] South Carolina,[49] Virginia,[50] and Wisconsin[51] Guarantees—generally followed this typical form without substantive variation. The remaining four typical Lockean Natural Rights Guarantees—the Delaware,[52]

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42. LA. CONST. of 1868, tit.1, art. I ("All men are created free and equal, and have certain inalienable rights; among these are life, liberty and the pursuit of happiness. To secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.").

43. ME. CONST. art. I, § 1 (amended 1988) ("All men are born equally free and independent, and have certain natural, inherent and unalienable Rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.").

44. MASS. CONST. pmbl. ("The end of the institution, maintenance, and administration of government, is to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it with the power of enjoying, in safety and tranquility, their natural rights, and the blessings of life . . . ."); MASS. CONST. art. I (amended 1976) ("All men are born free and equal, and have certain, natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.").

45. NEV. CONST. art. I, § 1 ("All men are, by nature, free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.").

46. N.J. CONST. of 1844, art. I, § 1 ("All men are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.").

47. OHIO CONST. of 1851, art. I, § 1 ("All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.").

48. PA. CONST. of 1838, art. IX, § 1 ("That all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.").

49. S.C. CONST. of 1868, art. I, § 1 ("All men are born free and equal—endowed by their Creator with certain inalienable rights, among which are the rights of enjoying and defending their lives and liberties, of acquiring, possessing and protecting property, and of seeking and obtaining their safety and happiness.").

50. VA. BILL OF RIGHTS of 1864, § 1 ("That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.").

51. WIS. CONST. art. I, § 1 (amended 1982) ("All men are born equally free and independent, and have certain inherent rights, among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.").

52. DEL. CONST. of 1831, pmbl. ("Through divine goodness all men have, by nature, the rights of worshipping and serving their Creator according to the dictates of their consciences; of enjoying and defending life and liberty, of acquiring and protecting reputation and property, and, in general, of attaining objects suitable to their condition, without injury by one to another; and as these rights are essential to their welfare, for the due exercise thereof, power is inherent in them; and therefore all just authority in the institutions of political society is derived from the people, and established

New Hampshire,[53] Kentucky,[54] and Vermont[55] Guarantees—expanded beyond the basic three parts. The Delaware and New Hampshire Guarantees specifically included freedom of religion in their listing of individual rights.[56] The Kentucky Guarantee contained a separate provision specifying that its Lockean Natural Rights Guarantee did not ban human slavery,[57] while the Vermont Guarantee concluded with an extra provision specifically abolishing slavery.[58] In other words, the Framers of the Vermont constitution explicitly wrote down their conclusion that the Vermont Lockean Natural Rights Guarantee abolished slavery, a conclusion also reached by several other state courts interpreting their more general Lockean Natural Rights Guarantees.[59]

Five of the atypical Guarantees contained slight variations from the typical Lockean Natural Rights Guarantees form. The Alabama,[60] Indiana,[61]

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with their consent, to advance their happiness. And they may for this end, as circumstances require, from time to time, alter their constitution of governance.").

53. N.H. CONST. pt. 1, art. I ("All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good."); N.H. CONST. pt. 1, art. II (amended 1974) ("All men have certain natural, essential, and inherent rights; among which are the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and, in a word, of seeking and obtaining happiness."); N.H. CONST. pt. 1, art. IV ("Among the natural rights, some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the rights of conscience.").

54. KY. CONST. of 1850, pmbl. ("We, the representatives of the people of the State of Kentucky, in convention assembled to secure to all the citizens thereof the enjoyment of the rights of life, liberty, and property, and of pursuing happiness, do ordain and establish this Constitution for its government."); KY. CONST. of 1850, art. XIII, § 3 ("The right of property is before and higher than any constitutional sanction; and the right of the owner of a slave to such slave, and its increase, is the same, and as inviolable as the right of the owner of any property whatever.").

55. VT. CONST. ch. 1, art. I (amended 1921 & 1991) ("That all men are born equally free and independent, and have certain natural, inherent, and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness, and safety;—therefore, no male person born in this country, or brought from over sea, ought to be holden by law to serve any person as a servant, slave, or apprentice, after he arrives to the age of twenty-one years, nor female in like manner after she arrives to the age of eighteen years, unless they are bound by their own consent after they arrive to such age, or bound by law for the payment of debts, damages, fines, costs, or the like.").

56. DEL. CONST. of 1831, pmbl.; N.H. CONST. pt. 1, art. V.

57. KY. CONST. of 1850, art. XIII, § 3.

58. VT. CONST. ch. 1, art. I (amended 1921 & 1991).

59. *See infra* subpart III(A).

60. ALA. CONST. of 1868, art. I, § 1 ("That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.").

61. IND. CONST. art. I, § 1 (amended 1984) ("We declare, That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well being.").

and Nebraska[62] Guarantees did not include the right to property. The North Carolina Guarantee substituted the term "property" for the phrase "enjoyment of the fruits of their own labor."[63] The Missouri constitution did not include a provision on the equality or freedom of men.[64] We refer to these twenty-four clauses collectively as the "Lockean Natural Rights Guarantees" throughout the remainder of this Article.

In addition to the twenty-four states with Lockean Natural Rights Guarantees in 1868, three additional state constitutions contained vaguer, atypical clauses with weak, vague language that calls to mind the Lockean Natural Rights Guarantees. Thus, the Constitution of the State of Connecticut recognized and established "the great and essential principles of liberty and free government" without specific reference to the equality or freedom of men, inalienable or natural rights, or rights beyond liberty.[65] This language is an echo of the Lockean Natural Rights Guarantee language and of Sir Edward Coke's idea that the common law guaranteed liberty of occupation,[66] or Lord Mansfield's view that men and women were born free, except where the positive law expressly said otherwise.[67] Similarly, the Rhode Island constitution recognized that religious and political freedom in general antedated its constitution and was preserved by it, but it too did not specifically refer to the equality or freedom of men, inalienable or natural rights, or rights beyond liberty.[68] The Rhode Island constitution said that:

> In order effectually to secure the religious and political freedom established by our venerated ancestors, and to preserve the same for our posterity, we do declare that the essential and unquestionable rights and principles hereinafter mentioned, shall be established,

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62. NEB. CONST. of 1866, art. I, § 1 ("All men are born equally free and independent, and have certain inherent rights; among these are life, liberty, and the pursuit of happiness. To secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.").

63. N.C. CONST. of 1868, art. I, § 1 ("That we hold it to be self-evident that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.").

64. MO. CONST. of 1865, art. I, § 1 ("That we hold it to be self-evident that all men are endowed by their Creator with certain inalienable rights, among which are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.").

65. CONN. CONST. of 1818, art. I, pmbl. ("That the great and essential principles of liberty and free government may be recognized and established, we declare, ...").

66. *See supra* note 33 and accompanying text.

67. *See supra* notes 30–32 and accompanying text.

68. R.I. CONST. of 1842, art. I, pmbl. ("In order effectually to secure the religious and political freedom established by our venerated ancestors, and to preserve the same for our posterity, we do declare, that the essential and unquestionable rights and principles hereinafter mentioned, shall be established, maintained, and preserved, and shall be of paramount obligation in all legislative, judicial and executive proceedings.").

> maintained, and preserved, and shall be of paramount obligation in all legislative, judicial and executive proceedings.[69]

This may well be a reference to the rights that Coke and Mansfield thought were inherent in the common law.

Finally, the Texas constitution stated that rights come from God, but it did not specifically refer to the equality or freedom of all men, or inalienable or natural rights, or rights beyond liberty.[70] Connecticut's quasi-Lockean Natural Rights Guarantee, the Delaware quasi-Guarantee, and the quasi-Guarantees in Rhode Island and Texas were positioned within preambular constitutional language. The courts in these states generally interpreted their Guarantees as providing fewer substantive rights as compared to other state courts, a result likely attributable to their weaker language, rather than their preambular positions within the constitutions.[71]

In order to determine how the twenty-four clear-cut Lockean Natural Rights Guarantees were understood and interpreted in 1868 at the time of the Fourteenth Amendment's adoption, we surveyed all state constitutional case law on these Lockean Natural Rights Guarantees from the founding of the Republic up to 1868. Using Westlaw electronic databases, we searched each state's database for key words from the version of the Guarantee existing in 1868 as well as prior versions of the Guarantee. If the opinion or reported arguments from the parties explicitly cited the Guarantee, we marked the case as relevant. In addition, if the Guarantee was not formally cited but the opinion's language used Guarantee terminology, such that it was likely that the court was referring to the Guarantee, we also recorded that case as relevant. We confirmed the electronic results by cross-checking them with the West Key Number Digest entries for individual rights, civil and political rights, natural law, and others. This research method is limited to reported cases. Furthermore, it may be possible that additional relevant opinions exist but did not contain a citation to the Guarantee or use the Guarantee's language. Those hypothetical cases have not been captured.

In addition, some state courts understandably appear to have relied on their constitutions' due process clauses to protect life, liberty, and property rather than the Lockean Natural Rights Guarantees.[72] Due process cases are not included in this analysis. Furthermore, eighteen of the thirty-seven state

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69. *Id.*

70. *See* TEX. CONST. of 1866, art. I, pmbl. ("That the general, great, and essential principles of Liberty and Free Government may be recognized and established we declare that . . . ."); *id.* at art. I, § 2 ("All freemen, when they form a social compact, have equal rights . . . .").

71. *See supra* note 23 and accompanying text; *infra* text accompanying notes 255–57, 523–29, 768.

72. *See generally* John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493 (1997) (discussing the history of the Due Process Clause).

constitutions contained Ninth Amendment analogues,[73] which reserved rights to the people and are a potential source for unenumerated rights. State case law interpreting these Ninth Amendment analogues is also not captured in this Article. Finally, some opinions rely on both the Guarantees as well as a more general understanding of natural law governing conduct. We highlight each court's reasoning in the discussion below, but it is impossible to determine in some instances whether the Guarantee was dispositive in the case at hand. Although this Article does not capture pre-1868 state constitutional case law on unenumerated rights under state due process clauses or Ninth Amendment analogues, we feel confident that it is highly unlikely that other unenumerated rights would have existed absent any reference to the Lockean Natural Rights Guarantee language. That language is a more textually plausible font of unenumerated rights than is the language of a due process clause or of a Ninth Amendment analogue.[74] It seems highly unlikely to us that an unenumerated rights natural law jurisprudence would have existed in the state courts in 1868 without there being any reference to the twenty-four Lockean Natural Rights Guarantees—provisions that, as we demonstrate below, inspired the famous natural rights language of the Declaration of Independence itself.

State courts explicitly cited the Lockean Natural Rights Guarantees in their state constitutions in 103 cases. Counting both the 103 cases with explicit citations to the Guarantees or quasi-Guarantees, as well as the cases that generally evoke the terminology of the Natural Rights Guarantees, our research uncovered 151 relevant opinions. In the following pages, we summarize this case law in an effort to determine what these Lockean Natural Rights Guarantees originally meant in practice prior to 1868. Did they protect substantive rights at all? Did state courts use the Guarantees to merely lend strength to rights listed elsewhere in the Constitution, or did they provide additional substantive protections? Were the Guarantees simply general preambular language that was made more explicit and was qualified by the later specific rights that were explicitly enumerated? What was the role of natural law, if any, in informing the meaning of the Guarantees' inalienable rights language?

This analysis provides a foundation to begin answering these questions, and the answer is that the Guarantees overall had great significance with respect to the abolition of slavery and the extension of civil and political

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73. Calabresi & Agudo, *supra* note 21, at 89; *see also* John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 999–1022 (1993) (describing the "baby Ninth" amendments).

74. In *Our Declaratory Ninth Amendment*, Professor John Yoo cites two state court cases from the antebellum period as evidence that the so-called "baby Ninth provisions" were "powerful rights-bearing texts." Yoo, *supra* note 73, at 1016, 1018. As discussed *infra*, the opinions in both cases relied on the Lockean Natural Rights Guarantees *in conjunction with* the Ninth Amendment analogues. *See infra* notes 671–76, 701–09 and accompanying text.

rights to minorities in the Northern States but less practical legal significance with respect to property regulation. This is surprising because if the Guarantees are read as establishing the presumption of liberty that is evident in Sir Edward Coke's *Case of the Monopolies*[75] or in *Dr. Bonham's Case*,[76] one would have expected the state courts to have construed the Lockean Natural Rights Clauses more broadly. Twenty of the twenty-four states with Lockean Natural Rights Guarantees reported relevant cases. The state courts also frequently cited other state opinions demonstrating the existence of a body of case law interpreting the Guarantees. These opinions show that the Guarantees were claimed to have substantive meaning in the majority of states with Guarantees. In the words of the California Supreme Court:

> [The California Natural Rights Guarantee] was not lightly incorporated into the Constitution of this State as one of those political dogmas designed to tickle the popular ear, and conveying no substantial meaning or idea; but as one of those fundamental principles of enlightened government, without a rigorous observance of which there could be neither liberty nor safety to the citizen.[77]

The Massachusetts Supreme Judicial Court called the Massachusetts Natural Rights Guarantee the "corner stone" of its state constitution.[78] Many other states highlighted the Guarantees as dispositive in invalidating and striking down legislation.

The Lockean Natural Rights Guarantee cases cover a very broad range of topics, including slavery, habeas corpus, minority rights, a variety of civil and political rights, liquor laws, economic regulations, property takings, and taxes. The wide range of cases shows creative application of the Guarantees to an enormous range of topics, but it also demonstrates that there was no single shared understanding of their meaning among state courts before 1868. Nevertheless, the cases do show that the Guarantees provided many parties with substantive and enforceable rights affecting their lives and livelihoods.

The following discussion analyzes the state Lockean Natural Rights Guarantees and the resulting case law that emerged in the state courts prior to 1868. We begin with (1) a discussion describing the historical origins of the Lockean Natural Rights Guarantee language; (2) a discussion of the original Guarantee's influence on other state constitutions, the Declaration of Independence, and on the French Declaration of the Rights of Man and Citizen of 1789; and (3) a brief summary of the philosophical debates surrounding the Lockean Natural Rights Guarantee language as well as an

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75. *See* (1602) 77 Eng. Rep. 1260 (Q.B.) 1266; 11 Co. Rep. 84 b, 88 a (critiquing how monopolies "take away and destroy" people's ability to work).

76. *See* (1610) 77 Eng. Rep. 638 (Ct. Com. Pl.) 639; 8 Co. Rep. 107 a, 117 b–118 a (explaining that a doctor only violates the law if the doctor practices for an extended time without a license or commits malpractice).

77. Billings v. Hall, 7 Cal. 3, 8 (1857).

78. Commonwealth v. Kneeland, 37 Mass. (20 Pick.) 206, 230 (1838).

analysis of revisions made to the Guarantees between their adoption and 1868.

We then present a survey of the Lockean Natural Rights Guarantee case law. We first present the cases in which the Lockean Natural Rights Guarantees were cited to the most dramatic effect: challenges to the constitutionality of slavery, the habeas petition of an abolitionist imprisoned under the Fugitive Slave Law, and other minority rights. In these dozens of cases, litigants successfully invoked the Guarantees in the process of gaining their freedom and access to basic rights. Perhaps this result should not be surprising considering the modern application of the Fourteenth Amendment to discrimination. Our discussion of the Lockean Natural Rights Guarantees case law continues with areas of more mixed success such as: (1) the application of the Lockean Natural Rights Guarantees to a variety of civil and political rights and (2) the application of the Guarantees to liquor laws, other business regulations, takings, property regulations, and in taxation cases. We conclude that the Lockean Natural Rights Guarantees played an important role in the pre-Fourteenth Amendment enforcement of unenumerated rights by state courts and the expansion of liberty to minorities in the Northern States, but we also found evidence that state courts found less concrete application of the rhetorical language to property regulation.

II. Historical Origins and Development of the Lockean Natural Rights Guarantees

The starting place for understanding the meaning and application of the Lockean Natural Rights Guarantees is in the history of the Guarantees themselves. In this Part, we discuss the origins of the original Lockean Natural Rights Guarantee in the Virginia Declaration of Rights of 1776. We then describe the spread of Lockean Natural Rights Guarantee language to other state constitutions and the influence of Virginia's Lockean Natural Rights Guarantee on the Declaration of Independence and the French Declaration of the Rights of Man and Citizen of 1789. This Part concludes with a few observations on the political-theory debates surrounding the Guarantee rights and a review of amendments made to the Guarantees from the time of their adoption until 1868.

A. Framing of the Original Lockean Natural Rights Guarantee

The Virginia Declaration of Rights of 1776 was the "first true bill of rights" in American history.[79] It must have been inspired in part by the English Bill of Rights of 1689, but whereas the English Bill of Rights only

79. BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 67 (1977).

protected rights against executive infringement,[80] the Virginia Declaration of Rights protected them against legislative infringement as well.[81] The Virginia Bill of Rights seems also to have been inspired by statements about religious freedom and about liberty in the various colonial charters, as well as perhaps reflecting the American colonists' enthusiasm for the views of Sir Edward Coke in the *Case of the Monopolies* or in *Dr. Bonham's Case*, in addition to Lord Mansfield's renunciation of slavery in *Somerset's Case*. The Virginia Declaration of Rights of 1776 provided the first protections for individual rights adopted by a popularly elected convention,[82] and it is fitting that it was the first state constitutional document to include a Lockean Natural Rights Guarantee. George Mason is widely considered to be the author of Virginia's Declaration of Rights, and the first draft appears almost entirely in his handwriting.[83]

The first traces of Virginia's future Lockean Natural Rights Guarantee are found in a transcript of George Mason's *Remarks on Annual Elections for the Fairfax Independent Company* in 1775, which were made just a year before the 1776 adoption of the Virginia Declaration of Rights.[84] In remarks arguing that the Fairfax Independent Company should hold annual elections for its militia officers, George Mason used the opportunity to expound on his theory of government:

> We came equals into this world, and equals shall we go out of it. All men are by nature born equally free and independent. To protect the weaker from the injuries and insults of the stronger were societies first formed; when men entered into compacts to give up some of their natural rights, that by union and mutual assistance they might secure the rest; but they gave up no more than the nature of the thing required. Every society, all government, and every kind of civil compact therefore, is or ought to be, calculated for the general good and safety of the community. Every power, every authority vested in particular men is, or ought to be, ultimately directed to this sole end; and whenever any power or authority whatever extends further, or is of longer duration than is in its nature necessary for these purposes, it may be called government, but it is in fact oppression.[85]

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80. *See* Bill of Rights, 1689, 1 W. & M., c. 2 (Eng.) (limiting the monarch's ability to pass laws, levy taxes, and suppress free speech and elections).

81. *See generally* VA. BILL OF RIGHTS of 1776.

82. SCHWARTZ, *supra* note 79, at 67.

83. *Id.* at 69.

84. George Mason, Remarks on Annual Elections for the Fairfax Independent Company (Apr. 17–26, 1775), *in* 1 THE PAPERS OF GEORGE MASON, 1725–1792, at 229 (Robert A. Rutland ed., 1970) [hereinafter PAPERS].

85. *Id.* at 229–30. As the editor notes: "Because of the exactness of language used, it could be argued (but not proved) that [Mason] had a copy of these remarks before him while drafting the

These remarks were his first articulation of the language that was to become Virginia's Lockean Natural Rights Guarantee.

In 1776, George Mason joined Virginia's state constitutional convention, and on May 27, 1776, he submitted the first draft of Virginia's Declaration of Rights to the convention.[86] This draft included a more full-throated version of the Lockean Natural Rights Guarantee than was ultimately adopted. The Guarantee appears at the beginning of the Virginia Declaration of Rights, and in George Mason's first draft of the Lockean Natural Rights Guarantee it states:

> That all Men are born equally free and independant [sic], and have certain inherent natural Rights, of which they can not by any Compact, deprive or divest their Posterity; among which are the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursueing [sic] and obtaining Happiness and Safety.[87]

This first draft of the Lockean Natural Rights Guarantee touched off an extensive debate at the Virginia state convention. Some members opposed the language fearing, quite correctly as it would turn out, that it could be used to abolish slavery. In the words of Thomas Ludwell Lee, a delegate to the convention:

> [A] certain set of aristocrats, for we have such monsters here, [who upon] finding that their execrable system [of slavery] cannot be reared on such foundations, have to this time kept us at bay on the first line, which declares all men to be born equally free and independent. . . . The words as they stand are approved by a very great majority, yet by a thousand masterly fetches and strategems the business has been so delayed that the first clause stands yet unassented to by the Convention.[88]

The liberal delegates responded that no revision was required because "slaves not being constituent members of our society could never pretend to any benefit from such a maxim."[89] Ultimately, the convention appeased the proslavery delegates by changing the opening line from "all men are born equally free" to "all men are by nature equally free" and deleting the word "natural" from the phrase "certain inherent natural rights" so that the

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1776 [Virginia Constitution]." Robert A. Rutland, *Editorial Note* to Remarks on Annual Elections for the Fairfax Independent Company (Apr. 17–26, 1775), *in* PAPERS, *supra* note 84, at 232, 232.

86. Robert A. Rutland, *Editorial Note* to The Virginia Declaration of Rights, *in* PAPERS, *supra* note 84, at 274, 275.

87. George Mason, First Draft of the Virginia Declaration of Rights (May 20–26, 1776), *in* PAPERS, *supra* note 84, at 276, 277.

88. Rutland, *supra* note 86, at 275 (quoting Thomas Ludwell Lee).

89. *Id.* (quoting Edmund Randolph).

Guarantee protected only "certain inherent rights."[90] Edward Pendleton also suggested a qualifying phrase—"when they enter into a state of Society"—which was accepted by the convention.[91] Historians agree that these changes were intended to reassure slaveholders that the Guarantee would not be interpreted as abolishing slavery in Virginia in 1776.[92] The Virginia delegates could not have known that, within a few short years, other Lockean Natural Rights Guarantees would be used to successfully challenge the constitutionality of slavery, and that the Virginia courts would rely on the legislative history just mentioned to reject the argument that Virginia's Lockean Natural Rights Guarantee banned slavery in Virginia.[93]

The final draft of Virginia's Lockean Natural Rights Guarantee read as follows, with the italicized and crossed out portions representing the edits to the final draft as compared to George Mason's original proposal:

> That all men are ~~born~~ *by nature* equally free and independent, and have certain inherent ~~natural~~ rights, of which, *when they enter into a state of society*, they cannot, by any compact, deprive or divest their posterity; *namely*, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.[94]

Thus, on June 12, 1776, the first Lockean Natural Rights Guarantee was adopted as binding constitutional law as part of the Virginia Declaration of Rights, the first such document in American history.[95]

Many scholars have speculated on the potential sources of George Mason's theory of government as articulated in the Virginia Lockean Natural Rights Guarantee, and these scholars have identified several key influences. Perhaps most importantly, all of the Framers, including George Mason, were heavily influenced by the writings of John Locke and his theories on the natural rights of life, liberty, and property.[96] Mason endorsed the Lockean

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90. Brent Tarter, *The Virginia Declaration of Rights*, *in* TO SECURE THE BLESSINGS OF LIBERTY: RIGHTS IN AMERICAN HISTORY 37, 46–47 (Josephine F. Pacheco ed., 1993). At the time these changes were made, Lord Mansfield had declared in *Somerset's Case* in Great Britain that slavery was abhorrent under natural law and that only positive law could suffice to authorize it. Somerset v. Stewart, (1772) 98 Eng. Rep. 499 (K.B.) 510; Lofft 1, 19. Since positive law did not explicitly authorize slavery in England, Lord Mansfield held that a slave brought to London became free upon his arrival in England. *Id.*

91. Tarter, *supra* note 90, at 46.

92. *Id.*; *accord* THOMAS B. MCAFFEE, INHERENT RIGHTS, THE WRITTEN CONSTITUTION, AND POPULAR SOVEREIGNTY 18 (2000).

93. *See infra* Part III.

94. *Compare* First Draft of the Virginia Declaration of Rights, *supra* note 87, at 277, *with* Final Draft of the Virginia Declaration of Rights (June 12, 1776), *in* PAPERS, *supra* note 84, at 287, 287.

95. Tarter, *supra* note 90, at 46.

96. A.E. Dick Howard, *From Mason to Modern Times: 200 Years of American Rights*, *in* THE LEGACY OF GEORGE MASON 95, 98 (Josephine F. Pacheco ed., 1983).

ideal that all men retain some of their natural rights after subscribing to the social compact, in contrast to the idea put forth by Thomas Hobbes and Jean-Jacques Rousseau that men surrender all their natural rights to the sovereign in exchange for security and public order.[97] George Mason appears to have borrowed almost directly from John Locke's *Second Treatise of Civil Government*, which included the statements "[t]hat all men by nature are equal" and that "[m]an being born, . . . hath by nature a power, . . . to preserve his property, that is, his life, liberty and estate."[98]

The Virginia Lockean Natural Rights Guarantee's specific protection of the right of "pursuing and obtaining happiness and safety" is also striking given the later inclusion of the "pursuit of Happiness" in the Declaration of Independence.[99] Mason's inspiration for including this right is not clear. Some have speculated that the right may have originated from *Cato's Letters*, which included the statement: "Happiness is the chief End of Man."[100] Others believe that the happiness right was derived from Locke's *An Essay Concerning Human Understanding*, which stated that "all Men desire Happiness" and were devoted to "the pursuit of happiness."[101]

B. Spread of the Lockean Natural Rights Guarantees and Their Impact

Regardless of its philosophical sources, George Mason's Virginia Lockean Natural Rights Guarantee had a far reaching impact in the other states and abroad. Its extensive influence can be attributed both to its timing as the earliest state constitution and thus a natural model for subsequent drafters, as well as the fact that it seemed to capture the key features of political thought in the colonies at the time.[102] In addition, its adoption in Virginia, one of the most populous colonies with many well-respected framers,[103] must have given it special credibility.

The spread of the Lockean Natural Rights Guarantee language began almost immediately. Only one month after its passage, in July 1776,

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97. HELEN HILL, GEORGE MASON: CONSTITUTIONALIST 140 (1938).

98. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 54, at 31, § 87, at 46 (C.B. Macpherson ed., 1980) (1690).

99. *Compare* VA. BILL OF RIGHTS OF 1776, § 1, *with* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

100. Robert A. Rutland, *Editorial Note* to First Draft of the Virginia Declaration of Rights (May 20–26, 1776), *in* PAPERS, *supra* note 84, at 279, 279.

101. *See* ALLEN JAYNE, JEFFERSON'S DECLARATION OF INDEPENDENCE: ORIGINS, PHILOSOPHY AND THEOLOGY 128–29 (1998) (discussing the literature available in the colonies in 1776 on the right of happiness).

102. SCHWARTZ, *supra* note 79, at 67, 71–72.

103. *See* Joyce A. McCray Pearson, *The Federal and State Bills of Rights: A Historical Look at the Relationship Between America's Documents of Individual Freedom*, 36 HOW. L.J. 43, 57–60 (1993) (discussing the influence of Virginia's bill of rights and of its delegates on the federal bill of rights).

delegates at the Pennsylvania constitutional convention used a copy of the Virginia Declaration of Rights in drafting Pennsylvania's constitution.[104] In 1779, John Adams confirmed the influence of the Virginia Guarantee on the drafting of the Pennsylvania constitution in his diary: "The [Pennsylvania] bill of rights is taken almost verbatim from that of Virginia."[105] But, in a remarkable turn of history, the Pennsylvania delegates probably were working from George Mason's *first draft* of the Guarantee, which did not contain the proslavery qualifications that were ultimately included in the Virginia state constitution to appease proslavery delegates. The version published in the *Virginia Gazette* on June 1, 1776, was taken from George Mason's first antislavery draft, the draft circulated prior to the addition of the proslavery qualifiers, and it is this version that remained the source for other colonial newspapers.[106] A Virginia delegate likely sent a copy of the first draft to the *Pennsylvania Evening Post*, which published the piece on June 6, 1776.[107] Many other newspapers also published George Mason's first draft, thus "spreading the 27 May draft up and down the seaboard."[108]

It is therefore not surprising that Pennsylvania's Lockean Natural Rights Guarantee closely tracked George Mason's first draft of the Virginia Guarantee, using the words "born equally free" and including an explicit reference to the existence of natural rights. The Pennsylvania Lockean Natural Rights Guarantee of 1776 stated:

> That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.[109]

The first draft of Virginia's Lockean Natural Rights Guarantee subsequently influenced other state conventions in their constitutional deliberations. Indeed, twenty-four states ultimately adopted a version of Mason's Lockean Natural Rights Guarantee, while three others had related language.[110]

In addition to influencing other state constitutions, the Lockean Natural Rights Guarantee in the Virginia Declaration of Rights also served as Thomas Jefferson's model for portions of the Declaration of Independence itself. Working in July of 1776, Jefferson extensively consulted two documents: the

104. SCHWARTZ, *supra* note 79, at 72–73.
105. *Id.* at 73.
106. Rutland, *supra* note 86, at 276.
107. *Id.*
108. *Id.*
109. PA. CONST. of 1776, art. I.
110. Calabresi & Agudo, *supra* note 21, at 88; *see also supra* note 23.

draft preamble for the Virginia constitution and George Mason's original version of the Declaration of Rights.[111] In *American Scripture*, historian Pauline Maier describes how the Declaration of Independence drafts show that Jefferson, and possibly Benjamin Franklin, carefully edited Mason's original version of Virginia's Lockean Natural Rights Guarantee to form the first sentence of the Declaration of Independence:

> Jefferson began with Mason's statement "that all men are born equally free and independant," which he rewrote to say they were "created equal & independent," then (on his "original rough draft") cut out the "& independent." Mason said that all men had "certain inherent natural rights, of which they cannot, by any compact, deprive or divest their posterity," which Jefferson compressed marvelously into a statement that men derived from their equal creation "rights inherent & inalienable," then moved the noun to the end of the phrase so it read "inherent & inalienable rights." Among those rights, Mason said, were "the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety," which Jefferson again shortened first to "the preservation of life, & liberty, & the pursuit of happiness," and then simply to "life, liberty, & the pursuit of happiness."[112]

In fact, Maier concludes that Mason's original draft of the Virginia Declaration of Rights "had a far greater impact than either the Declaration of Independence or the Declaration of Rights that the Virginia convention finally adopted, both of which were themselves descended from the Mason draft."[113]

Virginia's Declaration of Rights also influenced debates on the Bill of Rights to the federal Constitution. Antifederalists, including Mason, relied on the general existence of declarations of rights in the state constitutions to argue that the federal Constitution should contain similar protections.[114] Specifically, echoes of Virginia's Lockean Natural Rights Guarantee appeared in James Madison's June 8, 1789, speech to the House of Representatives, in which Madison made an initial proposal for the Bill of Rights.[115] The proposed first amendment stated: "That Government is instituted and ought to be exercised for the benefit of the people; which

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111. PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 104 (1997).

112. *Id.* at 133–34.

113. *Id.* at 165.

114. *See* SCHWARTZ, *supra* note 79, at 106–08 (discussing the "broad popular response" to George Mason's *Objections to the Constitution* that advocated for a federal bill of rights).

115. 1 ANNALS OF CONG. 424, 431–37 (1789) (Joseph Gales ed., 1834); *see also* LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 35 (1999) (explaining that Madison culled the proposed amendments from Virginia's and other states' constitutions).

consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety."[116] In arguing for the adoption of this amendment, Madison explicitly pointed to the bills of rights in many states containing similar provisions in various forms, all adopted to "limit and qualify the powers of Government."[117]

In introducing this quasi-Lockean Natural Rights Guarantee, Madison also defended its impact on the protection of minority rights:

> It may be thought all paper barriers against the power of the community are too weak to be worthy of attention. I am sensible they are not so strong as to satisfy gentlemen of every description who have seen and examined thoroughly the texture of such a defence; yet, as they have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, it may be one means to control the majority from those acts to which they might be other-wise inclined.[118]

However, the proposal to emerge from the House Select Committee did not include this quasi-Lockean Natural Rights Guarantee language, and it does not appear to have re-emerged in later debates over the Bill of Rights.[119] Although the precise reasons for the decision to exclude this language are not clear, the presence of such language in Madison's original proposal reflects its important role in the bills of rights in state constitutions of the time.

The influence of George Mason's first draft of the Lockean Natural Rights Guarantee was not limited to the United States.[120] Shortly after its printing in colonial newspapers, Mason's first draft was published in England in 1776, and from there it went on to strongly influence French political debates from 1776 to 1789.[121] In France, a leading intellectual, Jacques-

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116. 1 ANNALS OF CONG. 433–34.

117. *Id.* at 436–37.

118. *Id.* at 437. Madison's statement that a bill of rights might prove more effective than a mere "paper barrier" may have been influenced by his correspondence the previous year with Thomas Jefferson. Jefferson argued that a bill of rights would put a "legal check" in the "hands of the judiciary," which "merits great confidence." Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *available at* http://www.gwu.edu/~ffcp/exhibit/p7/p7_1text.html, *archived at* http://perma.cc/4D5S-RLS5. *See generally* SCHWARTZ, *supra* note 79, at 116–18 (discussing the correspondence).

119. *Report of the House Select Committee,* June 28, 1789, TEACHINGAMERICANHISTORY .ORG, *available at* http://teachingamericanhistory.org/bor/houseselect_17890728/, *archived at* http://perma.cc/4EVQ-NW3H.

120. One scholar has even argued that Virginia's Lockean Natural Rights Guarantee influenced the modern Universal Declaration of Human Rights adopted by the United Nations in 1948. David Little, *National Rights and Human Rights: The International Imperative*, *in* NATURAL RIGHTS AND NATURAL LAW: THE LEGACY OF GEORGE MASON 67, 67 (Robert P. Davidow ed., 1986).

121. Robert A. Rutland, *Editorial Note* to Committee Draft of the Virginia Declaration of Rights (May 27, 1776), *in* PAPERS, *supra* note 84, at 285, 286.

Pierre Brissot, described "l'immortelle declaration de l'Etat de Virginie sur la liberté des cultes."[122] The influence of the Virginia Declaration of Rights and of its Lockean Natural Rights Guarantee was limited to intellectual circles in France until the French Revolution of 1789 broke out thirteen years after American independence. But once the Revolution occurred, George Mason's first draft of the Virginia Lockean Natural Rights Guarantee obviously had a huge effect on the French Revolutionary Declaration of the Rights of Man and Citizen adopted in August 1789, two years before the U.S. Bill of Rights was ratified.[123]

Although many scholars cite only the Declaration of Independence as Lafayette's inspiration in pushing for a declaration of individual rights, the evidence clearly shows that Lafayette was strongly influenced by the bill of rights found in *state* constitutions and by Mason's first draft of Virginia's Lockean Natural Rights Guarantee.[124] Several French translations of the American state constitutions were available to Lafayette and the other members of the National Convention.[125] A direct comparison of each provision of the French Declaration to the state constitutions shows nearly identical language.[126] In fact, the opening sentence of Article I in the French Declaration of the Rights of Man and Citizen is nearly an exact quote of Mason's first draft. It states: "Men are born and remain free and equal in rights."[127] Article II of the Declaration then goes on to list "the natural and imprescriptible rights of man," including "liberty, property, security and resistance to oppression."[128] In the words of one scholar: "The French Declaration of Rights is for the most part copied from the American declarations or 'bills of rights.'"[129] The impact of the Lockean Natural Rights Guarantees truly seems to have been international. It should be noted in this regard that the current constitution of France has enshrined the 1789 Declaration of the Rights of Man and Citizen in present day French

122. Rutland, *supra* note 86, at 276.

123. *See* GEORG JELLINEK, THE DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS 18–20 (Max Farrand trans., Hyperion Press 1979) (1901) (discussing the significant influence of Virginia's Declaration of Rights on the French Declaration of the Rights of Man and Citizens).

124. *Id.*; *see also* MAIER, *supra* note 111, at 168 (asserting that Lafayette's draft and adopted version of the Declaration of the Rights of Man and Citizen were based on the state declarations of rights).

125. JELLINEK, *supra* note 123, at 18–19.

126. *Id.* at 27–42.

127. DECLARATION OF THE RIGHTS OF MAN AND CITIZEN art. I (1789) (Fr.), *translated in* Lynn Hunt, INVENTING HUMAN RIGHTS: A HISTORY app. at 221 (2007).

128. *Id.* art. 2.

129. JELLINEK, *supra* note 123, at 20.

constitutional law.[130] France today thus has a Lockean Natural Rights Guarantee that is judicially enforceable in its constitution.

C. *Political Theory Debates and Amendments to the Guarantees*

The principles of the Lockean Natural Rights Guarantees were not embraced universally, and their adoption by the French revolutionaries in 1789 provoked major controversy among political philosophers at the outset of the French Revolution. In 1790, Edmund Burke wrote his famous book, *Reflections on the Revolution in France*, which criticized the abstract language and values promoted by the French Declaration as meaningless and potentially dangerous:

> What is the use of discussing a man's abstract right to food or to medicine? The question is upon the method of procuring and administering them. In that deliberation I shall always advise to call in the aid of the farmer and the physician, rather than the professor of metaphysics.[131]

In the *Rights of Man*, Thomas Paine famously responded to Edmund Burke with a full-throated defense of Enlightenment Rights provisions like the French Lockean Natural Rights Guarantee. In explaining his theory of government, Paine emphasized the continued relevance of natural rights:

> Man did not enter into society to become *worse* than he was before, nor to have fewer rights than he had before, but to have those rights better secured. His natural rights are the foundation of all his civil rights.[132]

These same debates continued in the nineteenth century with Jeremy Bentham and John Austin making important contributions to the debate on inalienable rights and positive law. Bentham famously called natural law "nonsense upon stilts."[133] By the 1860s, shortly before the passage of the Fourteenth Amendment, John Stuart Mill had published *On Liberty*, a powerful defense of liberal individual rights.[134] Mill argued famously for a harm principle under which government can only intervene to prevent

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130. 1958 CONST. pmbl. (Fr.) ("The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789 . . . .").

131. Edmund Burke, *Reflections on the Revolution in France*, *in* REVOLUTIONARY WRITINGS: REFLECTIONS ON THE REVOLUTION IN FRANCE AND THE FIRST LETTER ON A REGICIDE PEACE 3, 61 (Iain Hampsher-Monk ed., 2014) (1790).

132. THOMAS PAINE, RIGHTS OF MAN 5, 30 (Paul Negri & Ronald Herder eds., Dover Publ'ns 1999) (1791).

133. 2 JEREMY BENTHAM, *Anarchical Fallacies; Being an Examination of the Declaration of Rights Issued During the French Revolution*, *in* JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 489, 501 (John Bowring ed., London, Simpkin, Marshall & Co. 1843).

134. JOHN STUART MILL, ON LIBERTY (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

citizens from harming one another but not to protect them from harming themselves.[135] This exact idea is codified in the French Declaration of Rights of Man and Citizen which provides:

> Liberty consists in the ability to do whatever does not harm another; hence the exercise of the natural rights of each man has no other limits than those which assure to other members of society the enjoyment of the same rights. These limits can only be determined by the law.[136]

Many of these debates echo our modern disagreements regarding the nature of these basic rights and the proper interpretation of broad language on unenumerated rights. In *Michael H. v. Gerald D.*,[137] U.S. Supreme Court Justices Antonin Scalia, writing for a plurality, and William Brennan, writing in dissent, argued over whether abstract rights-protection clauses ought to be interpreted at the most specific level of generality historically available, as Justice Scalia said, or more abstractly, as Justice Brennan argued.[138]

The debate between Edmund Burke, Thomas Paine, and John Stuart Mill was also likely influential in the revisions to the Lockean Natural Rights Guarantees that occurred between the adoption in 1776 of the Virginia and Pennsylvanian Lockean Natural Rights Guarantees and the twenty-four Lockean Natural Rights Guarantees as they would have been understood in 1868 when the Fourteenth Amendment was adopted. Appendix A identifies all versions for each of the twenty-four Natural Rights Guarantees existing in 1868.[139] After comparing the historical iterations of the twenty-four Guarantees, we can make a few observations. First, if a Lockean Natural Rights Guarantee appeared in the first adopted draft of a constitution, it remained in that state's constitution existing in 1868. We are not aware of any instance of a state convention permanently removing a Lockean Natural Rights Guarantee from its constitutional text between the Founding and 1868.

Second, nineteen of the twenty-four states included a Guarantee in the original versions of the state constitutions; the remaining five added their Guarantees at varying points prior to 1868. This was true of New Hampshire in 1784, of New Jersey in 1844, of Missouri in 1865, of South Carolina in

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135. *Id.* at 80.

136. DECLARATION OF THE RIGHTS OF MAN AND CITIZEN art. IV (1789) (Fr.), *translated in* Lynn Hunt, *supra* note 127, app. at 221.

137. 491 U.S. 110 (1989).

138. *Compare id.* at 122–24 (plurality opinion) (analyzing whether persons in the particular situation of the parties to the case would have traditionally been protected by society), *with id.* at 139–41 (Brennan, J., dissenting) (criticizing the plurality for excessive specificity in defining the right to be analyzed).

139. *See infra* Appendix A.

1865, and of North Carolina in 1868.[140] This suggests widespread admiration of the Lockean Natural Rights Guarantee language.

Third, there was a trend during the nineteenth century toward the deleting of the term "natural rights" from the various Lockean Natural Rights Guarantees. Three states had deleted their original inclusion of natural rights in state constitutional conventions prior to the Civil War: Indiana, Ohio, and Pennsylvania.[141] And, by 1868, only five states—Maine, Massachusetts, New Hampshire, New Jersey, and Vermont—explicitly protected natural rights in their Lockean Natural Rights Guarantees.[142] Moreover, none of the nine states that either created or amended their constitutions after 1860 included natural rights in their Guarantees, to wit: Alabama, Florida, Louisiana, Missouri, North Carolina, Nebraska, Nevada, South Carolina, and Virginia.[143] It is likely that Jeremy Bentham's view that natural law was "nonsense upon stilts" and John Austin's embrace of legal positivism in the 1830s had an impact across the Atlantic in leading to the elimination of natural rights rhetoric.[144] More broadly, the elimination of natural rights language shows that there was an ongoing debate in the nineteenth century

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140. *See infra* Appendix B.

141. The Pennsylvania, Indiana, and Ohio constitutional conventions deleted natural rights language from their Lockean Natural Rights Guarantees at some point before 1868. The following text compares their Lockean Natural Rights Guarantees as existing in 1868 with the prior version of their Guarantees that included natural rights. The crossed out text represents the deleted language and the italicized text represents added language. The Pennsylvania constitutional convention of 1790 was the first convention to delete the natural rights reference. "That all men are born equally free and independent, and have certain ~~natural~~ inherent and ~~inalienable~~ *indefeasible* rights, ~~amongst~~ *among* which are *those of* ~~the~~ enjoying and defending life and liberty, of acquiring, possessing, and protecting property *and reputation*, and *of* pursuing ~~and obtaining~~ their own happiness ~~and safety~~." *Compare* PA. CONST. of 1790, art. IX, § 1, *with* PA. CONST. of 1776, art. I. More than fifty years later, in 1851, both the Indiana and Ohio constitutional conventions removed natural rights from their Guarantees:

> We declare, That all men are *created equal* ~~born equally free and independent~~; that *they are endowed by their Creator with certain* ~~and have certain natural, inherent, and~~ unalienable rights; *that* among *these* ~~which~~ are ~~the enjoying and defending~~ life, ~~and~~ liberty and ~~of acquiring, possessing, and protecting property, and~~ the ~~pursuing and obtaining~~ pursuit of happiness ~~and safety~~ . . . .

Compare IND. CONST. art. I, § 1 (amended 1984), *with* IND. CONST. of 1816, art. I. The Ohio constitutional convention made very similar revisions to its Lockean Natural Rights Guarantee: "All men are, ~~born equally~~ *by nature*, free and independent, and have certain ~~natural inherent and~~ inalienable rights, ~~amongst~~ which are *those of* ~~the~~ enjoying and defending life and liberty, acquiring, possessing, and protecting property, and *seeking* ~~pursuing~~ and obtaining happiness and safety." *Compare* OHIO CONST. of 1851, art. I, *with* OHIO CONST. of 1802, art. VIII, § 1. The legislative history and records of these conventions, if available, might yield interesting evidence on the rationale of these revisions. This may be one area for further study in understanding how the Lockean Natural Rights Guarantees were interpreted before 1868.

142. *See infra* Appendix B.

143. *See infra* Appendices A & B.

144. 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 31–33 (Robert Campbell ed., 5th rev. ed. 1929) (1861); BENTHAM, *supra* note 133, at 501.

as to what the Lockean Natural Rights Guarantees should say. Thus, the language of the Lockean Natural Rights Guarantees was clearly in flux during the period leading up to the adoption of the Fourteenth Amendment in 1868.

Constitutional equality guarantees were later to come under siege as well thanks to the writing of Thomas Malthus, Herbert Spencer, and Charles Darwin. Social Darwinists took the idea of the survival of the fittest as suggesting that all men were not created equal and that only the most fit should survive, an idea that contributed to tragedies like the American eugenics movement and the Holocaust.[145] The statement of the French Revolutionary Declaration of the Rights of Man and Citizen in 1789 that "all men are born free and equal" came no longer to be believed in the late nineteenth and early twentieth centuries.[146] The text of the French Revolutionary Declaration, as inspired by George Mason's first draft of the Virginia Declaration of Rights, came to be disregarded by some.[147]

With this history in mind, we now turn to a survey of how state courts conducted the difficult task of applying the Lockean Natural Rights Guarantees to the issues of the day.

III. Slavery

One of the most striking applications of the Lockean Natural Rights Guarantees was to the controversial subject of slavery. A vibrant body of case law before 1868 explicitly cited or quoted the states' Lockean Natural Rights Guarantees and considered whether the Guarantees effectively abolished slavery. The state courts focused on the equality or freedom language in the Guarantees: the first part of the typical Guarantee that declared all men free and equal or free and independent. In five states, state supreme courts used the Lockean Natural Rights Guarantee equality clause, that "all men are born free and equal,"[148] to hold that slavery was unconstitutional as well as to issue other antislavery decisions related to out-of-state contracts, fugitive slave acts, and the retroactive application of

145. RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 90–91 (rev. ed. 1955); WILLIAM H. TUCKER, THE SCIENCE AND POLITICS OF RACIAL RESEARCH 133–34 (1994).

146. *See, e.g.*, 1 JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT AND A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES, *in* THE WORKS OF JOHN C. CALHOUN 1, 57–58 (Richard K. Cralle ed., New York, D. Appleton & Co. 1851) (characterizing that proposition as unfounded, false, and dangerous).

147. *See* William J. Barnds, *Human Rights: The International Dimension*, *in* THE LEGACY OF GEORGE MASON, *supra* note 96, at 113, 116 (crediting the Virginia Declaration of Rights as influencing the French Declaration of the Rights of Man); Rett R. Ludwikowski, *The French Declaration of the Rights of Man and Citizen and the American Constitutional Development*, 38 AM. J. COMP. L. (SUPPLEMENT) 445, 460–62 (1990) (concluding that, despite receiving significant support amongst the American public, French revolutionary documents failed to make any significant influence on American constitutional development).

148. *See supra* note 29 and accompanying text.

antislavery laws. Three states with Lockean Natural Rights Guarantees (Kentucky, Virginia, and New Jersey) along with Connecticut, which had a weak equality guarantee, considered this argument but rejected it. Although these courts cited some of the antislavery decisions, they declined to interpret their Guarantees the same way. Instead, these courts focused on history and other arguments to find that their Lockean Natural Rights Guarantees did not affect the legality of slavery.

These decisions, issued beginning in 1783 and continuing until 1867, reflect the enduring nature of the fight over the legality of slavery. Critically, these American state court opinions were written with the 1772 English decision in *Somerset's Case* in mind. *Somerset's Case* was frequently cited by state court judges in Lockean Natural Rights Guarantees slavery cases. In *Somerset's Case*, the English Court of the King's Bench considered the status of James Somerset, who had been a slave in the colonies but was brought back to England by his owner.[149] Lord Mansfield famously declared:

> The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political[;] but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory[:] it's so odious, that nothing can be suffered to support it, but positive law.[150]

Thus, Somerset was declared free because even though the colonial laws of the American state from which he was brought to England permitted slavery, English laws could not sustain it.[151] *Somerset's Case* said in essence that Englishmen were naturally free under the common law and that slavery could only exist where written positive law explicitly provided for it. *Somerset's Case* was of huge importance in the United States because the case was decided in 1772, four years before the Declaration of Independence made the United States an independent nation. *Somerset's Case* was thus part of the background English law, which all of the original thirteen States inherited from England.[152] This common law precedent explains why the southern states pushed for a fugitive slave clause in the federal Constitution obligating the free states to return fugitive slaves to the states from which they had escaped.[153] Otherwise, under *Somerset's Case*, fugitive slaves would have become free as soon as they set foot on free state soil. In the wake of this 1772 ruling in *Somerset's Case*, state supreme courts in all of the northern and border states would have to decide for themselves whether

149. Somerset v. Stewart, (1772) 98 Eng. Rep. 499 (K.B.) 499; Lofft 1, 1.

150. *Id.* at 510; Lofft at 19.

151. *Id.*

152. *See* FRANCIS D. COGLIANO, REVOLUTIONARY AMERICA 1763–1815: A POLITICAL HISTORY 24 (2000) (emphasizing that most colonists shared a perception that they had adopted "rights of Englishmen" under English law).

153. *Id.* at 123–24; JAMES M. MCPHERSON, ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION 75 (1982).

the positive law of their own states, like the positive law and common law of England, could not support slavery. The Lockean Natural Rights Guarantees turned out to be of great relevance in answering that question.

State supreme court judges were also considering these cases in the midst of an ever-evolving domestic landscape. The sweeping and grandiose language of the Declaration of Independence and the natural rights focus of the late eighteenth century had been forced to give way in the Missouri Compromise of 1820 to a practical compromise that allowed slavery in some of the western territories while disallowing it in others. This was a sad retreat from the Northwest Ordinance of 1787 under which the Continental Congress, acting under the Articles of Confederation, had banned slavery in all the Northwest Territories, which then became the free states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and part of Minnesota.[154] The Missouri Compromise of 1820 allowed slavery in the southern territories obtained as a result of the Louisiana Purchase while disallowing it in the northern territories.[155] Jeremy Bentham's idea that natural law was "nonsense upon stilts"[156] was eroding the Declaration of Independence's forceful statement that "all men are created equal."

Abolitionist movements continued to argue for an end to slavery both within particular states and western territories and also nationwide.[157] The Constitution obliquely acknowledged the existence of slavery in the infamous Three-Fifths Clause, which counted slaves as being three-fifths of a person,[158] and in the Clause barring Congress from stopping the international slave trade until 1808.[159] As we noted above, the Constitution also supported slavery by containing a Fugitive Slave Clause under which slaves escaping to free states had to be returned to bondage.[160] This Clause was essential to maintaining slavery in the wake of the rule in *Somerset's Case*. Congress passed a fugitive slave law enforcing the Fugitive Slave Clause of the Constitution in 1793, and it then passed another even tougher Fugitive Slave Act in 1850 as part of the Compromise of 1850.[161] People in the North came to hate these laws, which they felt made the North complicit

154. Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 929–30 * n.6 (1995).

155. ROBERT PIERCE FORBES, THE MISSOURI COMPROMISE AND ITS AFTERMATH 5, 92–98 (2007).

156. BENTHAM, *supra* note 133, at 501.

157. PAM CORNELISON & TED YANAK, THE GREAT AMERICAN HISTORY FACT-FINDER: THE WHO, WHAT, WHERE, WHEN, AND WHY OF AMERICAN HISTORY 2–3 (2d ed. 2004).

158. U.S. CONST. art. I, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIV, § 2.

159. U.S. CONST. art. I, § 9, cl. 1.

160. U.S. CONST. art. IV, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIII.

161. CORNELISON & YANAK, *supra* note 157, at 202.

in the maintenance of slavery.[162] Debate in many states over the legality of slavery turned on the effect of the respective state's Lockean Natural Rights Guarantee on slavery, and state court judges in many states were called upon to determine what rights, if any, their Lockean Natural Rights Guarantee conferred.

A. Slavery Unconstitutional

Five state supreme courts—the supreme courts of Vermont, Massachusetts, Indiana, Illinois, and Ohio—applied the Lockean Natural Rights Guarantee's equality language that "all men are by nature equally free and independent" to hold that slavery was unconstitutional.[163] In each of these cases, the state courts specifically pointed to their Lockean Natural Rights Guarantee as the critical text that led them to their decisions. The state courts' specific applications of the Lockean Natural Rights Guarantees differed. The text of the Vermont constitution included an explicit link between its Guarantee and slavery; the Massachusetts constitution was silent on the issue of slavery; and the Indiana, Illinois, and Ohio constitutions included specific antislavery articles in other parts of their state constitutions in addition to addressing it in their Lockean Natural Rights Guarantees. Despite the resulting differences in specific application, each of these state supreme courts consistently cited and explained their respective Lockean Natural Rights Guarantees to advance antislavery positions—whether by using their Guarantee alone or by applying it in conjunction with their antislavery prohibition to issue expansive rulings. In each case, the court relied on the Guarantee as being directly inconsistent with slavery and as providing substantive support for holding slavery to be unconstitutional as a matter of state constitutional law. Consequently, it is clear that the Lockean Natural Rights Guarantees played a key role in the abolitionist efforts in these states.

1. Vermont Constitution: Textual Link Between Lockean Natural Rights Guarantee and Slavery Prohibition.—In 1777, even before the federal

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162. *See* JOYCE APPLEBY ET AL., THE AMERICAN REPUBLIC TO 1877, at 441 (2003) (noting that "enforcement of the [Fugitive Slave Act] led to mounting anger in the North, convincing more people of the evils of slavery").

163. It is not clear whether New Hampshire should be included in this list as well. In 1788, Jeremy Belknap, a New Hampshire historian, wrote that "the negroes in Massachusetts and New Hampshire are all *free*, by the first article in the Declaration of Rights. This has been pleaded in law, and admitted." ARTHUR ZILVERSMIT, THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH 117 (1967). But no records of any judicial decisions appear to still exist. *Id.* The first reported consideration of the issue by the New Hampshire courts was not until 1837. The New Hampshire Superior Court of Judicature found that slavery was unconstitutional, but it is not clear whether it based that conclusion on the Lockean Natural Rights Guarantee or the general liberty guarantees of its state constitution. *See* State v. Rollins, 8 N.H. 550, 566 (1837).

Constitution was adopted, the framers of the Vermont constitution explicitly said in the Lockean Natural Rights Guarantee to that constitution that since all men were "born equally free," slavery must be abolished.[164] Using the term "therefore," the 1777 Vermont constitution clearly stated that the equality principle necessarily required the abolition of slavery. Article I of the Vermont constitution said in full:

> That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are the enjoying and defending life and liberty; acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety. Therefore, no male person, born in this country, or brought from over sea, ought to be holden by law, to serve any person, as a servant, slave or apprentice, after he arrives to the age of twenty-one years, nor female, in like manner, after she arrives to the age of eighteen years, unless they are bound by their own consent, after they arrive to such age, or bound by law, for the payment of debts, damages, fines, costs, or the like.[165]

Given the specificity of the language of Vermont's Lockean Natural Rights Guarantee, it is hardly surprising that the Vermont Supreme Court of Judicature relied on this article to find slavery unconstitutional in the 1802 case, *Selectmen of Windsor v. Jacob*.[166] The court declared that the "question under consideration is not affected by the constitution or laws of the *United States*. It depends solely upon the construction of our own State constitution . . . ."[167] Then, referring to Article I, which was the only constitutional clause relied on by the parties, the Vermont Supreme Court of Judicature concluded that:

> Our State constitution is express, no inhabitant of the State can hold a slave; and though the bill of sale may be binding by the *lex loci* of another State or dominion, yet when the master becomes an inhabitant of this State, his bill of sale ceases to operate here.[168]

Therefore, because slavery was unconstitutional in Vermont, the court dismissed the case for nonsuit.[169] The Vermont constitution was unique in its direct textual link of its Lockean Natural Rights Guarantee equality principle with the abolition of slavery, but the Massachusetts, Indiana,

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164. VT. CONST. of 1777, ch. 1, art. 1. This language remained unchanged in future constitutions. VT. CONST. ch. 1, art. 1 (amended 1921 & 1991).

165. VT. CONST. of 1777, ch. 1, art. 1.

166. 2 Tyl. 192, 200 (Vt. 1802). The reporter also notes that Jacob, an assistant judge of the Supreme Court of Judicature of Vermont, did not participate in the decision because he was a party in the case. *Id.* at 198 n.†.

167. *Id.* at 200.

168. *Id.* at 199.

169. *Id.* at 201.

Illinois, and Ohio state supreme courts followed Vermont's lead, and all four courts relied on the language of the Lockean Natural Rights Guarantee in their state constitutions in mandating the abolition of slavery.

2. Massachusetts: Lockean Natural Rights Guarantee Alone to Abolish Slavery.—Unlike the Vermont constitution, the 1780 Massachusetts constitution did not contain any provisions specifically addressing slavery. Instead, the Massachusetts Supreme Judicial Court relied solely on the Lockean Natural Rights Guarantee's equality guarantee that "[a]ll men are born free and equal"[170] to hold that slavery was unconstitutional. This landmark line of cases began in 1783, only three years after the Massachusetts state constitution was ratified and four years before the federal Constitution was written, in the case of *Commonwealth v. Jennison*.[171] This case powerfully illustrates the driving role of the Lockean Natural Rights Guarantee in the abolition of slavery in Massachusetts.[172]

In *Jennison*, the government charged Jennison with assault and battery for beating twenty-eight-year-old Quock Walker; Jennison's defense was that Quock Walker was his slave from a personal inheritance.[173] The available documents do not present any other details as to Walker's parents or their status. Summaries of the argument indicate that Walker's attorneys relied on the Lockean Natural Rights Guarantee in the new Massachusetts constitution to argue that slavery was unconstitutional. The attorney's argument is described by Professor Emory Washburn in his 1857 article:

> And the black child is born as much a free child in this sense as if it were white.
>
> Then, again, it is contended that the Constitution only determines *that those that have been born since its adoption are equal and free.* And they admit, that, since that time, everybody is born free; and they say, that, by a different construction, people will lose their property.
>
> This is begging the question. Is he property? If so, why not treat him as you do an article of stock,—an ox or a horse?[174]

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170. MASS. CONST. art. I (amended 1976).

171. For the history and detailed discussion of the Quock Walker cases, see generally John D. Cushing, *The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the "Quock Walker Case,"* 5 AM. J. LEGAL HIST. 118 (1961). This ruling was actually the product of a remarkable series of three cases beginning in 1781. *See generally* Emory Washburn, *Extinction of Slavery in Massachusetts*, 3 PROC. MASS. HIST. SOC'Y 188 (1857) (describing the preceding cases that lead up to the decision).

172. *See* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 46–50 (1975) (recounting the saga of a slave named Quock Walker and the resulting legal cases in which Massachusetts courts endeavored to reconcile state laws and natural rights).

173. Notes of Chief Justice William Cushing made during *Commonwealth v. Jennison*, *in* 13 PROC. MASS. HIST. SOC'Y 292, 293–94 (1874) [hereinafter Notes of Chief Justice Cushing].

174. Washburn, *supra* note 171, at 199.

The attorney continued by arguing that slavery was against natural law because slaves were not the same as other property.[175]

In his instructions to the jury, Chief Justice William Cushing relied on the newly enacted Lockean Natural Rights Guarantee in saying that slavery was unconstitutional in Massachusetts:

> As to the doctrine of slavery and the right of Christians to hold Africans in perpetual servitude, and sell and treat them as we do our horses and cattle, that (it is true) has been heretofore countenanced by the Province Laws formerly, but nowhere is it expressly enacted or established. It has been a usage—a usage which took its origin from the practice of some of the European nations, and the regulations of British government respecting the then Colonies, for the benefit of trade and wealth. But whatever sentiments have formerly prevailed in this particular or slid in upon us by the example of others, a different idea has taken place with the people of America, more favorable to the natural rights of mankind, and to that natural, innate desire of Liberty, with which Heaven (without regard to color, complexion, or shape of noses—features) has inspired all the human race. And upon this ground our Constitution of Government, by which the people of this Commonwealth have solemnly bound themselves, sets out with declaring that all men are born free and equal—and that every subject is entitled to liberty, and to have it guarded by the laws, as well as life and property—and in short is totally repugnant to the idea of being born slaves. This being the case, I think the idea of slavery is inconsistent with our own conduct and Constitution; and there can be no such thing as perpetual servitude of a rational creature, unless his liberty is forfeited by some criminal conduct or given up by personal consent or contract. . . .[176]

After receiving these instructions, the jury voted to convict Jennison.[177] From this text and the notes of Chief Justice Cushing, it appears that Chief Justice Cushing believed that the 1780 constitution outlawed all slavery in Massachusetts, including the enslavement of persons born prior to the enactment of the state constitution.[178] One can deduce as much from the facts

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175. *Id.*

176. *Document 15:* Commonwealth v. Jennison—*Charge of Chief Justice Cushing*, *in* CIVIL RIGHTS AND THE AMERICAN NEGRO: A DOCUMENTARY HISTORY 45, 45–46 (Albert P. Blaustein & Robert L. Zangrando eds., 1968) [hereinafter *Charge of Chief Justice Cushing*]. *See generally* Cushing, *supra* note 171 (discussing the Quock Walker cases in detail).

Interestingly, there does not appear to be any evidence that the Framers of the Massachusetts state constitution intended the Guarantee to abolish slavery. ZILVERSMIT, *supra* note 163, at 115.

177. Washburn, *supra* note 171, at 192.

178. *See* Notes of Chief Justice Cushing, *supra* note 173, at 294 ("This being the case, I think the idea of slavery is inconsistent with our own conduct and Constitution; and there can be no such thing as perpetual servitude of a rational creature, unless his liberty is forfeited by some criminal conduct or given up by personal consent or contract.").

of the case: because Quock Walker was in his twenties at the time the 1783 case involving him was decided, he must have been born well before the 1780 constitution was adopted.[179] Although Chief Justice Cushing's jury instructions were unreported, the instructions were widely discussed,[180] and the Massachusetts Supreme Judicial Court itself cited the decision in future opinions.[181]

The Massachusetts Supreme Judicial Court continued to cite the state's Lockean Natural Rights Guarantee in subsequent decisions concerning slavery. In *Greenwood v. Curtis*,[182] the Massachusetts Supreme Judicial Court ruled on the validity of a contract executed in Africa promising payment for delivery of slaves.[183] As background, Massachusetts had passed a statute in 1787 prohibiting its citizens from engaging in the slave trade.[184] The defendant argued that the slavery contract could not be enforced by the Massachusetts state courts because it violated the Massachusetts constitution as well as the 1787 antislavery statute.[185] The majority ruled for the plaintiff, relying on the doctrine that contracts executed in foreign lands must be enforced even if they would not be permitted in Massachusetts.[186]

Only Judge Theodore Sedgwick refused to enforce the contract.[187] Although he was riding circuit, he submitted a separate opinion to be

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179. *See id.* ("[Q]uock, when a child about 9 months old, with his father and mother was sold by bill of sale in 1754, about 29 years ago . . . .").

180. *See Charge of Chief Justice Cushing*, *supra* note 176, at 45 (noting that no official opinions were written or reported in the Quock Walker cases). In his famous book, *Justice Accused*, Professor Robert Cover describes the question of whether the Quock Walker cases really ended slavery in Massachusetts as a "historian's perennial football." COVER, *supra* note 172, at 44. He concludes, however, based on contemporary accounts, that the "general perception" was that the jury instructions were the "authoritative construction of the 1780 Bill of Rights' free and equal clause." *Id.* at 45.

181. *See, e.g.*, Inhabitants of Winchendon v. Inhabitants of Hatfield, 4 Mass. (3 Tyng) 123, 128 (1808). As the court describes:

> [I]n the first action involving the right of the master, which came before the Supreme Judicial Court, after the establishment of the constitution, the judges declared, that, by virtue of the first article of the declaration of rights [the Lockean Natural Rights Guarantee], slavery in this state was no more.

Id. A footnote to the opinion described a second case, *Littleton v. Tuttle*, in which the Court held that Tuttle was not responsible for the support of an African-American man named Jacob because he, "being born in this country, was born free." *Id.* at 129 n.†. I could not locate the full *Littleton* opinion, but it is plausible that this reference to being "born free" is an invocation of the Massachusetts Natural Rights Guarantee language: "All men are born free and equal . . . ." Lending support to this conclusion, the footnote is included directly after the description of the earlier case, which relied on the Lockean Natural Rights Guarantee. *Id.*

182. 6 Mass. (5 Tyng) 358 (1810).

183. *Id.* at 359.

184. *Id.* at 361.

185. *Id.* at 360–61.

186. *Id.* at 377–78, 380–81.

187. *Id.* at 362 n.† (Sedgwick, J., dissenting).

published in the reporter.[188] Throughout the opinion, his strong conviction as to the immorality of slavery is clear from the words he uses. Judge Sedgwick referred to slavery as "evil," "horrors," "wicked," "immoral," and an "atrocious cruelty and injustice."[189] Judge Sedgwick first explained that the laws of nations did not require that Massachusetts enforce the contract because the contract itself was immoral:

> In this view, it is pertinent to remark that, where a contract is *immoral*, or, as it is more technically termed, *malum in se*, a discussion about any *lex loci* is nugatory. It is only by the comity of nations that an action arising, not between subjects of a particular sovereignty, and without its limits, can be sustained by its courts, acting within those limits. This comity prevails amongst most civilized nations, and, as respects contracts, justice is generally administered in conformity to the laws of the country in which the cause of action arose. But it would be carrying our courtesy too far to enforce the execution of contracts in themselves vicious. No foreign nation can justly require, and no civility demands, that judges should thus become the panders of iniquity.[190]

Judge Sedgwick then explained that English common law did not require the enforcement of this contract. He rebutted an argument that *Somerset's Case* and other precedents recognized the legality of slavery in Africa by arguing that it was not clear from the record whether slavery was in fact legal in Africa at the time the contract was executed, and he focused again on the immorality of the contract in question.[191] Judge Sedgwick then turned to the Massachusetts state constitution. He acknowledged the "paramount" nature of the federal Constitution but noted that the state had some reserved powers.[192] Specifically, he focused on the language of the Massachusetts constitution's Lockean Natural Rights Guarantee:

> By the first article of the Declaration of Rights it is declared that "all men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be recorded the right of enjoying and possessing their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and

188. *Id.*

189. *Id.* at 363–64, 369 n.†. For example, in describing the facts, Judge Sedgwick wrote:

> The voyage was undoubtedly undertaken for the purpose of procuring a cargo of slaves, in a country with which this had no contention; to seize human beings, and tear them from their native land, and all those endearing connections which alleviate the evils inseparable from our present state of existence; and to subject the miserable, unoffending sufferers to all the horrors of perpetual slavery.

Id. at 363 n.†.

190. *Id.* at 364–65 n.†.

191. *Id.* at 368 n.†.

192. *Id.* at 369 n.†.

> obtaining their safety and happiness." These words have been, and may again be, construed to support wild and absurd theories; but in their most temperate meaning, I take them to be as decisive of this question, as any expressions which could be selected from the *English* language.
>
> If the liberties of men are unalienable, they could not have been transferred under this contract; and inasmuch as there was nothing on which it could operate, it was merely void.[193]

Therefore, Judge Sedgwick concluded that Massachusetts was not obligated to enforce the slavery contract before the court.[194] Although the controlling opinion found the contract to be enforceable under common law principles requiring enforcement of contracts from foreign lands, Judge Sedgwick's opinion foreshadowed the Massachusetts Supreme Judical Court's later extension of the state constitution's Lockean Natural Rights Guarantee to cover contracts executed elsewhere, and the opinion stands out for its passionate application of the Lockean Natural Rights Guarantee as a rule against slavery.

In 1836, the Massachusetts Supreme Judicial Court again turned to the state constitution's Lockean Natural Rights Guarantee in *Commonwealth v. Aves*[195] to issue a momentous ruling that slaves brought into the State of Massachusetts by nonresidents could not be held in Massachusetts against their will.[196] This foundational holding was cited by virtually every state court opinion following 1836 that dealt with the subject of slavery. In *Aves*, a Massachusetts citizen filed a habeas petition on behalf of Med, an African-American female child.[197] The petition argued that Med was unlawfully restrained by Aves, whose daughter was a citizen of Louisiana and claimed that her husband had lawfully purchased Med in that state.[198] In his discussion of the history of slavery in Massachusetts, Chief Justice Shaw explained that

> slavery to a certain extent seems to have crept in; not probably by force of any law, for none such is found or known to exist; but rather, it may be presumed, from that universal custom, prevailing through the European colonies, in the West Indies, and on the continent of America, and which was fostered and encouraged by the commercial policy of the parent states.[199]

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193. *Id.*
194. *Id.* at 373 n.†.
195. 35 Mass. (18 Pick.) 193 (1836).
196. *Id.* at 219.
197. *Id.* at 193.
198. *Id.* at 193–94.
199. *Id.* at 208.

Slavery was subsequently abolished in Massachusetts:

> How, or by what act particularly, slavery was abolished in Massachusetts, whether by the adoption of the opinion in Sommersett's [sic] case, as a declaration and modification of the common law, or by the Declaration of Independence, or by the constitution of 1780, it is not now very easy to determine, and it is rather a matter of curiosity than of utility; it being agreed on all hands, that if not abolished before, *it was so by the declaration of rights*.[200]

We can safely assume that this invocation of the declaration of rights refers to the Lockean Natural Rights Guarantee because Chief Justice Shaw referred, indirectly, to the *Jennison* case, which relied on the Lockean Natural Rights Guarantee.[201] He also focused on the Lockean Natural Rights Guarantee to ground his argument in this case:

> [B]y the constitution adopted in 1780, slavery was abolished in Massachusetts, upon the ground that it is contrary to natural right and the plain principles of justice. The terms of the first article of the declaration of rights are plain and explicit. "All men are born free and equal, and have certain natural, essential, and unalienable rights, which are, the right of enjoying and defending their lives and liberties, that of acquiring, possessing, and protecting property." It would be difficult to select words more precisely adapted to the abolition of negro slavery. According to the laws prevailing in all the States, where slavery is upheld, the child of a slave is not deemed to be born free, a slave has no right to enjoy and defend his own liberty, or to acquire, possess, or protect property. That the description was broad enough in its terms to embrace negroes, and that it was intended by the framers of the constitution to embrace them, is proved by the earliest contemporaneous construction, by an unbroken series of judicial decisions, and by a uniform practice from the adoption of the constitution to the present time. The whole tenor of our policy, of our legislation and jurisprudence, from that time to the present, has been consistent with this construction, and with no other.[202]

The court ordered that the child be released from Aves's custody and into the care of a probate guardian.[203] This line of cases illustrates the

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200. *Id.* at 209 (emphasis added).

201. *Id.* Chief Justice Shaw cites *Inhabitants of Winchendon v. Inhabitants of Hatfield*, 4 Mass. (3 Tyng) 123, 128 (1808), which in turn describes an unnamed case decided soon after the establishment of the Constitution that declared "by virtue of the first article of the declaration of rights, slavery in this state was no more." It is safe to assume that the reference is to the then well-known *Jennison* case.

202. *Id.* at 210.

203. *Id.* at 225. The Massachusetts Supreme Judicial Court reiterated its stance on the Lockean Natural Rights Guarantee's abolishment of slavery in the 1867 case *Jackson v. Phillips*. 96 Mass.

Massachusetts Supreme Judicial Court's use of the Lockean Natural Rights Guarantee's equality language to attack directly the existence of slavery as an institution.

3. Indiana, Illinois, and Ohio: Lockean Natural Rights Guarantees to Extend Existing Slavery Prohibitions.—The Indiana, Illinois, and Ohio supreme courts invoked their state Lockean Natural Rights Guarantees in slavery cases in a slightly different way. Like Vermont and Massachusetts, these state constitutions included the typical Lockean Natural Rights Guarantee language that all men were "born equally free and independent,"[204] but the Indiana, Illinois, and Ohio state constitutions also included a separate article specifically abolishing slavery.[205] The antislavery articles in Indiana, Illinois, and Ohio were surely influenced by the 1787 Northwest Ordinance, which declared that "[t]here shall be neither slavery nor involuntary servitude in the said territory."[206] The states of Indiana, Illinois, and Ohio all had been part of the Northwest Territory prior to obtaining statehood.[207] Thus, the basic question of whether slavery was constitutional had already been answered in these states both by the Northwest Ordinance and by the state constitutions' explicit antislavery articles. Issues nonetheless arose concerning the retroactive application of slavery and most especially concerning fugitive slave laws. The state courts employed the Indiana, Illinois, and Ohio Lockean Natural Rights Guarantees in their state constitutions as equality guarantees alongside the specific antislavery constitutional provisions. The state courts thus extended antislavery positions even to situations not necessarily addressed by the Ordinance or the

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(14 Allen) 539, 564 (1867). In *Jackson*, the court ruled that bequeathing money to assist fugitive slaves was a charitable gift not subject to the rule against perpetuities. It stated:

> It was in Massachusetts, by the first article of the Declaration of Rights prefixed to the Constitution adopted in 1780, as immediately afterwards interpreted by this court, that the fundamental axioms of the Declaration of Independence—"that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness"—first took at once the form and the force of express law; slavery was thus wholly abolished in Massachusetts . . . .
>
> The doctrine of our law, upon this subject, as stated by Chief Justice Shaw in delivering the judgment of the court in *Commonwealth v. Aves*, just cited, is that slavery is a relation founded in force, contrary to natural right and the principles of justice, humanity and sound policy . . . .

Id. at 563–64. Although this case was issued after the Thirteenth Amendment abolished slavery, the court still pointed to its own constitutional ban on slavery found in the Lockean Natural Rights Guarantee's equality language.

204. *See infra* Appendix A.

205. ILL. CONST. of 1847, art. XIII, § 16; IND. CONST. art. I, § 37 (amended 1984); OHIO CONST. of 1851, art. I, § 6.

206. *See* Northwest Ordinance of 1787, ch. 8, 1 Stat. 50 (1789) (reenacting the Northwest Ordinance under the federal Constitution).

207. CORNELISON & YANAK, *supra* note 157, at 357.

specific antislavery clauses in the Indiana, Illinois, and Ohio state constitutions.

Interestingly, each of these three states enacted their first constitution after the Massachusetts *Jennison* decision discussed above. The much-discussed *Jennison* holding should have provided fair warning to these state constitutional conventions that the equality guarantee language in a Lockean Natural Rights Guarantee could be interpreted to abolish slavery. Furthermore, the Northwest Ordinance had already abolished slavery in these states before they attained statehood. One might therefore wonder why these states chose to include specific antislavery clauses in their state constitutions in addition to the Lockean Natural Rights Guarantees. There are several plausible explanations for this decision. First, the framers of these constitutions may have simply been attempting to emphasize that slavery was in fact abolished in these states. As discussed in the next subpart, a few states did not interpret their Lockean Natural Rights Guarantees as necessarily prohibiting slavery, and the Northwest Ordinance was not part of the new state constitutions. Thus, it seems likely that the framers of the Indiana, Illinois, and Ohio state constitutions simply decided to write two different bans into their constitutions out of an abundance of caution to ensure that their constitutions did in fact abolish slavery. Second, neither the separate antislavery articles nor the Northwest Ordinance provided a definitive answer to the complex issues involving comity, fugitive slaves, and whether the slavery prohibition applied retroactively to free slaves who had been purchased prior to the prohibition. Instead, the antislavery clauses in these three state constitutions simply declared that the institution of slavery would not exist within the state. However, as the case law shows, the state supreme courts of Indiana, Illinois, and Ohio all issued antislavery decisions on issues of comity, on the rights of fugitive slaves, and on retroactivity questions by relying on the Lockean Natural Rights Guarantees in conjunction with the three state constitutions' specific antislavery articles. Perhaps the framers of these state constitutions anticipated the need for more general language in their constitutions to provide a textual basis for broader antislavery decisions.

In the earliest case, the Indiana Supreme Court Judicature used its Lockean Natural Rights Guarantee in conjunction with the antislavery article to abolish slavery even in cases where the slave had been purchased prior to the enactment of Indiana's constitution. Along with the typical Lockean Natural Rights Guarantee equality language,[208] Indiana's 1816 constitution

208. *See* IND. CONST. of 1816, art. I, § 1 ("[W]e declare, That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights; among which are, the enjoying and defending life and liberty, and of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.").

It is worth noting that, by 1868, the Guarantee language had been slightly amended. Indiana's constitutional convention amended the "born equally free" clause to read "all men are created equal"

also included Article 11, which specifically abolished slavery: "There shall be neither slavery nor involuntary servitude in this State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted."[209]

Even though the Indiana constitution of 1816 contained this explicit Article abolishing slavery in the state, the Indiana Supreme Court relied on the Lockean Natural Rights Guarantee in its *State v. Lasselle*[210] decision as critical textual support for holding that slavery was unconstitutional even where the slave had been purchased prior to the existence of the state.[211] This case arose under a habeas corpus writ for Polly, an African-American woman being held by Lasselle.[212] Lasselle argued that his claim over Polly was valid because he had legally purchased her in Indian Territory prior to its cession to the United States.[213] The court began by emphasizing the preeminence of the state constitution over historical custom and privileges granted by the Virginia legislature, which had previously controlled the territory in question:

> It must be admitted that a convention, chosen for the express purpose, and vested with full power, to form a constitution which is to define, limit, and control the powers of the legislature, as well as the other branches of the government, must possess powers, at least equal, if not paramount, to those of any ordinary legislative body. From these positions it clearly follows, that it was within the legitimate powers of the convention, in forming our constitution, to prohibit the existence of slavery in the state of *Indiana*.[214]

Thus, in looking only to the Indiana state constitution and "to that instrument alone," the Indiana Supreme Court held that slavery was unconstitutional.[215] It declared:

> We are, then, only to look into our own constitution, to learn the nature and extent of our civil rights; and to that instrument alone we must resort for a decision of this question. In the first article of the constitution, section 1st, it is declared, "That all men are born equally free and independent; and have certain natural, inherent, and unalienable rights; among which are, the enjoying and defending of

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and deleted the references to natural and inherent rights. The 1851 Guarantee read: "We declare, That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness . . . ." IND. CONST. art. I, § 1 (amended 1984).

209. IND. CONST. of 1816, art. XI, § 7. This text was moved to Article I in the 1851 constitution. IND. CONST. art. I, § 37 (amended 1984).

210. 1 Blackf. 60 (Ind. 1820).

211. *Id.* at 62.

212. *Id.* at 60.

213. *Id.* at 60–61.

214. *Id.* at 61–62.

215. *Id.* at 62.

> life and liberty, and of acquiring, possessing, and protecting property; and pursuing, and obtaining happiness and safety."[216]

The court then cited two other sections in the State constitution, including Article 11, before concluding that "[i]t is evident that, by these provisions, the framers of our constitution intended a total and entire prohibition of slavery in this state; and we can conceive of no form of words in which that intention could have been more clearly expressed."[217] The court specifically relied upon the provisions in the plural in expanding the ban on slavery to the facts of this case. It is interesting to note that this decision occurred only four years after Indiana's constitutional convention and was handed down in the same year as the Missouri Compromise.[218]

The Illinois state courts also addressed the constitutionality of slavery and the state's Lockean Natural Rights Guarantee in four reported cases. Again, the Illinois Lockean Natural Rights Guarantee followed the typical form including the equality language, "[t]hat all men are born equally free and independent . . . ,"[219] and the Illinois state constitution contained a separate article abolishing slavery: "There shall be neither slavery nor involuntary servitude in this state, except as a punishment for crime whereof the party shall have been duly convicted."[220] Both the Lockean Natural Rights Guarantee and the antislavery article were included in Illinois's first constitution of 1818.

In its earliest reported cases, the Illinois Supreme Court grappled with the constitutional status of fugitive slaves and slaves owned by nonresidents. In two 1843 cases, *Willard v. People*[221] and *Eells v. People*,[222] Illinois citizens were indicted under the Illinois Criminal Code for hiding fugitive slaves.[223] In defense of their actions, the defendants cited the state's Lockean Natural Rights Guarantee along with the prohibition against slavery in the Illinois constitution to argue that the state's laws against harboring fugitive slaves were unconstitutional under the Illinois constitution.[224] In both cases, the

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216. *Id.*

217. *Id.*

218. *Id.*; CORNELISON & YANAK, *supra* note 157, at 332.

219. ILL. CONST. of 1847, art. XIII, § 1. The 1818 constitution included a similar provision. ILL. CONST. of 1818, art. VIII, § 1.

220. ILL. CONST. of 1847, art. XIII, § 16. The 1818 constitution included a similar provision. ILL. CONST. of 1818, art. VI, § 1.

221. 5 Ill. (4 Scam.) 461 (1843).

222. 5 Ill. (4 Scam.) 498 (1843).

223. *Eells*, 5 Ill. (4 Scam.) at 508; *Willard*, 5 Ill. (4 Scam.) at 468–69.

224. For example, in *Willard*, the plaintiff argued:

> The first section of the 8th article declares, "That all men are born equally free and independent, and have certain inherent and indefeasible rights; among which are those of enjoying and defending life and liberty, and of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."

Illinois courts rejected this argument and focused on the law of comity to hold that fugitive slaves did not become free upon entry into Illinois,[225] which is hardly surprising in light of the Fugitive Slave Clause in the federal Constitution which would have trumped Illinois law.[226] But, an interesting dissent in *Eells* by Judge Samuel Lockwood, joined by two other justices, foreshadowed a change in Illinois case law on the question of harboring fugitive slaves.[227] After reciting the Guarantee and the prohibition against slavery, Judge Lockwood declared:

> From these provisions of the Constitution I deduce the following general rule, that all men, whether black or white, are in this State presumed to be free, and that every person who claims another to be his slave, under any exception or limitation of the general rule, must clearly show that the person so claimed comes within such exception.[228]

Thus, the dissenters relied on both provisions of the Illinois constitution to argue that the slavery ban should be extended to strike down laws against harboring fugitive slaves within the state as fundamentally inconsistent with the basic principles of the Illinois constitution. The dissenters also cited a number of cases, including Massachusetts's *Aves* decision, in support of this argument.[229]

Two years later, in the 1845 decision of *Jarrot v. Jarrot*,[230] a majority of the Illinois Supreme Court addressed the issue that the Indiana Supreme Court of Judicature had faced in *Lasselle*: whether a slave born under the proslavery laws in existence prior to the adoption of the state constitution could constitutionally be held in slavery.[231] Specifically citing the *Lasselle* decision as well as the Massachusetts *Aves* case, the Illinois Supreme Court

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> These and other provisions show most clearly that slavery was intended to be, and is, prohibited, except in the cases above referred to. No language can be more forcible or comprehensive. There can, therefore be no law of the State sanctioning the detention of any one in slavery; for the supreme law forbids it. Slavery, then, is repugnant to the Constitution of the State, and contrary to our public policy.

Willard, 5 Ill. (4 Scam.) at 463–64.

225. *Eells*, 5 Ill. (4 Scam.) at 510–12; *Willard*, 5 Ill. (4 Scam.) at 471–72.

226. *See* U.S. CONST. art. IV, § 2, cl. 3, *amended by* U.S. CONST. amend. XIII (stating that a person who is legally held "to Service or Labour" under the laws of one state cannot be discharged from that "Service or Labour" by fleeing to a state where the person would be free); U.S. CONST. art. VI, cl. 2 (stating that the U.S. Constitution is "the supreme Law of the Land" and that all state judges are bound by the Constitution's provisions).

227. *Eells*, 5 Ill. (4 Scam.) at 514 (Lockwood, J., dissenting).

228. *Id.*

229. *Id.*

230. 7 Ill. (2 Gilm.) 1 (1845).

231. *Id.* at 5, 9.

ruled that the state constitution prohibited slavery regardless of when the slave had been born.[232] As Judge Walter Scates stated in his opinion:

> After so many, and such uniformity of judicial determinations upon the meaning, and the application of the Constitution and Ordinance to facts and circumstances like these before the Court, made in so benignant a spirit of humanity and justice, I cannot allow my mind to doubt of the plaintiff's "inherent and indefeasible rights," to become "equally free and independent" with other citizens, "and of enjoying and defending life and liberty and of acquiring, possessing and protecting property and reputation, and of pursuing" his "own happiness," except so far as he may, by the Constitution and laws, be restricted or denied the right of suffrage, [et]c. All philanthropists unite in deprecating the evils of slavery, and it affords me sincere pleasure, when my duty under the Constitution and laws requires me to break the fetters of the slave, and declare the captive free.[233]

The other opinion in this case did not specifically cite the Illinois Lockean Natural Rights Guarantee, but it did refer to restrictions in the Illinois constitution generally, along with the court decision in *Lasselle* which interpreted state Guarantees, so it is likely it was influenced by Illinois's Lockean Natural Rights Guarantee as well.[234]

In 1852, in *Hone v. Ammons*,[235] the Illinois Supreme Court used the state constitution's Lockean Natural Rights Guarantee to push its antislavery position a step farther and to invalidate a contract involving the purchase of a slave due to the fact that the slave was the consideration at the root of the contract.[236] A concurring opinion by Judge Lyman Trumbull relied on both the Lockean Natural Rights Guarantee of the Illinois constitution as well as the provision against slavery:

> [A] contract made in Illinois, for the sale of a person as a slave, who is at the time in this State, and to a citizen thereof, is opposed to the policy which the people of Illinois thought proper to adopt in the foundation of their State government, and in the very teeth of the express provisions of the constitution. The State constitution declares that "all men are born equally free and independent," and that "there shall be neither slavery nor involuntary servitude in this State except as a punishment for crime, whereof the party shall have been duly convicted." In a legal point of view, I would as soon think of enforcing

232. *Id.* at 9, 12.
233. *Id.* at 11.
234. *Id.* at 19–26 (opinion of Young, J.).
235. 14 Ill. 29 (1852).
236. *Id.* at 29–30.

> a contract to carry into effect the African slave-trade, as that under consideration.[237]

The opinion cited the Massachusetts court opinion in the *Aves* case as an example of another state refusing to give effect to slavery contracts.[238]

Cases from the Ohio Supreme Court show a similar evolution, with the state's Lockean Natural Rights Guarantee being used to challenge the continued enslavement of slaves brought into Ohio from other states and then the laws with respect to harboring fugitive slaves themselves. The Ohio Lockean Natural Rights Guarantee followed the standard form beginning with the statement that "[a]ll men are, by nature, free."[239] The Ohio state constitution also included a specific provision banning slavery, which said: "There shall be no slavery in this State; nor involuntary servitude, unless for the punishment of crime."[240] Both the Ohio Lockean Natural Rights Guarantee and the antislavery provision were part of Ohio's first constitution in 1802.[241]

In the 1837 case *Birney v. State*,[242] Birney was indicted under a criminal law for harboring a slave.[243] Birney cited the Lockean Natural Rights Guarantee and the state constitution's prohibition of slavery while arguing that the criminal statute under which he was indicted was unconstitutional.[244] The Ohio Supreme Court dismissed the case on other grounds without addressing this argument.[245]

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237. *Id.* at 30 (Trumbull, J., concurring).

238. *Id.* at 32.

239. OHIO CONST. of 1851, art. I, § 1 ("All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."). The 1851 version of the Guarantee used slightly different language from the 1802 Guarantee. The 1802 Guarantee stated:

> That all men are born equally free and independent, and have certain natural inherent and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety; and every free republican government, being founded on their sole authority, and organized for the great purpose of protecting their rights and liberties, and securing their independence—to effect these ends, they have at all times a complete power to alter, reform or abolish their government whenever they may deem it necessary.

OHIO CONST. of 1802, art. VIII, § 1.

240. OHIO CONST. OF 1851, art. I, § 6.

241. OHIO CONST. OF 1802, art. VIII, §§ 1–2.

242. 8 Ohio 230 (1837).

243. *Id.* at 230.

244. *Id.* at 232.

245. *Id.* at 239. The plaintiff argued that:

> [T]he relation of owner and property, as between man and man, can not exist under the constitution of Ohio. This instrument declares "that all men are born *equally free* and independent, and have certain natural, inherent, and unalienable rights, among which are the enjoying and defending life and liberty; acquiring, possessing and protecting

The Lockean Natural Rights Guarantee argument reappeared in an Ohio case almost twenty years later in *Anderson v. Poindexter*.[246] In *Anderson*, Poindexter, a slave in Kentucky, entered Ohio to perform services for his owner there.[247] The Ohio Supreme Court declared that upon entering Ohio voluntarily and not as a fugitive, Poindexter became a free man,[248] which would clearly seem to be the case under the rule of *Somerset's Case*. In a lengthy set of separate concurring opinions, the Ohio Supreme Court looked at Massachusetts precedent, U.S. Supreme Court rulings, Ohio statutes, and the Ohio Lockean Natural Rights Guarantee and found that upon entering Ohio voluntarily to perform services for his owner, a slave became a free man.[249] In the concurring opinion that discussed the Ohio Lockean Natural Rights Guarantee the most specifically, an Ohio judge argued at length against comity in this case and said that the State of Ohio was not obligated by the federal Constitution to return this slave to Kentucky because his former master had voluntarily sent Poindexter to Ohio, and thus he was not an escaped slave.[250] The Lockean Natural Rights Guarantee analysis in this opinion was, however, quite sweeping in scope:

> Our policy in regard to an institution [of slavery] so unjust, and so fraught with disaster to the great mass of a free and enterprising people, has not been left to the discretion of the Legislature or the courts. Both are concluded by the express terms of our organic law. That declares what is in accordance with reason and justice, the

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> property, and pursuing and obtaining happiness and safety." It also declares as a direct consequence of these fundamental truths, "that there shall be neither slavery nor involuntary servitude in this state, otherwise than for the punishment of crimes;" and that "no alteration of the constitution shall ever take place, so as to introduce slavery or involuntary servitude into this state." From these extracts, it appears, that the one principle which the framers were especially anxious to make prominently conspicuous, and to surround with safeguards the most impregnable, was the *equal freedom of all men;* and the one thing which they sought to brand with deepest reprobation, and to exclude forever from the institution of the state, was the *slavery of man to man.*

Id. at 231–32.

246. 6 Ohio St. 622 (1856). The court's opinion in *Anderson* was foreshadowed in an earlier case, *State v. Hoppess*. 1 Ohio Dec. Reprint 105 (1845). In *Hoppess*, the Ohio Supreme Court considered a situation where the former slave, Watson, was voluntarily brought into Ohio by his master and, thus, did not meet the technical definition of escaping from a slave state. *Id.* at 114–15. The opinion did not explicitly reference the Lockean Natural Rights Guarantee but did explain in detail that slavery was against natural rights. *Id.* at 110–11. "Slavery is wrong inflicted by force, and supported alone by the municipal power of the State or territory wherein it exists. It is opposed to the principles of natural justice and right, and is the mere creature of positive law." *Id.* Nevertheless, the court held that Watson must remain in custody. *Id.* at 117.

247. 6 Ohio St. at 623.

248. *Id.* at 631.

249. *Id.* at 633–38 (Brinkerhoff, J., concurring); *id.* at 639–57, 674–75 (Swan, J., concurring).

250. *Id.* at 640–49 (Swan, J., concurring).

freedom of all men. It further declares that freedom to be the natural and inalienable right of all men. Thus:

> ART. I, SEC. 1. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property.

And as if to surround with further safeguards these principles and our own policy, the following provision was incorporated into our Constitution, and is equally emphatic:

> ART. I, SEC. 6. There shall be no slavery in this State, nor involuntary servitude, unless for the punishment of crime.

With these provisions in our Constitution, it can not be matter of inquiry what our policy is in regard to slavery.[251]

The opinion further declared: "In Ohio, as I have already stated, the right to freedom is inalienable. It is an old principle, instinct with meaning, born of the Revolution, and embodied into our Constitution."[252] This of course was the British rule established in *Somerset's Case*, and Judge Swan excerpted multiple pages of the *Somerset* opinion as well as citations to Blackstone's *Commentaries* in support of his position.[253]

A few years later, in 1859, one justice on the Ohio Supreme Court expanded upon the state's Lockean Natural Rights Guarantee to argue that the Federal Fugitive Slave Act of 1850 was itself unconstitutional. In *Ex Parte Bushnell*,[254] Justice Milton Sutliff of the Ohio Supreme Court argued in dissent that Congress did not have authority to pass a federal Fugitive Slave Act because the legal regulation of slavery was historically the province of the states under the U.S. Constitution.[255] In saying this, Judge Sutliff relied heavily on Ohio's Lockean Natural Rights Guarantee and maintained that the Founders placed the Guarantees in state constitutions to end slavery:

> It is well known that at the time of the formation of the constitution, it was the desire and expectation of the patriots and leading men in the slaveholding states, that all the slaveholding states would follow the example of Massachusetts, Pennsylvania, and those other states which had then already passed acts of emancipation, looking prospectively to the utter extinction of the system of slavery in the states.

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251. *Id.* at 639–40.

252. *Id.* at 652–53.

253. *Id.* at 657–66, 668–70.

254. 9 Ohio St. 77 (1859).

255. *Id.* at 229–30 (Sutliff, J., dissenting). Judge Sutliff wrote more than fifty pages to support his dissent and relied on such varied sources as the Federalist papers, a historical treatise from Virginia, the views of the Founding Fathers, and precedents from other State courts on the subject. *Id.* at 229–325.

> Shortly after the declaration of independence, strenuous efforts for the final abolition of slavery were put forth by leading men in Virginia, Pennsylvania, and other states. An abolition society had been formed, of which Benjamin Franklin was president. Mr. Jefferson and other distinguished friends of universal liberty lent the cause their hearty co-operation. Virginia, it is well known, at that time held a majority of all the slaves in the southern states. But Virginia, as well as New York, had, at a session of the legislature shortly preceding the constitutional convention, introduced a bill similar to the act of emancipation passed by the legislature of Pennsylvania, looking prospectively to the final abolition and removal of the evil of slavery. Virginia had also adopted a bill of rights, containing a declaration "that all men are by nature free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property and pursuing and obtaining happiness and safety." In the first clause of the constitution of that state, there was also then standing a complaint against "the inhuman use of the royal negative, in refusing the state permission to exclude slaves by law."[256]

Although the majority of the Ohio Supreme Court upheld the constitutionality of the federal Fugitive Slave Act,[257] this lengthy dissent demonstrates powerful support for the position that the subject of slavery was exclusively within the province of the states to regulate.

Taken together, these cases are authority that a significant number of the state courts that considered the issue interpreted the Lockean Natural Rights Guarantee "equality at birth" language as abolishing slavery itself or, in conjunction with other more explicit constitutional language, as advancing antislavery efforts more generally. In particular, the early decisions from the Massachusetts Supreme Judicial Court reflect vigorous judicial efforts to give that state's Lockean Natural Rights Guarantee real substantive meaning. The Indiana, Illinois, and Ohio supreme courts continued this effort by relying upon state Lockean Natural Rights Guarantees even in the face of contrary federal laws and comity considerations and even where their separate antislavery clauses did not require more general antislavery decisions, as was the case with laws about harboring fugitive slaves or voiding out-of-state contracts where the slave was the consideration for the contract. In sum, the Lockean Natural Rights Guarantees were an important component, together with other more explicit constitutional language in several state constitutions, in legal efforts to abolish slavery and to advance the abolitionist agenda in these states. This begins to suggest that the

256. *Id.* at 237–38.

257. *Id.* at 198–99 (majority opinion).

Lockean Natural Rights Guarantees were thought to be especially relevant to the question of the legality of slavery.

B. Slavery Constitutional

Three states (Kentucky, Virginia, and New Jersey) rejected Lockean Natural Rights Guarantee arguments that were made against the constitutionality of slavery.[258] A fourth state, Connecticut, also issued a ruling holding that its very watered-down equality guarantee did not abolish slavery in that state. The slave petitioners in these cases, often citing Massachusetts precedent, argued that the courts in these states should interpret their state's identical Lockean Natural Rights Guarantee to hold slavery unconstitutional or to provide additional rights to slaves. The Kentucky, Virginia, and New Jersey courts acknowledged the multiple decisions from other state courts holding that the Lockean Natural Rights Guarantees in those states abolished slavery, but the Kentucky, Virginia, and New Jersey courts relied on history, settled practice, and other interpretive tools to find that slavery in their states was consistent with their state constitutional Lockean Natural Rights Guarantee.

The Connecticut Supreme Court of Errors (now the Connecticut Supreme Court), in the 1837 case *Jackson v. Bulloch*,[259] interpreted that state's weak equality guarantee as meaning that the Connecticut state constitution did not abolish slavery because it only applied to persons within the "social compact."[260] The Connecticut constitution did not contain a Lockean Natural Rights Guarantee, but it did include general equality

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258. Two other cases from this period potentially interpreted state Lockean Natural Rights Guarantees. In the 1797 case *Respublica v. Blackmore*, the Pennsylvania Supreme Court also reported a Lockean Natural Rights Guarantee argument. 2 Yeates 234, 235 (Pa. 1797). The claimant is quoted as stating:

> [O]n elementary principles, slavery itself might be questionable under the 1st section of the 9th article of the state constitution, which declares, that "all men are born equally *free* and *independent*." . . . But the same clause guards and secures property, and regards the right of acquiring, possessing and protecting it, as inherent and indefeasible. The slaves among us were no parties to this compact.

Id. (internal citation omitted). The court, however, did not address this argument and instead used a registration statute to free the slaves in question. *Id.* at 239–40.

The Maine Supreme Judicial Court also issued a ruling in the 1820 case *Inhabitants of Hallowell v. Inhabitants of Gardiner*. 1 Me. 93 (1820). The court considered a complicated set of facts to determine whether a slave's free wife and child should be considered free inhabitants of Gardiner, such that the town would be liable to support them. *Id.* at 93–94. The court rejected the slave's Lockean Natural Rights Guarantee argument that the wife and child were entitled to support because the slave could not inherit the property in Gardiner, and therefore, the family never formally inhabited the area. *Id.* at 99–102. Although the plaintiffs argued that the wife and child were entitled to support based on their "inalienable rights," it is not clear that the court used the Guarantee in its ruling. *Id.* at 94.

259. 12 Conn. 38 (1837).

260. *Id.* at 42–43.

language. The first section of the Declaration of Rights stated: "[T]hat all men, when they form a social compact, are equal in rights; and that no man, or set of men, are entitled to exclusive public emoluments or privileges from the community."[261] The Connecticut court opinion looks to us as if it was obviously wrongly decided even given this weak equality language and the absence of a Lockean Natural Rights Guarantee.

In this case, Nancy Jackson used a writ of habeas corpus to challenge her continued status as a slave two years after Bulloch, a slaveholder in Georgia, brought her with him to Connecticut.[262] The court began its discussion with citations to the opinions in *Aves*, *Somerset*, and other cases to support its declaration that slavery was "contrary to the principles of natural right and to the great law of love; that it is founded on injustice and fraud, and can be supported only by the provisions of positive law . . . ."[263] Having established this, the Connecticut court next considered whether the state constitution abolished slavery. It construed the language guaranteeing that all men "are equal in rights" as applying only "when they form a social compact"[264]:

> The language [of the Connecticut constitution] is certainly broad [said the Connecticut court]; but [it is] not as broad as that of the bill of rights in Massachusetts, to which it has been compared. It seems evidently to be limited to those who are parties to the social compact thus formed. Slaves cannot be said to be parties to that compact, or to be represented in it.[265]

Therefore, the "equal in rights" guarantee of the Connecticut constitution did not apply to slaves, according to the Connecticut court because slaves were not parties to the social compact. The Connecticut court also emphasized that slavery had been recognized by the legislature at various points during Connecticut's history.[266] The court did not explain how slavery came to be legal under the positive law of the State of Connecticut, but the court did say that

> [i]t probably crept in silently, until it became sanctioned, by custom or usage. Did it depend entirely upon custom or usage, perhaps it would not be too late to enquire, whether a custom so utterly repugnant to the great principles of liberty, justice and natural right, was that *reasonable* custom, which could claim the sanction of law. But we find, that for nearly a century past, the system of slavery has been, to

261. *Id.*
262. *Id.* at 39.
263. *Id.* at 40–41.
264. *Id.* at 42–43.
265. *Id.* at 43.
266. *Id.* at 42.

> a certain extent, recognised, by various statutes, designed to modify, to regulate, and, at last, abolish it; and thus, we think, it has received the implied sanction at least of the legislature.[267]

Even though the court rejected the constitutional arguments against the legality of slavery in Connecticut, it ultimately held in favor of Nancy Jackson, ruling that she had been imported into Connecticut in violation of statutes prohibiting the importation of slaves into Connecticut.[268] This bottom line result in the slavery case at hand in favor of freedom is itself important.

The Kentucky, Virginia, and New Jersey state courts reached similar conclusions to those reached in Connecticut even though their state constitutions, unlike Connecticut's, had specific Lockean Natural Rights Guarantees. The Kentucky Court of Appeals (the highest state court at the time) considered the constitutionality of slavery in light of its Lockean Natural Rights Guarantee, but it focused on the property rights of slave owners rather than on the rights of slaves.[269] The Kentucky Lockean Natural Rights Guarantee did not follow the typical form. It did not include an equality guarantee or any references to inalienable, natural, or inherent rights. The 1799 version of Kentucky's Lockean Natural Rights Guarantee merely "secure[d] to all the citizens thereof the enjoyment of the right of life, liberty, and property, and of pursuing happiness."[270] The Kentucky Guarantee was amended prior to 1868,[271] but the opinion discussed below was issued when the 1799 version of the Lockean Natural Rights Guarantee was in effect.

In 1828, in *Jarman v. Patterson*,[272] the Kentucky Court of Appeals found that a statute allowing the taking of slaves "going at large" in the town

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267. *Id.* This statement about the "great principles of liberty" might be a reference to the Lockean Natural Rights Guarantee included in the Preamble to the Declaration of Rights: "That the great and essential principles of liberty and free government may be recognized and established, we declare . . . ." CONN. CONST. of 1818, art. I, pmbl.

268. *Jackson*, 12 Conn. at 52.

269. The Kentucky Court of Appeals issued a second decision on slavery in the 1836 case *In re Bodine's Will*, 34 Ky. (4 Dana) 476 (1836). The court reviewed the slave Jenny's right to appear as a person in probate court to challenge the execution of a will emancipating her. *Id.* at 476–77. The court ruled that although slaves are legally considered property until emancipation, they are also "human being[s]," and the court "recognizes their personal existence, and, to a qualified extent, their natural rights." *Id.* at 477. Thus, in this situation, Jenny had the legal capacity to sue in probate court regarding her argued emancipation under the will in question. *Id.* Although the court did not explicitly cite the Lockean Natural Rights Guarantee, these references to natural rights suggest that it may be referring to the Guarantee at least in part.

270. KY. CONST. of 1799, pmbl.

271. The 1850 constitution seemed to guard against any abolitionist interpretations by including a second provision: "The right of property is before and higher than any constitutional sanction; and the right of the owner of a slave to such slave, and its increase, is the same, and as inviolable as the right of the owner of any property whatever." KY. CONST. of 1850, art. XIII, § 3.

272. 23 Ky. (7 T.B. Mon.) 644 (1828).

of Richmond was constitutional as a regulation of property.[273] From context, it appears that "going at large" referred to a slave outside the presence of and beyond the obvious control of the owner.[274] The Kentucky Court of Appeals dismissed any possible claim by the slave to freedom by saying that "there are no rights secured to slaves [in Kentucky] by the constitution, except the right of trial by a petit jury in charges of felony."[275] The opinion expressed concern over potential infringement of a slave owner's "security of the enjoyment of life, liberty and property,"[276] and it did not address the issue of whether slaves are born free. However, the Kentucky Court of Appeals did conclude that the regulation in question was within "the discretion of the legislature, in controlling property [including slaves] for public purposes, and to avoid public injuries."[277] Thus, the Kentucky Court of Appeals found the regulation to be a permissible regulation of private property.[278]

The Virginia and New Jersey state supreme courts both held that their state constitutions' Lockean Natural Rights Guarantees did not abolish slavery. Unlike the Connecticut constitution's vague equality guarantee or Kentucky's atypical version of the Lockean Natural Rights Guarantee language, both the state constitutions of Virginia and of New Jersey included standard form Lockean Natural Rights Guarantee language with a statement that all men are born equal or equally free, a guarantee of inherent or inalienable rights, and a list of rights, including life, liberty, and property.[279]

The Virginia Supreme Court of Appeals first addressed the issue in its 1806 opinion in the case of *Hudgins v. Wright*.[280] In this case, the appellees argued for their freedom, claiming that the family was of Native American

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273. *Id.* at 645.

274. *Id.* at 644–45.

275. *Id.* at 645.

276. *Id.* at 646.

277. *Id.*

278. *Id.*

279. The Virginia Guarantee stated:

> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

VA. BILL OF RIGHTS of 1864, § 1. This language remained unchanged from the 1776 constitution. VA. BILL OF RIGHTS of 1776, § 1.

The New Jersey Guarantee used similar language: "All men are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. CONST. of 1844, art. 1, § 1. The New Jersey Guarantee was added to the state constitution during the convention preceding the 1844 constitution. *Compare* N.J. CONST. of 1776 (lacking any Guarantee language), *with* N.J. CONST. of 1844, art. 1, § 1 (containing the Guarantee language).

280. 11 Va. (1 Hen. & M.) 134 (1806).

descent and therefore could not be held in slavery.[281] Judge George Wythe in the Richmond District Court of Chancery ruled in their favor.[282] Although the full opinion is not available, references to it indicate that Wythe ruled, in part, based on the Virginia constitution's Lockean Natural Rights Guarantee.[283] However, the Virginia Supreme Court of Appeals rejected this argument on appeal:

> I do not concur with the chancellor in his reasoning on the operation of the first clause of the [Lockean Natural Rights Guarantee], which was notoriously framed with a cautious eye to this subject, and was meant to embrace the case of free citizens, or aliens only; and not by a side wind to overturn the rights of property, and give freedom to those very people whom we have been compelled from imperious circumstances to retain, generally, in the same state of bondage that they were in at the revolution, in which they had no *concern*, *agency* or *interest*.[284]

The opinion did not specifically refer to the Lockean Natural Rights Guarantee's legislative history wherein the text was specifically rewritten to try to make it consistent with the legality of slavery,[285] but it did say that the Lockean Natural Rights Guarantee "was notoriously framed with a cautious eye to this subject,"[286] which may indicate that the court was aware of the history of the adoption of Virginia's Lockean Natural Rights Guarantee, which had happened only about thirty years prior to the publication of the court's opinion. Although the Virginia court rejected a Lockean Natural Rights Guarantee argument against the constitutionality of slavery on the facts of this case, it did in the end affirm the freedom of the particular family whose freedom was in question on the grounds that the physical appearance of the family in question indicated that they were in fact Native Americans and not African-Americans.[287]

In the 1833 case *Betty v. Horton*,[288] the Virginia Supreme Court of Appeals addressed the question of the legal status of slaves brought into Virginia following the adoption of a 1792 statute prohibiting the future importation of slaves into Virginia.[289] The Supreme Court of Appeals refused

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281. *Id.* at 134.

282. *Id.*

283. *Id.* at 134, 141; *see also* COVER, *supra* note 172, at 50–55 (discussing the historical context of *Hudgins* and speculating on the motives of Judge Wythe and the Virginia Supreme Court of Appeals).

284. *Hudgins*, 11 Va. (1 Hen. & M.) at 141.

285. *See supra* subpart II(A).

286. *Hudgins*, 11 Va. (1 Hen. & M.) at 141.

287. *Id.* at 144.

288. 32 Va. (5 Leigh) 615 (1833).

289. *Id.* at 615–16.

to rely on the Massachusetts opinion construing that state constitution's Natural Rights Guarantee.[290] As the concurring opinion explained:

> [The Massachusetts Lockean Natural Rights Guarantee], it would seem, is the only provision in the laws or constitution of that state, upon this interesting subject. Looking to the actual state of that commonwealth, and knowing, as we all know, that its slaves were few in number, at the time of the adoption of its constitution, we should be disposed to take this declaration less as an abstraction, than we must regard that which is contained in our own bill of rights.[291]

So, instead of basing its decision in this case on Lockean Natural Rights Guarantee language, the court instead relied on the Virginia statute prohibiting importation of slaves to find that the slave in this case was a free man.[292]

The New Jersey Supreme Court of Judicature construed the New Jersey Lockean Natural Rights Guarantee in an 1845 case, *State v. Post*,[293] decided only a year after a Lockean Natural Rights Guarantee was added to the New Jersey constitution.[294] In *State v. Post*, the New Jersey Supreme Court of Judicature confronted the question of "whether the constitution, adopted in 1844, abolished slavery in New Jersey."[295] In deciding this question, two separate opinions considered and rejected a Lockean Natural Rights Guarantee argument that the 1844 New Jersey constitution abolished slavery broadly. The first opinion described the Guarantee as an "abstract proposition, the precise meaning and extent of which it is somewhat difficult clearly to comprehend."[296] According to Judge James Nevius, the use of the words "free and independent" in the New Jersey Lockean Natural Rights Guarantee could not be interpreted to mean completely free and independent because all societies are constrained by their governments and civil societies.[297] The judge therefore stated that the New Jersey Lockean Natural Rights Guarantee had to be interpreted in the context of the "condition and laws of the society."[298] Thus, he explained:

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290. *Id.* at 621–22; *id.* at 622–23 (Tucker, J., concurring).

291. *Id.* at 622 (Tucker, J., concurring). Two judges also noted that they did not have the full reports of the applicable Massachusetts decisions. *Id.* at 621–22 (majority opinion); *id.* at 623 (Tucker, J., concurring). "But without their reports here, we should, perhaps, venture too far to rest our decision upon the *Massachusetts* constitution." *Id.* at 623 (Tucker, J., concurring).

292. *Id.* at 621 (majority opinion).

293. 20 N.J.L. 368 (1845).

294. *Id.* at 368–69.

295. *Id.* at 368.

296. *Id.* at 372 (opinion of Nevius, J.).

297. *Id.* at 374.

298. *Id.*

> Had the convention intended to abolish slavery and domestic relations, well known to exist in this state and to be established by law, and to divest the master of his right of property in his slave and the slave of his right to protection and support from the master, no one can doubt but that it would have adopted some clear and definite provision to effect it, and not have left so important and grave a question, involving such extensive consequences, to depend upon the doubtful construction of an indefinite abstract political proposition.[299]

The opinion also compared New Jersey's Lockean Natural Rights Guarantee to the Declaration of Independence.[300] It noted that even though the Declaration of Independence uses sweeping language similar to the New Jersey Lockean Natural Rights Guarantee, the New Jersey constitution itself recognizes that slavery exists, and multiple state and federal courts had upheld slavery at the time this particular case arose in New Jersey.[301] Judge Nevius concluded by looking to other state interpretations of Lockean Natural Rights Guarantee language, and he pointed out that several states, including Virginia, had concluded that their Lockean Natural Rights Guarantees did not prohibit slavery.[302]

A second opinion in this case by Judge Joseph Randolph relied on a slightly different argument and emphasized the position of the New Jersey Lockean Natural Rights Guarantee within the New Jersey Bill of Rights:

> In coming to a just understanding of this clause, its position must first be considered. It is not necessarily a portion of the constitution, properly so called; but merely the first section of the bill of rights, or preamble to that instrument. . . .
>
> Yet strictly speaking, it is but a preamble, setting forth the reasons or the principles on which the following instrument is based; though in some instances, as in the clause respecting imprisonment for debt, which was an amendment to the original report, assuming a mandatory character. The first clause, however, which is that now under consideration, as well as the clause following, have no such feature; they seem to make a kind of preface of general abstract principles for the whole; and so far as political action is concerned, the constitution would have been perfect without them. They intend generally to assert the principles on which men, in a state of nature enter into civil government; and in that sense, all men are considered free and independent to act, and to have certain valuable rights, which, by way of superlative, are styled "unalienable;" not that they cannot really be transferred, because when men enter into a state of society, they give up a portion of their rights to secure the remainder, and the aggregate

299. *Id.* at 375.
300. *Id.* at 375–76.
301. *Id.*
302. *Id.* at 377–78.

> rights and powers of society are only composed of the rights and powers of its individual members, or rather of such of them as are surrendered. The same idea is more clearly expressed in the bill of rights of the State of Connecticut, which says, "all men, when they form a social compact, are equal in rights." It certainly never could have been intended otherwise, either by the framers or the adopters of the instrument, both of whom I consider may be consulted for its meaning, whenever light may be thrown by them on the doubtful or obscure passage.[303]

Judge Randolph also emphasized the legislative history of the convention, attributing meaning to the choice by the State of New Jersey to say only that men are "by nature free" rather than saying that they are "born equally free":

> This clause, as originally reported, stood thus: "all men are born *equally free* and independent," . . .; the words, "born equally," were stricken out and those "by nature" inserted; showing that the convention intended, that the clause should be understood, not as if it read, that, at that time, all men were born free or equally free; but merely that by or in a state of nature, they had its freedom and independence; and whilst that state continued, their rights were unalienable. A member of the convention, who conceived a different idea on this subject, while the clause was under consideration, proposed the following amendment, "on entering into society, men give up none of their rights, they only adopt new modes by which they are better secured." This however was rejected by ayes 4, nays 39 . . . . A contrary understanding of this passage, from that now maintained, would lead to strange conclusions. All men, that is men of every description, young or old, male or female, whether in a state of nature or society, are not only free, but entirely independent of each other, and all others; consequently the bonds that bind together, not only the master and servant, but the other domestic relations of parent and child, guardian and ward, husband and wife, are all snapped asunder, and each atom of human existence, the moment it is *freed*, by the impulse of life, becomes independent, and possessed of rights, that cannot be aliened under any circumstance, even for its own preservation; and whatever be his follies or his crimes, neither his life nor his liberty, can be impaired; for society can derive no rights from citizens, who have not the capacity of parting with them. This certainly would be carrying out first principles in a way, that the people of New Jersey never contemplated. They considered (and with them the convention, and, as I believe, the constitution itself agreed) that at the adoption of the constitution, things were to be taken as they

303. *Id.* at 379–80 (opinion of Randolph, J.).

> then existed, without doing violence to public feeling; and that the very utmost force that could be given to the clause in question, was that of a mere guide to future, and not a restriction to past legislation.[304]

Finally, Judge Randolph considered Lockean Natural Rights Guarantee case law from other states, and he cited the Virginia state court decision discussed above as support for his position while distinguishing the Vermont and Massachusetts Lockean Natural Rights Guarantee case law.[305] He noted that the Vermont Lockean Natural Rights Guarantee explicitly abolished slavery following its statement of the equality guarantee and that the Massachusetts Lockean Natural Rights Guarantee said that all men were "born" free rather than that they were "by nature" free.[306] Therefore, the New Jersey court in this case rejected the plaintiff's petition and ordered that he remain in slavery.[307]

This body of case law illustrates the vital impact that the Lockean Natural Rights Guarantee equality language had in the states on the question of the constitutionality under state law of slavery. The Vermont constitution's equality language required that slavery be abolished, and the Massachusetts Supreme Judicial Court relied solely on its state constitution's Lockean Natural Rights Guarantee equality language to reach the same conclusion. Over a period of decades, the states of Indiana, Illinois, and Ohio applied their Lockean Natural Rights Guarantees, alongside specific antislavery provisions, to reject comity considerations and to reach antislavery outcomes.

In *Justice Accused*, Professor Robert Cover cited case law from Massachusetts, Virginia, and New Jersey to conclude that state courts interpreted the Lockean Natural Rights Guarantees (which he termed "free and equal clause[s]") in accordance with the "purposes and motives associated with the men who wrote [the Lockean Natural Rights Guarantees]."[308] Our research has shown that the Lockean Natural Rights Guarantees had a far greater impact on the slavery debate in many more states than Professor Cover recognized. Moreover, the shift in Illinois's interpretation of its Lockean Natural Rights Guarantee with respect to fugitive slave laws and the strong dissent in Ohio with respect to the federal Fugitive Slave Act may cast new light on Professor Cover's conclusion that state court judges simply interpreted the Lockean Natural Rights Guarantees to reflect the intent of their authors and prevailing popular sentiment.

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304. *Id.* at 380–81 (citations omitted).
305. *Id.* at 381–83.
306. *Id.* at 381–82.
307. *Id.* at 377–78 (opinion of Nevius, J.).
308. COVER, *supra* note 172, at 43–60.

On the other hand, some state courts in Connecticut, Kentucky, Virginia, and New Jersey rejected the antislavery interpretation of the Lockean Natural Rights Guarantees. By focusing on societal conditions and the abstract meaning of the Lockean Natural Rights Guarantees in those states, as well as subtle differences in wording, these state courts reasoned that their Lockean Natural Rights Guarantee language did not apply to slavery. Even so, these cases offer indirect proof of the impact of the Lockean Natural Rights Guarantees. Because the Lockean Natural Rights Guarantees were successfully used to free slaves in other states, this group of state supreme courts appears to have found it necessary to explicitly reject that application in their own states. Despite the differences in outcome, all of these state courts recognized their state Lockean Natural Rights Guarantees and the potential power of the equality guarantee.

IV. Lockean Natural Rights Guarantees and the Right to a Writ of Habeas Corpus

The question of the original understanding of the meaning of a Lockean Natural Rights Guarantee arose in another slavery-related case in the State of Wisconsin in 1854. In this case, the Wisconsin Lockean Natural Rights Guarantee did not directly concern slavery, but the issue of helping fugitive slaves was in the background of a case in which an individual sought a writ of habeas corpus. We describe this case below.

The case involved here was a decision of the Wisconsin Supreme Court in 1854 called *In re Booth*.[309] The Wisconsin Supreme Court in this case considered the power of state courts to hear habeas claims in situations where a state citizen was held in custody by federal officials, and the Wisconsin Supreme Court held that a state court could review the holding of an individual in *federal* custody in order to protect the liberty of its state citizens.[310] Importantly, this decision of the Wisconsin Supreme Court was overturned by the United States Supreme Court ruling in *Ableman v. Booth*.[311]

In re Booth began on March 10, 1854, when a group of U.S. marshals and a Kentucky slave owner captured Joshua Glover, an escaped slave, in the free State of Wisconsin.[312] Although the U.S. marshals attempted to keep the news of Glover's capture and imprisonment in federal custody secret, the news quickly spread to abolitionists in the state, including Sherman Booth.[313]

309. 3 Wis. 1 (1854).

310. *Id.* at 7–10.

311. 62 U.S. (21 How.) 506, 526 (1858).

312. Jeffrey Schmitt, Note, *Rethinking* Ableman v. Booth *and States' Rights in Wisconsin*, 93 VA. L. REV. 1315, 1323 (2007).

313. *Id.*

Booth published a handbill announcing and protesting the arrest and helped to gather a crowd in front of the courthouse to denounce the holding of Joshua Glover in federal custody.[314] A crowd of people carrying axes and a battering ram then stormed the jailhouse and freed Glover from the custody of the U.S. marshals, and Glover promptly escaped to freedom in Canada where he was beyond the reach of the fugitive slave laws.[315] Booth, a citizen of Wisconsin, was then arrested by federal officials and was charged for violating the 1850 Fugitive Slave Act enacted by the federal government.[316] Booth then sued in the Wisconsin state courts asking for a writ of habeas corpus from the state courts freeing him from federal custody.[317] Booth's suit in the Wisconsin state courts for release on habeas corpus subsequently led to the Wisconsin state supreme court's opinion in *In re Booth*.[318]

In three separate opinions, the Wisconsin Supreme Court affirmed its authority to release Wisconsin citizens illegally imprisoned by federal officials under the federal Fugitive Slave Act in accordance with the habeas jurisdiction of the Wisconsin state courts.[319] Two Wisconsin Supreme Court opinions referred to Wisconsin's obligation to enforce the right to "liberty" of Wisconsin state citizens.[320] It is not clear from which text the Wisconsin State Supreme Court derived this right of liberty, but it may very well have been from the Wisconsin State Constitution's Lockean Natural Rights Guarantee, which explicitly stated: "All men are born equally free and independent, and have certain inherent rights, among these are life, liberty, and the pursuit of happiness . . . ."[321]

The first state supreme court opinion was written by Chief Judge Edward Whiton, who argued that the power of state courts to review the legality of the federal government's imprisonment of state citizens was necessary if the state courts were to be able to fulfill their duty of safeguarding liberty.[322] Chief Judge Whiton said that:

> It will not be denied that the supreme court of a state, in which is vested by the constitution of the state, the power to issue writs of *habeas corpus*, and to decide the questions which they present, has the

314. *Id.* at 1323–24.

315. *Id.* at 1324–25.

316. *Id.* at 1328.

317. *Id.* at 1329–30.

318. *Id.*

319. *In re* Booth, 3 Wis. 157, 175–78 (1854) (opinion of Whiton, C.J.); *id.* at 189 (opinion of Crawford, J.); *id.* at 217–18 (opinion of Smith, J.).

320. *Id.* at 176 (opinion of Whiton, C.J.); *id.* at 191–92 (opinion of Smith, J.). The third opinion by Judge Crawford relied on the argument that the federal court did not have jurisdiction over the alleged crimes because they were crimes against the state. *Id.* at 178–80, 189 (opinion of Crawford, J.).

321. WIS. CONST. art. I, § 1 (amended 1982 & 1986).

322. *Booth*, 3 Wis. at 176 (opinion of Whiton, C.J.).

> power to release a citizen of the state from illegal imprisonment. Without this power, the state would be stripped of one of the most essential attributes of sovereignty, and would present the spectacle of a state claiming the allegiance of its citizens, without the power to protect them in the enjoyment of their personal liberty upon its own soil.[323]

In a separate opinion, Judge Abram Smith explicitly stated that he was relying on the Wisconsin state constitution for his authority, and he argued that the duty to protect liberty was "inherent" in state sovereignty[324]:

> The states never yielded to the federal government the guardianship of the liberties of their people. In a few carefully specified instances they delegated to that government the power to punish, and so far, and so far only, withdrew their protection. In all else they reserved the power to prescribe the rules of civil conduct, and continued upon themselves the duty and obligation to protect and secure the rights of their citizens declared to be inalienable, viz: "Life, liberty and the pursuit of happiness."[325]

It is not clear what state constitutional text is being referred to in Judge Smith's quotation of the phrase "life, liberty and the pursuit of happiness" because that language appears in both the Wisconsin Lockean Natural Rights Guarantee as well as in the U.S. Declaration of Independence. But because Judge Smith said that he was relying on the Wisconsin state constitution, it is very likely that the Wisconsin Lockean Natural Rights Guarantee is the source of the quotation. Regardless, the opinion repeatedly emphasizes the importance of the state courts as guardians of liberty: "As the state judiciary is the power to which the guardianship of individual liberty is intrusted, it follows that it must have the right to inquire into such conformity, unrestricted by, and independent of, the power which demands his imprisonment."[326] Therefore, the Wisconsin Supreme Court ordered that Booth be released under Wisconsin's claimed power to review the legality of the holding of Booth in federal custody on a state writ of habeas corpus directed to the federal officials who had imprisoned Booth.[327]

On appeal, however, the U.S. Supreme Court reversed the Wisconsin Supreme Court in *Abelman v. Booth*.[328] In an opinion authored by Chief Justice Roger Taney, a notorious defender of slavery in all contexts,[329] the

323. *Id.*

324. *Id.* at 193–94 (opinion of Smith, J.).

325. *Id.* at 204–05.

326. *Id.* at 205.

327. *Id.* at 189 (opinion of Crawford, J.).

328. 62 U.S. (21 How.) 506, 526 (1859).

329. For example, Chief Justice Taney wrote the majority opinion in *Dred Scott v. Sandford*. 60 U.S. (19 How.) 393 (1856).

U.S. Supreme Court disavowed the power of state courts to issue writs of habeas corpus against federal officials who had imprisoned state citizens.[330] Chief Justice Taney argued that there would be chaos in the Union if every state could, in effect, determine the outcome of federal cases occurring within its borders by issuing state writs of habeas corpus to those held in federal imprisonment.[331] The U.S. Supreme Court did not refer to the Wisconsin state constitution's Lockean Natural Rights Guarantee justification, but it denied that the Wisconsin state courts could free individuals in federal custody on a state writ of habeas corpus:

> [N]o State can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent Government. And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States.[332]

Citing the Supremacy Clause, the opinion continued its explanation of the supremacy of the United States Constitution over state constitutions, and it emphatically concluded that the Wisconsin state court did not have authority to free federal prisoners from federal custody in this state case.[333] A few decades later, the supremacy of federal jurisdiction was reaffirmed in *Tarble's Case*,[334] which again held that state courts did not have the authority to free federal prisoners from federal custody by issuing state court habeas corpus rulings.[335]

In sum, the Wisconsin Supreme Court sought in its *In re Booth* opinion to assert the power to free Booth, who had helped a fugitive slave escape from federal custody, from being himself federally imprisoned on the grounds that the Wisconsin state constitution required it to protect liberty. Although the opinions do not state whether or not the court derived this duty from the Wisconsin state constitution's Lockean Natural Rights Guarantee, the court did explicitly rely on state constitutional guarantees of liberty, which are consistent with reliance on the Wisconsin state constitution's Lockean Natural Rights Guarantee.

V. Lockean Natural Rights Guarantees and Minority Rights

In another striking line of cases, the Maine Supreme Judicial Court used Maine's Lockean Natural Rights Guarantee, which appeared in the state

330. *Abelman*, 62 U.S. (21 How.) at 515–16.
331. *Id.* at 514–15.
332. *Id.* at 515–16.
333. *Id.* at 517–19, 523–24.
334. 80 U.S. (13 Wall.) 397 (1871).
335. *Id.* at 403–04, 411–12.

constitution, to extend additional rights to minority groups, including the right to enter contracts, the right to citizenship, and the right to vote. Maine's Lockean Natural Rights Guarantee followed the typical form with all three parts, including an "all men are born equally free" clause; a granting of natural, inherent, and inalienable rights; and a listing of those rights including life, liberty, property, safety, and happiness.[336] Of particular interest, two cases issued on the same day in 1857 paint a picture of an outraged Maine Supreme Court aggressively fighting the *Dred Scott*[337] decision and using its state constitution's Lockean Natural Rights Guarantee to expand minority rights.

In 1842, the Maine Supreme Judicial Court issued a decision in *Murch v. Tomer*,[338] applying its Lockean Natural Rights Guarantee in the Maine constitution to protect the rights of Native Americans to participate in the making of contracts.[339] Peol Tomer, a member of the Penobscot Indian tribe, argued that he was not liable for a contract because as a Native American he could not legally enter into a contract in the first place.[340] The court acknowledged that Maine did have limits on the right of Native Americans to enter into contracts, including by providing for some legal limitations such as the appointing of state agents to care for and manage Indian lands.[341] The court noted that in other states, like Massachusetts, contracts with Native Americans were invalid.[342] However, the Maine Supreme Judicial Court reached a different result after relying on Maine's Lockean Natural Rights Guarantee, which said that all persons within the State of Maine are equal and that all persons are guaranteed the right to acquire, possess, and protect property.[343] Specifically, quoting the Lockean Natural Rights Guarantee, the Supreme Judicial Court of Maine said that:

> [The Native Americans living in Maine] are, however, human beings, born and residing within our borders. . . . Our constitution, moreover, says that "all men are born equally free and independent; and have certain natural, inherent and unalienable rights; among which is, that of acquiring, possessing, and protecting property." Why, then, should the condition of an Indian differ from that of other individuals born and reared upon our own soil?[344]

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336. ME. CONST. art. 1, § 1 (amended 1987).
337. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).
338. 21 Me. 535 (1842).
339. *Id.* at 538.
340. *Id.* at 535.
341. *Id.* at 536–37.
342. *Id.* at 537.
343. *Id.*
344. *Id.*

Thus, the Supreme Judicial Court of Maine held that the state's Lockean Natural Rights Guarantee provided Native Americans the right to participate in contracts, and it therefore held that Tomer was liable for the contract in question.[345]

The Maine Supreme Judicial Court returned to the issue of minority rights in 1857, issuing two remarkable opinions on the same day, finding African-Americans to be citizens of Maine and holding that they had the right to vote.[346] First, in *Opinion of the Supreme Judicial Court*,[347] the Supreme Judicial Court of Maine responded to an interrogatory from the senate asking whether "'free colored persons, of African descent, having a residence established in some town in this state' . . . are men, women, children, paupers, persons under guardianship, or unnaturalized foreigners."[348] The Supreme Judicial Court of Maine began its opinion by focusing on the state constitution's use of the term "citizens of the United States," thus equating Maine citizenship with citizenship in the United States, assuming residency requirements.[349] It cited other judicial decisions, such as *Dred Scott v. Sandford*, that had found that African-American residents were not citizens of the United States, but the Supreme Judicial Court of Maine said that those decisions "do not, however, affect the question now before us."[350]

The Supreme Judicial Court of Maine then looked to history and found that free African-Americans were considered to be citizens at the time the Maine constitution was adopted.[351] As evidence, it cited the original state constitutions from New York, New Jersey, North Carolina, and Massachusetts, which did not constrain African-American civil rights.[352] As further evidence, the Supreme Judicial Court of Maine cited records from an 1820 Maine state constitutional convention in which a proposal was rejected to include "Negroes" along with Indians as persons not taxed.[353] The court reprinted a statement by a delegate to the 1820 constitutional convention, Holmes, who referred to the State of Maine's Lockean Natural Rights Guarantee saying that

345. *Id.* at 538.

346. A third opinion issued on this day suggested that African-Americans had the right to run for public office, but it did not explicitly rely on the constitution's Lockean Natural Rights Guarantee in its reasoning. *See* Opinion of Judge Davis, 44 Me. 576, 595 (1857). In response to a senate interrogatory, the court relied on its earlier findings that African-Americans were citizens of the United States and of the State of Maine but did not explicitly invoke the Lockean Natural Rights Guarantee again. *Id.*

347. 44 Me. 507 (1857).

348. *Id.* at 507.

349. *Id.*

350. *Id.* at 508.

351. *Id.* at 515–16.

352. *Id.* at 510–14.

353. *Id.* at 515.

> I know of no difference between the rights of the negro and the white man; God Almighty has made none—our declaration of rights has made none. That declares that "all men" (without regard to colors) "are born equally free and independent."[354]

The court concluded that "we are of the opinion that our constitution does not discriminate between the different races of people which constitute the inhabitants of our state."[355] Although the Maine Supreme Judicial Court said that its analysis was not affected by the *Dred Scott* decision, its holding suggests that the Maine Supreme Judicial Court viewed the State of Maine's Lockean Natural Rights Guarantee as being more expansive than federal guarantees of civil rights.

On the same date in 1857, Judge John Appleton announced a second opinion of the Supreme Judicial Court of Maine, *Opinion of Judge Appleton*,[356] which left little doubt as to the Maine Supreme Judicial Court's view of the *Dred Scott* decision. *Opinion of Judge Appleton* answered a senate interrogatory presenting the issue of whether African-Americans had the right to vote in Maine.[357] The opinion began by proclaiming that

> [t]he constitution of Maine recognizes as its fundamental idea, the great principle upon which all popular governments rest—*the equality of all before the law.* It confers citizenship and entire equality of civil and political rights upon all its native born population.[358]

Before proceeding, the Supreme Judicial Court of Maine noted that this opinion raised the fundamental question of "whether a sovereign state is restricted by the constitution of the United States as to those of its native born population upon whom it may confer the right of citizenship."[359]

As in the previous opinion of the Supreme Judicial Court of Maine, the court in this case relied heavily on historical evidence. It cited the original state constitution, the Declaration of Independence's guarantee of freedom, and various state court decisions that recognized freedom at birth of inhabitants without regard to ancestry.[360] The Supreme Judicial Court of Maine concluded that "colored freemen were regarded as citizens, and [were] entitled to the right of suffrage, in most of the states, during the whole period of the revolution."[361] In one brief paragraph, the Supreme Judicial Court of Maine also cited language from Maine's Lockean Natural Rights Guarantee,

354. *Id.* (internal quotation marks omitted).
355. *Id.*
356. 44 Me. 521 (1857).
357. *Id.* at 521–22.
358. *Id.* at 522.
359. *Id.*
360. *Id.* at 521–25, 528.
361. *Id.* at 538.

finding that "[t]he right[s] of personal security, personal liberty, and to acquire and enjoy property, are natural and inherent."[362]

The opinion devoted most of its arguments to a direct attack on the correctness of the U.S. Supreme Court's *Dred Scott* decision. Reciting the federal Constitution's Preamble, which asserts the sovereignty of "we the people of the United States," and reiterating that the phrase "we the people" at the time of the Constitution's adoption included people of all races, the Maine Supreme Judicial Court delivered this criticism of the U.S. Supreme Court's *Dred Scott* decision:

> As the free blacks were in some of the states citizens, and entitled to vote, by what rules of construction can any portion of the "people" (which certainly must include all who were legally competent to act on the question of its acceptance or rejection,) be deprived of previously existing rights? What language can be found indicating the purpose of forming a new and hybrid class unknown to any system of law—neither citizens, aliens nor slaves—a class owing allegiance to the state and bound to obey its laws, and yet without their protection, "having rights which no white man was bound to respect." No express words can be found, showing an intention of thus dividing the free native born inhabitants into classes, and of conferring all rights upon one portion, and of depriving the other of those previously belonging to them. No words can be found from which by any construction, however forced, any such implication can arise.[363]

Continuing its criticism of *Dred Scott*, the Maine Supreme Judicial Court said that Chief Justice Taney's conclusion in *Dred Scott* that Congress has exclusive control over citizenship was incorrect as a matter of history and constitutional interpretation and would lead to "absurd" results.[364] The court reiterated that there was no support for Chief Justice Taney's conclusion that free African-Americans were not citizens: "The framers of the constitution made no such article. The people adopted no such article. Interpolation is no judicial duty."[365] Thus, in a free-ranging discussion, the Maine Supreme Judicial Court asserted that free African-Americans throughout the country should be considered to be citizens with the right to vote.[366]

Going even farther, the Maine Supreme Judicial Court concluded that the *Dred Scott* opinion was not "obligatory" on state courts.[367] It then lauded the *Dred Scott* dissenters and included a thinly veiled criticism of the Taney opinion, saying that the dissenting Justices showed "a fullness of learning

362. *Id.* at 522.
363. *Id.* at 545.
364. *Id.* at 569–71.
365. *Id.* at 557.
366. *Id.* at 575–76.
367. *Id.* at 559.

and a cogency of argumentation rarely equaled[,] . . . demonstrat[ing the] right to citizenship [of free African-Americans] in the land of their birth."[368] Judge Appleton concluded by finding that free African-Americans were guaranteed citizenship under the Maine constitution, and thus according to the Privileges and Immunities Clause of Article IV, Section Two of the U.S. Constitution, must be considered as being citizens under the federal Constitution with the right to vote.[369]

Finally, in another case in another state, the Supreme Court of Ohio addressed the relationship of a Natural Rights Guarantee in the Ohio state constitution to minority rights in the case of *Woodson v. State ex rel. Borland*.[370] In *Woodson*, the plaintiff had called two witnesses on his behalf, but they were disqualified from testifying after visual "inspection" by the court because the court said they were mulattos and were thus not allowed to testify in court because of their race.[371] In response, the plaintiff challenged an Ohio state law that prohibited testimony in the Ohio state courts by African-Americans or mulattos, arguing that it violated the State of Ohio's Lockean Natural Rights Guarantee.[372] In the plaintiff's words:

> We ask the attention of the court to the first section of the bill of rights, which constitutes the eighth article, "All men have certain natural, inherent, and inalienable rights, [. . .] amongst which are the enjoying and defending life and liberty, acquiring possession of and protecting property, and pursuing and obtaining happiness and safety." How can these rights be enjoyed, or exercised, if the legislature may at pleasure deprive any man or every man of the testimony necessary to defend his life, or liberty, or property—testimony unimpeached, of crime, incapacity, or interest?[373]

Unfortunately, in a brief opinion, the Supreme Court of Ohio did not address this argument and dismissed the case on jurisdictional grounds.[374] The plaintiff was correct, however, in our opinion, in arguing for the unconstitutionality of this Ohio law under that state's Lockean Natural Rights Guarantee.

The Supreme Judicial Court of Maine's application of Lockean Natural Rights Guarantee language to race discrimination issues does show that Lockean Natural Rights Guarantees were, at least in some cases, the source of substantive rights for minorities. The Maine Supreme Judicial Court

368. *Id.*
369. *Id.* at 575–76.
370. 17 Ohio 161 (1848).
371. *Id.* at 163.
372. *Id.* at 168.
373. *Id.*
374. *Id.* at 169.

extended the application of Maine's Lockean Natural Rights Guarantee well beyond the question of slavery and construed it to serve as the constitutional basis for contract rights, citizenship, and the right to vote for racial minorities. The Supreme Judicial Court of Maine's reliance on Lockean Natural Rights Guarantee language in the face of a contrary U.S. Supreme Court decision in *Dred Scott* further highlights the role the Guarantees could be said to play in banning race discrimination.

VI. Civil and Political Rights

Fourteen cases further illustrate the breadth of pre-1868 state case law interpreting the Lockean Natural Rights Guarantees.[375] These cases address a wide variety of topics, including: (1) freedom of religion; (2) the right of marriage; (3) the involuntary confinement and transportation of the poor; (4) retroactive legislation; (5) the constitutionality of statutes imposing or exempting tort liability; and (6) miscellaneous other civil and political rights. Advocates and courts in a number of states relied on the Lockean Natural Rights Guarantee language in state constitutions as providing substantive grounding for an extensive range of civil and political rights. It is clear that the sweeping language of the state constitutional Lockean Natural Rights Guarantees lent itself to creative application by litigants to many individual rights issues with varying degrees of success.

A. Freedom of Religion

Three cases reported by the Maine, Massachusetts, and New Hampshire state supreme courts related to Lockean Natural Rights Guarantees and the freedom of religion. Although undoubtedly additional cases regarding religion were argued and adjudicated on the basis of freedom of religion clauses, these cases are unique in that the Lockean Natural Rights Guarantees were explicitly discussed in each decision alongside the applicable freedom of religion provisions. The inclusion of the Lockean Natural Rights Guarantee discussion indicates that even though the freedom of religion clauses were more obviously applicable to freedom of religion issues, the courts recognized that the Lockean Natural Rights Guarantees could also be relevant in preserving the basic liberty or inalienable rights that formed the foundation of the state constitutions. In each case, the opinions recognized the importance of the state Lockean Natural Rights Guarantee and its relevance to the freedom of religion issue in question, but the courts ultimately ruled against the plaintiff. Although the decisions did not therefore expand religious freedom, their serious consideration and

375. Nine additional cases invoked the language of the Guarantees, referring to liberty or natural or unalienable rights, but did not explicitly cite the Guarantees. *See infra* notes 481–83 and accompanying text.

discussion of the relevance to these cases of the Lockean Natural Rights Guarantees demonstrates that these state courts viewed the Guarantees as an important feature of their state constitutions.

In 1826, the Maine Supreme Judicial Court reported the case of *Waite v. Merrill*,[376] which addressed freedom of religion in the context of a contract dispute.[377] After leaving the Shaker community, the plaintiff sued for compensation for services performed and sought to invalidate a contract that designated all of his property as joint property of the community.[378] The contract also stipulated that should any member leave the community, he would not be permitted to make any claims against the community.[379]

Relying on Maine's Lockean Natural Rights Guarantee, the plaintiff argued that the contract violated his property rights.[380] He claimed that by forbidding personal ownership of property, the contract he had signed had violated the Maine Lockean Natural Rights Guarantee's provision for the "right to acquire and possess property."[381] The defendant responded that the contract was no different from typical public-property arrangements.[382] In such a typical public-property arrangement, every citizen of a town is expected to contribute to common property, which the citizen then loses if he moves to a different town.[383] By analogy, defendants argued that in the Shaker community each member must contribute to the community's joint property, and upon leaving the community, the member loses those contributions.[384]

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376. 4 Me. 102 (1826).

377. *Id.* at 116–18.

378. *Id.* at 117.

379. *Id.*

380. *Id.* at 111. The plaintiff made a second argument that the contract violated his liberty of conscience by "enslav[ing] the mind and person." *Id.* at 113. The plaintiff referenced only general principles of liberty, so it is not clear whether this argument was based on Maine's Lockean Natural Rights Guarantee or a more general liberty concept. *Id.* The court rejected this argument and found that the existence of the contract was itself an expression of the liberty right. In the court's words:

> It is said the covenant is void because it is in derogation of the inalienable right of liberty of conscience. To this objection the reply is obvious; the very formation and subscription of this covenant is an exercise of the inalienable right of liberty of conscience. . . . We must remember that in this land of liberty, civil and religious, conscience is subject to no human law; its rights are not to be invaded or even questioned, so long as its dictates are obeyed, consistently with the harmony, good order and peace of the community.

Id. at 119–20. Again, the court did not provide a source for its invocation of the "inalienable right of liberty," so it is unknown whether or not it was relying on the Guarantee. *Id.*

381. *Id.* at 111.

382. *Id.* at 114–15.

383. *Id.* at 115.

384. *Id.*

The court, correctly in our view, rejected the plaintiff's arguments and ultimately ruled to uphold the contract. It responded directly to the plaintiff's "acquire and possess property" Guarantee argument as follows:

> It is said that it is void, because it deprived the plaintiff of the constitutional power of acquiring, possessing and protecting property. The answer to this objection is, that the covenant only changed the mode in which he chose to exercise and enjoy this right or power; he preferred that the avails of his industry should be placed in the common fund or bank of the society, and to derive his maintenance from the daily dividends which he was sure to receive. If this is a valid objection, it certainly furnishes a new argument against banks, and is applicable also to partnerships of one description as well as another.[385]

As a result, the contract was found to be valid, and the complainant was not allowed to recover any property.[386] The Maine Supreme Judicial Court correctly prioritized freedom of religion and conscience, including the freedom to enter into communal property arrangements with a religious community and viewed state interference with such private dealings suspiciously.[387]

In *Commonwealth v. Kneeland*,[388] the Massachusetts Supreme Judicial Court interpreted its Lockean Natural Rights Guarantee in response to a challenge to the state's blasphemy statute.[389] Abner Kneeland, an avowed pantheist, published a statement in his newspaper that the Universalists' God was "nothing more than a mere chimera of their own imagination."[390] Kneeland defended himself by arguing that the Massachusetts blasphemy statute was unconstitutional.[391]

The majority opinion upheld the statute without addressing the Lockean Natural Rights Guarantee argument, reasoning that the statute was passed soon after the adoption of the Massachusetts constitution and that many other states also had statutes criminalizing blasphemy.[392] The dissenting opinion, however, specifically addressed Kneeland's Lockean Natural Rights Guarantee argument but rejected its application to the blasphemy statute:

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385. *Id.* at 118.

386. *Id.* at 124.

387. *See id.* at 119–20 (highlighting the primacy of the "inalienable right of liberty of conscience" and the importance of allowing individuals to worship God "according to the dictates of their consciences").

388. 37 Mass. (20 Pick.) 206 (1838).

389. *Id.* at 209–10. The blasphemy statute provided that "the denial of God, his creation, government, or final judging of the world, made willfully, that is, with the intent and purpose to calumniate and disparage him and impair and destroy the reverence due to him, is blasphemy." *Id.* at 206.

390. *Id.* at 207.

391. *Id.* at 208.

392. *Id.* at 217–18.

> The first article, the corner stone of the constitution, contains the following political expressions: "All men are born free and equal, and have certain natural, essential, and unalien able [sic] rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property." The rights of *enjoying* liberty and life, of *acquiring* and *possessing* property, are not less valuable or less deserving of constitutional protection than the liberty of the press; nor are they guarded by less strong or explicit language; yet no rational man can suppose that the legislature is restrained from determining, for what *deeds*, *property*, *liberty*, and even *life*, shall be forfeited. It cannot for a moment be doubted that the legislature has the general power, in their wisdom and discretion, to determine what *acts* shall be deemed crimes, and to prescribe for them such punishment as they may judge proper, either by *fine*, by *imprisonment*, or *by the taking of life*.[393]

The dissent was not persuaded by the Lockean Natural Rights Guarantee argument, but it did recognize the Lockean Natural Rights Guarantee as the "corner stone" of the state's constitution.[394] Although the dissent argued that the statute should be unconstitutional under the constitution's freedom of religion clauses,[395] the majority ruled that it was a permissible exercise of power.[396]

Finally, the New Hampshire Supreme Judicial Court addressed the Lockean Natural Rights Guarantee's relationship to religion in the 1868 case of *Hale v. Everett*.[397] This opinion, which is over two hundred pages long, addressed the issue of whether towns could authorize expenditures for non-Protestant religious teachings.[398] The town of Dover provided funds and stock to build a Unitarian church, but shortly after its establishment, the pastor allegedly disavowed central Christian teachings and his association with the Unitarian church.[399] After the pastor was chosen for a subsequent year, several town wardens took possession of the church arguing that it no longer met the conditions of the town's grant.[400]

Although much of the parties' arguments addressed whether the pastor's beliefs should be considered Unitarian or not, the opinion begins by quoting New Hampshire's Lockean Natural Rights Guarantee: "Among the natural rights, some are in their very nature unalienable, because no equivalent can

393. *Id.* at 230 (Morton, J., dissenting).
394. *Id.*
395. *Id.* at 238.
396. *Id.* at 221 (majority opinion).
397. 53 N.H. 9 (1868).
398. *Id.* at 60.
399. *Id.* at 13–15.
400. *Id.* at 15–16.

be given or received for them. Of this kind are the RIGHTS OF CONSCIENCE."[401] The opinion clarified that these "unalienable rights" received the strongest possible protection:

> The framers of the constitution were very careful to state and declare the distinction between mere civil or political rights, although they were "natural, essential, and inherent" rights belonging to "all men" (Art. II) [the Lockean Natural Rights Guarantee], and the "rights of conscience," which had the additional quality and excellence of being "unalienable." These merely civil or political rights could be surrendered to the government or to society (Art. III) in order to secure the protection of other rights, but the rights of conscience could not be thus surrendered; nor could society or government have any claim or right to assume to take them away, or to interfere or intermeddle with them, except so far as to protect society against any acts or demonstrations of one sect or persuasion which might tend to disturb the public peace, or affect the rights of others.[402]

Thus, the Lockean Natural Rights Guarantee was read as according the rights of conscience even more protection than the rights of life, liberty, property, and happiness because the rights of conscience contained the extra qualification of being "unalienable." However, the majority held that the pastor must preach Christianity in order to fulfill the terms of the land grant and that this requirement did not violate his inalienable rights found in the state constitution's Lockean Natural Rights Guarantee, but that the requirement was merely a permissible condition attached to the land grant to which the pastor had no inherent legal right.[403]

B. Right of Marriage

The Lockean Natural Rights Guarantee of the State of Vermont was discussed in the context of an 1829 Vermont Supreme Court case. In that case, the Vermont Supreme Court issued a ruling on the right to marriage that contained a reference to the natural rights guaranteed by the Vermont Guarantee, although it did not cite the Guarantee explicitly. Vermont's Lockean Natural Rights Guarantee in 1829 was unchanged since its original adoption in 1793. The Vermont constitution's Lockean Natural Rights Guarantee followed the typical form with three parts, including a statement that "all men . . . have certain natural, inherent, and inalienable rights."[404]

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401. *Id.* at 52.
402. *Id.* at 61.
403. *Id.* at 76–78, 80–81.
404. VT. CONST. ch.1, art. I (amended 1921 & 1991); *see also infra* Appendix A.

In *Overseers of the Poor of the Town of Newbury v. Overseers of the Poor of the Town of Brunswick*,[405] the Vermont Supreme Court addressed whether or not a marriage conducted in Canada without the proper solemnization was valid.[406] The case arose when the town of Brunswick ordered the "pauper" Nathaniel Harriman removed from the town.[407] He claimed to be married to Lydia, and if she were determined to be his wife, the overseers of the poor in Brunswick would be required to support Lydia and her children.[408] The town argued that they were not married because twenty-two years earlier while in Canada, Nathaniel and Lydia had not followed the proper procedure of having a clergy member solemnize their marriage.[409] They were informed at the time by the justice of the peace that he could not declare them man and wife without this solemnization.[410] Complicating matters, sometime after their move to Vermont the British Parliament passed a statute retroactively legalizing Canadian marriages without solemnization.[411] In sweeping language regarding the right to marry, the Vermont Supreme Court declared that the right

> [t]o marry is one of the natural rights of human nature, instituted in a state of innocence for the protection thereof; and was ordained by the great Lawgiver of the universe, and not to be prohibited by man. Yet, human forms and regulations in marriages are necessary for the safety and security of community; but those forms and regulations are to be within the reach of every person wishing to improve them; and if they are not, other forms and customs will be substituted; and such was the case in this instance.[412]

In support of its claim that marriage was a natural right, the court implied that if legal marriage was not available to the community, people would substitute other procedures, which would be undesirable.[413] It concluded that the key factors for legal marriage were "the declaration of the man or woman, the continued understanding of friends, and cohabitation."[414] Thus, the Supreme Court of Vermont ruled that the town was required to support Nathaniel Harriman as well as "those who have a matrimonial or

405. 2 Vt. 151 (1829).
406. *Id.* at 158–59.
407. *Id.* at 152.
408. *Id.* at 159.
409. *Id.* at 155.
410. *Id.* at 152.
411. *Id.* at 158–59.
412. *Id.* at 159.
413. *Id.* The Vermont Supreme Court further supported the validity of the marriage in question by citing various historical marriage procedures. Specifically, it referred to procedures preceding Pope Innocent III in which Christian solemnization of marriage did not exist, and marriage ceremonies consisted solely of the man leading the woman to his habitation. *Id.* at 159–60.
414. *Id.* at 160.

natural right to be supported by him."[415] The Vermont Supreme Court's reasoning that marriage was a "natural right" echoed the natural right guarantee in the state's Guarantee, but because the court did not cite the Lockean Natural Rights Guarantee for this argument, it is unclear whether it was referring to the Lockean Natural Rights Guarantee or to a more general understanding of natural law or natural rights. Either way, this opinion supports the idea that prior to 1868 inherent, unenumerated rights were sometimes supported by the courts.

C. *Involuntary Confinement and Transportation of the Poor*

In two cases, state courts addressed the role of the Lockean Natural Rights Guarantees in the involuntary physical confinement or transportation of the poor once they had been committed to the state's care. In both cases, the plaintiffs argued that the state's treatment of them violated their rights under their state constitutions' Lockean Natural Rights Guarantee. First, in *Town of Londonderry v. Town of Acton*,[416] the Vermont Supreme Court ruled on the constitutionality of the practice of removing paupers from a town.[417] Under Vermont statutes at the time, towns were authorized to forcibly remove those who could not support themselves without being public charges.[418] In this case, the town of Londonderry sought to remove Elisha Johnson to his birthplace, Acton.[419] Interestingly, the court relied on the Vermont Lockean Natural Rights Guarantee's right to property, rather than on its right to liberty, in finding that this removal would be unconstitutional.[420] The Court did not find that the statute, in general, was unconstitutional, but it held instead that the specific instance of removing a landowner from his property deprived him of the right to enjoy, acquire, and possess property.[421] In the words of the Vermont Supreme Court:

> This involves the question whether a person owning and residing on his real estate can be the subject of removal. If this can be done, it has been well said that nothing would have a greater tendency to reduce men to pauperism than to remove them from their homes and property, and thus compel them to dispose of that property at any price they could get, and that it would in fact operate as a confiscation of their property. Indeed, it would contravene the first article of our bill of rights [the Lockean Natural Rights Guarantee], which enumerates

415. *Id.* at 160–61.
416. 3 Vt. 122 (1830).
417. *Id.* at 122.
418. *Id.* at 130.
419. *Id.* at 122.
420. *Id.* at 129–30.
421. *Id.* at 130.

> among the natural, inherent, and unalienable rights, the enjoying, acquiring and possessing property.[422]

The court also cited the Magna Carta and historical English cases as support for the protection of landowners to be able to stay on their own land.[423] The statute, as applied to landowners, was thus found to be in violation of Vermont's Lockean Natural Rights Guarantee and was held to be unconstitutional.[424]

The Supreme Judicial Court of Maine also faced the issue of the removal of impoverished citizens in the *Case of Nott*.[425] In contrast to Vermont's removal practices, the Maine statutes authorized towns to commit the poor to workhouses.[426] In this case, Adeline Nott addressed a petition of habeas corpus to the master of the workhouse, arguing that his commitment to the workhouse without trial or hearing violated Maine's Lockean Natural Rights Guarantee:

> [I]t violates the spirit and genius of the constitution and laws of the land. The constitution declares that "all men are born equally free and independent, and have certain natural inherent and unalienable rights, among which are those of defending life and liberty." But how can it be said that the citizen of this State can enjoy liberty, if at any time he may be committed by two others, to a dungeon, without a hearing, without a trial—without even a *complaint on oath*, and the imprisonment being, as by the law it may be, *for life*.[427]

In an unsympathetic response, the Supreme Judicial Court of Maine ruled that such committal was constitutional.[428] It did not specifically address the Guarantee argument, but reasoned:

> The objects of public bounty, must necessarily be more or less subject to the public control. It is not unreasonable that they should be made to contribute to their own support, by some suitable employment. This cannot often be effected, without subjecting them to a degree of coercion and restraint, which would be an invasion of the rights of any citizen, competent to take care of himself.[429]

The court went on to compare the poor to insane persons who cannot enjoy the rights of citizens.[430] Thus, the court seemed to conclude that the Lockean Natural Rights Guarantee protections of the Maine constitution did

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422. *Id.* at 129–30.
423. *Id.* at 130–32.
424. *Id.* at 132–33.
425. 11 Me. 208 (1834), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.
426. *Id.* at 209.
427. *Id.*
428. *Id.* at 210.
429. *Id.*
430. *Id.*

not apply when the beneficiaries of public aid were committed to a workhouse.

In both of these cases, the impoverished plaintiffs argued that the states' actions violated the Lockean Natural Rights Guarantee protections in their respective state constitution. But only the Vermont Supreme Court granted relief to the plaintiff on the grounds that his involuntary removal from the town violated his property rights, while the Maine Supreme Judicial Court rejected the liberty argument against committing the plaintiff to a workhouse.[431] The contrast between these cases may suggest that the state courts enforced the Lockean Natural Rights Guarantee's property rights protections more seriously than the liberty guarantee in protecting the poor.

D. Retroactive Legislation

Two opinions from the Maine Supreme Judicial Court illustrate its interpretation of the Guarantee as a ban on retroactive legislation or on legislation granting special benefits to a particular person. The Maine constitution was unique in that it did not contain a retroactivity clause. Despite this omission, the Maine Supreme Judicial Court found retroactive legislation to be unconstitutional by applying the state's Lockean Natural Rights Guarantee. Like many of the other state courts, the Maine Supreme Judicial Court used the Maine constitution's Lockean Natural Rights Guarantee as a type of catch-all phrase by which it could strike down what it viewed as unjust legislation, even when there was no specific constitutional provision prohibiting it.

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431. The Pennsylvania and Massachusetts supreme courts also addressed involuntary confinement in a different context. In *Ex Parte Crouse*, the Pennsylvania Supreme Court adjudicated a father's habeas petition on behalf of his daughter challenging her confinement in a "House of Refuge." 4 Whart. 9, 9 (Pa. 1839). The court also addressed the argument that the child's confinement was an "abridgement of indefeasible rights" by reasoning that her confinement was similar to normal schooling. *Id.* at 11. Therefore, the court ruled that her confinement was constitutional. *Id.* at 11–12. Although the opinion did not cite the Guarantee directly, it is possible that the opinion was interpreting the meaning of the "indefeasible rights" guaranteed in the Pennsylvania Lockean Natural Rights Guarantee.

The Massachusetts Supreme Judicial Court issued an opinion in *Commonwealth v. Badlam* in response to a habeas petition. 26 Mass. (9 Pick.) 362, 362 (1830). In this case, a married woman argued that her imprisonment for debt was unconstitutional because her husband had legal control over all of the property. *Id.* In a two-paragraph per curiam opinion, the court dismissed her argument:

> It is urged that imprisonment for debt is unconstitutional; and that it is contrary to the unalienable rights of man; and other arguments have been used, which would be more properly addressed to a legislative body than to a court of justice. The immemorial practice in this Commonwealth has been to imprison for debt, and there is nothing against it in our constitution.

Id. at 363. Again, it is not clear whether the court was referring to the unalienable rights guaranteed by the Guarantee or not.

First, in *Proprietors of the Kennebec Purchase v. Laboree*,[432] the Maine Supreme Judicial Court focused on the retrospective application of a statute.[433] The case involved a property dispute over a portion of land occupied by tenants without a formal title.[434] The Maine legislature had passed an 1821 statute declaring constructive possession permissible and abolishing the distinction between possession with a formal title and without title.[435] If the statute were applied, the tenants in this particular case would almost certainly win.[436] If not, the decision would be much more complicated and would turn instead on whether the tenants had fulfilled the common law requirements of adverse possession.[437] But, the court noted that although the Maine constitution did not contain a retroactivity clause that applied in civil cases, the application of this statute in a civil case retrospectively would violate the constitution's Lockean Natural Rights Guarantee, as well as the provision defining the legislative power and the takings clause.[438] The court thus construed the state's Lockean Natural Rights Guarantee in light of retrospective laws: "By the spirit and true intent and meaning of this section, every citizen has the right of possessing and protecting property according to the *standing laws* of the state in force *at the time of his acquiring it*, and *during the time* of his continuing to possess it."[439] Indeed, the court declared that it was the "design of the framers [in including the Lockean Natural Rights Guarantee] . . . to guard against the retroactive effect of legislation upon the property of the citizens."[440] The court did not strike down the legislation entirely but prohibited any retroactive application of the legislation in this civil case.[441] Finding the statute inapplicable, the court then remanded the claim for a new trial with jury instructions on the common law of adverse possession existing at the time of the claim.[442] The case is particularly striking because the U.S. Constitution's Ex Post Facto Laws Clause forbids only retroactive criminal laws and not retroactive civil laws.[443]

In the second opinion on retroactive application of civil laws, *Lewis v. Webb*,[444] the Maine Supreme Judicial Court struck down legislation granting an individual petitioner the right to appeal an insolvency determination even

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432. 2 Me. 275 (1823).
433. *Id.* at 286–88.
434. *Id.* at 275–76.
435. *Id.* at 277.
436. *Id.* at 280, 283.
437. *Id.* at 281.
438. *Id.* at 292–95.
439. *Id.* at 290 (internal quotation marks omitted).
440. *Id.*
441. *Id.* at 294–95.
442. *Id.* at 297–98.
443. Calder v. Bull, 3 U.S. (3 Dall.) 386, 390–91 (1798).
444. 3 Me. 326 (1825).

though the applicable time limit had passed.[445] Again, the court cited the legislative grant of power in the constitution, and then the court focused on the Lockean Natural Rights Guarantee's equality language to invalidate the law granting a special benefit to one person:

> [Public laws] are considered as the guardians of the life, safety and rights of each individual in society. In these, each man has an interest, while they remain in force, and on all occasions he may rightfully claim their protection; and all have an equal right to make this claim, and enjoy this protection; because, according to the first section in our declaration of rights, "All men are born equally free and independent; and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." On principle then it can never be within the bounds of legitimate legislation, to enact a special law, or pass a resolve dispensing with the general law, in a particular case, and granting a privilege and indulgence to one man, by way of exemption from the operation and effect of such general law, leaving all other persons under its operation. Such a law is neither just or reasonable in its consequences. It is our boast that we live under a government of laws and not of men. But this can hardly be deemed a blessing unless those laws have for their immoveable basis the great principle of constitutional equality.[446]

Thus, the Maine Supreme Judicial Court found the retroactive civil law objectionable under the state constitution's Lockean Natural Rights Guarantee because it did not provide rights or benefits equally.[447] Although the court did not specifically mention attainder in these opinions, its concern for retroactive civil legislation applying to one particular person certainly reflects attainder as well as ex post facto law concerns, even though the Maine constitution did not include a specific ex post facto provision.[448]

E. Statutes Imposing or Excusing Liability

In two cases, state supreme courts considered the application of their Lockean Natural Rights Guarantees to statutes that imposed or excused liability for particular torts. First, in *Boston, Concord & Montreal Railroad v. State*,[449] the New Hampshire Supreme Court upheld the constitutionality of legislation subjecting railroads to liability for deaths resulting from

445. *Id.* at 335–37.

446. *Id.* at 335–36.

447. *Id.* at 336–37.

448. Article I, Section Ten of the federal Constitution prevents the states from adopting retroactive criminal laws. U.S. CONST. art. I, § 10, cl. 1.

449. 32 N.H. 215 (1855).

negligence.[450] The railroad company argued that this statute exceeded the legislature's power and contravened the state constitution's Lockean Natural Rights Guarantee protecting "the natural, essential and inherent right of acquiring, possessing and protecting property."[451] However, the New Hampshire Supreme Court upheld the statute as being well within the bounds of state legislative authority. Reasoning that railroads already had an obligation to avoid loss of life, the court explained that the statute "merely regulates the existing rights and duties of corporations, or provides new modes of enforcing acknowledged obligations."[452] The court further noted that there was no problem of partial application because the law applied to the entire railroad class of common carriers not just this particular railroad company.[453]

The California Supreme Court considered a statute on government immunity from suit in the case of *Parsons v. City & County of San Francisco*.[454] In *Parsons*, the plaintiff sued San Francisco for injuries after he fell on a public street in disrepair, and the government relied on an immunity statute for its defense.[455] The immunity statute of 1856 stated that the City and County of San Francisco was not liable for injuries resulting from street damages that had existed for a period of less than twenty-four hours.[456] It did allow recovery from the city and county if the street damages had been left unaddressed for longer than twenty-four hours.[457] The California Supreme Court held that this statute did not violate the State of California's Lockean Natural Rights Guarantee:

> We do not think that this section is a violation of the State or National Constitution; or that it prevents any person from enjoying the inalienable rights of life and liberty, or acquiring, possessing, and protecting property, or pursuing and obtaining safety and happiness, as declared by the first section of the State Constitution; or that it has the effect of taking the property of the plaintiff for public use without compensation. The statute, while relieving the city from liability, affords an ample remedy against those whose acts or negligence were the cause of the injury; and there is evidently no violation of any constitutional right in such a provision.[458]

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450. *Id.* at 225–27.
451. *Id.* at 217 (internal quotation marks omitted).
452. *Id.* at 225–26.
453. *Id.* at 226–27.
454. 23 Cal. 462 (1863).
455. *Id.* at 463–64.
456. *Id.*
457. *Id.* at 464.
458. *Id.* at 465.

Therefore, the government was not liable for the plaintiff's injuries because it had immunity.[459]

F. Miscellaneous Civil and Political Rights

Four other cases applied the state Lockean Natural Rights Guarantees to important situations related to civil and political rights. First, in the 1828 case of *Beard v. Smith*,[460] the Kentucky Court of Appeals relied on the Virginia Lockean Natural Rights Guarantee for guidance in interpreting a compact between Kentucky and Virginia resolving disputed boundary lands.[461] Chief Judge George Bibb first established the framework for the analysis by describing the "[p]olitical doctrine recognized at the adoption of the compact,"[462] which included the Declaration of Independence as well as the Virginia Lockean Natural Rights Guarantee:

> The declaration of Virginia, in the first, second and third articles of the bill of rights prefixed to her form of government, is not less emphatic and explicit, as to the natural and unalienable rights of man; the first article declares that all men "have certain inherent rights, of which, when they enter into a state of society, they can not, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."[463]

He then relied on the principles in the Guarantee to guide his interpretation of the compact:

> The compact was made by and between people who recognized those truths, and those principles. In construing this compact then, neither the unalienable rights of self government which belong to the people of Kentucky of the one party, nor that good faith and regard for private rights and interests, exempt from retrospective legislation, which was pledged to Virginia of the other party, should be forgotten.[464]

Judge Bibb cited the Lockean Natural Rights Guarantee yet again in explaining his holding:

> The valid claims against the government will be held and remain valid, into whosoever hands they may lawfully pass, secured under the laws of Kentucky by the pledge of faith and moral sentiment, by the security resulting from the organization and moral action of the government, guaranteed by that universal sentiment of respect for

459. *Id.*
460. 22 Ky. (6 T.B. Mon.) 430 (1828).
461. *Id.* at 435, 502–03.
462. *Id.* at 474.
463. *Id.* at 475.
464. *Id.*

> private property, which belongs to the nature of civilized man, and under the sanction of that sentiment contained in the constitution of the United States. This construction will avoid the absurdity of endeavoring to fix upon the people, forever, a government, or its laws, which are inadequate, or contrary to the common benefit, protection and security of the community. By the declaration of rights made by Virginia, in 1776, and prefixed to the organization of the government, she declared, "that all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they can not by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.[465]

Thus, in construing a compact between the states, the Kentucky Court of Appeals looked to the Lockean Natural Rights Guarantee as an important indicator of each state's political doctrine and therefore a useful guide to interpreting the compact. Although this opinion resulted from an isolated and unusual fact pattern, the Kentucky court's effort to ensure that its interpretation was consistent with the Lockean Natural Rights Guarantee language demonstrates the centrality of the Lockean Natural Rights Guarantee in that court's view of the state constitution.

Second, the California Supreme Court implied the right to vote from California's Lockean Natural Rights Guarantee in the 1866 case *Knowles v. Yates*.[466] In an election for sheriff decided by only five votes, the appellants

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465. *Id.* at 502–03.

466. 31 Cal. 82, 87–88 (1866). The Lockean Natural Rights Guarantees were explicitly invoked by litigants in two other cases related to voting rights and elections, but the state court opinions ruled on other grounds. In the first case, the Wisconsin Supreme Court considered the validity of procedures used to elect the governor. Attorney General *ex rel.* Bashford v. Barstow, 4 Wis. 567, 826 (1855). In arguing that the statutory procedure of submitting returns to the clerks and boards rather than to state canvassers should be enforced, the plaintiff emphasized that the people had given sovereignty to the government to protect their rights and cited the Lockean Natural Rights Guarantee:

> In our system of government, the people are the source of all political power; and as a matter of course, all governments "derive their just powers from the consent of the governed." This is the universally received American principle, and it is fully recognized in the first section of the "declaration of rights" [the Wisconsin Lockean Natural Rights Guarantee] in our constitution. . . .
>
> In this sense, the people are sovereign; but that is not the sovereignty which acts daily in the exercise of sovereign power. The people, as such, cannot act on all occasions. Hence the people establish what is called government, and invest it with so much sovereignty as they may deem proper; and this sovereign power being thus delegated to, and invested in the government, that government becomes what is called the sovereign state.

Id. at 651 (opinion of Smith, J.); *id.* at 834 (majority opinion). Unfortunately, the plaintiff did not elaborate on precisely how the Lockean Natural Rights Guarantee related to the voting dispute but simply urged the courts to invalidate election results that did not follow applicable statutory

sought to invalidate the votes cast in a number of precincts alleging "irregular[] . . . conduct."[467] In order to establish its jurisdiction over the case, the California Supreme Court argued that the right to vote was guaranteed by the state constitution because it was implied from the State of California's Lockean Natural Rights Guarantee:

> The Constitution of this State was created and adopted by a free people, in order to secure to themselves and their posterity the blessings of liberty. In the declaration of rights the great fundamental truths that "all men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property; and pursuing and obtaining safety and happiness," are distinctly announced; and it is declared that all political power is inherent in the people; that government is instituted for the protection, security and benefit of the people, and that no person shall be deprived of life, liberty or property without due process of law. The Constitution secures to the citizen the right of suffrage, without which he could not exert his political power, and without which he would be impotent to secure to himself the full enjoyment of life, liberty and property.[468]

Because the right to vote was guaranteed by the state constitution's Lockean Natural Rights Guarantee, the state supreme court held that it had jurisdiction over the voting dispute in question.[469] The court went on to consider the allegations of voting misconduct, ultimately finding that the votes from the disputed precincts were invalid due to the use of irregular

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procedures. *Id.* at 581. The court's opinion did not specifically address the Lockean Natural Rights Guarantee, although it ruled that votes not following the statutory procedure were invalid. *Id.* at 834–35 (majority opinion).

In the second case, the Alabama Supreme Court evaluated the constitutionality of a statute changing the state treasurer's election from an annual election to a biennial election. Collier v. Frierson, 24 Ala. 100, 108 (1854). Quoting Alabama's Lockean Natural Rights Guarantee, the plaintiff argued that the statute was unconstitutional because it did not follow the proper procedure for constitutional amendments:

> The constitution prescribes the mode of changing it. Until that mode is resorted to, it stands, in the language of its preamble, "to promote the general welfare, and to secure to ourselves and to our posterity the rights of life, liberty and property": it stands a check against any law, save in the manner prescribed; it is the prescribed will, above and beyond any reach of constructive change. This peculiar security is the distinctive feature of a republic, the essential and marked difference between a monarchy and a republic.

Id. at 106. The supreme court did not specifically address the Natural Rights Guarantee but focused on the importance of precisely following the amendment procedures. It ruled that the treasurer must remain annually elected, and therefore the treasurer's term was only one year. *Id.* at 104–05, 111.

467. *Knowles*, 31 Cal. at 83–84.

468. *Id.* at 87.

469. *Id.* at 88.

procedures.[470] This case shows that the inclusion of Lockean Natural Rights Guarantee language in the California constitution was seen as safeguarding the central feature of a democracy: the right to vote and to participate in elections.

Third, the Pennsylvania Supreme Court cited the Pennsylvania constitution's Lockean Natural Rights Guarantee in a discussion of the right to protect reputation in the case of *Commonwealth v. Duane*.[471] In this case, Duane was criminally prosecuted for a libelous statement about a former governor of the state.[472] The opinion does not disclose what Duane said about the governor. But, after Duane's arrest, the Pennsylvania legislature passed a statute decriminalizing libel for examinations of the government and providing that truth is a defense in such cases for libel claims.[473] The government argued that this new statute was unconstitutional because it prevented citizens from protecting their reputation, as it said was guaranteed by the Pennsylvania constitution's Lockean Natural Rights Guarantee:

> By the first section of the ninth article [the Lockean Natural Rights Guarantee], the constitution declares that all men have an indefeasible right to acquire, possess, and protect reputation: and by the seventh section, in prosecutions for the publication of papers investigating the official conduct of officers, the truth thereof may be given in evidence. The one is intended as a security to reputation; the other as a regulation of the means of protection, so as to make them consist with the interests of truth and the public. Together they imply that nothing shall be done to prevent either the acquisition or vindication of character.[474]

The court responded to this argument by pointing to the continued existence of civil remedies:

> Although their argument was rather faintly urged, it is proper to take notice of it. By the first section of the ninth article it is declared, that all men have a right of acquiring, possessing, and protecting property and *reputation*; and it is supposed that the protection of reputation will be less perfect, when the punishment of libels by indictment is taken away. It may be so; and I fear it will be so. But it is sufficient to remark, that the civil remedy by *action* is still left unimpaired, and that

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470. *Id.* at 91.

471. 1 Binn. 601, 604 (Pa. 1809).

472. *Id.* at 601.

473. *Id.* at 601–02.

474. *Id.* at 603–04. In 1809, the Pennsylvania Lockean Natural Rights Guarantee included a specific protection for reputation: "That all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." PA. CONST. of 1790, art. IX, § 1. This text remained unchanged in the 1838 constitution. *See infra* Appendix B.

> the proceeding by indictment is not the *right* of the *injured party*, but of the *public*.[475]

Therefore, because no judgment had yet been pronounced in Duane's case, the court held that the intervening statute was constitutional, and it put an end to Duane's prosecution.[476]

Fourth, the Kentucky Court of Appeals rejected a Lockean Natural Rights Guarantee challenge and upheld legislation that exempted the three-year period of 1824–1827 from counting in tolling the statute of limitations period in the 1829 case *Davis v. Ballard*.[477] The court's decision declared that the statute extending the statute of limitations in this case did not violate any aspect of the Kentucky or federal Constitution, including the Lockean Natural Rights Guarantee in the Kentucky constitution.[478] In its opinion, the court specifically discussed the meaning of Kentucky's Lockean Natural Rights Guarantee:

> The present constitution of Kentucky, was adopted at a time, when the natural, civil, and political rights of men, were well understood. . . .
>
> The enjoyment of life, liberty, and property, and the right to pursue happiness, embrace all the comforts and pleasures which man's physical, intellectual, and moral nature is capable of acquiring, by the application and exercise of the various faculties with which he is endowed, and all that the world can afford him. The right to pursue happiness, includes the right to use all means necessary for its attainment, by the proper exercise of our faculties. The acquisition of property, to some extent at least, is indispensable to our most limited ideas of happiness. Food and raiment are property; and without food and raiment, existence can not be preserved many days. Whether our acquisitions shall be limited to a bare subsistence, or shall be multiplied to the accumulation of every luxury, will depend upon the degree of labor employed, and the success of the business to which it may be directed; but it equally results, whether we have much or little, that one of the objects in the formation of the constitution, was to secure the enjoyment of that which we do possess and own. "We, the representatives of the people of the state of Kentucky, in convention assembled, to secure to all the citizens thereof, the enjoyment of the rights of life, liberty, and property, and of pursuing happiness, do ordain and establish this constitution for its government," is the language of the preamble.[479]

475. *Duane*, 1 Binn. at 606–07.
476. *Id.* at 608–09.
477. 24 Ky. (1 J.J. Marsh.) 563, 579–82 (1829).
478. *Id.* at 580–81.
479. *Id.* at 567–68.

However, because the statute of limitations adjustment did not take Ballard's property, impair his right to contract, or affect any of the rights guaranteed by the constitution, the court upheld the act as a valid public-policy measure designed for the public good.[480]

In addition to these cases, a number of other interesting cases address civil and political rights but do not explicitly cite the Lockean Natural Rights Guarantees, relying instead on a general argument that the state constitution guarantees liberty or other natural or inalienable rights. State courts employed these general references in the context of legislative limitations,[481] the permissible actions a citizen can take to defend his life or recover his property,[482] and emigration.[483] Although these cases do not specifically cite

480. *Id.* at 581–82.

481. In the 1817 case, *Trustees of Dartmouth College v. Woodward*, the New Hampshire Superior Court of Judicature held that the legislature's action to add new members to Dartmouth College's board of trustees was constitutional. 1 N.H. 111, 137 (1817). It reasoned that because Dartmouth was a public corporation and a creature of the State, the only limits to legislative power were "the fundamental principles of all government and the unalienable rights of mankind." *Id.* at 114, 119. It is not clear whether this reference to "unalienable rights" is referring to New Hampshire's Lockean Natural Rights Guarantee. Two years later, Dartmouth College, led by Daniel Webster, successfully won a reversal in the Supreme Court. *See* Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 651, 654 (1819) (ruling that the college was a private corporation based on its original pre-Revolution charter, and thus the federal Constitution's Contract Clause prohibited the government from interfering with that original contract).

482. First, in *State v. Walker*, the Ohio Court of Common Pleas instructed the jury in a murder case that the self-defense was "the great natural, unsurrendered, and inalienable right of every man in society." 8 Ohio Dec. Reprint 353, 356 (Ct. Com. Pl. 1850). It is unclear whether the court was referring to the Guarantee. While attending the circus, Walker was involved in a fight with two constables, although they did not announce themselves as officers before or during the altercation. *Id.* at 353. In the course of the fight, Walker fatally stabbed one officer with a bowie knife. *Id.* The jury voted to acquit Walker. *Id.* at 354. At the time of this case, the 1802 constitution was in effect, which contained a Lockean Natural Rights Guarantee stating: "That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety . . . ." OHIO CONST. of 1802, art. VIII, § 1. The Guarantee was modified in the 1851 constitution: "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety." OHIO CONST. of 1851, art. I, § 1.

In *Heacock v. Walker*, the Supreme Court of Judicature of Vermont instructed the jury that "[t]o recapture property of which a person hath been unlawfully deprived, is a natural right, sanctioned by the laws; but he must retake his property without breach of the peace, 'for the public peace is a superior consideration to any man's property.'" 1 Tyl. 338, 342 (Vt. 1802). Walker used "force and arms" to forcibly repossess a horse from Heacock, claiming that it rightfully belonged to him. *Id.* at 338. The jury ultimately ruled for Walker. *Id.* at 343. Again, the court referred only to natural rights generally, which is part of New Hampshire's Lockean Natural Rights Guarantee, but did not explicitly cite the Guarantee. *Id.* at 342.

483. The Virginia Supreme Court of Appeals described the right of emigration as an "inherent" right in *Murray v. McCarty*, where it ruled that McCarty had remained a citizen of Virginia, and thus his importation of Murray into the state was illegal. 16 Va. (2 Munf.) 393, 397, 400 (1811). In 1792, Virginia passed a statute prohibiting further importation of slaves. *Id.* at 393 n.1. In 1802,

the Guarantees, they show the far-reaching nature of the state court's consideration of liberty and natural or unalienable rights for a very broad range of fact patterns.

One particular case stands out for the state court's reliance on its own constitution in the face of intense federal pressure and then the court's almost immediate reversal of its opinion. In *Kneedler v. Lane*,[484] the Pennsylvania Supreme Court during the U.S. Civil War relied on the Pennsylvania state constitution's guarantees of liberty to declare the federal draft unconstitutional.[485] The Pennsylvania Supreme Court then reversed its injunction against the federal draft only a month later after a change in the court's membership![486] In the first decision, a narrow majority found that the federal draft violated the State of Pennsylvania's reserved rights, the state's power to form a militia, and the liberty of Pennsylvania citizens found in the "bill of rights to our state constitution."[487] Thus, the Pennsylvania Supreme Court in its initial decision granted an injunction against the enforcement in Pennsylvania of the federal draft during the Civil War.[488]

However, Chief Justice Walter Lowrie's term as a judge on the court expired one month after this decision, and the newly appointed judge, Judge William Strong, issued an order with the support of the newly seated Judge Daniel Agnew overruling the injunction against the federal draft.[489] Judge Strong wrote that, "[a]nd now, to wit, January 16th 1864, it is ordered by the court, that the orders heretofore made in all these cases be vacated; and the motions for injunctions are overruled."[490] Another judge in the case, however, Judge George Woodward, could hardly contain his despair over this outcome. Judge Woodward first described the failure of the defendants to even appear at the first hearing or to appeal while Chief Justice Lowrie was in office:

> But though the court sat at Pittsburg [sic] a week after each judge had delivered an opinion, and the interlocutory decree had been entered, and though the commission of Chief Justice Lowrie did not expire until the first Monday of December, yet no motion or effort was made by the defendants to prepare the record to be reviewed; no

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McCarty, a Virginia resident, left Virginia for Maryland. *Id.* at 394. The court concluded that because McCarty had never ceased to be a citizen of Virginia, his importing of Murray into the state was illegal. *Id.* at 400. Thus, the court ruled for Murray's freedom. *Id.*

484. 45 Pa. 238 (1863).

485. *Id.* at 245–46, 252.

486. *Id.* at 300.

487. *Id.* at 259–61 (Woodward, J., concurring).

488. *Id.* at 252 (majority opinion).

489. *Id.* at 300.

490. *Id.* at 295, 300.

> reargument was asked for in this court, no explanation or apology for the non-appearance of the defendants was offered.
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> . . . .
>
> This proceeding is so extraordinary, that I have felt it my duty to mark the several stages of its progress . . . .[491]

Judge Woodward then attacked the court's decision to reverse the previous ruling in no uncertain terms:

> I have said all the citizens of the commonwealth were bound to respect that decree. I include, of course, the judges of this court. A dissenting judge is as much bound by the decrees and judgments of the majority, regularly entered, as the majority themselves. . . .
>
> . . . .
>
> The time and manner of bringing forward this motion would seem to indicate that it was a sort of experiment upon the learned judge who has just taken his seat as the successor of Judge Lowrie. Does anybody suppose it would have been made if Judge Lowrie had been re-elected? I presume not. Are we to understand, then, that whenever an incoming judge is supposed to entertain different opinions on a constitutional question from an outgoing judge, every case that was carried by the vote of the retiring judge is to be torn open, rediscussed, and overthrown? God save the Commonwealth, if such a precedent is to be established![492]

Following his position as associate justice on the Pennsylvania Supreme Court, Judge Strong returned to private practice and then was appointed to the U.S. Supreme Court, where he served with great distinction from 1870 to 1880.[493] The lengthy and separate opinions issued in this case reflect a divided court conscious of its impact on a divisive and political issue. The connection to the Pennsylvania state Lockean Natural Rights Guarantee in this episode is tenuous because the judges do not explicitly cite the provision, but it is clear that they placed great value on the liberty protections in the state constitution, even to the point of striking down a federal draft in the midst of the Civil War.

In sum, litigants and state courts creatively invoked the Lockean Natural Rights Guarantees as supporting a broad range of civil and political rights in the years prior to the adoption of the Fourteenth Amendment in 1868. The cases described above illustrate that many state courts were willing to find substantive rights in their state constitutions' Lockean Natural Rights Guarantees for a variety of actions, and they often did not adopt rigid

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491. *Id.* at 325 (Woodward, J., dissenting).

492. *Id.* at 326, 329.

493. *Strong, William (1808–1895)*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=S001021, *archived at* http://perma.cc/A8R9-BSU5.

definitions or limits in applying those state constitutional Guarantees. In these cases, the Lockean Natural Rights Guarantees in question were interpreted as flexible provisions that ensured basic political and civil rights to state citizens.

VII. Rights Related to Legal Procedures

In this Part, we describe the state case law in regard to rights related to legal procedures. In these seven cases, state supreme courts applied the state constitutional Lockean Natural Rights Guarantees to evaluate the constitutionality of various legislative enactments affecting the legal process directly. Alongside other provisions in their state constitutions, state judiciaries used the Guarantees to (1) prevent legislative encroachment on the appeals process; (2) address legislative interference with final judgments; and (3) preserve basic procedural rights during criminal trials. In a majority of these cases, the courts actually struck down the state legislation in question or ordered that the litigant be afforded the procedural right requested. This shows that, at times, the state courts flexibly interpreted state constitutional Lockean Natural Rights Guarantees to limit legislative power, particularly when it encroached upon the legal process and guarantees of fair legal procedures.

A. The Right of Appeal

The Indiana and Louisiana state supreme courts applied their Lockean Natural Rights Guarantees in considering legislation that affected the right to appeal in those states.[494] The Indiana Supreme Court of Judicature struck down a statute that limited the right to appeal whereas, in contrast, the Louisiana Supreme Court upheld such a statute and described its state Lockean Natural Rights Guarantee as offering only weak protection of rights.

First, in the 1856 case *Madison & Indianapolis Railroad Co. v. Whiteneck*,[495] the Indiana Supreme Court of Judicature evaluated a statute that imposed a monetary penalty and a reduction in the amount of any judgment against plaintiffs who appealed suits for damages resulting from

494. The New Hampshire Supreme Judicial Court struck down a similar statute in *East Kingston v. Towle*, where it held that the legislation in question violated the "principle[s] of natural justice." 48 N.H. 57, 61, 63 (1868). The legislation authorized town selectmen to determine damages against a person whose dog killed someone else's livestock. *Id.* at 58. The dog owner would have no part in the process. *Id.* Thus, relying on natural justice principles, the court found that the legislature had exceeded the scope of its authority. *Id.* at 63. Although the court did not cite the state constitution for evidence of natural rights, the language mirrored the New Hampshire Lockean Natural Rights Guarantee's protection of "natural, essential and inherent rights." N.H. CONST. pt. 1, art. 2 (amended 1974).

495. 8 Ind. 217 (1856).

trains striking and killing their animals.[496] The plaintiff had sued the railroad for "the value of a heifer killed by a locomotive" and then appealed the original judgment.[497] The Indiana Supreme Court of Judicature took the opportunity to expound on the meaning of the Lockean Natural Rights Guarantee in the Indiana state constitution as a limit on the state legislature's power:

> May the judiciary pronounce a law void because of repugnance to the fundamental principles of the government declared in the constitution as being prohibited by implication, though not in express words? Or because of repugnance to the clear scope and intention, the spirit, of express restrictions, as being impliedly embraced by them? These are now the questions. For example, the first section of the article of the bill of rights, declares that all men are endowed with unalienable rights, among which are life, liberty, [etc]. Now, how broad a meaning is to be given to this section? With what view or object was it inserted in the constitution? What should be its interpretation?[498]

The opinion continued with an extensive discussion of the history of European monarchies, and it argued that the American Revolution reacted against absolutism and tyranny in Europe with the nation's Founders using the Declaration of Independence to pointedly endorse the idea that human beings all have certain inherent rights.[499] This idea confirmed the opinions of Sir Edward Coke and of Lord Mansfield that the natural state of mankind under the ancient constitution of England and under the common law was one of freedom except where the law explicitly provided otherwise.[500]

> Men with minds liberalized, enlightened, and invigorated by the perusal of recovered ancient learning, and hearts warmed by the eloquence of ancient freedom, entered upon the study of the science of the rights of man, and arrived at the conclusion that he was possessed of such by nature, which it was tyranny in government to invade.[501]

The Indiana Supreme Court of Judicature specifically referred to the work of Buchanan, Harrington, Milton, Sidney, Fletcher, and Vane, as well as Thomas Paine, Burke, Lieber, and James Mackintosh in its discussion.[502] It declared that the United States, as a nation, had endorsed this view of natural law in the Declaration of Independence holding "these truths to be self-evident," and that this view was affirmed in the Lockean Natural Rights

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496. *Id.* at 218–19.
497. *Id.* at 217.
498. *Id.* at 222–23.
499. *Id.* at 223–26.
500. *See supra* notes 30–32 and accompanying text.
501. *Whiteneck*, 8 Ind. at 224.
502. *Id.* at 224–25.

Guarantees of the various states, including in the Lockean Natural Rights Guarantee of the Indiana state constitution.[503] After citing the Lockean Natural Rights Guarantees in other states' constitutions, the Indiana Supreme Court asked:

> [W]hat force should be conceded to the [Lockean Natural Rights Guarantee]? The purpose for which it was intended appears to be plain enough, and also the great importance attached to it. The monarchies of *Europe* maintained the doctrine that the people had no natural rights, and, hence, might rightfully be controlled at will and without limit by the government. The people in this country denied the doctrine and determined to emancipate themselves from it.
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> . . . .
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> . . . That security they designed should be perpetuated by their constitutions, and particularly by [the Lockean Natural Rights Guarantee].[504]

Thus, the Indiana Lockean Natural Rights Guarantee was read by the court as being a "fundamental provision," which constrained the legislature from violating natural rights.[505] The court reiterated its duty to enforce the Lockean Natural Rights Guarantee as a check against the legislature by declaring:

> Having thus ascertained the intention of the section in question, it is the duty of the Court, so far as consistent with its language, to give effect to it accordingly. The mere demarkation [sic] on parchment of the constitutional limits, is not a sufficient guard against the encroachments of tyrannical legislation.[506]

Curiously, despite the extensive discussion of natural rights,[507] the court did not expressly say that the right to appeal, without paying a penalty for having done so, was a natural right. Nevertheless, the majority held that the Indiana statute in question imposing a penalty for appealing a case was unconstitutional.[508]

In contrast, the Supreme Court of the State of Louisiana reached a different result, upholding legislation imposing a fine for frivolous appeals in the 1839 case *Davis v. Jonti*,[509] one of only two published decisions citing

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503. *Id.* at 225–27.

504. *Id.* at 227.

505. *Id.*

506. *Id.* at 229.

507. The opinion included a numbered listing of what types of legislation would be permissible and which types of legislation might violate the natural rights guaranteed by the Guarantee. *Id.* at 233–35. The dissenting judge pointed out that this discussion was not necessary to the holding. *Id.* at 237–38 (Gookins, J., dissenting).

508. *Id.* at 236.

509. 14 La. 95, 96 (1839).

the Louisiana state constitution's Lockean Natural Rights Guarantee.[510] The state supreme court's brief opinion merely describes the Louisiana legislation in question as imposing a fine for "frivolous appeals," and the court's opinion does not further explain how the legislation in question worked.[511] The court rejected the defendant's constitutional argument stating: "Our constitution states its object to be to secure to all the citizens of the state, the enjoyment of the right of life, liberty and property, and yet citizens are every day imprisoned and fined, and sometimes even deprived of life."[512] Thus, the court seemed to reason that the Louisiana Lockean Natural Rights Guarantee should not be interpreted as providing any substantive protection, and the court held that the legislation in question was in fact constitutional.[513] This decision directly contradicts the Indiana Supreme Court's *Madison* decision described above, but the two statutes are arguably different because of the Louisiana statute's application only to "frivolous" appeals.[514] Perhaps not coincidentally, the subsequent Louisiana constitution passed in 1845 did not include a Lockean Natural Rights Guarantee.[515] In fact, Lockean Natural Rights Guarantee language was not included in the four Louisiana state constitutions of 1845, 1852, 1861, and 1864, but a Lockean Natural Rights Guarantee reemerged in the Reconstruction Era constitution of Louisiana in 1868,[516] after the Thirteenth Amendment had made slavery unconstitutional.[517]

B. Legislative Interference with Final Judgments

In two cases, state supreme courts addressed state legislative attempts to interfere with final judgments issued by courts. First, in *Denny v. Mattoon*,[518] the Massachusetts Supreme Judicial Court invoked the Massachusetts

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510. *Id.*; *see also infra* note 700.

511. *Davis*, 14 La. at 96.

512. *Id.* At this time, the Louisiana Lockean Natural Rights Guarantee stated:

> In order to secure to all citizens thereof the enjoyment of the right of life, liberty and property, do ordain and establish the following constitution or form of government, and do mutually agree with each other to form ourselves into a free and independent State, by the name of the State of Louisiana.

LA. CONST. of 1812, pmbl.

513. *Davis*, 14 La. at 96.

514. *Compare* Madison & Indianapolis R.R. Co. v. Whiteneck, 8 Ind. 217, 236 (1856) (holding the appeal penalty statute unconstitutional), *with Davis*, 14 La. at 96 (holding the "frivolous" appeals penalty statute constitutional).

515. LA. CONST. of 1845, pmbl.

516. *Compare* LA. CONST. of 1868, tit. 1, art. 1 ("All men are created free and equal, and have certain inalienable rights; among these are life, liberty, and the pursuit of happiness . . . ."), *with* LA. CONST. of 1864 (containing no similar Guarantee language), LA. CONST. of 1861 (same), *and* LA. CONST. of 1852 (same).

517. U.S. CONST. amend. XIII.

518. 84 Mass. (2 Allen) 361 (1861).

Lockean Natural Rights Guarantee's protection of property rights to strike down Massachusetts state legislation invalidating a judicial opinion.[519] In this bankruptcy case, Judge Horace Hodges had issued an order that was later declared invalid for lack of jurisdiction.[520] The case was then reheard by another judge in a different county, Judge Charles Mattoon, who issued a separate order considered to be the binding order.[521] However, shortly thereafter, the legislature of the State of Massachusetts passed a statute declaring that Hodges's decision was actually the valid and controlling decision.[522] The Massachusetts Supreme Judicial Court described several provisions of the state's constitution as providing independent grounds to strike down the legislation in question.[523] The Massachusetts Supreme Judicial Court relied on the state constitution's separation of powers principles and its due process clause.[524] The court also cited the Massachusetts Lockean Natural Rights Guarantee's property protections as justification for striking down the legislature's interference in state judicial decisions:

> [This legislation] takes away from a subject his property, not by due process of law or the law of the land, but by an arbitrary exercise of legislative will. Under our Constitution the right of the legislature to interfere with vested rights and to deprive persons of their estate is not left to implication. Not only is the right of acquiring, possessing and protecting property declared to be among the essential and unalienable rights of all men [i.e., the Lockean Natural Rights Guarantee], but also, by the twelfth article of the Declaration of Rights, the great principle is enunciated that no subject shall be deprived of his property or estate but "by the judgment of his peers, or the law of the land."[525]

Therefore, the court concluded that the Massachusetts legislation unconstitutionally deprived the debtor of his property, which was protected by the state constitution's Lockean Natural Rights Guarantee.[526]

In *G. & D. Taylor & Co. v. Place*,[527] the Rhode Island Supreme Court invoked its very watered-down quasi-Lockean Natural Rights Guarantee to inform its reading of the separation of powers-like provisions in the Rhode Island constitution and to strike down Rhode Island legislation that opened

519. *Id.* at 366–68.
520. *Id.* at 362.
521. *Id.*
522. *Id.* at 363.
523. *Id.* at 365–66.
524. *Id.* at 366–67.
525. *Id.* at 381.
526. *Id.* at 382.
527. 4 R.I. 324 (1856).

judgments against garnishees and set aside verdicts.[528] The opinion first declared that "[i]t is hardly necessary . . . to use arguments or to cite authorities to show that thus to set aside a verdict and grant a new trial in a suit at law . . . is the exercise of judicial power."[529] After noting the history, precedents, and state constitutional language implying the separation of powers, the court concluded that the legislation was "judicial power of the most eminent and controlling character."[530] The Rhode Island Supreme Court then turned to the weak Guarantee-like language to add weight to its reading of the separation of powers provisions. As discussed previously, the Rhode Island Guarantee language did not specify any particular rights but simply emphasized that the state constitution must be of "paramount obligation in all legislative, judicial and executive proceedings."[531] The *Place* court invoked this language to argue that enforcing Rhode Island's weak separation of powers principles must be seen as a "paramount obligation" not a "mere 'parchment barrier' against the enterprising ambition of the legislative department of the government."[532] The Rhode Island Supreme Court used the state's weak Lockean Natural Rights Guarantee-like constitutional language to emphasize its obligation to enforce other principles in its constitution.[533] These two cases demonstrate the state courts' flexible applications of their Lockean Natural Rights Guarantee or weak quasi-Guarantee language to limit legislative power and to preserve the judicial power of the courts.

C. *Procedural Rights During Legal Proceedings*

Three additional cases applied state constitutional Lockean Natural Rights Guarantees to preserve other basic procedural rights during legal proceedings. Two cases applied state Lockean Natural Rights Guarantees to ensure procedural protections for criminal defendants during their trials.[534]

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528. *Id.* at 325–26, 364.

529. *Id.* at 331.

530. *Id.* at 332–39.

531. R.I. CONST. of 1841, art. 1, pmbl.; *see also supra* Appendix A.

532. *Place*, 4 R.I. at 345, 354.

533. *Id.* at 345–47.

534. The Lockean Natural Rights Guarantee was arguably invoked in five additional criminal cases. In the Vermont Supreme Court of Judicature's 1802 case, *State v. J.H.*, the court quashed an arrest warrant based on testimony that was taken without an oath. 1 Tyl. 444, 445, 448 (Vt. 1802). The court highlighted the "unalienable rights" guarantee in the state constitution:

> By our successful struggles for independence, from colonies we have become a nation; and it is curious to observe, that all the State Constitutions bear the marks of our former political servitude. The evils we feared or experienced as colonists, are scrupulously guarded against by bills of unalienable rights, when to the reflecting mind it is apparent, that few or none of those evils are experienced or to be apprehended in our state of sovereignty.

Id. at 447.

One additional case applied a Lockean Natural Rights Guarantee to provide procedural protections during a civil proceeding.

In the first case regarding criminal defendants' rights during trial, *Commonwealth v. Anthes*,[535] the Massachusetts Supreme Judicial Court cited the Massachusetts Lockean Natural Rights Guarantee in striking down an 1855 statute which gave the jury the authority in all criminal cases to decide "both the law and the fact involved in the issue."[536] The majority of the Supreme Judicial Court emphasized that it is the judiciary that has the sole authority to decide questions of law in order to ensure the equal application of all of the laws to every citizen.[537] Along with an extensive discussion of common law tradition and other Massachusetts Declaration of Rights provisions, including provisions guaranteeing due process rights, trial rights, and the impartial administration of justice, the Supreme Judicial Court also cited the Massachusetts Lockean Natural Rights Guarantee contained in the preamble as providing a constitutional basis for this principle:

In 1851, the Maine Supreme Judicial Court referred to language in the Guarantee while giving jury instructions in *State v. Smith*. 32 Me. 369, 372 (1851). The defendant was being prosecuted for murder in the death of a woman following an abortion attempt. *Id.* at 370. The chief justice instructed the jury: "If you disregard the law, the promises which it makes to the citizen, of life, liberty and the pursuit of happiness, become unreliable." *Id.* at 372. Life, liberty, and the pursuit of happiness were included in Maine's Lockean Natural Rights Guarantee, but the court did not cite the Guarantee specifically. ME. CONST. art. 1, § 1 (amended 1988).

In the third case, in 1853 before the Pennsylvania Supreme Court, the defendant in *Purcell v. Commonwealth* argued that his absence during sentencing was unconstitutional because it deprived him of an "inherent and inalienable right[]" to be present. 1 Walk. 243, 245 (Pa. 1853). It is not clear whether this one-sentence opinion was referring to the inherent and inalienable rights secured by Pennsylvania's Guarantee. PA. CONST. of 1790, art. IX, § 1.

In the fourth case, *Caldwell v. State*, the Alabama Supreme Court reviewed a conviction for murder. 1 Stew. & P. 327, 327 (Ala. 1832). The defendant argued that the court did not have jurisdiction over the crime because it occurred on lands belonging to the Creek Indian tribe. *Id.* at 327–28. The court held that it did have jurisdiction, which was necessary to enforce the "inalienable rights" of Alabama citizens. *Id.* at 435, 440 (opinion of Taylor, J.). But it is unlikely that the court was referring to the Guarantee because the version in the constitution at the time (the 1819 constitution) did not include a reference to inalienable rights. ALA. CONST. of 1819, pmbl.

In the final case, the Pennsylvania Supreme Court arguably used its Guarantee language to describe the importance of protection from double jeopardy in its 1822 opinion in *Commonwealth v. Cook*. 6 Serg. & Rawle 577, 595–96 (Pa. 1822). In describing the meaning of the prohibition against double jeopardy, the court emphasized the importance of the principle by describing it as a "general great and essential principle[] of liberty." *Id.* at 596. Although it did not explicitly cite the Lockean Natural Rights Guarantee, it is likely that these terms were used to refer to the Guarantee language in Pennsylvania's Preamble: "That the general, great and essential principles of liberty and free government may be recognized and unalterably established, we declare." PA. CONST. of 1790, art. IX. This language was unaltered in the 1838 constitution. PA. CONST. of 1838, art. IX, pmbl.

535. 71 Mass. (5 Gray) 185 (1855).

536. *Id.* at 236.

537. *Id.* at 191–92.

> Another leading idea which pervades the whole system—Preamble, Declaration of Rights and Frame of Government—is the absolute necessity to the peace, harmony and tranquility of the citizens of a free government that the laws under which they live be fixed and settled. [The Framers] manifestly had in view the consideration often alluded to in works popular at the time, expatiating on the misery and wretchedness of a people where the laws are uncertain, vague and fluctuating, prescribing one rule to one man and a different one to another, this day punishing and tomorrow exempting from punishment, under the same circumstances, so that no man, be he ever so honest, can know by what rule of law to square his conduct, faithfully perform his social duty, and avoid the penalties of the law.[538]

Thus, the Massachusetts Supreme Court relied on the state constitution's Lockean Natural Rights Guarantee, along with other constitutional guarantees, to require that the laws be applied equally to all state citizens and that the judiciary be the decider of issues of law in criminal cases.[539]

A similar issue arose in the State of Virginia in 1827 in a case called *Word v. Commonwealth*.[540] In that case, a criminal defendant invoked the Virginia constitution's Lockean Natural Rights Guarantee to argue for his right to appear at trial in his own defense.[541] Counsel for the juvenile criminal argued that the right to appear at trial in your own defense was guaranteed by Virginia's Lockean Natural Rights Guarantee:

> [I]t will be impossible to find any reason of policy, much more any reason of law, why the privilege of the citizen to defend his *property*, upon the question of fact before the jury, against the claim of his neighbour, or an amercement at the suit of the commonwealth, should be more restricted, (in the regard in which we are now considering it), than his privilege to defend his *liberty* or his *life* in prosecutions for crime. To allow the distinction, will be to reverse the known principle of the common law, which allowed counsel to the parties in a civil action and to those who were accused of misdemeanours, and denied counsel to persons accused of felonies—counsel, I mean, to argue the questions of fact upon the evidence before the jury. *Property*, if it be not as valuable, is just as sacred a right, as *liberty* or *life*. All civilized nations so regard it; and the bill of rights of *Virginia*, particularly, ranks in the same class, and secures on the same footing, "the enjoyment of *life* and *liberty*, with *the means of acquiring and possessing property*, and obtaining happiness and safety." Surely, this

538. *Id.* at 223–24. This discussion also cited statements by President Adams and Beccaria's *On Crimes and Punishment* in support of this principle. *Id.* at 224–25.

539. *Id.* at 235–36.

540. 30 Va. (3 Leigh) 743 (1827).

541. *Id.* at 759.

> court will not give its sanction to a distinction between the means of *acquiring* and *possessing*, and the means of *defending*, property: and surely, too, the *plus* or *minus* cannot vary the principle.[542]

The Virginia state court in this case simply concluded that criminal proceedings against juveniles should "be conducted in the same manner as against persons of full age" and that every criminal has the right to be heard.[543] The Virginia court did not address the Lockean Natural Rights Guarantee argument and other points made in this case by counsel, saying that "[w]e deem it unnecessary, however, to enter more at large into an investigation of the subject, since we have no difficulty in deciding [it]."[544] It is nonetheless revealing that a litigant relied on Lockean Natural Rights Guarantee language in arguing for a criminal procedural right.

Litigants also invoked the Lockean Natural Rights Guarantees in civil legal proceedings.[545] In *Berger v. Smull*, the Pennsylvania Supreme Court

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542. *Id.* at 754–55.

543. *Id.* at 759.

544. *Id.* at 760.

545. In addition to the case discussed here, several other cases invoked Lockean-like guarantees related to legal process rights in civil legal proceedings. First, in *Hunt v. Lucas*, the defendant challenged Massachusetts legislation requiring him to submit an affidavit to the court within ten days of receiving legal service in order to avoid a default judgment. 99 Mass. 404, 404–05 (1868). The opinion does not specify what type of service that defendant received, only that it was "legal." *Id.* at 404. The defendant argued that this requirement violated the inalienable right to protect property:

> By the Constitution, all men have certain inalienable rights, of which they can be lawfully deprived neither by legislators nor by courts. One of these is the right of protecting property. When that property is menaced by suit brought, every citizen has the right of protecting it in court without denial or needless hindrance; and can be deprived of it only in accordance with the settled course of judicial proceeding, and by the ultimate decision of the court upon the matter of law, and of the jury upon the matter of fact.

Id. at 405. Although the defendant did not cite the specific Lockean Natural Rights Guarantee section of the constitution, his use of the terms "inalienable rights" and "protecting property" appear to be referring to the language of the Massachusetts Lockean Natural Rights Guarantee. MASS. CONST. pt. 1, art. 1 (amended 1976). The Massachusetts Supreme Judicial Court did not specifically address the Guarantee argument and held that the statute was constitutional. *Id.* at 412. It explained that the new pleading requirement was no different from other pleading requirements historically upheld. *Id.* at 410. The court itself seemed to be in favor of the procedural change, noting that affidavits were helpful because they "ha[ve] proved to be expedient and useful." *Id.* at 412.

In *Wilkins v. Treynor*, the plaintiff dismissed his action of replevin against the defendant, reinstated the action to assess his damages, and then demanded a jury trial as his "inalienable" right. 14 Iowa 391, 392 (1862). The Iowa Supreme Court held that the right to jury trial can be waived or forfeited in certain circumstances, and the plaintiff had lost this right when he dismissed the original action. *Id.* at 393.

In *Insurance Co. of Valley of Virginia v. Barley's Administrator*, the Virginia Supreme Court of Appeals called the "right of parties to make and accept confessions of judgment, and thereby to terminate litigation between them . . . a right inherent in the members of society" and "one of a fundamental character." 57 Va. (16 Gratt.) 363, 365–67 (1863).

held that the Pennsylvania Act of 1842 requiring defendants to verify their answers in creditor–debtor proceedings with an oath did not violate the indefeasible rights guaranteed by the Guarantee.[546] The plaintiff argued that

> [The Lockean Natural Rights Guarantee in the Pennsylvania constitution] is to be taken as pervading all legislation, as completely as do the doctrines of the common law, from which it was derived. Whether a given proceeding is criminal or penal, is to be judged, not by its name or form, but by its effects upon those "indefeasible rights" of "life and liberty," "property and reputation," so carefully defined and secured in [the Pennsylvania constitution].[547]

The Pennsylvania Supreme Court did not specifically respond to the litigant's Lockean Natural Rights Guarantee argument. Instead, it upheld the statute on the grounds that the oath requirement did not create any "conclusive effect" and was instead "only evidence" that the court would use in adjudicating the dispute.[548] Therefore, it concluded that no natural or constitutional rights of the citizen were violated by the statute.[549]

Litigants invoked their state constitutions' Lockean Natural Rights Guarantees to argue for procedural rights on a variety of subjects. In cases of legislative overreach, state courts applied the Guarantees as a constitutional basis to invalidate legislation that disrupted basic judicial functions, like the right to appeal or to final judgments. These cases suggest that state courts did sometimes interpret the Lockean Natural Rights Guarantees to protect the legal process and that their meaning was flexible enough to invalidate legislation that invaded the judicial sphere of power. In these respects, the cases here foreshadowed the U.S. Supreme Court's decision in *Plaut v. Spendthrift Farm, Inc.*,[550] in which Justice Scalia's opinion for the Court denied the legislature power to reopen final judicial judgments.[551]

VIII. Liquor Laws

In this Part, we describe what turns out to be a very large body of case law applying the Lockean Natural Rights Guarantees to liquor laws. Eight

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The New Hampshire Supreme Judicial Court considered the appropriate procedures for the appointment of guardians in *Kimball v. Fisk*, 39 N.H. 110, 116–17 (1859). The court expressed concern over the guardian's appointment, stating that "in a case involving the right to liberty and the control and enjoyment of a man's property, nothing should be left to presumptions." *Id.* at 118. Because the probate court acted within its jurisdiction, the court refused to invalidate the proceedings. *Id.* at 119–20, 123. It is not clear whether this statement about enjoyment of property refers to the Lockean Natural Rights Guarantee.

546. 39 Pa. 302, 315–16 (1861).

547. *Id.* at 309.

548. *Id.* at 316.

549. *Id.* at 315–17.

550. 514 U.S. 211 (1995).

551. *Id.* at 227–28.

different state supreme courts adjudicated constitutional challenges to liquor laws, issuing opinions explicitly citing some portion of the Lockean Natural Rights Guarantees of their respective state constitutions. In every state except Indiana, the liquor laws were upheld as reasonable exercises of the police power to promote the public benefit. Nevertheless, the repeated challenges to the constitutionality of liquor-regulation laws in many states suggest a widespread perception that alcohol regulation could potentially infringe upon the rights of liberty or property protected by state constitutional Lockean Natural Rights Guarantees. This also informs our understanding of how the Framers of the Fourteenth Amendment viewed liberty and property in relation to substance control and is thus clearly of relevance to modern debates about the outlawing of controlled substances such as homegrown medical marijuana.[552] Although we limit this Article to summarizing historical evidence, the potential relevance of this case law to modern debates on whether there is a constitutional right in some situations to use marijuana and other drugs is clear.

A. Liquor Laws Unconstitutional

In a series of cases, the Indiana Supreme Court of Judicature consistently struck down Indiana state liquor laws as unconstitutional under the Indiana Lockean Natural Rights Guarantee. Unlike the majority of the liquor law cases in other states, the Indiana Supreme Court of Judicature evaluated and struck down the laws in question under the liberty guarantee of Indiana's Lockean Natural Rights Guarantee rather than relying on its protections for property. Indiana's Lockean Natural Rights Guarantee was a variation from the typical form in that it only explicitly included the rights to "life, liberty, and the pursuit of happiness," and it therefore did not explicitly protect the right to property.[553] This probably explains the court's unique focus on liberty interests in its alcohol-related decisions.

In the earliest case, *Herman v. State*,[554] the defendant used a habeas petition to argue that an Indiana liquor-regulation statute was unconstitutional.[555] Herman was arrested for violating an Indiana state liquor law,

552. *See* Gonzales v. Raich, 545 U.S. 1, 16–19 (2005) (upholding the federal Controlled Substances Act by a vote of six to three against an enumerated powers challenge).

553. Indiana's Lockean Natural Rights Guarantee states:

> We declare, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the People; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well being.

IND. CONST. art. 1, § 1 (amended 1984).

554. 8 Ind. 545 (1855).

555. *Id.* at 545.

which prohibited the manufacture and sale of "whisky, ale, porter, and beer," with an exception for medicinal use.[556]

The Indiana Supreme Court of Judicature looked to the state constitution, and specifically to the Lockean Natural Rights Guarantee of the Indiana constitution, to assess the constitutionality of the statute:

> The first section of the first article declares, that all men are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. Under our constitution, then, we all have some natural rights that have not been surrendered, and which government cannot deprive us of, unless we shall first forfeit them by our crimes; and to secure to us the enjoyment of these rights, is the great end and aim of the constitution itself.[557]

The court then considered what was specifically protected by the Guarantee and made a sweeping declaration on the nature of the liberty and pursuit of happiness rights:

> We lay down this proposition, then, as applicable to the present case; that the right of liberty and pursuing happiness secured by the constitution, embraces the right, in each *compos mentis* individual, of selecting what he will eat and drink, in short, his beverages .... If the constitution does not secure this right to the people, it secures nothing of value. If the people are subject to be controlled by the legislature in the matter of their beverages, so they are as to their articles of dress, and in their hours of sleeping and waking. And if the people are incompetent to select their own beverages, they are also incompetent to determine anything in relation to their living, and should be placed at once in a state of pupilage to a set of government sumptuary officers; eulogies upon the dignity of human nature should cease; and the doctrine of the competency of the people for self-government be declared a deluding rhetorical flourish.[558]

The *Herman* court also looked to historical evidence to support its interpretation of the Lockean Natural Rights Guarantee of the Indiana constitution. The Indiana Supreme Court of Judicature cited legislative history from the state's constitutional convention noting that the prohibition of alcohol was proposed at the constitutional convention and that this proposal was repeatedly rejected.[559] The Indiana Supreme Court of Judicature also pointed out that "fifty distilleries and breweries, in which a half a million of dollars was invested, and five hundred men were employed"

556. *Id.* at 547.
557. *Id.* at 556–57.
558. *Id.* at 558–59.
559. *Id.* at 559.

existed when the constitution was adopted.[560] Finally, the Indiana Supreme Court described the consumption and use of liquor throughout history, including in Europe, Egypt, Spain, and in the history of Anglo-Saxon and Danish culture.[561] (This alone is striking given recent debates on the U.S. Supreme Court about the propriety of consulting foreign law.) Therefore, the Indiana Supreme Court of Judicature concluded that the law prohibiting the manufacture of liquor was an unconstitutional violation of the Lockean Natural Rights Guarantee liberty provision.[562]

A few months later, the Indiana Supreme Court of Judicature reiterated its stance on the liberty rights contained in its Lockean Natural Rights Guarantee in *Beebe v. State*.[563] Roderick Beebe was held in custody for violating the prohibition against liquor and sued on a writ of habeas corpus claiming that the law was unconstitutional.[564] Judge Samuel Perkins's opinion explained that the Indiana Lockean Natural Rights Guarantee provided substantive natural law rights to Indiana citizens:

> The first section of the first article declares, that "all men are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness." Under our constitution, then, we all have some rights that have not been surrendered, which are consequently reserved, and which government can not deprive us of unless we shall first forfeit them by our crimes; and to secure to us the enjoyment of those rights is the great aim and end of the constitution itself.
>
> It thus appears conceded that rights existed anterior to the constitution; that we did not derive them from it, but established it to secure to us the enjoyment of them. And it here becomes important to ascertain with some degree of precision what these reserved natural rights are. To do this we must have recourse to the common law, as the section was undoubtedly inserted in the constitution with reference to it. Counsel, in the argument of this cause, on the part of the state, it is true, deny the existence of any such rights in *Indiana*. Our answer is, the constitution above quoted has settled the point here; and a legislature, acting under that instrument, is estopped by its solemn declaration to deny the existence of the natural rights there asserted. That assertion, while it remains, is binding within the territory of *Indiana*.[565]

560. *Id.*

561. *Id.* at 560.

562. *Id.* at 567.

563. Beebe v. State, 6 Ind. 501, 518 (1855) (opinion of Perkins, J.), *overruled in part by* Schmitt v. F.W. Cook Brewing Co., 187 Ind. 623, 628–69 (1918).

564. *Id.* at 501.

565. *Id.* at 510.

Judge Perkins also responded to the State's argument that alcohol prohibition laws were necessary to preserve the public health, stating that "as a beverage, [alcohol] is not necessarily hurtful, any more than the use of lemonade or ice-cream. . . . It is the abuse, and not the use, of all these beverages that is hurtful."[566] He analogized liquor to other items that can be abused, including axes or firearms, which can be abused to kill people, and fists, which can be abused to fight.[567] He concluded that Indiana's legislature had "overstepped" its authority with the liquor law.[568]

In a separate opinion, Judge William Stuart interpreted the Lockean Natural Rights Guarantee as implying a right to property:

> To prevent misconception, the first section of the bill of rights is quoted entire:
>
> "SEC. 1. We declare, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety and well-being. For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government."
>
> According to all publicists, the right to hold and enjoy private property is among the unalienable rights. In the constitution of 1816, the right "of acquiring, possessing and protecting property," was expressly enumerated.
>
> It becomes important, therefore, to inquire, in what sense are the rights of life, liberty and property said to be unalienable?[569]

He then held that because the law prevented manufacturing liquor, it invaded the property rights secured by the Indiana constitution.[570] The *Beebe* precedent was then implemented in six additional Indiana cases striking down liquor laws as unconstitutional.[571] This constitutes one of the most striking instances in American history of the invocation of a Lockean Natural Rights Guarantee.

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566. *Id.* at 520 (citation omitted).

567. *Id.*

568. *Id.* at 519.

569. *Id.* at 523 (opinion of Stuart, J.).

570. *Id.* at 538.

571. Hollenbaugh v. State, 11 Ind. 556, 557 (1859); O'Daily v. State, 10 Ind. 572, 572 (1858); Turner v. State, 10 Ind. 60, 60 (1858); Crossinger v. State, 9 Ind. 557, 557 (1857); Eigenmann v. State, 9 Ind. 510, 510 (1857); O'Daily v. State, 9 Ind. 494, 494–95 (1857). It is not clear why these cases continued to reach the Indiana Supreme Court of Judicature. Each case contains a single sentence opinion applying the prior precedents finding the liquor law unconstitutional.

The Indiana Supreme Court's invalidation of alcohol control laws calls to mind Sir Edward Coke's and Lord Mansfield's arguments in *The Case of the Monopolies*, *Dr. Bonham's Case*, and *Somerset's Case*, in all of which these famous English judges argued for what Professor Randy Barnett calls a "Presumption of Liberty."[572] Professor Barnett's argument is powerfully supported by the Indiana Supreme Court's decisions in these liquor-law Lockean Natural Rights Guarantee cases.

B. Liquor Laws Constitutional

Nonetheless, in a majority of states liquor laws were upheld in the face of Lockean Natural Rights Guarantee challenges. This was the outcome in particular in the states of Iowa, Vermont, Massachusetts, Delaware, Maine, Alabama, and Ohio.[573] Although the state courts in these states acknowledged that their state constitutions contained certain Lockean Natural Rights Guarantee property protections, the state courts in question nonetheless concluded that various alcohol-control laws fit comfortably within the state's general police power to regulate property for public health and safety.

In a leading case, *Santo v. State*,[574] the Iowa Supreme Court ruled in 1855 that the state's liquor law did not violate the property rights secured by the Iowa constitution's Lockean Natural Rights Guarantee.[575] Santo challenged the 1855 Act for the Suppression of Intemperance, which allowed the state to seize liquor and other alcohol intended for sale.[576] The attorney general defended the Act, arguing:

> It is contended that the law violates section 1st of the "bill of rights;" that it restricts the right of acquiring, possessing, and protecting property. To this, I answer, that while all men possess these rights under the constitution, yet no man can, in the exercise of what he conceives to be *his* constitutional rights, use his property, or enjoy it, in such a manner as to debar others of their rights. When the public good demands it, all are required to surrender certain natural rights, for the mutual benefit of the whole people. It is no violation of this

572. RANDY E. BARNETT, LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 259 (2004).

573. The Connecticut Supreme Court of Errors also upheld that state's liquor law prohibiting any person from owning or keeping alcohol with intent to sell it in *State v. Wheeler*. 25 Conn. 290, 298–99 (1856). Although the defendant argued that it violated "fundamental principles of civil liberty," the court held that the legislature was exercising "the power possessed by every sovereign state, to provide by law, as it shall deem fit, for the health, morals, peace and general welfare of the state." *Id.* at 297–98. The defendant may have been referring to Connecticut's generic liberty guarantee of "the great and essential principles of liberty and free government," CONN. CONST. of 1818, art. 1, but the court did not address the liberty argument.

574. 2 Iowa 165 (1855).

575. *Id.* at 214–15.

576. *Id.* at 167.

> section of the bill of rights, for the legislature to say, that one man shall not sell to another unwholesome bread, or meat, or that he shall not manufacture and sell intoxicating liquors; because, in the exercise of the discretionary power vested in the people of the state, by the constitution, they have the right to say what laws shall be enacted for the "*benefit, security, and protection of themselves, and for the public good.*"[577]

In its opinion upholding the Iowa statute, the court endorsed the State's argument and expressed its faith in the legislature to pass laws for the public benefit:

> [T]o the objections based on the constitutional provisions concerning the right to acquire and protect property . . . . The legislative power is the supreme judge and guardian of the public health, safety, happiness, and morals; and if the traffic in certain property is held detrimental and dangerous to these, it may be prohibited, and such property illicitly held, kept or used, may be declared forfeited, and being forfeited, may be destroyed; and this is not taking private property for public use, in any sense which any one attaches to the constitution.[578]

Therefore, the court concluded that the statute allowing seizure of alcohol intended for sale was constitutional.[579] The Iowa Supreme Court applied this precedent to a subsequent constitutional challenge to Iowa's liquor laws in its 1856 decision in *Sanders v. State*.[580] Thus, the Iowa

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577. *Id.* at 184–85.

578. *Id.* at 216–17.

579. *Id.* at 219.

580. 2 Iowa 230, 277 (1856). The court did not specifically address *Sanders*'s specific Lockean Natural Rights Guarantee argument: "How can a man acquire property in a more legitimate manner, than by purchase? Yet he is restrained from purchasing, by reason of a penal statute prohibiting the sale of the article of property, which the declaration of rights says he may *acquire, possess and protect*." *Id.* at 235.

In addition, the Iowa Supreme Court had previously made similar, but more abbreviated, statements in the 1853 case *Our House, No. 2 v. State*. 4 Greene 172, 174 (Iowa 1853). Our House challenged its indictment under a statute that outlawed the sale of liquor by the glass and, thus, effectively prohibited dram shops. *Id.* at 173–74. The court upheld the statute as providing a public benefit:

> The statute is intended as a great public benefit. It seeks to abolish a general and growing evil, which is having a most degrading effect upon the moral and physical condition of our race. It seeks to keep men from the common use of those intoxicating and poisonous beverages which so frequently lead to the ruin of property, character and health, and are proved to be the leading incentives to crime. It seeks to promote the general welfare, by prohibiting an excessive vice . . . from which can be traced most of the outrages upon those unalienable rights of life, liberty, property, safety and happiness, which our constitution claims to protect.

Id. at 174. Although the Guarantee is not cited specifically, the reference to the unalienable rights of life, liberty, property, safety, and happiness is likely referring to the Guarantee's listing of those rights. IOWA CONST. of 1846, art. 2, § 1.

Supreme Court held that the state's liquor laws were constitutional.[581]

The Vermont Supreme Court weighed in on the liquor laws debate in the 1855 case of *Lincoln v. Smith*,[582] where it upheld an 1852 state statute prohibiting traffic in liquor and authorizing the seizure of alcohol kept for the purpose of sale.[583] In this case, Lincoln argued that the seizure of one barrel of rum and eight barrels of cider from his home was an unconstitutional violation of the Lockean Natural Rights Guarantee of the Vermont constitution.[584] In response, the Vermont Supreme Court explained that Lincoln's Guarantee rights were subject to legislative regulation:

> This article declares that all men have certain, natural, inherent and inalienable rights, among which is the enjoying and defending of life and liberty, and of acquiring, possessing and protecting property. This article seems to be a recitation of some of the natural rights of men before entering into the social compact. But these rights may be controlled or modified by the laws of the land. In the language of Judge BLACKSTONE, "they are absolute and inherent rights without any control, or diminution; save only by the laws of the land." It might as well be claimed, that the law punishing murder with death, or the laws restraining the liberty of the subject for any of the lesser offences, are violations of this article in the bill of rights, as the act in question provided, in other respects it is a valid law. The right to life, liberty and property are all placed in the same connection; and certainly the two former are as sacred as the latter; although they have not seemed at all times to have called out the same legal acumen in their behalf, as the latter.[585]

As a result, the statute prohibiting the keeping of liquor for sales was found to be constitutional.[586]

This decision relying on Blackstone to essentially eliminate Vermont's Lockean Natural Rights Guarantee and its presumption of liberty seems to us to be wrong in that the framing generation was far more influenced by the presumption of liberty made by the common law in such leading cases written by Sir Edward Coke and Lord Mansfield as *The Case of the Monopolies*,

581. *Sanders*, 2 Iowa at 277.
582. 27 Vt. 328 (1855).
583. *Id.* at 332–33, 362–63.
584. *Id.* at 331–33.
585. *Id.* at 340–41.
586. *Id.* at 362–63.

Dr. Bonham's Case, and *Somerset's Case*.[587] Blackstone was a Tory while Coke, Lord Mansfield, and the American revolutionaries were all Whigs.[588]

The courts in the State of Delaware reached a similar result. In 1856, in *State v. Allmond*,[589] the Delaware Court of General Sessions of the Peace and Jail Delivery upheld the Delaware Act of 1855, which prohibited the sale of liquor for any purpose other than "mechanical, chemical and medicinal."[590] Allmond challenged his indictment, arguing that the legislature did not have the power to restrict sales of liquor.[591] Citing the Lockean Natural Rights Guarantee in the Delaware constitution, he argued that legislation must fulfill one of the stated goals of government: "[E]njoying and defending life and liberty, of acquiring and protecting reputation and property, and in general, of attaining objects suitable to their condition, without injury by one to another."[592] He argued that because the state prohibited both the buying and selling of liquor, it destroyed the value of his property as well as his inherent right to acquire alcohol.[593] According to Allmond, this "was unquestionably the same thing substantially as the destruction of the property itself."[594]

The court firmly rejected the argument that the right to sell was inherent in the right to property: "The vendible quality of a thing is not of the substance of the thing in such sense that they may not be lawfully separated, and the right to have or own a thing does not oblige the State to furnish a market for its sale."[595] It found in addition that the state's police power was not only consistent with the Lockean Natural Rights Guarantee but also that it affirmatively helped to preserve the rights protected by the Guarantee:

> The innate or natural rights are comprehensively referred to in our Bill of Rights, which is believed to embrace, to the full extent, this idea of a higher law, or the existence of rights paramount to the constitution itself. "Through Divine Goodness (says the preamble to the constitution) all men have by nature the rights of worshipping and serving their Creator according to their consciences, of enjoying and defending life and liberty, of acquiring and protecting reputation and property, and in general of attaining objects suitable to their condition,

587. *See supra* note 573 and accompanying text.

588. For an introduction to English constitutional political theories that gave rise to American revolutionary thinking, see generally David N. Mayer, *The English Radical Whig Origins of American Constitutionalism*, 70 WASH. U. L.Q. 131 (1992).

589. 7 Del. (2 Houst.) 612 (Ct. General Sessions 1856).

590. *Id.* at 613.

591. *Id.*

592. *Id.* at 614–15 (internal quotation marks omitted).

593. *Id.* at 615.

594. *Id.* at 616.

595. *Id.* at 641.

> without injury one to another, and as these rights are essential to their welfare, for the due exercise thereof, power is inherent in them."
>
> But the great law of social self preservation is equally a paramount law essential to the enjoyment of the natural rights thus declared to belong to "all men[."] Freedom of conscience cannot be secured; life and liberty cannot be enjoyed and defended; nor property and reputation acquired and protected, unless society has the power to compel its members to respect these rights by imposing sanctions, which, in the due course of law, shall even take away from those who would prevent others from the enjoyment of them, the rights thus declared to be natural rights, and which in fact constitute the existence of the social system.[596]

Thus, the court affirmed the police power of the Delaware state legislature to enact statutes that "prevent the acquisition of such kinds of property as it considers so dangerous as to require such prohibition."[597] It analogized the Delaware liquor-control law to regulations on "[p]oisonous drugs; unwholesome food; infected goods; demoralizing books or prints; combustible and explosive substances; dangerous animals; and every species of property."[598]

The Massachusetts Supreme Judicial Court also found that that state's liquor-control laws were constitutional exercises of the state's police power. In the earliest Massachusetts case, *Commonwealth v. Blackington*,[599] the court upheld an 1836 statute requiring that vendors of alcohol be licensed under the statutory scheme.[600] The court rejected the defendant's Lockean Natural Rights Guarantee argument, and compared the regulation to other, less controversial licensing schemes:

> The first argument of the defendant was founded on the preamble of the constitution, which announces one of its great objects to be, to secure to individuals the power of enjoying in safety and tranquility their natural rights, one of the most important of which is, that of acquiring, possessing and protecting property. This is one of those general truths, which both legislators and people should keep constantly in view, and therefore properly finds its place in a declaration of rights. But it is by no means repugnant to any salutary laws, designed to regulate the means of acquiring property; and a large proportion of all the laws which have been passed, since the adoption

596. *Id.* at 631–32.
597. *Id.* at 632–33.
598. *Id.* at 641.
599. 41 Mass. (24 Pick.) 352 (1837).
600. *Id.* at 352, 358–59.

> of the constitution, have related, more or less directly, to the acquisition, preservation and transmission of property.[601]

In upholding the Massachusetts liquor control law, the court specifically analogized the liquor law to inspection laws for agricultural products and to laws regulating the practice of skilled professions, including doctors, lawyers, ferrymen, steamboat operators, railroad, and others.[602]

About two decades later in *Fisher v. McGirr*,[603] the Massachusetts Supreme Judicial Court expanded this logic to uphold an 1852 statute prohibiting the manufacture and sale of liquor and authorizing the seizure and confiscation of alcohol violating the statute.[604] The court reiterated the police power of the legislature to enact statutes for the general good stating: "We have no doubt that it is competent for the legislature to declare the possession of certain articles of property, either absolutely, or when held in particular . . . circumstances, to be unlawful, because they would be injurious, dangerous or noxious . . . ."[605] The Supreme Judicial Court then compared the liquor law to regulations on gunpowder and food storage.[606]

However, the Massachusetts Supreme Judicial Court did reject some portions of the liquor control act, including portions of its enforcement procedures such as a provision authorizing seizure on the basis of statements from only three persons, the deprivation of the rights of citizens to have an opportunity to question these persons, and the granting to justices of the peace of jurisdiction to hear these cases.[607] It quoted the Massachusetts Lockean Natural Rights Guarantee, along with several other articles from the Declaration of Rights, in its criticism of the act's procedures for forfeiture.[608] The Supreme Judicial Court of Massachusetts reiterated that "frequent recurrence to [these maxims] is absolutely necessary to preserve the advantages of liberty, and maintain a free government."[609] Therefore, the court found that the prohibition of the keeping of liquor for sale and its forfeiture were constitutional, but the court required additional procedural safeguards beyond those adopted by the legislature to ensure that legal property interests were protected.[610]

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601. *Id.* at 357.
602. *Id.* at 357–58.
603. 67 Mass. (1 Gray) 1 (1854).
604. *Id.* at 21, 47–48.
605. *Id.* at 27.
606. *Id.*
607. *Id.* at 42–44.
608. *Id.* at 32.
609. *Id.* at 33.
610. *Id.* at 35–36. The following year, the Massachusetts Supreme Court again upheld the liquor law in *Commonwealth v. Clapp*. 71 Mass. (5 Gray) 97, 100 (1855). Eustis Clapp, the defendant, argued that the liquor law should be unconstitutional under the Lockean Natural Rights Guarantee language "of acquiring, possessing and protecting property," which included the right to

The Supreme Judicial Court of Maine employed a reasonableness standard to uphold its state liquor law. In an 1830 opinion, *Lunt's Case*,[611] the court found that an 1821 statute regulating the sale of certain liquors and imposing licensing and duties requirements was constitutional.[612] The defendants argued that the statute violated the Guarantee's right of "acquiring, possessing and protecting property."[613] The court ruled that "[t]he legislature has a right to impose reasonable limitations and duties upon the sale of spirituous liquors."[614] This reasonableness discussion by the Maine Supreme Judicial Court may have foreshadowed *Lochner*'s reasonableness standard,[615] which in the New Deal era became what we today call rational basis review.[616]

More than twenty years later, the Maine Supreme Judicial Court again ruled on the constitutionality of a liquor law in *Preston v. Drew*.[617] In a creative maneuver to avoid the property constitutional challenge, the Maine legislature simply declared that alcohol did not constitute property subject to recovery.[618] The Supreme Judicial Court of Maine first cited the state constitution's Lockean Natural Rights Guarantee, along with its due process clause, in describing the property rights protected by the Maine constitution.[619] It then upheld the legislature's designation of alcohol as a controlled substance, relying heavily on the legislature's determination that liquor was dangerous and harmful to the public good: "The State, by its legislative enactments, operating prospectively, may determine that articles injurious to the public health or morals, shall not constitute property, within its jurisdiction."[620] The Supreme Judicial Court recognized the implications of granting power to the legislature to outlaw controlled substances, and the court noted in dicta that the legislature was not permitted to declare that legal possessions did not constitute property.[621] So, for example, if the alcohol in question was possessed for private use and was not intended for sale, the Supreme Judicial Court said that the state could not declare that the mere possession of alcohol without the intention to sell it violated the law, and the

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buy and sell liquor. *Id.* at 99 (internal quotation marks omitted). The court did not address the Lockean Natural Rights Guarantee argument specifically but relied on the fact that previous liquor laws regulating buying and selling of liquor were found to be valid. *Id.* at 100.

611. 6 Me. 412 (1830).

612. *Id.* at 413–14.

613. *Id.* at 412–13 (internal quotation marks omitted).

614. *Id.* at 412.

615. Lochner v. New York, 198 U.S. 45, 56 (1905).

616. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 486–88 (1955).

617. 33 Me. 558 (1852).

618. *Id.* at 560.

619. *Id.*

620. *Id.*

621. *Id.* at 561.

state could not declare that it was not property.[622] However, in the case at hand, because the liquor was intended for sale and its possession was thus illegal, the citizen had no grounds for complaint.[623]

In 1859, the Alabama Supreme Court upheld an Alabama statute prohibiting sales of alcohol near a university in *Dorman v. State*.[624] The defendant in this case first cited the Lockean Natural Rights Guarantee as a constitutional basis for an asserted property right: "In the preamble to our constitution the people say, that it was ordained in order to establish justice, insure tranquillity, provide for the common defense, promote the general welfare, and insure to themselves and their posterity the rights of life, liberty and property."[625] He then argued that the statute prohibiting sales of alcohol violated the property right, which "consists in the free use, enjoyment, and *disposal of* [property] . . . . There can be no property, in the legal or popular sense of the term, where neither the owner nor the person representing him has the power of sale and disposition."[626] The Alabama Supreme Court avoided addressing this question directly, holding instead that because the Alabama statute only prohibited sales near the university, "[a] substantial and valuable right of sale within the State is preserved."[627] It also acknowledged that extensive liquor regulation might unconstitutionally deprive citizens of their property:

> When, in the constitutional sense of these terms, is a citizen "deprived of his property?" The answer to this question demands the ascertainment of that shadowy line separating regulation from destruction, which courts have found so much difficulty in defining, and which is, perhaps, destined forever to remain in the catalogue of disputed boundaries.[628]

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622. *Id.* at 562–63.

623. *Id.* at 560. Just a few years later, the Maine Supreme Judicial Court cited *Preston* in *Lord v. Chadbourne*, where it ruled that the plaintiff should have been able to submit evidence of his liquor in his argument for compensation. 42 Me. 429, 442, 444–45 (1856). The plaintiff argued that under the Lockean Natural Rights Guarantee "all men have the right of acquiring, possessing and protecting property." *Id.* at 432. Without referencing the Guarantee explicitly, the court agreed that he should have been able to submit evidence in the trial to gain compensation. *Id.* at 444–45. The court cited *Preston* in its decision, but it appears that it believed that the plaintiff may have possessed the liquor lawfully and, thus, was entitled to present evidence for compensation. *Id.* at 442–45.

624. 34 Ala. 216, 217, 237, 245 (1859).

625. *Id.* at 218.

626. *Id.* at 220.

627. *Id.* at 243.

628. *Id.* at 238.

However, the court concluded that the regulation in question did not cross this line because it only affected the area near the university.[629] Thus, the court found that the regulation was constitutional.[630]

Finally, in the case *Miller v. State*,[631] the Ohio Supreme Court found that an 1854 statute prohibiting liquor sales in Ohio was constitutional.[632] The plaintiffs argued that by completely prohibiting the sale of liquor in Ohio, the statute violated the Ohio constitution's Lockean Natural Rights Guarantee of an inalienable right to acquire, possess, and protect property.[633] However, the Ohio Supreme Court held that the law in question was permissible because it merely regulated alcohol and did not prohibit it entirely:

> In support of these views, counsel, in addition to the section before quoted from the schedule, cite the first, nineteenth, and twentieth sections of the bill of rights, by which it is declared, among other things, that all men have the inalienable right of "acquiring, possessing, and protecting property;" that "private property shall ever be held inviolate, but subject to the public welfare," and that "this enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people."
>
> We are unable to perceive that either of these provisions of the constitution, or any of its other provisions, is violated by the law in question. In saying this, we by no means affirm that the legislature has the power to wholly prohibit traffic in intoxicating liquors. . . . [F]or the law is not prohibitory, nor does it interfere, in any degree, with any right of property. It belongs to that class of legislative acts commonly called "police laws," and is framed with a view to regulate, and not to destroy. It seeks to do, by constitutional means, what the assembly is expressly authorized to do, provide against the evils resulting from the traffic in intoxicating liquors.[634]

The court analogized the liquor law to other permissible police power regulations like market laws, license laws, and Sabbath laws.[635] For these reasons, the Ohio Supreme Court found that the statute at issue in this case was constitutional.[636]

With the exception of the Indiana Supreme Court, the state courts almost universally rejected the Lockean Natural Rights Guarantees as constitutional

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629. *Id.* at 243.
630. *Id.* at 245.
631. 3 Ohio St. 475 (1854).
632. *Id.* at 485–86.
633. *Id.* at 485.
634. *Id.* at 485–86.
635. *Id.* at 486.
636. *Id.* at 485–87.

limitations on liquor laws. Most state supreme courts upheld alcohol control laws as being, under the circumstances, reasonable exercises of the legislature's police power to promote the general welfare. These cases also show that most state courts and litigants conceived of the liquor laws as regulations of property rights rather than as being restrictions on liberty rights. Thus, these cases may suggest that the Supreme Court was right in *Lochner v. New York* when it held that even fundamental constitutional rights are always subject to reasonable exercises of the police power.[637] In the state courts prior to 1868, this was true of Lockean Natural Rights Guarantees insofar as they implicated the exercise of the police power to regulate and prohibit alcohol.

IX. Other Business Regulations

The Lockean Natural Rights Guarantees were also utilized by litigants seeking to invalidate state statutes regulating their businesses or professions. The majority of these litigants focused on the protection of property in the various Lockean Natural Rights Guarantees and argued that the regulations in question deprived them of this "inalienable right[]."[638] Three cases related to laws prohibiting businesses from operating on the Sabbath, and three others specifically addressed the South's post-Civil War use of loyalty oaths as a prerequisite for practicing a profession or for voting. An additional four cases ruled on other business regulations. In nearly every case, the state court considered the Lockean Natural Rights Guarantee to be relevant but nevertheless upheld the business regulation in question.

Thus, this set of cases illustrates both that the Lockean Natural Rights Guarantees were seen by many as a key limitation to legislative regulation and that while the courts accepted that the Lockean Natural Rights Guarantees provided substantive rights, in practice, they did not use them to limit the legislature's ability to regulate businesses. Accordingly, the judiciary's deference to the legislature during this time period indicates that the Lockean Natural Rights Guarantees were not interpreted as strong limits on legislative regulation, and it suggests that the federal judicial activism in *Lochner* and its progeny was something of a departure from this deferential tradition. These cases may also provide an historical basis for the federal and state courts' application of rational basis review to economic regulations, as is illustrated in the paradigm deference case of *Williamson v. Lee Optical of Oklahoma, Inc.*[639]

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637. Lochner v. New York, 198 U.S. 45, 56 (1905).

638. *See, e.g.*, LA. CONST. of 1868, art. 1 (referring to "certain inalienable rights").

639. *See* 348 U.S. 483, 486–88 (1955) (stating that a law regulating prescription eyewear needs only to be "rational," rather than "in every respect logically consistent," to be constitutional).

A. Sabbath Laws

The New Hampshire and California state supreme courts separately addressed the constitutionality of laws prohibiting activities or business from being conducted on the Sabbath. It is important to note that the state courts in the three cases described below did not rely solely on those state constitutions' Lockean Natural Rights Guarantees but instead considered the Lockean Natural Rights Guarantees alongside other relevant provisions, including freedom of religion clauses. The opinions illustrate that these courts thought that the state constitutional Lockean Natural Rights Guarantees were one of several constitutional provisions relevant to the Sabbath law issue. In addition, there are certainly other Sabbath law cases from this time period that did not reference the Lockean Natural Rights Guarantees. In both New Hampshire and California, the state courts ultimately held that the Sabbath laws in question were permissible.

First, in 1817, the New Hampshire Superior Court of Judicature issued a ruling in *Mayo v. Wilson*[640] on the constitutionality of a 1799 statute authorizing "selectmen and tythingmen to arrest persons, suspected of travelling unnecessarily on the Lord's day."[641] The plaintiff argued, in part, that the statute was unconstitutional.[642] The court framed its discussion by citing the New Hampshire constitution's Lockean Natural Rights Guarantee:

> The second article of the bill of rights declares, that all men have certain natural, essential, inherent rights, among which are the enjoying and defending life and liberty, and acquiring, possessing and defending property; but the third article declares, that, when men enter into a state of society, they surrender up some of their natural rights to that society. All society is founded upon the principle, that each individual shall submit to the will of the whole. When we become members of society, then, we surrender our natural right, to be governed by our own wills in every case, where our own wills would lead us counter to the general will.[643]

The court then used this framework in its interpretation of the other sections of the New Hampshire constitution, analyzing their protections alongside the importance of the general will of the people as expressed in the constitution.[644] For example, in analyzing the New Hampshire constitution's due process provision, the court found that the Sabbath statute did not violate the constitutional protection of property because this restriction was a product of the general will of the lawmaking authorities of the State of New

640. 1 N.H. 53 (1817).
641. *Id.* at 53–54.
642. *Id.* at 55.
643. *Id.* at 57.
644. *Id.* at 58–59.

Hampshire.[645] Thus, the court seemed to view the Lockean Natural Rights Guarantee, which it interpreted as being subject to being overridden by the general will of the people of the state,[646] as a lens through which to interpret the entire New Hampshire constitution. The court upheld the Sabbath statute, finding that it did not violate any part of the state constitution.[647]

Decades later, the California Supreme Court addressed the same issue in *Ex Parte Newman*.[648] In this case, the defendant was convicted of selling goods on the Sabbath under an 1858 California state statute that provided "for the better observance of the Sabbath" and that prohibited doing business on the Sabbath.[649] The chief justice's opinion in *Ex Parte Newman* first discussed the Sabbath statute in terms of the freedom of religion clause, finding that it violated the constitution's protection of religion.[650] It then focused on the State of California's Lockean Natural Rights Guarantee, reiterating that the Guarantee granted California citizens substantive rights:

> It is said that [the Lockean Natural Rights Guarantee] is a commonplace assertion of a general principle, and was not intended as a restriction upon the power of the Legislature. This Court has not so considered it. . . .
>
> . . . .
>
> It is the settled doctrine of this Court to enforce every provision of the Constitution in favor of the rights reserved to the citizen against a usurpation of power in any question whatsoever, and although in a doubtful case, we would yield to the authority of the Legislature, yet upon the question before us, we are constrained to declare that, in our opinion, the Act in question is in conflict with the [Lockean Natural Rights Guarantee], because, without necessity, it infringes upon the liberty of the citizen, by restraining his right to acquire property.[651]

Thus, the majority held that California's Lockean Natural Rights Guarantee protection of the right to acquire property prevented the legislature from restraining individuals from doing business on the Sabbath![652]

Judge Nathaniel Burnett's concurring opinion in this case specifically answered the argument that the California constitution's Lockean Natural Rights Guarantee was unenforceable:

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645. *Id.*

646. *See id.* at 57–59 (describing how the natural rights of citizens are governed by the will of society).

647. *Id.* at 60.

648. 9 Cal. 502, 505 (1858), *overruled in part by Ex Parte* Andrews, 18 Cal. 679 (1861).

649. *Id.* at 505, 515 (internal quotation marks omitted).

650. *Id.* at 511.

651. *Id.* at 510–11.

652. *Id.* at 511.

> It was urged, in argument, that the provision of the [Lockean Natural Rights Guarantee], asserting the "inalienable right of acquiring, possessing, and protecting property," was only the statement in general terms, on a general principle, not capable in its nature of being judicially enforced.
>
> It will be observed that [if the Lockean Natural Rights Guarantee] asserts a principle not susceptible of practical application, then it may admit of a question whether any principle asserted in this declaration of rights can be the subject of judicial enforcement. But that at least a portion of the general principles asserted in that article can be enforced by judicial determination, must be conceded. This has been held at all times, by all the Courts, so far as I am informed.[653]

He then elaborated on the substantive property guarantees contained in the Lockean Natural Rights Guarantee:

> The right to acquire must include the right to use the proper means to attain the end. The right itself would be impotent without the power to use its necessary incidents. The Legislature, therefore, can not prohibit the proper use of the means of acquiring property, except the peace and safety of the State require it. And in reference to this point, I adopt the reasons given by the Chief Justice, and concur in the views expressed by him.[654]

Therefore, the California Supreme Court held that the statute prohibiting business on the Sabbath was an unconstitutional restriction on the Lockean Natural Rights Guarantee property rights.[655]

However, the California Supreme Court's bold holding in *Ex Parte Newman* was short lived. In 1861, the legislature passed a second statute entitled "An Act For the Observance of the Sabbath."[656] The California Supreme Court completely reversed its prior ruling in the new case of *Ex Parte Andrews*,[657] upholding the constitutionality of the new statute and concluding that it violated neither the freedom of religion clauses nor the Lockean Natural Rights Guarantee.[658] The opinion began by acknowledging that several different judges had previously "commented" on the topic when the 1858 law on the same subject was under review.[659] But without further explanation, the California Supreme Court proceeded to disavow its prior opinion in its entirety.[660]

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653. *Id.* at 516 (Burnett, J., concurring).
654. *Id.* at 517.
655. *Id.* at 511 (majority opinion).
656. 18 Cal. 678, 680 (1861).
657. *Id.* at 678.
658. *Id.* at 681–83.
659. *Id.* at 681.
660. *Id.* at 681–82.

Citing a string of opinions from other state courts, the California Supreme Court first argued that every other state had found Sabbath laws to be in accordance with their state constitutions.[661] With regard to the Lockean Natural Rights Guarantee "acquiring property" argument, the California Supreme Court reasoned that the state legislature had the police power regulatory authority to "repress whatever is hurtful to the general good" as was determined by the state legislature.[662] In a broad grant of authority, the California Supreme Court granted the legislature power to impose regulations to avoid physical as well as moral harms:

> If from physical causes the carrying on of particular pursuits—as in certain mines or some mechanical branches which generate disease—is hurtful to health, it is within the power of Government to regulate the business so as to obviate or mitigate such results. And of both the evil and the remedy the Legislature is the judge; and why should the power be less or different when the evil is moral instead of physical? The Legislature has not only the power to regulate, but the power to suppress particular branches of business which it considers immoral and prejudicial to the general good, as gambling, lotteries, etc. The duty of government comprehends the moral as well as the physical welfare of the State; and in this instance it is asserted, on behalf of this law, that the passage of it is essential to the welfare of the people, both moral and physical.[663]

Therefore, the California legislature's regulation of the conducting of business on the Sabbath was held to be well within its capacity to regulate the acquisition of property for the public good and not in violation of California's Lockean Natural Rights Guarantee.[664]

These state supreme court decisions regarding Sabbath laws indicate a broad recognition of and deference to state legislative regulatory power. In fact, nearly fifty years later, Justice Oliver Wendell Holmes, Jr. used the example of the constitutionality under state and federal constitutional law of Sunday closing laws as an example of the sweeping ability of the police power to overcome constitutional rights in his *Lochner* dissent:

> It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a

661. *Id.* at 681.
662. *Id.* at 682.
663. *Id.* at 683.
664. *Id.* at 685–86.

> constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.[665]

B. Test Oaths

In four cases, state courts addressed the constitutionality of state statutes requiring members of various professions to take oaths in order to participate in their professions. A pre-Civil War Alabama case struck down a test oath relying solely on the Lockean Natural Rights Guarantee, but subsequent state court decisions issued during the Reconstruction period rejected this argument and upheld test oaths except when under the direct order of the Supreme Court. The U.S. Supreme Court struck down the constitutionality of test oaths in the 1866 case *Ex Parte Garland*,[666] issued during Reconstruction, a time when many state governments were imposing loyalty oaths as a prerequisite for participation in various aspects of public life.[667] In *Ex Parte Garland*, the U.S. Supreme Court struck down an 1865 congressional statute, which functionally prohibited former Confederate officials from participating in government or practicing law before the United States federal courts.[668] The U.S. Supreme Court found that the law was equivalent to a bill of attainder in that it retroactively punished conduct.[669]

The first state case on this topic was a pre-Civil War case in Alabama decided before the U.S. Supreme Court ruling. In the 1838 case, *In re Dorsey*,[670] the Alabama Supreme Court relied on substantive protections in Alabama's Lockean Natural Rights Guarantee to strike down an 1828 statute requiring that attorneys take an oath that they had not participated in a duel since January 1, 1826.[671] Judge Henry Goldthwaite declared:

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665. Lochner v. New York, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting).

666. 71 U.S. (4 Wall.) 333, 381 (1866).

667. HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 177 (1973).

668. *Garland*, 71 U.S. (4 Wall.) at 376–77, 381.

669. *Id.* at 377.

670. 7 Port. 293 (Ala. 1838).

671. *Id.* at 338–43, 354. "As this is a case *sui generis*, and of great importance, involving the constitutional power of the legislature, to pass the act of eighteen hundred and twenty-six, and in which the judges of the Supreme court delivered their opinions *seriatim*." *Id.* at 300. The oath stated: "'I, —, do solemnly swear, that I have neither directly nor indirectly given, accepted, or knowingly carried a challenge, in writing or otherwise, to, [et]c.—or aided or abetted in the same, since the first day of January, eighteen hundred and twenty-six.'" *Id.* at 347–48.

> The first section of the declaration of rights, announces the great principle which is the distinctive feature of our government, and which makes it to differ from all others of ancient or modern times: "All freemen, when they form a social compact, are equal in rights, and no man, or set of men, are entitled to exclusive separate public emoluments or privileges, but in consideration of public services." This is no empty parade of words: it means, and was intended to guarantee to each citizen, all the rights or privileges which any other citizen can enjoy or possess. Thus, every one has the same right to aspire to office, or to pursue any avocation of business or pleasure, which any other can. As this general equality is thus expressly asserted and guaranteed as one of the fundamental rights of each citizen, it would seem to be clear, that the power to destroy this equality must be expressly given, or arise by clear implication, or it can have no legal existence.[672]

The opinion then considered the specific sections of the state constitution that allowed for disqualification and found that the dueling oath was not justified by any of these grants of power to the legislature.[673] Judge Goldthwaite's rationale is particularly interesting in light of Professor John Yoo's invocation of the concurring opinion from Judge Ormond as the "most striking reading" of a Ninth Amendment analogue protecting natural rights.[674] Thus, the Alabama Supreme Court struck down the state statute in question that required that attorneys take oaths against dueling as a condition for admission to the bar.[675]

Several decades passed before the next state test oath cases arose under state constitutional law. The first loyalty oath case to arise in the states following the Civil War occurred before the Supreme Court's *Ex Parte Garland* ruling. The California Supreme Court ruled on the constitutionality of a test oath for attorneys in the 1863 case *Cohen v. Wright*.[676] The California legislature had passed an 1863 statute entitled "An Act to exclude Traitors and Alien Enemies from the Courts of Justice in Civil Cases."[677] Among other arguments, the appellant argued that this statute was unconstitutional under California's Lockean Natural Rights Guarantee because it prevented attorneys from protecting their property in court.[678] In its decision, the court emphasized the importance of the Guarantee and its centrality to the theory of American government:

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672. *Id.* at 360–61 (opinion of Goldthwaite, J.).

673. *Id.* at 363–66.

674. Yoo, *supra* note 73, at 1016; *see also Dorsey*, 7 Port. at 371–73, 387 (opinion of Ormond, J.) (relying on various provisions in the Alabama constitution to support the holding).

675. *Dorsey*, 7 Port. at 354 (majority opinion).

676. 22 Cal. 293, 306 (1863).

677. *Id.* at 301 (internal quotation marks omitted).

678. *Id.* at 300.

> [I]t is urged that Sec. 1 of Art. 1, declaring that "all men have the inalienable right by nature of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing safety and happiness," is violated by this act, as litigants are prevented from protecting their lives, liberty, and property, by the aid of the Courts, and that it has the effect of taking the property of one man and giving it to another, thus depriving the litigant of his property without due process of law. The great natural right to life, liberty, and property, is fully recognised by this section of the Constitution. These rights are guaranteed to all who do not infringe upon the rights of others, or forfeit them by crime. They are not in any way impaired by the act in question, for all persons have the same right to enjoy and defend their lives and liberties, and to acquire, possess, and protect their property, as before. . . . These great rights are founded in the law of nature, but nature has provided no Courts in which contested claims can be litigated or admitted rights can be enforced. Hence arises one of the necessities of a Government, which is instituted for the very purpose of protecting and securing these natural rights . . . .[679]

However, the California Supreme Court rejected the attorney's argument in this case and held that the government had an obligation to protect the rights protected by the Guarantee only when the citizen fulfilled his "correlative duty of obedience and support to the Government."[680] Thus, the legislature was justified in "closing [the court's] doors against traitors," and the test oath was accordingly upheld as being constitutional by the California Supreme Court.[681] This decision must be understood as having been issued in light of the enormous disruption of civil government caused by the Civil War, and in our view, it therefore ought not to be seen as having much precedential significance.

The Missouri Supreme Court also addressed the constitutionality of test oaths in three Civil War-era cases spanning the period from 1865 to 1867. First, in an 1865 case, *State v. Cummings*,[682] the Missouri Supreme Court upheld the use of loyalty oaths for preachers, stating that they did not infringe upon any recognized rights in the constitution.[683] The court quoted Missouri's Lockean Natural Rights Guarantee in its opinion but simply stated that "[w]e do not see that any one is forbidden to enjoy the fruits of his labor,

679. *Id.* at 324–25.
680. *Id.* at 325.
681. *Id.* at 325–26.
682. 36 Mo. 263 (1865), *rev'd*, 71 U.S. (4 Wall.) 277 (1866).
683. *Id.* at 271, 275.

but in doing so he must conform to the law."[684] Thus, the court found the test oath for preachers to be constitutional.[685]

The United States Supreme Court reversed this decision the following year in *Cummings v. State*,[686] a companion case to *Ex Parte Garland*.[687] As in *Ex Parte Garland*, the Supreme Court focused on the retroactive nature of the oath and compared it to a bill of attainder.[688] Strikingly, some of the language in the U.S. Supreme Court's opinion echoed the Lockean Natural Rights Guarantee argument made in the state courts below, as the following passage in the U.S. Reports makes clear:

> The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.[689]

However, the U.S. Supreme Court explicitly relied on the bill of attainder provisions in the U.S. Constitution, which apply to the states as well as to Congress, to reverse the Missouri decision below and to hold that requiring a test oath for preachers was unconstitutional.[690] There is, of course, no Lockean Natural Rights Guarantee in the federal Constitution, which the U.S. Supreme Court could have relied on, and the Missouri state courts have the last word on the meaning of Missouri's state constitutional Lockean Natural Rights Guarantee.

One year later, the Missouri Supreme Court sharply limited the *Cummings* decision by refusing to apply the precedent in *Blair v. Ridgely*,[691] which upheld the requirement of a test oath for voting.[692] The court acknowledged the U.S. Supreme Court's bill of attainder concerns as well as the guarantees of "life, liberty, and property" in the state constitution, although it did not specifically cite the Lockean Natural Rights Guarantee:

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684. *Id.* at 275.

685. *Id.* at 279.

686. 71 U.S. (4 Wall.) 277 (1866).

687. *Id.* at 332 (Miller, J., dissenting).

688. *Id.* at 323, 325–27.

689. *Id.* at 321–22.

690. *Id.* at 325, 332.

691. 41 Mo. 63 (1867).

692. *Id.* at 180. This same year, however, the Missouri Supreme Court followed the *Cummings* precedent in the *Murphy & Glover Test Oath Cases*. 41 Mo. 339, 379–80 (1867). Not surprisingly, in this case, the defendant focused his arguments on the prohibition against attainder, and the Missouri Supreme Court found the statute unconstitutional on those grounds. *Id.* at 342–43, 388. The opinion also relied on the protection of "liberty" although it did not specify the source for this right. *Id.* at 367.

> The illustrious author of the Declaration of Independence embodies the same in estimable axioms, when he declares that "all men are endowed by their Creator with certain inalienable rights, among which are life, liberty, and the pursuit of happiness." Essentially the same principles are inserted in the amendments to the Constitution of the United States, and in the bills of rights of the respective States. The right, then, to life, liberty, and private property, is natural, absolute, and vested, and belongs as well to the individual in a state unconnected with society, as in the most carefully guarded and well arranged system of government.[693]

Nevertheless, the Missouri Supreme Court held that a test oath in this case was permissible because the right to vote was not encompassed in the protections of life, liberty, or property, and was not a natural right.[694] Perhaps most surprisingly, the Missouri Supreme Court acknowledged the U.S. Supreme Court's rulings finding test oaths unconstitutional but rejected them.[695] It claimed that the Supreme Court precedents were not applicable because they addressed the civil right to practice a profession rather than the political right to vote.[696] It was common in the 1860s to grant civil rights more extensively than political rights, like the right to vote.[697] Therefore, the Missouri Supreme Court concluded that the political right to vote was not protected from being made conditional on the taking of an oath, and the prerequisite of a test oath was thus held to be constitutional.[698] Thus, the Missouri Supreme Court maintained that the state had the right to impose test oaths in certain situations notwithstanding the contrary opinions of the U.S. Supreme Court. The test oath cases illustrate that despite an early decision relying on the Lockean Natural Rights Guarantees to strike down a test oath, the Guarantees were largely ineffective in protecting citizens from test oath requirements during the chaos that followed the Civil War. The state courts appeared very willing to defer to the state legislatures on test oath requirements in the lawless environment of the 1860s. In our opinion, these test oath cases ought not to be given much weight given the extraordinary experience of the Civil War.

C. *Miscellaneous Regulations*

Four other business regulations were adjudicated in various states producing state court rulings on Lockean Natural Rights Guarantee

693. *Blair*, 41 Mo. at 173.

694. *Id.* at 175–78.

695. *Id.* at 178.

696. *Id.* at 173–74, 178.

697. *See generally* Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEXAS L. REV. 1, 70–75 (2011) (describing the differences between political and civil rights).

698. *Blair*, 41 Mo. at 168, 180.

arguments.[699] With the exception of one case, the state courts concluded that the various legislative business regulations that they reviewed were constitutionally permissible, and that the regulations did not violate the state's Guarantee.

In the only case to strike down a state legislative business regulation, *Billings v. Hall*,[700] the California Supreme Court addressed the constitutionality of an 1856 statute that was entitled "an Act for the protection of actual settlers, and to quiet land-titles in this State."[701] This statute provided that when title holders of land ejected tenants or others occupying their land, they were required to reimburse them for the value of improvements made to the land.[702] After addressing the defendant's other arguments, the court focused on California's Lockean Natural Rights Guarantee language:

> [The Lockean Natural Rights Guarantee] declares that "all men are by nature free and independent, and have certain inalienable rights, amongst which are those of enjoying and defending life and liberty, acquiring possession, protecting property, and pursuing and obtaining safety and happiness." This principle is as old as the Magna Charta. It lies at the foundation of every constitutional government, and is necessary to the existence of civil liberty and free institutions. It was

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699. State supreme courts upheld business regulations in three additional cases. In the 1840 case *Pontchartrain Railroad Co. v. Orleans Navigation Co.*, the Louisiana Supreme Court upheld a business regulation granting one company exclusive rights to construct a railroad from New Orleans to Lake Pontchartrain in the face of the plaintiff's Lockean Natural Rights Guarantee argument. 15 La. 404, 412–13 (1840). The defendants argued that granting the exclusive rights violated Louisiana's Lockean Natural Rights Guarantee:

> It is inconsistent with the constitution of the United States, made, as the sovereign people in convention said, to establish justice; it is even contrary to the spirit and intent of our own constitution, which was *"ordained and established to secure to all the citizens the enjoyment of the right of life, liberty and property."*

Id. at 411. The court did not specifically address this argument but ruled that the charter granting this exclusive right was valid. *Id.* at 412–13.

Two other cases also upheld business regulations in the context of inalienable rights or property rights, but these opinions did not specifically cite the Lockean Natural Rights Guarantees. In *Shelton v. Mayor of Mobile*, the Alabama Supreme Court upheld a statute prohibiting the "hawking and peddling about the streets of the city of meat, game, poultry, vegetables, [or other marketplace goods]." 30 Ala. 540, 540–42 (1857) (internal quotation marks omitted). The court found that it was not against the "common right" because it was a reasonable regulation and did not completely prevent the plaintiff from selling meat. *Id.* at 541.

The Florida Supreme Court also upheld a statute regulating "pilotage" licenses within the state in *Cribb v. State*. 9 Fla. 409, 417–18 (1861). The court concluded that it had the "inherent right and power over her citizens and of controlling her inhabitants or residents while they remain as residents" to exercise police power for the "common welfare of all" but did not specifically cite the Lockean Natural Rights Guarantee. *Id.* at 417.

700. 7 Cal. 1, 15–16 (1857).

701. *Id.* at 3.

702. *Id.*

> not lightly incorporated into the Constitution of this State as one of those political dogmas designed to tickle the popular ear, and conveying no substantial meaning or idea; but as one of those fundamental principles of enlightened government, without a rigorous observance of which there could be neither liberty nor safety to the citizen.[703]

The California Supreme Court concluded in this case that because the title bearer of property in land had not contributed to improvements made on the land, the state land law statute in question was unconstitutional as applied because it was "repugnant to the plainest principles of morality and justice . . . . It divests vested rights, attempts to take the property acquired by the honest industry of one man, and confer it upon another, who shows no meritorious claim in himself."[704] The court continued with a lengthy discussion of Locke's political philosophy and concluded that the legislature had limited powers because the people retained certain rights listed in the Lockean Natural Rights Guarantee for themselves.[705] Therefore, the court concluded that the California statute requiring title bearers to reimburse those they ejected from their lands was unconstitutional as applied.[706]

In his article on Ninth Amendment analogues, Professor Yoo cites a concurring opinion from Judge Burnett, in which Judge Burnett cites the state's Ninth Amendment analogue to protect "certain inherent and inalienable rights of human nature that no government can justly take away."[707] However, Judge Burnett then cites California's Lockean Natural Rights Guarantee as enumerating the content of those rights: "[A]mong the inalienable rights declared by our Constitution as belonging to each citizen[], is the right of 'acquiring, possessing, and protecting property.'"[708] This opinion suggests that the interpretation of California's Ninth Amendment analogue was linked to the Lockean Natural Rights Guarantee.

About a decade later, the California Supreme Court revisited the state's Lockean Natural Rights Guarantee as it related to business regulations in *Ex Parte Shrader*.[709] In this case, it upheld a city provision prohibiting slaughterhouses within city limits.[710] The city acted under authority from the state legislature, which had passed a statute authorizing cities to make regulations "necessary or expedient for the preservation of the public health

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703. *Id.* at 6.

704. *Id.* at 10–11.

705. *Id.* at 9–14.

706. *See id.* at 13–14 (arguing that a statute which forces title bearers to pay those they ejected from their lands falls outside the bounds of government power under a social contract).

707. Yoo, *supra* note 73, at 1018 (citing *Billings*, 7 Cal. at 17 (Burnett, J., concurring)).

708. *Billings*, 7 Cal. at 16 (Burnett, J., concurring).

709. 33 Cal. 279, 282 (1867).

710. *Id.* at 284–85.

and the prevention of contagious diseases."[711] The court rejected the defendant's Lockean Natural Rights Guarantee argument:

> As to the other objection, that the order interferes with the constitutional right of the petitioner to acquire, possess and protect property, both his capacities and rights in that regard are untouched by the order. Voluntary obedience to the order would have involved neither a surrender of the right nor a disuse or suspension of the capacity, and disobedience to it on the part of the prisoner has been visited with no description of civil disability.[712]

It further analogized the case to *Ex Parte Andrews*, in which the court had found Sabbath laws to be constitutional,[713] and it reiterated that the state legislature had the power to regulate business, so long as it did not deprive citizens of their property entirely.[714] The court concluded that the city's regulation of slaughterhouse locations was within its regulatory power and that it did not violate the right to property.[715] Only six years later, the U.S. Supreme Court would revisit similar regulations in the City of New Orleans, Louisiana, in the famous *Slaughter-House Cases*.[716]

In an 1859 case entitled *State v. Freeman*,[717] the New Hampshire Supreme Judicial Court ruled that a regulation requiring restaurants to close at ten o'clock at night was constitutional.[718] The restaurant owner cited the State of New Hampshire's Lockean Natural Rights Guarantee to argue that the ordinance interfered with his property rights: "The objection is that the ordinance deprives the citizen of the right guaranteed to him by the constitution, of 'acquiring' 'property' by the prosecution of a lawful business."[719] The court found that the ordinance in question was perfectly constitutional, saying that it was a reasonable regulation of property rights in the following language:

> It is one thing to deprive a party of his rights, and quite another to regulate and restrain their exercise in such a manner as the common convenience and safety may require. If it is permissible to interfere in any way with the private right to carry on and manage his lawful business at such time and place, and in such manner as suits himself,

711. *Id.* at 280–81 (internal quotation marks omitted).
712. *Id.* at 282.
713. *See supra* notes 657–65 and accompanying text.
714. *Shrader*, 33 Cal. at 282 (citing *Ex Parte* Andrews, 18 Cal. 678 (1861)).
715. *Id.* at 284–85.
716. 83 U.S. (16 Wall.) 36, 38–43 (1872).
717. 38 N.H. 426 (1859).
718. *Id.* at 426, 428.
719. *Id.* at 427.

> we are unable to see anything unreasonable in requiring places of public entertainment to be closed at seasonable hours.[720]

Thus, the court concluded that mandating closing times was permissible because it was a regulation on property not a deprivation of property.[721]

In the final case on this topic, *New Albany & Salem Railroad Co. v. Tilton*,[722] the Indiana Supreme Court of Judicature considered an Indiana state statute that required railroad companies to either fence their tracks or to reimburse owners for damage to animals injured or killed by trains.[723] In this case, the plaintiff sued the railroad for $100, which he alleged was the value of a mare killed by the railroad company's locomotive.[724] The Indiana Supreme Court of Judicature upheld the state statute at issue, explaining that the language in the Indiana Lockean Natural Rights Guarantee providing for the "pursuit of happiness" required compensation for damaged property:

> One of the "unalienable rights" of man is the "pursuit of happiness," included in which, as generally understood, is the right to acquire and quietly enjoy property. Yet by these acts of congress, this unalienable right to acquire property is, to a certain extent, infringed; the right of the individual is treated as secondary and subordinate to the general welfare.
>
> If the legislative body possesses the power to regulate the enjoyment, by the citizen, of an unalienable right, we cannot well conceive how such body could grant to a few of the citizens of the state, when organized into a body politic, rights of a higher dignity or more sacred character than those generally recognized as unalienable.
>
> Viewing in this light the questions involved in the case at bar, we are, we repeat, clearly of opinion that the statute, should be considered as a police regulation, and, as such, is valid and binding upon all railroads, whether constructed under charters granted before or after its publication.[725]

Thus, the court found the state statute requiring reimbursement for property damage was affirmatively necessary to fulfill the Guarantee's "pursuit of happiness" language, as well as constitutional under the property protections. The statute was a constitutional exercise of the police power.[726]

From Sabbath laws to test oaths and slaughterhouse regulations, litigants invoked the Lockean Natural Rights Guarantee protections to argue that the

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720. *Id.* at 428.

721. *Id.*

722. 12 Ind. 3 (1859).

723. *Id.* at 5.

724. *Id.* at 3.

725. *Id.* at 8. As previously explained, the Indiana Lockean Natural Rights Guarantee did not explicitly protect property, which may explain the state court's reliance on the "pursuit of happiness" language. *See supra* note 554 and accompanying text.

726. *Tilton*, 12 Ind. at 8.

regulations of businesses should be treated as being unconstitutional under state constitutional Lockean Natural Rights Guarantees. Yet, although state courts acknowledged the existence of property rights, the state courts generally permitted the legislature to impose reasonable regulations on businesses and justified the regulations as necessary for the common welfare and as permissible exercises of the police power. A review of these cases suggests that the *Lochner* dissenters may very well have been right, and that the majority opinion in that case was wrong, with respect to the level of scrutiny historically afforded to regulations of business in American constitutional law. This history lends some support to the idea that the rational basis test of *Nebbia v. New York*[727] and *Williamson v. Lee Optical Co.* is more deeply grounded in U.S. constitutional practice than is the reasonableness test of *Lochner*.[728] These cases do not take account, however, of the presumption of liberty that the United States inherited from such English cases as *The Case of the Monopolies*, *Dr. Bonham's Case*, and *Somerset's Case*.[729] Sir Edward Coke and Lord Mansfield most certainly did not, in these foundational cases, employ a mere rational basis test.

X. Property Transfer Regulations

In eight cases, state courts adjudicated disputes over the role of the Lockean Natural Rights Guarantees with respect to legislative and judicial restrictions on property transfers. These cases concerned two main topics: the purchase and sale of real property and the use of property to satisfy debts. In each case, one party challenged the regulation, claiming that it interfered with his constitutional right to "acquire, possess, and protect property," as provided by the Lockean Natural Rights Guarantee. Without exception, the courts upheld the regulations, finding that they were not so invasive so as to violate constitutional property rights.

A. Regulation of Property Transfers

Six cases addressed the role of the Lockean Natural Rights Guarantees in regulating the buying, selling, and inheritance of properties.[730] In each

727. 291 U.S. 502 (1934).

728. *Compare* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–88 (1955) (analyzing whether law is "a rational way" to correct a perceived wrong), *and Nebbia*, 291 U.S. at 537 (analyzing whether a law has "a reasonable relation to a proper legislative purpose"), *with* Lochner v. New York, 198 U.S. 45, 56 (1905) (analyzing the constitutionality of a law based on whether the law is a "fair, reasonable and appropriate exercise of the police power").

729. *See supra* note 573 and accompanying text.

730. The Virginia Supreme Court of Appeals also ruled on the regulation of property transfers in the 1834 case *Richmond v. Judah*. 32 Va. (5 Leigh) 305, 307–08 (1834). Judah sued the City of Richmond to return the $178 that he had overpaid in taxes based on a misunderstanding of law. *Id.* at 308. The court upheld the city's refusal to refund the money, and one judge noted:

case, the courts found that the regulations in question were permissible and did not violate the state's Lockean Natural Rights Guarantee of the right to acquire, possess, and protect property.

First, in *Commonwealth v. Franklin*,[731] the earliest case to consider regulations on property transfers, the Pennsylvania Supreme Court considered an indictment charging the defendants with conveying land on "pretended title[s]," rather than Pennsylvania state land grants as required by a 1795 state statute.[732] From context, it appears that these "pretended" titles were derived from pre-Revolutionary War British deeds.[733] The defendants argued that the statute requiring state land grants violated the Lockean Natural Rights Guarantees, but the attorney general responded that the state regulates property:

> The act has been said to be a violation of the [Lockean Natural Rights Guarantee] of the state constitution, which declares, "that all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."
>
> We answer, property is a creature of society; and the right, in all its modifications, of acquisition, possession and transfer, is regulated by positive law.[734]

Without explanation, the Pennsylvania Supreme Court simply ruled that the indictment was valid, implying its agreement with the attorney general that the regulation was constitutional.[735]

In *Doe ex dem. Chandler v. Douglass*,[736] the Indiana Supreme Court of Judicature addressed a much more specific regulation on property sales.[737] In 1819, the Indiana legislature had passed a statute permitting an estate administrator to sell land into town lots on behalf of juvenile heirs.[738] Years

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> Some bounds are, therefore, set to the right of reclamation, by that power, from which is derived the right of property, and which assumes the sovereign authority to prescribe rules for its enjoyment. It reminds us of what we are too apt to forget, that our right of property is not inherent, but derived merely from the regulations of society.

Id. at 323 (opinion of Tucker, P.). The judge did not refer to Virginia's Lockean Natural Rights Guarantee "certain inherent rights" language, but this statement may suggest some limitations to the property right. VA. BILL OF RIGHTS of 1864, § 1.

731. 4 U.S. (4 Dall.) 254 (Pa. 1802).

732. *Id.* at 255–56.

733. *See id.* at 255 (describing the "pretended title" as being from before the Revolutionary War and not deriving its authority from "this commonwealth").

734. *Id.* at 258–59.

735. *Id.* at 265.

736. 8 Blackf. 10 (Ind. 1846).

737. *Id.* at 11.

738. *Id.*

later, in 1846, juvenile heirs brought this suit challenging the administrator's authority to sell the lands and arguing that the 1819 statute was unconstitutional.[739] The court cited the Lockean Natural Rights Guarantee contained in Article I, § 1 as providing property rights[740] but found that the statute in question was valid:

> [Constitutional provisions] restrain the legislature from passing a law impairing the obligation of a contract, from the performance of a judicial act, and from any flagrant violation of the right of private property. This last restriction, we think clearly contained in [the Lockean Natural Rights Guarantee] of our constitution. Does the act involved in this case, come within any of these restrictions? That it does not, is clearly settled by judicial authorities, if any question can be settled by such authorities, and those entitled to the highest consideration. Legislative acts, some of them precisely analogous to, and others equally obnoxious to the same constitutional objections with, that under consideration, have been sanctioned, under constitutions containing the same provisions bearing upon the question as our own . . . .[741]

Thus, the court concluded that the legislative act in question regulating property transfers was valid.[742]

The Iowa Supreme Court applied that state constitution's Lockean Natural Rights Guarantee to inheritance laws in the 1852 case *Stemple v. Herminghouser*.[743] In this case, one of Stemple's children living in Iowa filed a petition arguing that Stemple's other children residing in Prussia could not inherit any interest in Stemple's lands.[744] The Iowa Supreme Court upheld the common law rule that a nonresident alien cannot inherit land by descent and prohibited the Prussian residents from receiving their inheritance.[745] In

739. *Id.*

740. Indiana's Lockean Natural Rights Guarantee was substantially modified in the 1851 Constitution. *See* IND. CONST. art. 1, § 1 (amended 1984). This case refers to the version found in the 1816 constitution, which guaranteed "certain natural, inherent, and unalienable rights; among which are the enjoying and defending life and liberty, and of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety." IND. CONST. of 1816, art. I, § 1.

741. *Doe ex dem. Chandler*, 8 Blackf. at 12.

742. *Id.*

743. 3 Greene 408, 411 (Iowa 1852). The Indiana Supreme Court of Judicature also issued a decision addressing statutes governing inheritance. In *Noel v. Ewing*, the Indiana Supreme Court of Judicature held a statute mandating specific apportionment of estates to widows to be constitutional. 9 Ind. 37, 54 (1857). However, the dissent argued that each person should be able to dispose of property as they wished: "It seems, also, that the right to dispose of property by will, is now becoming to be regarded as a natural right, though *Blackstone* and *Paley* do not so admit it." *Id.* at 61 (Perkins, J., dissenting). Although the judge did not cite Indiana's Guarantee specifically, Indiana's Lockean Natural Rights Guarantee at this time used the "natural rights" language and may have influenced this dissent. *See supra* note 741.

744. *Stemple*, 3 Greene at 408.

745. *Id.* at 411.

a lively dissent, Judge George Greene lambasted the common law "inheritable blood" rule as "readily indorsed by the selfish dictates of crowned heads, to which the property would escheat"[746] and argued that it was incompatible with Iowa's state constitution:

> The reason for this prerogative of the crown ceased with our declaration of independence and our republican forms of government. From that time the rights of all, both native and alien, were encouraged and protected by our more equal, just and catholic systems of law. Our constitution and laws are made for the *people*, whose persons or property may come within their supervision, and not for the citizen or resident only. The rights of property in a non-resident are distinctly recognized by our laws. The first article of our state constitution declares, that "all men have certain unalienable rights; among which are those of *acquiring, possessing and protecting property*, and obtaining safety and *happiness*."
>
> What dearer or more unalienable right has a parent than that of acquiring and protecting property for his offspring? What contributes more to his pursuit of happiness. Surely, under such a declaration of rights, so comprehensive and universal in its application, there can be neither reason, propriety, nor justice in thus excluding the non-resident child from the property acquired for him by his resident father. In Iowa, at least, this relic of despotism and injustice should have no vitality as a principle of common law.[747]

Judge Greene argued that Iowa's Lockean Natural Rights Guarantee nullified the common law rule prohibiting a nonresident alien from inheriting land,[748] but the Iowa Supreme Court's majority continued to enforce the rule.[749]

In the next case addressing regulations of property transfers, *Lessee of Good v. Zercher*,[750] the Ohio Supreme Court enforced an Ohio state statutory requirement that when a married woman transfers land to her husband, the deed must include a set of declarations regarding the voluntary nature of the transfer.[751] Elizabeth Zercher argued that the transfer of her property to her husband, George Zercher, was invalid because the deed did not include the required voluntary declaration.[752] The defendant relied on a different statute, passed five years after the transfer in question, which permitted legal

746. *Id.* at 412 (Greene, J., dissenting).
747. *Id.* at 412–13.
748. *Id.* at 413–14.
749. *Id.* at 411.
750. 12 Ohio 364 (1843).
751. *Id.* at 365, 369.
752. *Id.* at 364–65.

transfers of land from a wife even when the declaration was not included in the deed.[753]

Because the deed was incomplete, the court ruled that the transfer was "a nullity" and that Elizabeth had not been divested of her land.[754] The Ohio Supreme Court reasoned that the second statute was not intended to apply retroactively to validate previous transfers.[755] The court further argued that the legislature did not have the power to validate this deed because the deed did not legally exist since it had failed the proper legal requirements upon its execution.[756] Finally, the Ohio Supreme Court relied on Ohio's Lockean Natural Rights Guarantee:

> It is the principal object of our political organization to secure each individual in the enjoyment of his natural rights. And the chief glory of every citizen, however humble or weak, is to feel, in the omnipotence of constitutional protection, that there is no power under God can deprive him of his property or his rights. . . . The right of property is coupled with the right of life, since the day that man first ate his bread in the sweat of his brow. Hence it is declared in the Constitution that the rights of acquiring, possessing, and protecting property are natural, inherent, and inalienable.[757]

Therefore, the court held that the original deed was invalid and that the legislature's subsequent statute could not constitutionally divest Zercher of her land.[758]

The Maine Supreme Judicial Court also ruled on property regulations related to a wife's rights in the 1847 case *Given v. Marr*.[759] In this case, the demandant was divorced from her husband, John Given, following his desertion.[760] She argued that she was entitled to inherit the land, but Rufus Marr argued that Given had conveyed the mortgage note to him prior to his departure.[761] In resolving this conflict, the Maine Supreme Court relied on its construction of the Maine constitution's Lockean Natural Rights Guarantee:

> By article 1, sect. 1, of the constitution of Maine, "all men are born equally free and independent, and have certain natural, inherent, and inalienable rights, among which are those of enjoying and defending life and liberty, *acquiring, possessing and protecting* property." Of

753. *Id.* at 366–67.
754. *Id.* at 367.
755. *Id.*
756. *Id.*
757. *Id.* at 367–68.
758. *Id.* at 369.
759. 27 Me. 212, 218 (1847).
760. *Id.*
761. *Id.* at 219–20.

> this section there has been a judicial construction in this State, where the Court say, "by the spirit and true intent, and meaning of this section, every citizen has the right of possessing and protecting property, according to the *standing laws* of the State, in force, *at the time of acquiring it, and during the time*, of his continuing to possess it." And again, "It cannot by a *mere act of the Legislature*, be taken from *one man* and vested in *another directly*, nor can it by the *retrospective operation* of laws, be indirectly transferred from one to another, or be subjected to the government of principles in a court of justice, which must necessarily produce the same effect."[762]

The court then analyzed the laws in effect at the time of Marr's desertion, which occurred prior to the passage of the statute authorizing divorce for desertion.[763] Thus, it ruled that Marr's wife was not entitled to inherit the land due to divorce, and the court awarded the property to Given.[764]

Finally, the California Supreme Court addressed a wife's property rights in *Dow v. Gould & Curry Silver Mining Co.*[765] The plaintiff, Mrs. Mary A. Dow, sued for 48 shares of Gould & Curry stock, alleging that she still owned the stock.[766] She argued that the deed transferring the stock was invalid because her husband had power of attorney in the sale, and only she had signed the power of attorney document not her husband.[767] She relied on a state statute requiring that a wife's husband join in writing any instrument conveying property.[768] Among other arguments, the defendant claimed that this requirement was an unconstitutional infringement on the wife's right to property.[769]

The California Supreme Court held that requiring the husband to join legal instruments conveying his wife's property was constitutional.[770] The court reasoned that the wife still had a right to property and that the legislature was acting within its permissible scope of authority in regulating that right.[771] The California Supreme Court also pointed to common law requirements regulating a wife's transfer of her property to support this conclusion, and it explained that such requirements exist to "guard and protect the interests of

762. *Id.* at 220–21 (citation omitted).
763. *Id.* at 221–24.
764. *Id.* at 224–25.
765. 31 Cal. 629, 647–48 (1867).
766. *Id.* at 631.
767. *Id.* at 634–35.
768. *Id.* at 635.
769. *Id.* at 636.
770. *Id.* at 647.
771. *Id.*

the wife."[772] The court specifically concluded that the statute in question was constitutional "notwithstanding the constitutional declaration of the inalienable right, pertaining alike to all persons, of 'acquiring, possessing and protecting property.'"[773]

B. Creditor–Debtor Property Regulations

Two additional cases upheld the rights of creditors to sell debtor property or impose liens on property for unpaid debts.[774] First, in 1826, the Kentucky Court of Appeals issued a ruling in *Kirby v. Chitwood's Administrators*[775] upholding an administrator's sale of an estate's property in order to pay debts owed by the estate.[776] The juvenile heirs to the estate challenged the administrator's sale, arguing that they had not consented to it.[777] Quoting from the State of Kentucky's Lockean Natural Rights Guarantee, the Kentucky Court of Appeals ruled that the sales in question were necessary to protect the creditor's property rights:

> [A]s the constitution is adopted for the express purpose of securing to the citizens, "the enjoyment of the right of life, liberty and property," the end would not be answered if the debtor should be allowed to keep the "property" of the creditor, and also the fund to which he had trusted; and as the general laws reaching that fund were adopted by the consent of the community, in accordance with the objects and purposes of the constitution, every individual is estopped to say that he does not consent to this disposition of his estate for the purpose of paying his debts.[778]

Thus, the court held that the administrator's sales of the property in question were legally justified to fulfill the creditor's right to property under the state constitution's Lockean Natural Rights Guarantee.[779]

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772. *Id.* at 643.

773. *Id.*

774. The Delaware High Court of Errors and Appeals also issued a ruling on the payment of debts in the 1821 case *Douglass v. Stephens*. 1 Del. Ch. 465, 479 (1821) (opinion of Johns, C.J.). As Chancellor Nicholas Ridgely recognized: "The rights of enjoying and defending life and liberty, of acquiring and protecting reputation and property,—and, in general, of attaining objects suitable to their condition, without injury to another, are the rights of a citizen; and all men by nature have them." *Id.* at 470 (opinion of Ridgely, C.). From the text, it is not clear whether he was specifically referencing Delaware's Lockean Natural Rights Guarantee. However, the majority of the court did not specifically address this argument and instead ruled that the citizen preference was permissible. *Id.* at 479 (opinion of Johns, C.J.).

775. 20 Ky. (4 T.B. Mon) 91 (1826).

776. *Id.* at 95–96.

777. *Id.* at 91–92.

778. *Id.* at 95.

779. *Id.* at 95–96.

The Maine Supreme Judicial Court addressed the question of a creditor's right to debtor property in the 1851 case *Spofford v. True*.[780] In this case, the Maine Supreme Judicial Court upheld a Maine statute regarding land sales.[781] The statute allowed the seller to take a lien on the lumber to be produced from the land purchased until the buyer paid the purchase price in full.[782] Here, the seller sued the purchaser for the value of the timber produced, claiming that the purchase price was never paid.[783] The Maine Supreme Judicial Court ruled that the statute did not violate Maine's Lockean Natural Rights Guarantee and analogized it to a common law lien:

> The statute in its prospective operation, and in this case it can have no other, is no abridgment of the rights of the citizen, secured to him, by the constitution of the State, in Art 1, sec. 1, of "acquiring, possessing and protecting property." It subjects the property to the payment of debts, which the owner has directly or indirectly caused or authorized, in its improvement, under a knowledge, that the property is so charged. In principle it in no respect differs from the lien at common law, in favor of mechanics, who have bestowed labor upon the article which it attaches.[784]

The court concluded that the seller's lien on the logs was valid.[785]

In these cases related to property regulations, litigants and courts used state constitutional Lockean Natural Rights Guarantees to emphasize the protection of private property rights, just as the state constitutional Lockean Natural Rights Guarantees were used to emphasize the protection of private property rights in the takings cases, which we discussed in the prior Part of this Article. But, without exception, in this group of cases the state courts found that the property rights in question were not absolute and that legislative regulations on property transfers and creditor–debtor transactions were within the legislature's authority to enact. The courts did not deny the possibility that some regulations reviewed might, in theory, violate the property rights provided by the state constitutional Lockean Natural Rights Guarantee, but the state courts deferred to the state legislatures with respect to all of the regulations challenged in these cases. Although the takings cases discussed in the previous Part acknowledged the possibility that some regulatory takings might violate state constitutional protections for private property rights, this set of cases, which upheld state regulations on property transfers and creditor–debtor transactions without exception, suggests that

780. 33 Me. 283, 291–92 (1851).
781. *Id.* at 292.
782. *Id.* at 290–91.
783. *Id.* at 285.
784. *Id.* at 291–92.
785. *Id.* at 292.

the state courts often deferred to state legislatures even where regulations encumbered the full exercise of property rights.

XI. Lockean Natural Rights Guarantees and Powers of Taxation

A surprising body of case law addressed the relationship of the Lockean Natural Rights Guarantees to various taxation situations. Eleven cases specifically cited or quoted state constitutional Lockean Natural Rights Guarantees in adjudicating the constitutionality of various taxation schemes. In many of these cases, the litigants invoked the property protection found in their state constitutions' Lockean Natural Rights Guarantee, arguing that their right to property was violated by an imposed tax. Like many of the cases discussed in this Article, these taxation cases included both general taxation schemes and fact patterns based on current events, especially railroad construction and enlistment during the Civil War. With a few exceptions, the state courts upheld the legislature's taxation schemes, ruling that they did not violate the Guarantees' property protections.

A. General Taxation Schemes

In four cases, state supreme courts considered the authority of state or local governments to impose general taxation schemes on state citizens. With the exception of one case, the state courts found that the Lockean Natural Rights Guarantees did not prohibit the taxation practice in question.[786]

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786. In addition to the cases discussed in this subpart, the Virginia Supreme Court of Appeals summarily upheld a taxation scheme in the face of the plaintiff's Lockean Natural Rights Guarantee arguments. In *Justices of Harrison County v. Holland*, the Virginia Supreme Court of Appeals upheld a state statute declaring that Simpson's creek would become a public highway for navigation purposes and requiring owners of land alongside the creek to construct dams with certain dimensions or modify their existing dams accordingly. 44 Va. (3 Gratt.) 236, 236, 250 (1846). The act further provided that the county should use public funds to reimburse the owners for their expenditures on these dams. *Id.* at 236. In response to a claim for reimbursement, the county relied on the Lockean Natural Rights Guarantee to argue that the state legislature did not have the authority to impose this tax. The county argued:

> The foundation principle of English liberty is security of persons and property. The principle upon which our revolution was commenced, prosecuted and perfected, was security of persons and property; and it would have been strange, therefore, if in establishing the principles of our institutions, and giving form to the government, this great cardinal principle had been forgotten, or had failed to be carefully guarded and secured. Accordingly we find that the first article of the Bill of Rights declares the indefeasible right of the citizen to "the enjoyment of life and liberty, with the means of acquiring and possessing property." The government to be established is not to be a government devised for the purpose of limiting the acquisition of property, or of artfully drawing it from its possessor; but its object and purpose is to afford encouragement and facility to its acquisition, and security to the possession of it.

Id. at 243. However, the opinion itself did not cite the Lockean Natural Rights Guarantee; the Virginia Supreme Court of Appeals summarily affirmed the constitutionality of the act. *Id.* at 250.

In the only case to invalidate a tax on the basis of the Lockean Natural Rights Guarantee,[787] in 1837 the Supreme Judicial Court of Maine used the state's Lockean Natural Rights Guarantee to strike down a town's taxation scheme in *Hooper v. Emery*.[788] Under an 1837 federal statute, the town of Biddeford received a refund of surplus tax money previously paid to the federal government.[789] A subsequent state statute specified that each city, town, or organized plantation was permitted to appropriate or loan its portion of the refund, provided it "receiv[ed] safe and ample security" for the money.[790] The Biddeford town selectmen voted to redistribute the money in question by dividing it among every inhabitant and family residing in Biddeford.[791] The plaintiff, a resident of Biddeford, sued to recover his share of the town's surplus, and the selectmen defended against the suit by arguing that their resolution to redistribute the money was unenforceable because it did not provide "safe and ample security" for the money as required by state legislation.[792]

The Maine Supreme Judicial Court agreed with the town's ruling that the redistribution of money back to families violated the requirement that the money be kept with "safe and ample security."[793] The court went further by invoking the Guarantee's protection of property to declare redistribution of tax money to be unconstitutional:

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787. Two other cases invalidated taxation schemes by invoking general inalienable or natural rights without relying specifically on a Lockean Natural Rights Guarantee. First, the Missouri Supreme Court held that the city could not impose taxes for its own local purposes on any lands outside of its geographical limits in *Wells v. City of Weston*. 22 Mo. 384, 387–88 (1856). The plaintiff argued that the taxation of his lands violated his "inalienable right of life, liberty and the pursuit of happiness," but it is not clear whether he was referencing the Missouri Lockean Natural Rights Guarantee. *Id.* at 386. Second, the Ohio Supreme Court ruled that Cincinnati lacked the proper authorization to impose a tax upon those bringing provisions to sell in the market. Mays v. City of Cincinnati, 1 Ohio St. 268, 279 (1853). Using language similar to the Guarantee, the court stated:

> The power to tax is one of the highest attributes of sovereignty. It involves the right to take the private property of the citizen without his consent, and without other compensation than the promotion of the public good. Such interference with the natural right of acquisition and enjoyment gaurantied [sic] by the constitution, can only be justified when public necessity clearly demands it. Being a sovereign power, it can only be exercised by the general assembly, when delegated by the people in the fundamental law; much less can it be exercised by a municipal corporation without a further unequivocal delegation by the legislative body.

Id. at 273. Thus, it ruled that the city could not impose the tax. *Id.* at 279. Again, the court did not explicitly cite the Guarantee but did recognize the right to acquire property.

788. 14 Me. 375, 380 (1837).

789. *Id.* at 375.

790. *Id.* at 376.

791. *Id.* at 375, 379.

792. *Id.* at 375–76, 378.

793. *Id.* at 379–80.

> To contend, that towns have the power to assess and collect money for the purpose of distributing it again according to numbers . . . . violate[s] "the principles of moral justice." For if the right to assess and collect money is without limit, it would not be difficult to continue the process of collection and division until the whole property held by the citizens of the town, had passed into, and out of the treasury; and until an equalization of property had been effected . . . . Such a construction would be destructive of the security and safety of individual property; and subversive of individual industry and exertion. It would authorize a violation of what is asserted in our "declaration of rights" to be one of the natural rights of men, that of "acquiring, possessing and protecting property."[794]

Therefore, the court held that the town did not have the authority to redistribute the surplus tax money under either the authorizing legislation as well as the state constitution.[795]

The Supreme Court of Ohio upheld the City of Cincinnati's five dollar tax on draymen in the 1846 case *City of Cincinnati v. Bryson*.[796] In context, this tax appears to have targeted the liquor industry because "drays" were low, flat-bed wagons used for liquor deliveries.[797] The court held that the tax was permissible because the city already had the authority to license drays and "the authority to license carries with it the power to impose the terms and conditions upon which it shall be granted."[798] In this case, the terms and conditions for the drayman's license were the payment of the fee.[799] In dissent, Justice Nathaniel Read distinguished between taxation of property, which was permissible, and taxation of labor, which he argued was unconstitutional.[800] Specifically, he relied on the right to acquire property found in Ohio's Lockean Natural Rights Guarantee:

> The constitution has declared that the right to acquire property is a natural, inherent, and unalienable right.

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794. *Id.*

795. *Id.* at 339–80, 382. However, the Maine Supreme Judicial Court did allow the legislature some flexibility in its tax schemes in the 1854 case *Inhabitants of Winslow v. County Commissioners of Kennebec*. 37 Me. 561 (1854). The court upheld the town's requirement that all inhabitants present a list of their estates to the town for the purpose of assessing taxes. *Id.* at 562–63. It reasoned that the list was required for administering a tax scheme, and taxation was necessary "[f]or the purpose of defending our constitutional and 'unalienable rights.'" *Id.* at 562. From the opinion, it is not possible to determine whether the use of "unalienable rights" was a reference to the Maine Lockean Natural Rights Guarantee.

796. 15 Ohio 625, 626, 643 (1846).

797. D.J. SMITH, DISCOVERING HORSE-DRAWN VEHICLES 91–93 (1994).

798. *Bryson*, 15 Ohio at 643.

799. *Id.*

800. *Id.* at 646 (Read, J., dissenting).

> Labor is the exercise of the right of acquisition. Hence, the legislature has no right to tax or interrupt such right. To talk of granting a license to a man for the privilege of pursuing honest labor, is an insult to the age, and belongs to a period of despotic barbarism, and is fit only to be addressed to vassals and slaves. Every person, by natural right and under our constitution, has the right to pursue honest labor without permission or license to do so from any source, except from that great and good God who gives him health and strength.[801]

Thus, although the majority of the court held that the city had the power to impose taxation upon draymen, the dissent framed its argument in terms of the state's Lockean Natural Rights Guarantee, maintaining that labor free from taxation was implied from the Guarantee's provision of the right to acquire property.[802]

One of the Ohio Courts of Common Pleas invalidated a licensing and taxation scheme for taverns in *Extract from Judge Lawrence's Charge to the Grand Jury*.[803] The opinion explicitly relied on Judge Read's dissent in *Cincinnati v. Bryson* and affirmed his logic that taxing labor violated the state constitution's Lockean Natural Rights Guarantee.[804] In fact, it quoted the above excerpted portion of the *Bryson* case.[805] This case is particularly interesting because of its apparent inconsistency with the Ohio Supreme Court decisions discussed in the liquor laws Part, which had upheld various liquor laws.[806] The outcome of this case suggests that property rights protect labor from taxation, even if the labor is an area otherwise permissibly regulated by the state's police power.

Ten years later, the Ohio Supreme Court again upheld a taxation provision in *Matheny v. Golden*,[807] where it held that a tax exemption provision in the incorporation charter of Ohio University was constitutional.[808] In dissent, Chief Justice Thomas Bartley cited the State of Ohio's Lockean Natural Rights Guarantee:

> Now, the constitution of 1802, under which the law incorporating the Ohio University was enacted, not only enjoined "a frequent recurrence to the *fundamental principles of civil government*, as absolutely necessary to preserve the blessings of liberty," and declared, as one of "the natural, inherent, and inalienable rights of the

801. *Id.* at 651.

802. *Id.* at 651–52.

803. Extracts from Judge Lawrence's Charge to the Grand Jury, 2 Ohio Dec. Reprint 491 (Ct. Com. Pl. 1861).

804. *Id.* at 493–94.

805. *Id.* at 493.

806. *See supra* notes 632–37 and accompanying text.

807. 5 Ohio St. 361 (1856).

808. *Id.* at 373–74.

> people, that they have *at all times a complete power to alter, reform*, or *abolish* their government, whenever they may deem it necessary."[809]

Thus, he argued that the citizens of Ohio should not be bound by this charter.[810]

B. Taxation for Railroads

Four reported cases addressed the use of taxes to support the railroad industry. In this series of cases, the state courts considered the use of tax money to buy subscriptions to railroad stock and directly assist a railroad in constructing tracks. Without exception, the state courts upheld these taxation schemes in the face of Lockean Natural Rights Guarantee challenges, suggesting deference to the popularly elected legislature or the popular vote authorizing the tax expenditures. However, strong dissents from the Kentucky, Florida, and Ohio courts invoking the Guarantees suggest that some judges viewed the Guarantees as a limitation on the taxation power of the state.

In 1853, the Pennsylvania Supreme Court issued a landmark opinion in *Sharpless v. Mayor of Philadelphia*,[811] upholding Philadelphia's use of taxation for the purpose of subscribing to railroad stock.[812] Sharpless argued that the taxation was unconstitutional because it took private property for a private purpose, which violated the citizens' property rights.[813] In response, the government argued that the constitution did not impose any limits on using tax money to subscribe to railroad stock.[814] The court agreed.[815] With regards to the State of Pennsylvania's Lockean Natural Rights Guarantee, Judge George Woodward explained:

> When, therefore, "the right of acquiring, possessing, and protecting property," is asserted, it does not mean to exempt property from taxation, since without taxation civil government cannot exist. Nor does it mean to exempt it from the prerogative of *eminent domain*, for the right to take private property for public use, is elsewhere expressly asserted, and without this also government cannot exist prosperously, if indeed at all. The acquisition, protection, and defence guaranteed, must be consistent with and subordinate to these first principles, else one part of the constitution destroys the other, and so the government is dissolved. I am clearly of opinion, that this section cannot be set up

809. *Id.* at 433 (Bartley, C.J., dissenting).
810. *Id.*
811. 21 Pa. 147 (1853).
812. *Id.* at 158, 173–74.
813. *Id.* at 151–52.
814. *Id.* at 157.
815. *Id.* at 173.

> against a tax law. Nor is there any clause in the Declaration of Rights, which restrains the legislative power of taxation. I know this may seem to some a startling proposition, but, rightly considered, there is nothing alarming in it.[816]

In a separate opinion, Chief Justice Jeremiah Black simply stated: "It does not violate the right of acquiring, possessing, and protecting property, secured by [the Lockean Natural Rights Guarantee]. The right of property is not so absolute but that it may be taxed for the public benefit."[817] In sum, the court found that the Lockean Natural Rights Guarantee's property rights did not affect the city's ability to use tax money in this way.[818] The Pennsylvania court and other state courts cited this precedent in subsequent cases addressing taxation for railroads.[819]

Perhaps most dramatically, the opinion had an impact on the Pennsylvania constitution itself. Just four years after this ruling, in 1857, the constitution was amended to prohibit "any county, city, borough, township, or incorporated district . . . to become a stockholder in any company, association or corporation."[820] According to the Pennsylvania Supreme Court: "It is well known that the evils pointed out by our Supreme Court in the leading case of Sharpless v. The Mayor . . .[,] as necessary to be remedied only by constitutional law, led to the amendment of 1857."[821]

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816. *Id.* at 184 (opinion of Woodward, J.).

817. *Id.* at 173 (opinion of Black, C.J.).

818. However, in its 1858 decision in *Mott v. Pennsylvania Railroad Co.*, the Pennsylvania Supreme Court did impose a limit on the legislature's use of taxation to benefit the railroads. 30 Pa. 9, 33–34 (1858). An 1857 act provided for the public sale and auction of the Main Line and stipulated that if the Pennsylvania Railroad Company were the purchaser, it would be exempt forever from the "payment of all tonnage taxes, and all other taxes whatever, except for school, city, county, borough, and township purposes." *Id.* at 9. The Pennsylvania Supreme Court invalidated the act and described it as creating "one of the most magnificent exhibitions of a '*mock auction*' that the world has ever witnessed!" *Id.* at 26. In his concurring opinion, Judge Walter Lowrie relied on "inherent and inalienable rights," although he did not explicitly cite Pennsylvania's Lockean Natural Rights Guarantee:

> As individuals must, in the nature of things, have certain inherent and inalienable rights, in order to be individuals; so society must have its inherent and inalienable rights, in order to be a society. This is a natural and scientific necessity. The social right and power of government is essentially inherent and inalienable, because man is naturally social, and there can be no society without government.

Id. at 35 (Lowrie, J., concurring). Thus, the court held that a legislature could not exempt a railroad from taxation forever. *Id.* at 34 (majority opinion).

819. For example, in 1853, the Pennsylvania Supreme Court issued a second opinion on the City of Reading's use of tax funding to subscribe to the stock of the Lebanon Valley Railroad Company. Moers v. City of Reading, 21 Pa. 188, 199 (1853). The court summarily dismissed the Lockean Natural Rights Guarantee argument, noting that it "ha[d] been already decided in the case of Sharpless v. Philadelphia," and focused instead on a set of arguments related to the railroad's charter. *Id.* at 200.

820. PA. CONST. of 1838, art. XI, § 7 (1857).

821. Speer v. Sch. Dirs. of Blairsville, 50 Pa. 150, 157 (1865).

The Kentucky, Florida, and Iowa state courts also upheld the uses of taxes to subscribe to railroad stock.[822] However, powerful dissents in the Kentucky, Florida, and Ohio cases suggest that some members of the state courts were persuaded by the Lockean Natural Rights Guarantee argument against such taxes. First, the Court of Appeals of Kentucky issued a ruling upholding taxation used to subscribe to railroad stock in the 1852 case, *Slack v. Maysville & Lexington Railroad Co.*[823] The majority did not cite or refer to the Lockean Natural Rights Guarantee in its opinion. This decision is most notable for its dissent, which presented nearly forty pages of argument against the tax and included a reference to Kentucky's Lockean Natural Rights Guarantee.[824] Explaining that the legislature "has no right to take from one citizen the honest earnings of his lawful industry . . . and give it to another citizen, or to a corporation (which amounts to the same thing)," Judge Hise argued that the tax deprived the Maysville citizens of their natural rights to property, which existed with or without the state constitution.[825] Citing Kentucky's Lockean Natural Rights Guarantee, he stated:

> It is substantially prohibited in the solemn declaration made in convention, as contained in the short but comprehensive preamble to the constitution of 1799, ordaining and establishing the same, as

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822. The Alabama, Virginia, and Ohio state courts also upheld taxation to subscribe to railroad stocks but did not specifically address the litigants' Lockean Natural Rights Guarantee arguments. First, the Alabama Supreme Court ruled in *Gibbons v. Mobil & Great Northern Railroad Co.* that the taxation was permissible because it fulfilled a public purpose. 36 Ala. 410, 439, 449 (1860). The appellant argued that the taxation violated "the 1st and 13th sections of the bill of rights; the former declaring, that 'no set of men are entitled to exclusive, separate public emoluments or privileges, but in consideration of public services,'" which formed part of Alabama's Lockean Natural Rights Guarantee at the time. *Id.* at 430. The Alabama Supreme Court held that the taxation was constitutional. *Id.* at 439.

Second, in the 1837 Virginia case *Goddin v. Crump*, the citizen challenger argued that Richmond's taxation for subscribing to railroad stock violated the Lockean Natural Rights Guarantee right to property: "The bill of rights, art. 1. ranks among the inherent indefeasible rights of men in a state of society, the right to the means of acquiring and possessing property." 35 Va. (8 Leigh) 120, 141 (1837). Specifically, he argued that it unconstitutionally taxed a particular area (Richmond) for the benefit of the entire area around the transportation line. *Id.* at 142. The Virginia Supreme Court of Appeals did not address the Lockean Natural Rights Guarantee argument; it ruled that Richmond had exercised its taxation power constitutionally because cities have the authority to exercise certain corporate powers, including subscribing to private stock. *Id.* at 155–56 (opinion of Tucker, P.).

The Ohio Supreme Court reached a similar decision upholding a county's subscription to one hundred dollars of railroad stock in *Griffith v. Crawford County Commissioners*. 20 Ohio 609, 621 (1851). After reciting the Guarantee and declaring that it contained the "general, great, and essential principles of liberty and free government," Griffith argued that the subscription served only a private purpose and therefore taxing for this purpose was unconstitutional. *Id.* at 612–14. In a brief opinion, the majority dismissed Griffith's motion, citing procedural irregularities, and held that it did not have jurisdiction to issue a ruling on the merits. *Id.* at 620–23.

823. 52 Ky. (13 B. Mon.) 1, 4, 38 (1852).

824. *Id.* at 93 (Hise, J., dissenting).

825. *Id.* at 92–93.

> instituted expressly to "*secure* to all the citizens the enjoyment of the rights of life, liberty, and *property*, and of pursuing happiness." Now, the act in question defeats the purpose, as thus expressed, for which the government was formed; for, instead of *securing* to the citizen the enjoyment of the rights of property, etc., they destroy that security; not only so, but take it from him without compensation, against his will, to give it to a corporation. . . . The legislation in question disregards, therefore, one of the most important objects for which the government was formed; that is, to secure the rights of property. If it is permitted that the citizen's property be taken from him, against his will, and without compensation, and be given to others by any sort of device or indirection, however it may be disguised or cloaked over by verbosity in language, complexity of machinery, and by the substitution of delusive and misleading terms and phraseology . . . then will the enjoyment of the rights of property, and, in fact, the satisfactory enjoyment of life itself ("for you take away my life, if you take the means whereby I live withal"), be rendered insecure and worthless in this community.[826]

Thus, the dissent argued that the tax was unconstitutional because it violated the property rights guaranteed by Kentucky's Guarantee.[827]

Similarly, the Florida Supreme Court approved a statute authorizing the use of public money to purchase stock in railroads in the 1856 case *Cotten v. County Commissioners of Leon County*.[828] The dissent, however, invoked the state's Lockean Natural Rights Guarantee to argue that the taxation violated the right to property:

> "All freemen are declared equal by our Constitution and to have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation."
>
> Can it be that the right of possessing and protecting property does not exist as against a corporation? Is a proposition to be tolerated, or course of reasoning to be sanctioned which either in its terms or in its conclusions would secure to a corporation superior privileges, or guaranty to it greater rights than those enjoyed by the citizen? Assure protection to a corporation which is denied to the citizen—a protection not of natural persons but of fictitious beings, not of individuals, but of a class—create not merely aristocratic distinctions, but an oligarchy of wealth, the most odious of all influences and the most antagonistic to the essence of free institutions.[829]

826. *Id.* at 93–94.
827. *Id.*
828. 6 Fla. 610, 621–22 (1856).
829. *Id.* at 648–49 (Baltzell, C.J., dissenting).

Thus, although the majority held that the tax was constitutional,[830] the dissent relied on the state constitution's Lockean Natural Rights Guarantee to argue that it violated the right to property.[831]

A dissenter on the Iowa Supreme Court also invoked that state's Lockean Natural Rights Guarantee to argue that the taxation scheme should be invalidated in the 1853 case, *Dubuque County v. Dubuque & Pacific Railroad Co.*[832] The taxation scheme in this case was slightly different: Dubuque County used its tax revenue to directly contribute to railroad construction.[833] The majority held that nothing in the state constitution prevented the citizens from voting to spend their tax money on railroad construction or on any other improvements within the county.[834] However, the dissent invoked the Lockean Natural Rights Guarantee of the Iowa constitution to argue that the taxation scheme in this case was unconstitutional:

> The constitution declares "that all men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property." If this property is to be held by the citizen, subject to the will of the majority, and if by that majority it can be taxed, sold, and appropriated towards building works of internal improvement, where is the enjoyment, possession and protection guaranteed by this article of the constitution? Is a man protected in the possession of his property when public clamor may at any time demand it for what a majority may please to call public purposes? Do the people of Iowa hold their land by so feeble a tenure?[835]

The dissent further predicted that if the court allowed tax money to be used for public improvements like the railroad, there would be nothing to prevent future money from being used "to erect manufacturing establishments, to sustain a line of steamboats, keep up a line of stages or telegraphic communication."[836] Therefore, according to the dissent, the constitution required that tax expenditures be strictly limited to direct protections of life, liberty, and property.[837]

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830. *Id.* at 621–22 (majority opinion).
831. *Id.* at 648–49 (Baltzell, C.J., dissenting).
832. 4 Greene 1 (Iowa 1853), *overruled in part by* Stokes v. Cnty. of Scott, 10 Iowa 166 (1859).
833. *Dubuque Cnty.*, 4 Greene at 1–2.
834. *Id.* at 2–3.
835. *Id.* at 11 (Kinney, J., dissenting).
836. *Id.* at 10.
837. *Id.* at 9.

C. *Taxation for Enlistment Bounties*

In three cases occurring in 1865, the final year of the American Civil War, the Pennsylvania, Wisconsin, and Massachusetts state courts found that imposing state taxes for the purpose of providing bounties to those who enlisted in military service was constitutional. First, in *Speer v. School Directors of Borough of Blairsville*,[838] the Pennsylvania Supreme Court addressed the constitutionality of such so-called "Bounty Laws."[839] This series of state statutes authorized boroughs to acquire debt in order to provide a $300 bounty to each person enlisting in federal military service.[840] The bounties were designed to help each borough meet its enlistment quota established by the federal government and to avoid a forced conscription.[841] William Speer argued that the taxes in question would benefit only those who would have been drafted into military service and that the public should not have to bear the burden of supporting private individuals.[842] The government responded that the tax in question served an important public purpose: the "holier[] purpose of preserving . . . liberties and the Union."[843] In finding the tax to be constitutional, the Pennsylvania Supreme Court agreed that the tax benefitted the general public.[844] Although the court did not specifically cite the Lockean Natural Rights Guarantee of the Pennsylvania constitution, it did rely on the constitutional guarantee of the right to pursue happiness, which was included in the text of the state constitutional Lockean Natural Rights Guarantee: "The pursuit of happiness is our acknowledged fundamental right, and that, therefore, which makes a whole community unhappy, is certainly a social evil to be avoided if it can be."[845] Thus, taxation to provide bounties for enlistment fell within the legislature's authority because it benefitted the whole public.[846]

The Wisconsin Supreme Court addressed a nearly identical issue in *Brodhead v. City of Milwaukee*,[847] a case in which the court upheld a City of Milwaukee tax to raise money to pay enlistment bounties.[848] The Wisconsin Supreme Court focused on the same question as did the *Speer* court, which was whether or not the tax in question benefitted the whole public.[849] The

838. 50 Pa. 150 (1865).
839. *Id.* at 150–51.
840. *Id.* at 151.
841. *Id.* at 158.
842. *Id.* at 152.
843. *Id.* at 157.
844. *Id.* at 164.
845. *Id.* at 160.
846. *Id.* at 164.
847. 19 Wis. 624 (1865).
848. *Id.* at 651.
849. *Id.* at 651–52.

first paragraph of the decision in this case cites Pennsylvania's *Speer* case in support of its decision to find the tax constitutional, and the Wisconsin Supreme Court quotes extensively from the Pennsylvania court's decision.[850] The Wisconsin Supreme Court held that the pursuit of happiness is a fundamental right of the whole community and that that right was furthered by taxation to provide enlistment bounties.[851] As in *Speer*, the State of Wisconsin's Lockean Natural Rights Guarantee specifically refers to the right to pursue happiness: "All men are born equally free and independent, and have certain inherent rights; among these are life, liberty, and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."[852] Thus, it seems likely that the court relied, in part, on the state constitution's Lockean Natural Rights Guarantee in rendering its decision.

In the third case, *Freeland v. Hastings*,[853] the Massachusetts Supreme Judicial Court upheld taxation for the purpose of repaying citizens who had contributed money to pay for enlistment bounties.[854] The petitioners cited the Massachusetts constitution's Lockean Natural Rights Guarantee to argue that the tax in question was unconstitutional: "This act is retrospective in its operation; and violates the provision securing the right of acquiring, possessing and protecting property [under the state constitution's Lockean Natural Rights Guarantee]."[855] The Massachusetts Supreme Judicial Court did not address this argument specifically, but it upheld the constitutionality of the tax in question, reasoning that if it was constitutional to impose a tax for directly paying bounties, it was also constitutional to impose the tax for repaying those who provided bounties.[856]

By applying the private property protections of the state constitutional Lockean Natural Rights Guarantees in the context of taxation, litigants were able to constitutionally challenge various taxation schemes, which might otherwise have gone unchallenged. By and large, the state courts ruled against these claims and accepted the challenged taxation as being constitutional. However, the consistency with which litigants raised and relied on Lockean Natural Rights Guarantee arguments, as well as the reliance of dissenting justices on such arguments, suggests the importance of the Lockean Natural Rights Guarantees as a potential limitation on the taxation power of state governments.

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850. *Id.* at 651, 655–58.
851. *Id.* at 656–57.
852. WIS. CONST. art. 1, § 1 (amended 1982 & 1986).
853. 92 Mass. (10 Allen) 570 (1865).
854. *Id.* at 586.
855. *Id.* at 574.
856. *Id.* at 579–80.

XII. Conclusion

In the time period before 1868, state constitutional Lockean Natural Rights Guarantees were invoked and considered in written opinions by state supreme courts across the country more than one hundred times. Such cases arose in nearly every state whose constitution contained a Lockean Natural Rights Guarantee. From George Mason's 1776 draft of the Virginia Declaration of Rights at the very beginning of the American Revolution up through the final resolution in the 1860s of the divisive issue of slavery, dozens of Lockean Natural Rights Guarantee arguments were made. These arguments include claims involving civil rights, political rights, legal procedures, business regulations, and property rights. Lockean Natural Rights Guarantees were an important tool for litigants in protecting their rights, and state courts relied on them frequently to protect substantive rights. Our exhaustive survey of the state constitutional case law makes it crystal clear that the Lockean Natural Rights Guarantees did mean *something*. They did not function as simply vague, preambular language but were instead applied with varying degrees of judicial vigor to decide some of the most challenging and controversial issues of the day.

The precise meaning of the Lockean Natural Rights Guarantees is debatable because different state supreme courts reached different conclusions on many of the issues presented. But in a few areas, the case law is consistent enough to draw some very important conclusions. First, the Lockean Natural Rights Guarantees protected the rights of minority group members in a way that was especially significant in light of the political climate of the day. Even before the original Lockean Natural Rights Guarantee was adopted, the framers of Virginia's Declaration of Rights noted the potential applicability of its equality guarantee to the issue of slavery. The framers of subsequent state bills of rights or constitutions must have been aware of this application as well, and almost immediately state supreme courts began to enforce the Lockean Natural Rights Guarantees to invalidate slavery and to advance the abolitionist agenda. Although an antislavery interpretation of the Lockean Natural Rights Guarantees was not followed universally, it is a fact that, as a general matter, the Lockean Natural Rights Guarantees were of great benefit to the antislavery movement as a whole. Lockean Natural Rights Guarantees were applied in a habeas case to protect a violator of the Fugitive Slave Act and by the Maine Supreme Court to grant citizenship and the right to vote to African-Americans in direct contradiction to prevailing U.S. Supreme Court precedents. The commitment of state supreme courts to apply the Lockean Natural Rights Guarantees to protect minority rights is clear, and this judicial commitment remains evident in the antidiscrimination application of the Fourteenth Amendment today.

Second, although the Lockean Natural Rights Guarantees were frequently invoked in an effort to invalidate state liquor laws, on the whole state supreme courts were not receptive to this argument and consistently

upheld the laws. Indeed, these opinions often used broad language to describe the state's police power to impose regulations for the general welfare and the judiciary's deference to the legislature on these matters. Although the Lockean Natural Rights Guarantees generally included protections for both liberty and property, almost all state supreme courts considered the liquor laws to be property regulations. Only the Indiana Supreme Court viewed the laws as an imposition on liberty, which perhaps explains its outlier position as the only state supreme court to invalidate the liquor laws on Lockean Natural Rights Guarantee grounds.

Third, courts often cited the Lockean Natural Rights Guarantees in economic cases, including cases involving laws regulating business like Sabbath laws, test oaths, laws regulating property, and taxation laws. In these cases, the state supreme courts again issued very consistent rulings. In nearly every case, the courts acknowledged that the Lockean Natural Rights Guarantees protected rights but then proceeded to defer to the legislature to regulate those rights. Therefore, the courts did not rely on the Lockean Natural Rights Guarantees as strong limitations on legislative powers and were content to allow the legislature flexibility and discretion in regulating those issues.

Fourth, state supreme courts cited the Lockean Natural Rights Guarantees in a wide variety of individual civil rights cases, including cases involving the freedom of religion, the right to marry, the involuntary confinement of and transportation of the poor, cases challenging retroactive legislation, statutes imposing or excluding liability, and cases involving a variety of other civil and political rights. Most state courts agreed that the Lockean Natural Rights Guarantees were relevant to the outcome of these individual civil rights cases, but the state courts often disagreed on what outcomes were dictated by their respective state constitutions.

This survey of more than one hundred cases is comprehensive and exhaustive with respect to state court reliance on Lockean Natural Rights Guarantees between 1776 and 1868, but it also suggests a number of questions which deserve further research. One interesting question that merits further research would involve examining the legislative history of the state constitutional conventions that adopted and modified each state's respective Lockean Natural Rights Guarantee. This could offer valuable insight as to the original meaning of the Lockean Natural Rights Guarantees and the original understanding as to unenumerated rights in each state. Second, our analysis here suggests the value more generally of research into state court case law on state constitutional provisions. In particular, in the context of substantive due process and in pursuing the quest to understand which rights, if any, are "deeply rooted in our history and tradition,"[857] our

857. Washington v. Glucksberg, 521 U.S. 702, 727 (1997).

analysis here suggests the value of further research into state case law on state constitutional provisions that are Ninth Amendment analogues, on the "fundamental principles"[858] provisions which appear in many state constitutions in the period between 1776 and 1868, and on state constitutional due process clauses as they were construed between 1776 and 1868. Such research could shed additional light on how the Framers of the Fourteenth Amendment understood the concepts of life, liberty, and property and on the role of courts in enforcing rights in these areas.

While further research into the questions mentioned above is needed, this Article does begin to suggest some answers to several of the unenumerated individual rights questions that are the source of modern-day federal constitutional law debates. The existence of this body of state constitutional case law on unenumerated individual constitutional rights itself suggests that unenumerated individual constitutional rights not only existed in state constitutional case law prior to 1868 but also that such rights were considered to be important enough to be dispositive in many states as to the question of slavery and as to the protection of other rights held by African-Americans. The Fourteenth Amendment's equality concern with all forms of discrimination is thus entirely consistent with the historical state case law under the Lockean Natural Rights Guarantees.

In addition, several state supreme courts applied the Lockean Natural Rights Guarantees to an enormous variety of topics, suggesting an understanding during this time that the Lockean Natural Rights Guarantees protected a vast range of unenumerated rights. Almost universally, the state courts deferred to the legislative branch with respect to economic and business regulations, but state courts did show a willingness to consider the constitutionality of regulatory takings, even though no state court actually ruled for the plaintiff in any of these cases. This suggests that it may be appropriate as a matter of original meaning for courts to evaluate the legality of regulatory takings.

Finally, with respect to use of Lockean Natural Rights Guarantees to protect civil and political rights, the implication of the state case law between 1776 and 1868 is somewhat mixed. The array of different rights that the state courts thought were affected by the Lockean Natural Rights Guarantees is striking. However, the inconsistent rulings in the various states suggest that the quest to identify unenumerated rights that are deeply rooted in American history and tradition is itself somewhat quixotic. It is not clear that either the framers of the Lockean Natural Rights Guarantees themselves or the state supreme courts, which applied the Lockean Natural Rights Guarantees between 1776 and 1868, ever reached a consensus as to their meaning. In fact, state constitutional Lockean Natural Rights Guarantees were amended during this time, and some of the most prominent scholars of the day debated

858. *See supra* text accompanying notes 77, 498, 704, and 810.

one another as to their meaning. Prior to 1868, the general sweeping language of the Lockean Natural Rights Guarantees defied easy explanation, lent itself to extensive debate, and inspired lengthy discussions on the definition and application of the Lockean Natural Rights Guarantees. This same statement remains true today.

Appendix A: Lockean Natural Rights Guarantees and Quasi-Guarantees in 1868

State	Version in use in 1868 [Placement (Year adopted): Text]
Alabama	ART. I, § 1 (1868): That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.
California	ART. I, § 1 (1849): All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.
Connecticut	ART. I, PREAMBLE (1818): That the great and essential principles of liberty and free government may be recognized and established, we declare, . . .
Delaware	PREAMBLE (1831): Through divine goodness all men have, by nature, the rights of worshipping and serving their Creator according to the dictates of their consciences; of enjoying and defending life and liberty, of acquiring and protecting reputation and property, and, in general, of attaining objects suitable to their condition, without injury by one to another; and as these rights are essential to their welfare, for the due exercise thereof, power is inherent in them; and therefore all just authority in the institutions of political society is derived from the people, and established with their consent, to advance their happiness. And they may for this end, as circumstances require, from time to time, alter their constitution of governance.
Florida	DECLARATION OF RIGHTS, § 1 (1868): All men are by nature free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.
Illinois	ART. XIII, PREAMBLE (1848): That the general, great, and essential principles of liberty and free government may be recognized and unalterably established, we declare: . . . ART. XIII, § 1 (1848): That all men are born equally free and independent, and have certain inherent and indefeasible rights; among which are those of enjoying and defending life and liberty, and of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness.

Indiana	ART. I, § 1 (1851): We declare, That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well being.
Iowa	ART. I, § 1 (1857): All men are, by nature, free and equal, and have certain inalienable rights among—which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.
Kansas	BILL OF RIGHTS, § 1 (1859): All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.
Kentucky	PREAMBLE (1850): We, the representatives of the people of the State of Kentucky, in convention assembled to secure to all the citizens thereof the enjoyment of the rights of life, liberty, and property, and of pursuing happiness, do ordain and establish this Constitution for its government. ART. XIII, § 3 (1850): The right of property is before and higher than any constitutional sanction; and the right of the owner of a slave to such slave, and its increase, is the same, and as inviolable as the right of the owner of any property whatever.
Louisiana	TIT. 1, ART. I (1868): All men are created free and equal, and have certain inalienable rights; among these are life, liberty and the pursuit of happiness. To secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.
Maine	ART. I, § 1 (1819): All men are born equally free and independent, and have certain natural, inherent and unalienable Rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.
Massachusetts	PREAMBLE (1780): The end of the institution, maintenance, and administration of government, is to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it with the power of enjoying, in safety and tranquility, their natural rights, and the blessings of life . . . . PT. 1, ART. I (1780): All men are born free and equal, and have certain, natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

Missouri	ART. I, § 1 (1865): That we hold it to be self-evident that all men are endowed by their Creator with certain inalienable rights, among which are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.
Nebraska	ART. I, § 1 (1866): All men are born equally free and independent, and have certain inherent rights; among these are life, liberty, and the pursuit of happiness. To secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.
Nevada	ART. I, § 1 (1864): All men are, by nature, free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.
New Hampshire	PT. 1, ART. I (1792): All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good. PT. 1, ART. II (1792): All men have certain natural, essential, and inherent rights; among which are the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and, in a word, of seeking and obtaining happiness. PT. 1, ART. IV (1792): Among the natural rights, some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the rights of conscience.
New Jersey	ART. I, § 1 (1844): All men are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.
North Carolina	ART. I, § 1 (1868): That we hold it to be self-evident that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.
Ohio	ART. I, § 1 (1851): All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

Pennsylvania	ART. IX, PREAMBLE (1838): That the general, great and essential principles of liberty and free government may be recognized and unalterably established, we declare . . . ART. IX, § 1 (1838): That all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.
Rhode Island	ART. I, PREAMBLE (1842): In order effectually to secure the religious and political freedom established by our venerated ancestors, and to preserve the same for our posterity, we do declare, that the essential and unquestionable rights and principles hereinafter mentioned, shall be established, maintained, and preserved, and shall be of paramount obligation in all legislative, judicial and executive proceedings.
South Carolina	ART. I, § 1 (1868): All men are born free and equal—endowed by their Creator with certain inalienable rights, among which are the rights of enjoying and defending their lives and liberties, of acquiring, possessing and protecting property, and of seeking and obtaining their safety and happiness.
Texas	ART. I, PREAMBLE (1866): That the general, great, and essential principles of Liberty and Free Government may be recognized and established we declare that . . . ART. I, § 2 (1866): All freemen, when they form a social compact, have equal rights; and no man, or act of men, is entitled to exclusive separate public emoluments or privileges, but in consideration of public services.
Vermont	CH. 1, ART. 1 (1793): That all men are born equally free and independent, and have certain natural, inherent, and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness, and safety;—therefore, no male person born in this country, or brought from over sea, ought to be holden by law to serve any person as a servant, slave, or apprentice, after he arrives to the age of twenty-one years, nor female in like manner after she arrives to the age of eighteen years, unless they are bound by their own consent after they arrive to such age, or bound by law for the payment of debts, damages, fines, costs, or the like.
Virginia	BILL OF RIGHTS, § 1 (1864): That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Wisconsin	ART. I, § 1 (1848): All men are born equally free and independent, and have certain inherent rights, among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

Appendix B: Development of Lockean Natural Rights Guarantees and Quasi-Guarantees until 1868

State	1868 Version [Placement (Year adopted): Text]	Prior Versions [Placement (Year adopted): Text]
Alabama	ART. I, § 1 (1868): That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.	ART. I, § 1 (1865): That no man, and no set of men, are entitled to exclusive separate public emoluments or privileges, but in consideration of public services. ART. I, § 1 (1861): That all freemen, when they form a social compact, are equal in rights; and that no man or set of men are entitled to exclusive, separate public emoluments or privileges, but in consideration of public services. ART. I, § 1 (1819): That all freemen, when they form a social compact, are equal in rights; and that no man, or set of men, are entitled to exclusive, separate public emoluments or privileges, but in consideration of public services.
California	ART. I, § 1 (1849): All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.	No prior constitution.
Connecticut	ART. I, PREAMBLE (1818): That the great and essential principles of liberty and free government may be recognized and established, we declare, . . .	No prior constitution.
Delaware	PREAMBLE (1831): Through divine goodness all men have, by nature, the rights of worshipping and serving their Creator according to the dictates of their consciences; of enjoying and defending life and liberty, of acquiring and protecting reputation and property, and, in general, of attaining objects suitable to their condition, without injury by one to another; and as these rights are essential to their welfare, for the due exercise thereof, power is inherent in them; and therefore all just authority in the institutions of political society is derived from the people, and established with their consent, to advance their happiness. And they may for this end, as circumstances require, from time to time, alter their constitution of governance.	PREAMBLE (1792): Through divine goodness, all men have by nature, the rights of worshipping and serving their Creator according to the dictates of their consciences, of enjoying and defending life and liberty, of acquiring and protecting reputation and property, and in general of attaining objects suitable to their condition, without injury by one to another; and as these rights are essential to their welfare, for the due exercise thereof, power is inherent in them; and therefore all just authority in the institutions of political society is derived from the people, and established with their consent, to advance their happiness; and they may for this end, as circumstances require, from time to time, alter their constitution of government. DECLARATION OF RIGHTS, § 2 (1776): That all Men have a natural and unalienable Right to worship Almighty God according to the Dictates of their own Consciences and Understandings; and that no Man ought or of Right can be compelled to attend any religious Worship or maintain any Ministry contrary to or against his own free will and Consent, and that no Authority can or ought to be vested in, or assumed by any Power whatever that shall in any Case interfere with, or in any Manner control the Right of Conscience in the free Exercise of Religious Worship.

State	1868 Version [Placement (Year adopted): Text]	Prior Versions [Placement (Year adopted): Text]
Florida	DECLARATION OF RIGHTS, § 1 (1868): All men are by nature free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.	ART. I, PREAMBLE (1865): That the great and essential principles of liberty and free government may be recognized and established, we declare: . . . ART. I, § 1 (1865): That all freemen, when they form a government, have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness. ART. I, PREAMBLE (1861): That the great and essential principles of liberty and free government may be recognized and established, we declare: . . . ART. I, § 1 (1861): That all freemen, when they form a social compact, are equal, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty; of acquiring, possessing, and protecting property and reputation; and of pursuing their own happiness. ART. I, PREAMBLE (1839): That the great and essential principles of liberty and free government, may be recognized and established; we declare: . . . ART. I, § 1 (1839): That all freemen, when they form a social compact, are equal; and have certain inherent and indefeasible rights; among which are those of enjoying and defending life and liberty; of acquiring, possessing, and protecting property and reputation; and of pursuing their own happiness.
Illinois	ART. XIII, PREAMBLE (1848): That the general, great, and essential principles of liberty and free government may be recognized and unalterably established, we declare: . . . ART. XIII, § 1 (1848): That all men are born equally free and independent, and have certain inherent and indefeasible rights; among which are those of enjoying and defending life and liberty, and of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness.	ART. VIII, PREAMBLE (1818): That the general, great, and essential principles of liberty and free government may be recognized and unalterably established, we declare, . . . ART. VIII, § 1 (1818): That all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, and of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Indiana	ART. I, § 1 (1851): We declare, That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well being.	ART. I, § 1 (1816): That the general, great and essential principles of liberty and free Government may be recognized and unalterably established; We declare, That all men are born equally free and independent, and have certain natural inherent, and unalienable rights; among which are the enjoying and defending life and liberty, and of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety. ART. I, § 2 (1816): That all power is inherent in the people; and all free Governments are founded on their authority, and instituted for their peace, safety and happiness. For the advancement of these ends, they have at all times an unalienable and indefeasible right to alter or reform their Government in such manner as they may think proper.
Iowa	ART. I, § 1 (1857): All men are, by nature, free and equal, and have certain inalienable rights among—which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.	ART. II, § 1 (1846): All men are by nature free and independent, and have certain unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness. ART. II, § 1 (1844): All men are by nature free and independent, and have certain unalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.
Kansas	BILL OF RIGHTS, § 1 (1859): All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.	No prior constitution.
Kentucky	PREAMBLE (1850): We, the representatives of the people of the State of Kentucky, in convention assembled to secure to all the citizens thereof the enjoyment of the rights of life, liberty, and property, and of pursuing happiness, do ordain and establish this Constitution for its government. ART. XIII, § 3 (1850): The right of property is before and higher than any constitutional sanction; and the right of the owner of a slave to such slave, and its increase, is the same, and as inviolable as the right of the owner of any property whatever.	PREAMBLE (1799): We, the representatives of the people of the State of Kentucky, in convention assembled, to secure to all the citizens thereof the enjoyment of the right of life, liberty, and property, and of pursuing happiness, do ordain and establish this Constitution for its government. ART. XII, PREAMBLE (1792): That the general, great and essential principles of liberty and free government may be recognized and established, We declare— ART. XII, § 1 (1792): That all men when they form a social compact, are equal, and that no man or set of men are entitled to exclusive separate public emoluments or privileges from the community, but in consideration of public service.

State	1868 Version [Placement (Year adopted): Text]	Prior Versions [Placement (Year adopted): Text]
Louisiana	TIT. 1, ART. I (1868): All men are created free and equal, and have certain inalienable rights; among these are life, liberty and the pursuit of happiness. To secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.	(1864): No Lockean Natural Rights Guarantee (1861): No Lockean Natural Rights Guarantee (1852): No Lockean Natural Rights Guarantee (1845): No Lockean Natural Rights Guarantee PREAMBLE (1811): [I]n order to secure to all the citizens thereof the enjoyment of the right of life, liberty and property, do ordain and establish the following constitution or form of government, and do mutually agree with each other to form ourselves into a free and independent state, by the name of the State of Louisiana.
Maine	ART. I, § 1 (1819): All men are born equally free and independent, and have certain natural, inherent and unalienable Rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.	No prior constitution.
Massachusetts	PREAMBLE (1780): The end of the institution, maintenance, and administration of government, is to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it with the power of enjoying, in safety and tranquility, their natural rights, and the blessings of life . . . . PT. 1, ART. I (1780): All men are born free and equal, and have certain, natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.	No prior constitution.

Missouri	ART. I, § 1 (1865): That we hold it to be self-evident that all men are endowed by their Creator with certain inalienable rights, among which are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.	ART. XIII, PREAMBLE (1820): That the general, great, and essential principles of liberty and free government may be recognized and established, we declare, . . .
Nebraska	ART. I, § 1 (1866): All men are born equally free and independent, and have certain inherent rights; among these are life, liberty, and the pursuit of happiness. To secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.	No prior constitution.
Nevada	ART. I, § 1 (1864): All men are, by nature, free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.	No prior constitution.
New Hampshire	PT. 1, ART. I (1792): All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good. PT. 1, ART. II (1792): All men have certain natural, essential, and inherent rights; among which are the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and, in a word, of seeking and obtaining happiness. PT. 1, ART. IV (1792): Among the natural rights, some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the rights of conscience.	PT. 1, ART. I (1783): All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good. PT. 1, ART. II (1783): All men have certain natural, essential, and inherent rights; among which are the enjoying and defending life and liberty—acquiring, possessing and protecting property—and in a word, of seeking and obtaining happiness. PT. 1, ART. IV (1783): Among the natural rights, some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the rights of conscience. (1776): No Lockean Natural Rights Guarantee
New Jersey	ART. I, § 1 (1844): All men are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.	(1776): No Lockean Natural Rights Guarantee

State	1868 Version [Placement (Year adopted): Text]	Prior Versions [Placement (Year adopted): Text]
North Carolina	ART. I, § 1 (1868): That we hold it to be self-evident that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.	DECLARATION OF RIGHTS, § 3 (1776): That no man or set of men are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public service.
Ohio	ART. I, § 1 (1851): All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.	ART. VIII, § 1 (1802): That all men are born equally free and independent, and have certain natural inherent and unalienable rights, amongst which are the enjoying and defending of life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety; and every free republican government being founded on their sole authority, and organized for the great purpose of protecting their rights and liberties, and securing their independence—to effect these ends, they have at all times a complete power to alter, reform, or abolish their government whenever they deem it necessary.
Pennsylvania	ART. IX, PREAMBLE (1838): That the general, great and essential principles of liberty and free government may be recognized and unalterably established, we declare . . . ART. IX, § 1 (1838): That all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.	ART. IX, PREAMBLE (1790): That the general, great and essential principles of liberty and free Government may be recognized and unalterably established, We declare, . . . ART. IX, § 1 (1790): That all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness. PREAMBLE (1776): Whereas all government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it, to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man . . . . CH. 1, ART. I (1776): That all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.

Rhode Island	ART. I, PREAMBLE (1842): In order effectually to secure the religious and political freedom established by our venerated ancestors, and to preserve the same for our posterity, we do declare, that the essential and unquestionable rights and principles hereinafter mentioned, shall be established, maintained, and preserved, and shall be of paramount obligation in all legislative, judicial and executive proceedings.	No prior constitution.
South Carolina	ART. I, § 1 (1868): All men are born free and equal—endowed by their Creator with certain inalienable rights, among which are the rights of enjoying and defending their lives and liberties, of acquiring, possessing and protecting property, and of seeking and obtaining their safety and happiness.	ART. IX, § 1 (1865): All power is originally vested in the people, and all free governments are founded on their authority, and are instituted for their peace, safety and happiness. ART. IX, § 1 (1861): All power is originally vested in the people, and all free governments are founded on their authority, and are instituted for their peace, safety and happiness. ART. IX, § 1 (1790): All power is originally vested in the people; and all free governments are founded on their authority, and are instituted for their peace, safety, and happiness. (1778): No Lockean Natural Rights Guarantee (1776): No Lockean Natural Rights Guarantee
Texas	ART. I, PREAMBLE (1866): That the general, great, and essential principles of Liberty and Free Government may be recognized and established we declare that . . . ART. I, § 2 (1866): All freemen, when they form a social compact, have equal rights; and no man, or act of men, is entitled to exclusive separate public emoluments or privileges, but in consideration of public services.	ART. I, PREAMBLE (1861): That the general, great and essential principles of Liberty and Free Government may be recognized and established, we declare, that . . . ART. I, § 2 (1861): All freemen, when they form a social compact, have equal rights; and no man, or set of men, is entitled to exclusive separate public emoluments or privileges, but in consideration of public services. ART. I, PREAMBLE (1845): That the general, great, and essential principles of liberty and free government may be recognized and established, we declare that . . . ART. I, § 2 (1845): All freemen, when they form a social compact, have equal rights; and no man or set of men is entitled to exclusive, separate public emoluments or privileges, but in consideration of public service.

State	1868 Version [Placement (Year adopted): Text]	Prior Versions [Placement (Year adopted): Text]
Vermont	CH. 1, ART. 1 (1793): That all men are born equally free and independent, and have certain natural, inherent, and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness, and safety;—therefore, no male person born in this country, or brought from over sea, ought to be holden by law to serve any person as a servant, slave, or apprentice, after he arrives to the age of twenty-one years, nor female in like manner after she arrives to the age of eighteen years, unless they are bound by their own consent after they arrive to such age, or bound by law for the payment of debts, damages, fines, costs, or the like.	CH. 1, ART. 1 (1777): That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty; acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety. Therefore, no male person, born in this country, or brought from over sea, ought to be holden by law, to serve any person, as a servant, slave, or apprentice, after he arrives to the age of twenty-one years; nor female, in like manner, after she arrives to the age of eighteen years, unless they are bound by their own consent, after they arrive to such age, or bound by law for the payment of debts, damages, fines, costs, or the like.
Virginia	BILL OF RIGHTS, § 1 (1864): That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.	BILL OF RIGHTS, § 1 (1851): That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety. BILL OF RIGHTS, § 1 (1830): That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety. BILL OF RIGHTS, § 1 (1776): That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Wisconsin	ART. I, § 1 (1848): All men are born equally free and independent, and have certain inherent rights, among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.	No prior constitution

Book Reviews

Resistance Songs: Mobilizing the Law and Politics of Community

REDEMPTION SONGS: SUING FOR FREEDOM BEFORE DRED SCOTT. By Lea VanderVelde. New York, New York: Oxford University Press, 2014. 305 pages. $29.95.

Anthony V. Alfieri*

> And those poor people that lived down there on Washington, I mean, they caught the blues. They got it all. They got the smell, the fumes, excuse me the maggots, and everything else around there. It was just terrible around there. It was contaminated badly.[1]
>
> —Jimmie Ingraham

Introduction

In 1834, twenty-three years before the United States Supreme Court's decision in *Dred Scott v. Sanford*,[2] an illiterate young African-American woman, mother, and slave known only by the name of Rachel sued her master, the Missouri slave trader William Walker, for her freedom.[3] Like other freedom petitions of the antebellum era, Rachel's suit risked both

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1. Interview by Ariel Mitchell with Jimmie Ingraham, in Miami, Fla. 19 (Jan. 10, 2014) (transcript on file with author).

2. 60 U.S. (19 How.) 393 (1857).

3. LEA VANDERVELDE, REDEMPTION SONGS: SUING FOR FREEDOM BEFORE DRED SCOTT, at xi (2014).

retaliation from her master and imprisonment by the Missouri courts.[4] Nevertheless, two years later in *Rachel v. Walker*[5] a St. Louis, Missouri, court declared Rachel a free woman,[6] redeeming her rights claim to liberty and ratifying her power to resist enslavement.

In 1925, the City of Miami built a trash incinerator in the de jure segregated Afro-Caribbean-American community of Coconut Grove Village West (the West Grove) amid rows of shotgun style houses and Jim Crow schools. Commonly known as Old Smokey, the incinerator discharged airborne carcinogenic chemicals (arsenic, benzo(a)pyrene, barium, and lead) and produced residual toxic waste (ash, liquefied plastic, and melted glass) for forty-five years until Florida courts finally ordered it closed in 1970.[7] In 1978, the City of Miami converted the 4.5 acre Old Smokey site and incinerator building into its Fire-Rescue Training Center,[8] which continues to operate today in a still impoverished and segregated West Grove community battered by inner-city decay (abandoned homes and vacant lots, drug gangs, and public-school-to-prison pipelines); deteriorating demographics (aging church congregations and black middle- and working-class flight); dwindling skilled and unskilled labor markets (deindustrialization, immigrant competition, and geographic isolation); and commercial and residential displacement (private-sector gentrification and public-sector disinvestment).[9]

In 2013 and 2014, the University of Miami School of Law's Historic Black Church Program (the Program)[10] learned from a whistleblower-

4. VanderVelde notes that Walker "was well-known in the [St. Louis] community for being ruthless. [Rachel] must have also known that she and her infant son faced months of life in a dank, dark jail, the only safe haven she could count on, while the court considered her case." *Id.* at xi (footnote omitted).

5. 4 Mo. 350 (1836).

6. *Id.* at 354.

7. Jenny Staletovich, *Ash Dumped at Coconut Grove Park Called Biggest Health Risk, Remains Under Investigation*, MIAMI HERALD, Sept. 17, 2013, http://www.miamiherald.com/news/local/community/miami-dade/coconutgrove/article1955048.html, *archived at* http://perma.cc/D2SX-E6FL [hereinafter Staletovich, *Ash Dumped at Coconut Grove Park*]; Jenny Staletovich, *City Inaction on Polluted Soil Angers Residents*, MIAMI HERALD, Sept. 8, 2013, http://www.miamiherald.com/news/local/environment/article1954788.html, *archived at* http://perma.cc/Q43S-ERR3.

8. *Training Division–Fire-Rescue Training Center*, CITY MIAMI DEPARTMENT FIRE-RESCUE, http://www.miamigov.com/Fire/pages/Divisions/Training_Center.asp, *archived at* http://perma.cc/K2SH-93RM.

9. *See* Anthony V. Alfieri, Essay, *Post-Racialism in the Inner City: Structure and Culture in Lawyering*, 98 GEO. L.J. 921, 941–50 (2010) (surveying economic conditions and the effect of poverty in the West Grove). *But see* Andres Viglucci, *The Resurgence of Coconut Grove*, MIAMI HERALD, Nov. 29, 2014, http://www.miamiherald.com/news/local/community/miami-dade/coconut-grove/article4199797.html, *archived at* http://perma.cc/4ZKB-67KC (addressing redevelopment plans for the area).

10. *See generally* Anthony V. Alfieri, *Community Education and Access to Justice in a Time of Scarcity: Notes from the West Grove Trolley Garage Case*, 2013 WIS. L. REV. 121, 125–28 [hereinafter Alfieri, *West Grove Trolley Garage Case*] (discussing the Historic Black Church Program and its involvement in the West Grove); Anthony V. Alfieri, *Educating Lawyers for*

leaked, municipal environmental report and a series of subsequent environmental studies that long-term exposure to Old Smokey's airborne carcinogens and toxic-waste dump sites had caused extensive soil and possibly groundwater contamination of homeowner properties and public parks in Coconut Grove and across the City of Miami and Miami-Dade County.[11] Founded in 2008 through a partnership with the Coconut Grove Ministerial Alliance, a consortium of West Grove black churches and housed at the law school's Center for Ethics and Public Service, the Program helps engineer antipoverty and civil rights campaigns through legal (direct service, impact litigation, and law reform) and political (civic engagement, coalition building, government lobbying, media networking, public education, and grassroots protest) interventions in impoverished inner cities.[12] The mission of the Program is to train law students to facilitate local legal–political interventions by providing rights education, conducting interdisciplinary research, and fostering economic justice-based urban policy initiatives in collaboration with struggling communities.[13] In the West Grove, recent Program supported legal–political campaigns have addressed public education,[14] civil rights law,[15] and public health.[16] The hope is that such interventions will disrupt and transform the disempowering roles, relationships, and institutions of the inner city and, thereby, enable economically subordinated and politically disenfranchised individuals and groups to gain enlarged access to economic opportunity and to obtain expanded forums for political participation.[17]

Community, 2012 WIS. L. REV. 115 (discussing the "teaching or pedagogy of community and public citizenship in legal education and professional training" as influenced by the author's work in impoverished Miami neighborhoods).

11. *See* Nick Madigan, *In the Shadow of 'Old Smokey,' a Toxic Legacy*, N.Y. TIMES, Sept. 22, 2013, http://www.nytimes.com/2013/09/23/us/old-smokey-is-long-gone-from-miami-but-its-toxic-legacy-lingers.html?_r=0, *archived at* http://perma.cc/C27B-E2NM; David Villano, *Old Incinerator and New Cancer in Coconut Grove*, MIAMI NEW TIMES, Apr. 10, 2014, http://www.miaminewtimes.com/2014-04-10/news/old-smokey-incinerator-miami-cancer-cluster/, *archived at* http://perma.cc/4PAA-JJGQ.

12. For a discussion of antipoverty and civil rights intervention strategies, see generally LANI GUINIER, LIFT EVERY VOICE: TURNING A CIVIL RIGHTS SETBACK INTO A NEW VISION OF SOCIAL JUSTICE 220–47 (1998); Anthony V. Alfieri, Essay, *(Un)Covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805 (2008).

13. *See* Alfieri, *West Grove Trolley Garage Case*, *supra* note 10, at 125.

14. Anthony V. Alfieri, *Fidelity to Community: A Defense of Community Lawyering*, 90 TEXAS L. REV. 635, 635–37 (2012) (book review).

15. Anthony V. Alfieri & Angela Onwuachi-Willig, *Next-Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 YALE L.J. 1484, 1555–56 (2013) (book review).

16. Zachary Lipshultz, Anthony Alfieri & Steven Lipshultz, *Miami's West Grove: 'Old Smokey' Incinerator Remains Health Hazard*, MIAMI HERALD, July 19, 2013; Staletovich, *Ash Dumped at Coconut Grove Park*, *supra* note 7.

17. Anthony V. Alfieri, *Integrating into a Burning House: Race- and Identity-Conscious Visions in* Brown*'s Inner City*, 84 S. CAL. L. REV. 541, 601–03 (2011) (book review); Alfieri & Onwuachi-Willig, *supra* note 15, at 1555–57.

Initially launched as a means to devise a West Grove-specific action agenda for law school- and university-sponsored rights education workshops, capacity-building seminars, and self-help courses,[18] and grounded in the social movement traditions of community organization and legal mobilization,[19] the Program gradually evolved from lawyer-led outreach clinics into joint lawyer–community partnerships encompassing neighborhood field investigations, university research alliances, and multidisciplinary policy practicums with West Grove residents, faith-based groups, and nonprofit entities, in cooperation with like-minded law firms, legal services organizations, foundations, and government officials. Currently, each of the Program's main projects—civil rights and poverty law, documentary film production, environmental justice, public health, and social enterprise—seeks to enhance economic opportunity and to increase political participation within the West Grove, the City of Miami, and Miami-Dade County. For each project and its matching social movement, "the legal piece is only one tactic of organizing. It is not the goal."[20]

In the case of Old Smokey, the goal of the campaign currently underway is to integrate South Florida civil rights, environmental, and public-health stakeholders into a unified legal–political reform coalition. To that end, the Program's Environmental Justice Project is aiding a citizen-led steering committee to organize the cleanup of city- and county-wide public parks by enlisting residents adversely affected by contaminated soil or groundwater; recruiting a local pro bono team of law firms and national environmental advocacy organizations to advise on legal strategy; retaining foundation-backed environmental science and health experts independently to verify testing and remediation procedures; assembling a campus–community environmental law and science summer consortium to train undergraduate and graduate students; and reaching out to consult with local, state, and federal governmental officials responsible for environmental protection in the region.[21] This sweeping campaign draws continuing strength from the fact that during the forty-five years of Old Smokey's noxious operation and the forty-five years of its lingering toxic aftermath, past and present West Grove residents reported troubling rates of respiratory illness and cancer incidence.[22]

Yet, despite decades of community distress and anecdotal evidence of incinerator-related illness and mortality, there is no record of a West Grove resident ever taking action to sue the City of Miami or Miami-Dade County

18. Alfieri, *supra* note 9, at 927.

19. Anthony V. Alfieri, *Faith in Community: Representing "Colored Town,"* 95 CALIF. L. REV. 1829, 1832–33 (2007).

20. GUINIER, *supra* note 12, at 226.

21. Anthony V. Alfieri, *Paternalistic Interventions in Civil Rights and Poverty Law: A Case Study of Environmental Justice*, 112 MICH. L. REV. 1157, 1169–70 (2014) (book review).

22. Madigan, *supra* note 11; Villano, *supra* note 11.

for personal injury, property damage, or injunctive relief associated with the wounds caused by Old Smokey. Even now, in the three-year wake of continuing revelations of private-property and public-park contamination, no West Grove resident has stepped forward to sue the City of Miami or Miami-Dade County to enforce Florida's "right to know" laws; to ensure comprehensive testing and remediation of contaminated property and park sites; or to establish a health registry and medical-monitoring system to document past, present, and future disease clusters.

This Review investigates the historical absence of civil rights and environmental-justice-incited legal and political mobilization around Old Smokey in light of Professor Lea VanderVelde's important new book *Redemption Songs: Suing for Freedom Before Dred Scott*. For advocates educated in multidisciplinary curricular models and trained in community-centered legal–political methods, VanderVelde's antebellum history of freedom suits offers long forgotten exemplars of individual and collective resistance and surprisingly instructive contemporary lessons in how to "journey" with a community—that is, how to engage the diverse members of a community in "really getting a sense of who they are" and how "to understand their own power."[23] The resistance stories retain meaning today, VanderVelde reminds us, because the constitutional abolition of slavery in 1865 under the Thirteenth Amendment "has not completely curtailed social and economic subordination of some working people who struggle for survival."[24]

The purpose of this Review is to draw out the lessons of antebellum freedom suits and, by comparison, modern civil rights and environmental-justice suits. In so doing, this Review seeks to learn how to tell better stories of community power and resistance in Miami and elsewhere. For historians and advocates alike, better stories are not only more accurate descriptively but also more potent emotionally or expressively and more effective instrumentally or prescriptively.[25] To draw out the historical comparison between freedom and civil rights or environmental-justice suits and to hone better legal–political stories of resistance, the Review revisits the principal set of questions animating VanderVelde's nineteenth-century investigation. However basic these questions may appear at first glance, they warrant continuing reassessment and reconsideration by lay and legal advocates, law school clinical faculty, law students, and university scholars.

Consider, for example, the threshold question—how do subordinated communities of color learn of their legal rights? Further, how do they advance their emancipatory, civil, or environmental-justice rights without

23. GUINIER, *supra* note 12, at 221 (internal quotation marks omitted).

24. VANDERVELDE, *supra* note 3, at 3.

25. On emotion and passion in lawyering, see generally Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997 (2010).

equal access to courts or effective representation? Who does and who should instruct such communities in their legal rights? Who, in St. Louis, Miami, or other inner-city communities across the nation, leads the way? Why do some individuals, families, or groups delay and wait to file suit? What are the end results of civil rights and environmental-justice lawsuits spearheaded by subordinated groups and communities, and what "factors" influence their in-court and out-of-court outcomes? Although beyond the cabined scope of this Review, these fundamental questions of civil rights, environmental justice, and poverty law frame its broad contours and invigorate wider research on law and social movements.

The Review proceeds in three parts. Part I parses VanderVelde's central notions of subordination, voice, and redemption and illustrates their resonant force in the recently compiled oral histories of Old Smokey survivors. Part II examines VanderVelde's interpretation of St. Louis freedom suits and the Missouri legal rule of freedom by residence. Part III recasts VanderVelde's interpretive stance on antebellum freedom suits against the backdrop of Old Smokey to consider legal–political rights campaigns and community resistance strategies in the context of civil rights and environmental-justice claims.

I. Slavery and Segregation Stories: Accommodation, Resistance, and Redemption

> Who would think that black folks would speak up for themselves?[26]
>
> —Dr. Joyce Price

In *Redemption Songs*, VanderVelde, a distinguished legal historian, builds on her much praised biography of *Mrs. Dred Scott*[27] and the contemporary work of historians in the field of slavery[28] to study the nineteenth-century practices of antebellum freedom suits in Missouri and in

26. Interview by Ariel Mitchell with Dr. Joyce Price, in Miami, Fla. 6 (Jan. 10, 2014) (transcript on file with author).

27. LEA VANDERVELDE, MRS. DRED SCOTT: A LIFE ON SLAVERY'S FRONTIER (2009). For reviews of *Mrs. Dred Scott*, see generally Kristin Anderson, *Mrs. Dred Scott: A Life on Slavery's Frontier*, 72 ANNALS IOWA 2, 175 (2013) (book review); Lolita Buckner-Inniss et al., Book Review, 24 CAN. J. WOMEN & L. 458 (2012); Sally Hadden, Book Review, 114 AM. HIST. REV. 1451 (2009).

28. VANDERVELDE, *supra* note 3, at 10 & n.35 (citing HELEN TUNNICLIFFE CATTERALL, JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO (1968); JUDITH KELLEHER SCHAFER, BECOMING FREE, REMAINING FREE (2003); Jason A. Gillmer, *Suing for Freedom: Interracial Sex, Slave Law, and Racial Identity in the Post-Revolutionary and Antebellum South*, 82 N.C. L. REV. 535 (2004)).

the western territories.[29] The genesis of this study, VanderVelde explains, emerged out of her research on the life of Harriet Scott and Scott's attendant travel to St. Louis, Missouri, where she lived before the commencement of the protracted and ultimately failed lawsuit in *Dred Scott v. Sandford*.[30] Well-versed in the litigation history of the *Dred Scott* case,[31] VanderVelde carefully traced Missouri Supreme Court decisions to uncover the lower court case records of a small cluster of freedom suits filed by enslaved persons in St. Louis municipal courts. Initially, in searching the case records of slaves prosecuting suits against their masters, VanderVelde acknowledges that she "had no idea of the extent to which slaves in the western territories actually resorted to the courts in seeking freedom."[32] Fortuitously, with the archival help of Missouri courthouse librarians, she soon discovered approximately 300 cases spanning 239 litigants across 38 family groups and extending over more than three decades, lawsuits memorializing the defiant voices of enslaved men and women seeking freedom in the courts of St. Louis.[33]

The startling discovery of archival case materials, VanderVelde confesses, "upended" her doctrinal preconceptions "about slaves, legal status, race, and the courts."[34] To move beyond those preconceptions and to break new ground in the study of slavery, legal status, and race in nineteenth-century American courts, VanderVelde carves out several lines of inquiry in *Redemption Songs* useful for historians of race and advocates for the legal–political rights of impoverished racial communities. Closely interwoven, the inquiries seek to ascertain how enslaved men and women learned that their residence in free territories conferred the legal right to sue for freedom and, further, how they advanced that emancipatory right in the St. Louis courts. To resolve these questions, VanderVelde parses the extraordinary collection of freedom-suit petitions filed by slaves in St. Louis between 1814 and 1860.[35] These freedom suits, according to

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29. VanderVelde mentions that the substantial "numbers of enslaved persons traversing through and residing in free territory indicates rather strongly that the antebellum frontier, even north and west of the Ohio River, was not as free from slavery as the law decreed." *Id.* at 204. She also comments that Missouri's extensive border with Illinois gave geographic rise to "most of the St. Louis freedom suits." *Id.* at 12. St. Louis itself, she adds, served as the marketplace for the west in the exchange and transport of slaves and as "a manumission destination . . . because it had an existing free black community." *Id.* at 16.

30. *Id.* at ix.

31. VanderVelde argues that the U.S. Supreme Court in *Dred Scott* not only reversed the Missouri rule of freedom by residence but also undermined freedom suits by declaring that African Americans "had no rights at all." *Id.* at 208. Although never repealed, the Missouri statute was "repurposed" to correct "mistaken status" and to enforce the promise of manumission inscribed in the last will and testament of a master. *Id.* at 210.

32. *Id.* at ix.

33. *Id.* at 194. Of these, VanderVelde selected twelve stories for more detailed accounts. *Id.*

34. *Id.* at x.

35. *Id.* at xi.

VanderVelde, preserve "the voices of slaves who had turned to the courts for justice," and, moreover, "provide insight into the heroism, hope, determination, and struggle of slaves who sought liberty in a time when it was not guaranteed."[36] In this way, freedom suits tell stories of nineteenth-century caste, class, and racial status, "heartbreaking stories of family members desperate to purchase their brothers, wives, and daughters."[37] Equally important, the freedom suits tell stories of nineteenth-century judges, lawyers, and legal rights consciousness in the contexts of racial advocacy and adjudication.[38] In recounting these stories, VanderVelde hews closely to the axioms of liberal legalism, trusting enthusiastically in rights discourse, rule formalism, and the autonomy of law.

In the same way, civil rights and environmental-justice suits tell stories of twentieth and twenty-first century caste, class, and racial status, affecting stories of chronic illness and widespread contamination bound up in the work of judges and lawyers and informed by an expanding legal consciousness of common law, statutory, and constitutional rights. Here in Miami's West Grove and in similarly situated low-income communities of color across America's inner cities and rural townships, rights consciousness is roused by local concerns about public health and safety. By discrete turns, freedom suits, civil rights suits, and environmental-justice suits tell stories of individual, group, and community rights under conditions of cultural, political, and socioeconomic subordination. Typically, the stories are about powerless people "who inhabit the *bottom* of political, social, and economic hierarchies" constructed and reinforced by age, class, disability, ethnicity, gender, race, and geography.[39] Viewed from the bottom, these same stories of freedom, civil rights, and environmental justice are also about individual and community power expressed through multifaceted forms of legal–political resistance.

Like other modern historians of the antebellum period,[40] VanderVelde strives to hear and to capture the "muffled voices of a silenced population."[41] From the outset, she seeks out "the authenticity of subordinates' voices."[42] In nineteenth-century freedom suits, she discovers

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36. *Id.*

37. *Id.* at xii.

38. *See id.* at 6, 8–9 (describing the role of lawyers and judges during the freedom suits).

39. Anthony V. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1747, 1748 n.3 (1994) (book review).

40. For example, see ARIELA J. GROSS, DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM (2006); MARK TUSHNET, THE AMERICAN LAW OF SLAVERY 1810–1860: CONSIDERATIONS OF HUMANITY AND INTEREST (1981); MARK S. WEINER, BLACK TRIALS: CITIZENSHIP FROM THE BEGINNING OF SLAVERY TO THE END OF CASTE (2004); Eric Foner, Hamsworth Professor of Am. History, Slavery and Freedom in Nineteenth Century America (May 17, 1994), *in* ERIC FONER, SLAVERY AND FREEDOM IN NINETEENTH-CENTURY AMERICA (1994).

41. VANDERVELDE, *supra* note 3, at 1.

42. *Id.* at 2.

"a rich context of slave life, patterns of oppression and of survival, as revealed by the slaves themselves in seeking their own objectives."[43] The stories enable her to document in noteworthy detail "the lives of subordinated people and their adaptive methods" and to "illustrate how society's least well-off survive and how and why they approach courts in circumstances of widespread oppression."[44] Vital to this endeavor are the notions of accommodation, resistance, and redemption. VanderVelde defines accommodation in terms of the human survival instinct to adapt to and endure conditions of cruelty and privation. Conversely, she denotes resistance in terms of the competing human instinct to defy or oppose such conditions for self- or other-regarding reasons. On this valence, personal redemption occurs when an act of resistance wins or vindicates an individual's freedom or the freedom of others. Turn first to the notion of redemption stories.

A. Redemption Stories

VanderVelde's notion of redemption stories informs her understanding of the St. Louis freedom suits and the legal underpinnings supporting the Missouri rule of freedom by residence. In a freedom suit, VanderVelde explains, "the slave defies his or her master."[45] Defiance in the form of a redemption song, she notes, "speaks truth to power" albeit "not full truth," for "the slave is not empowered to tell the whole truth—but enough of the truth to be upsetting to the master, to make a sound discordant with the legitimacy of her master's dominion, and enough of the truth to meet the elements legally necessary to redemption."[46] On this view, each freedom suit offers a partial truth through the vehicle of a story "told by a slave while enslaved, a person who is normally expected to be neither seen nor heard."[47]

For VanderVelde, each suit and each slave's story carries a structure and a discursive pattern resembling a song marked by "a beginning, the petition; a middle, the lawsuit; and an end, the judgment."[48] Pronounced in the public sphere of "courts, law and legal order," the judgment describes "multiple changing contexts: a life, other lives, a social relationship, an economic relationship, a social history, and the history of multiple communities."[49] At the same time, experienced in private and "often out of hearing," the judgment also causes "dramatic and transformative" changes in the slave petitioner's discourse, voice, and status consonant with the

43. *Id.*
44. *Id.* at 2–3.
45. *Id.* at 1.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*

instrumental objective of redeeming the legal right to freedom[50] or, in the current context of the West Grove, the goal of redeeming the right to live in a healthy and safe environment.

To VanderVelde, even the partial truth and the muffled voice of a freedom-suit petition offers "about as authentic as any historical record that slaves could leave."[51] The petition, typically filed by a slave appearing as a pauper and signed at the bottom with an "X," presented a claim of entitlement to a juridical official (e.g., a justice of the peace or a clerk of court), named a slave owner as the defendant, and at times prompted the court assignment of legal counsel.[52] Often, VanderVelde points out, "the petition reads as if the clerk simply took down the petitioner's account of what had happened to him or her."[53] In this way, the roughly 300 discovered case files and the 239 disclosed litigants[54] reveal the "variability" of the enslaved lives at stake and the "contested discourse" of lawsuits at the trial court level.[55]

Read closely, VanderVelde remarks, the diverse lives and voices of the enslaved captured in the petitions convey a "sense of the personal, psychological, emotional, and social context of the litigants' motives" and the "raw authenticity" of their original songs.[56] Despite the presence of corroborating witness affidavits and depositions, she cautions, the text of freedom suits frequently appears "scripted" though "larger patterns and departures"—recurrent "riffs of fortuity, circumstance, and personality that characterize individual lives"—confirm "some truth in the legal records."[57] This basic "truth" echoes in the asserted "grievances that impelled slaves to file suit for freedom" and the efforts by slaves "to negotiate some better situation or buy their freedom."[58]

For many slaves, according to VanderVelde, the shifting elements of time and place mediated their grievances and negotiations, triggering the filing of petitions sometimes upon their initial arrival in St. Louis and sometimes later upon their sale to or settlement in a slave-owning household.[59] VanderVelde's insight here is crucial. As in antebellum St. Louis, in contemporary Miami, and in impoverished communities of

50. *Id.*
51. *Id.* at 2.
52. *Id.* The Missouri statute stated that "slaves were able to sue their masters, or anyone else who held them against their will, if they had reasonable grounds to believe they were free." *Id.* at 21.
53. *Id.* at 2.
54. *Id.* at 194. VanderVelde reports that "[o]ne hundred and fifty-three litigants were women or girls, while 126 litigants were men or boys." *Id.* at 5.
55. *Id.* at 6–7.
56. *Id.* at 3.
57. *Id.* at 4.
58. *Id.*
59. *Id.*

color elsewhere, the elements of time and place serve as key factors in mediating local legal–political grievances and negotiations and in triggering legal–political group and neighborhood organization and mobilization. Neither time nor place, however, appears to be singularly determinative in mediating grievances and negotiations or triggering organization and mobilization.

In Miami, for example, the Historic Black Church Program environmental research team's public investigation and disclosure of a whistleblower-leaked municipal report of contamination at the original site of Old Smokey and the team's vetting of subsequent government reports corroborating findings of contamination affecting adjacent private properties and nearby public parks comes more than forty years after the court-ordered closing of the facility and the subsequent razing of the incinerator smokestack.[60] Coupled with the passage of two generations, those much delayed environmental research findings have mitigated but in no way extinguished the embittered sense of community outrage directed toward Old Smokey and, by extension, the City of Miami. In fact, the sizeable architectural preservation of the site, including the central building and weigh station, has proven to be a rallying point for the West Grove community and a place for media photo opportunities and press briefings.

Additionally, in her survey of the St. Louis freedom suits, VanderVelde emphasizes the importance of a "triggering action," mentioning that slave litigants typically encountered a causal or intervening event to "trigger" the filing of a petition.[61] By trigger, VanderVelde means something beyond the ordinary abuse and violence of enslavement, something that rendered "the risk of escalation by angering one's master" tolerable.[62] Given the risks of retaliation, jail, and auction to strangers during the pendency of freedom-suit litigation, this trigger very often involved the protection of children from sale,[63] the preservation of extended family,[64] or the material threat to survival.[65] VanderVelde comments that the triggering action implied no necessary correlation to the outcome or success of the freedom suit. To assess litigation outcomes, she cites several common factors, including the persistence of the litigant, the presence and quality of lawyer representation, and the degree of slave-owner resistance.[66] Pointedly, she notes that these factors fail to explain the dismissal of a

60. Madigan, *supra* note 11; Staletovich, *Ash Dumped at Coconut Grove Park*, *supra* note 7.

61. VANDERVELDE, *supra* note 3, at 4.

62. *Id.*

63. *Id.* at 5. VanderVelde points out that enslaved "[w]omen filed more lawsuits than men, and many of the women were mothers." *Id.*

64. VanderVelde estimates that of the 239 litigants identified in records, "160 persons . . . were related to the 38 identifiable families or housemate groups." *Id.*

65. *Id.* at 4.

66. *Id.* at 5.

significant number of suits on the grounds of litigant abandonment, lawyer refusal to prosecute, and party settlement or accommodation.[67]

VanderVelde's insight here is critical as well. As in antebellum St. Louis, in present-day Miami, and in other poor communities, the concept of a "triggering action"—defined as a causal or intervening event rising out of a community from the inside or thrust upon a community from the outside—is indispensable to understanding legal–political mobilization in civil rights and environmental-justice disputes. In the context of such interrelated campaigns, a triggering action may mean something beyond the ordinary, long-tolerated discriminatory experience of disparate treatment and environmental degradation. It may mean something more, such as a causal or intervening event that endangers the health and safety of children, imperils the preservation of intergenerational family and neighborhood enclaves, or jeopardizes the economic survival and physical integrity of a whole community. As VanderVelde suggests, the internal or external triggering action implies no necessary correlation to the outcome or success of the legal–political campaign. To be sure, litigation outcomes hinge on multiple factors, including the resoluteness of the litigant, the effectiveness of lawyer representation, and the staunchness of the opposition. Although central to VanderVelde's study, these factors fail to explain fully the process through which poor communities come to adopt accommodation and survival strategies in the face of state-sanctioned racial segregation and city-sanctioned environmental degradation. Likewise, they fail fully to explain or to justify the legal–political grounds for outside intervention by lay activists and legal advocates in the affairs of an indigent community.

The concepts of accommodation and survival stand common to the antebellum freedom suits of slaves in St. Louis and to the Old Smokey stories of West Grove residents in Miami. For St. Louis freedom suit petitioners, accommodation occurred outside the stock structure and typical discursive pattern of public lawsuits in the shadows of private-party negotiation and settlement. Distorted by unequal bargaining power, the abiding threat of violence, and the weight of material family necessity, these private, master–slave shadow negotiations doubtless hindered the ability and willingness of freedom-suit petitioners to press their cases to trial and later to final judgment.

For West Grove residents, accommodation also occurred outside the standard structure and conventional discursive pattern of public and private lawsuits. In the extended Jim Crow era of Old Smokey, neither public institutional reform litigation nor private-party litigation or negotiation were meaningfully available to West Grove residents. Burdened by inadequate political power, entrenched segregation, and everyday economic necessity,

67. *Id.*

private negotiations with white absentee landlords offered no recourse to residents, and public negotiations with municipal and county government officials proved futile. Lacking sufficient private-power and public-interest-group standing to halt the operation of Old Smokey, the appropriate knowledge to press for the remediation of its toxic effects, and the economic and familial resources to flee the close-knit neighborhood boundaries of the West Grove, hundreds of residents adapted, surviving decades of ash dumps, burning embers, foul smoke, and ruining soot.[68] The next subpart explores the concepts of accommodation and survival through the Old Smokey stories of West Grove residents.

B. Old Smokey Stories

This subpart presents selected Old Smokey stories collected from the recently assembled oral histories of past and present West Grove residents. Unlike the freedom-suit petitions recently discovered within St. Louis court archives, the oral histories of long-standing West Grove residents document a segregated culture and society mostly unmediated by the statutory framework of federal or state laws and the interpretive inscriptions and interventions of court clerks, lawyers, and judges.[69] Compiled by the Historic Black Church Program's Oral History and Documentary Film Project at the Center for Ethics and Public Service, the oral histories form part of an ongoing series chronicling the cultural and social history of race in Miami, the ongoing struggle for civil rights and equitable public education, and the emerging South Florida politics of environmental justice.[70] The individual subjects of the Old Smokey oral histories include six current and former residents of the West Grove: Delores Patterson Baine, Theodore W. Johnson, Antoniette Price, Francina Hopkins, Jimmie Ingraham, and Dr. Joyce Price.[71] The content of their testimony, especially

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68. *See* Villano, *supra* note 11 (describing how residents of the West Grove endured years of exposure to toxic emissions without any government remedial action).

69. Consider, by contrast, the freedom suit petition of an African-American woman and slave known by the name Winny. Her petition alleges:

> That since she has been living in This Territory she has had the following children, to wit: Jerry, Daniel, Jenny, Nancy, Lydia, Sarah, Hannah, Lewis and Malinda. And your Petitioner is informed that by reason of having been held in Indiana, she and her children born since are free. And your Petitioner further showed that she and her children Hannah, Lewis, and Malinda are now claimed as slaves by Phebe Prewitt, that Jerry is claimed as a slave by the representatives of Thomas Whitesides deceased, Daniel by John Whitesides, Jenny by Robert Musick, Nancy by Isaac Voteau, Lydia by John Butler and Sarah by Michael Hatton.

VANDERVELDE, *supra* note 3, at 61.

70. *Oral History Film Project*, U. MIAMI SCH. L., http://www.law.miami.edu/center-for-ethics-and-public-service/oral-history-film-project.php?op=2, *archived at* http://perma.cc/F7Q9-DFFT.

71. The transcripts of the six Old Smokey oral histories collected here have been abridged and edited sparingly mainly to reduce redundancy.

the themes of accommodation and survival, inequality, legal rights, political disenfranchisement, restorative justice, and segregation, bear serious consequences for advocates working to marshal legal–political campaigns of resistance from both inside and outside poor communities. The same testimony helps illuminate how such isolated communities, particularly communities of color burdened by the cultural, political, and socioeconomic legacy of Jim Crow segregation, learn of their legal rights. Indeed, the testimony works to elucidate not only how post-Jim Crow communities advance their civil rights and environmental rights without equal access to courts and effective representation but also who instructs such communities in their legal rights and leads the way. It also clarifies why some individuals, families, and groups delay and wait to file suit. Turn first to the oral history of Delores Patterson Baine.

1. Delores Patterson Baine.—

> I don't know of anyone that got sick from Old Smokey. I do know I have a sister that died from pancreatic cancer, and I have a sister that died from lung cancer. So am I thinking that that might have had something to do with it? You bet your life I am.[72]
>
> —Delores Patterson Baine

The oral history of Delores Patterson Baine describes the incinerator ash, smoke, and soot of Old Smokey and its fetid garbage dump. Her description points to the inequities of state-enforced segregated schools, the duplicities of public officials, and the indeterminate health risks of long-term exposure to airborne and soil contaminants. Most striking, it adverts to the intractability of race-motivated inequality.

> What comes to mind is seeing the garbage truck come down Washington Avenue from Carver Park, and going around what is now called the Barnyard, they had a weighing station [now a nonprofit-sponsored after-school program]. There was a platform that the truck would drive up on, and they would weigh the truck, and then it would go to the back of the Barnyard, go up the hill, dump their garbage. And when the incinerator was fired up it would dump all this ashes into the sky and would end up everywhere. We were often bathed in ash.
>
> Our football players practiced out there, our PE classes practiced out there. After school we played out there. It was just a part of our lives. Often our teachers wouldn't even want us to be out there in it. It was a way of life. What were we going to do? We had to go to

72. Interview by Ariel Mitchell with Delores Patterson Baine, in Miami, Fla. 9–10 (Jan. 10, 2014) (transcript on file with author).

school. And that was the school that was earmarked for us, and so that's where we went. We made the best of it. You could not escape the smell. We all complained about it.

There was a mango tree that was on the right of our house. We loved the mangos off of there. But my dad told us don't eat it if we didn't have a lot of rain because the rain washed the soot and the film off of the mangoes. I can remember washing mangoes in the washtubs that mom and my sisters used to wash our clothes in.

I think they need to stop making too little of this and think about how many lives have been impacted from things that happened way back when. There's no telling what kind of effect it had on us as children and our children's children. And the fact that they knew that this was a problem and didn't say anything until it came to light. It is sickening to know that this is the case. Do your job. Do what you're supposed—what you need to do to make sure that this isn't revisited years and years later. It's just the same old, same old over again.

When I became a teenager and all this stuff was coming, the soot and everything that came out of there, the smell and all that, yeah, we wondered. We talked about it. But we had a community and we had our school and we had each other, so that wasn't something that we focused on as much as now. Now when I think about it, it angers me that this was done, and how many people that was affected by this stuff. We don't—we'll never know. They put Old Smokey in there in a time when nobody was aware of what was happening and what the causes and effects were going to be farther down the line. So they don't care enough. The same thing when they put Old Smokey there and all the black faces were surrounding Old Smokey, they didn't care enough for them, so it's inequality. Same as it was back when.[73]

Turn next to the recollections of Theodore W. Johnson.

73. *Id.* at 5–8, 12, 15, 17–18.

2. Theodore W. Johnson.—

> Looking back on it is easy as an adult now and a more educated person, to say how in the heck could we have lived in a situation like that that was totally harmful, potentially causing respiratory or cancer diseases? How could we put up with all that?[74]
>
> —Theodore W. Johnson

Like the account of Delores Patterson Baine, the oral history of Theodore W. Johnson describes the burning trash, falling ash and soot, and belching smoke of Old Smokey. His description notes the inability of segregated communities to control their physical environment in the struggle against poverty and the tendency of such communities to misplace their trust in government without articulating strong or sustained dissent. It also mixes narratives of accommodation and survival with painful recollections of asthma and cancer-related family deaths, adaptive narratives which seem to recede only when confronted by alternate readings of medical causation and by increasing demands for government cleanup, compensation, and apology.

> I do recall the days that they were burning the trash because the smell was prominent and soot would fall down. I kinda remember black stuff being on clothes if they were hanging outside. If the incinerator was being fired up at that time, soot and ash would fall down. It was there, it was a fact of life, and it was accepted. There are people I know that had asthma. I guess there's some things, if you get accustomed to it, you get accustomed to it and you move on. I guess there was too much trusting as a community during that time. Because of the way things were. We were in segregated communities, predominantly black people, and we got accustomed to it. There was an acceptance of it because we felt that, okay, it has to be somewhere. It's in our area. I mean, I'm born and raised in this area, I have no control over it. But you feel that if it was really bad for you it wouldn't be there. It wouldn't—smoke and ashes and soot—wouldn't be falling down on a whole group of people because it would be harmful and why would someone do something like that?
>
> I never really heard that much dissension or overly concern about it. I don't remember any—when I went to church, there was a lot of concern about desegregation and the plight of black people as far as jobs and poverty. But there is seldom that I hear anything about Old Smokey as really something that people were up in arms or fired up about. How could we put up with all that? But the fact of life is that

74. Interview by Ariel Mitchell with Theodore W. Johnson, in Miami, Fla. 9–10 (Jan. 10, 2014) (transcript on file with author).

> we did. And I think it made us, not better, but it made us, as we grow up living in a situation like that, to question a lot more things that we took for granted. So yes, the trucks came. Old Smokey belched down smoke and ashes on us. Somehow we survived as a community. Hopefully it made us better as people. Hopefully it will cast light on the administrations and governments around here to realize this was something wrong that shouldn't have been done. And to address it and hopefully not hide from it, do something about it, clean it up.
>
> My mom died from pancreatic cancer. There's been other cancers in my family. If it can be tracked down that Old Smokey was the cause of medical conditions and that there are families who lost loved ones as a result of that, and it can be directly traced to it, I think they should be remunerated for it. And definitely I think an apology should be forthcoming, and recognition that this is something that shouldn't have been done. I think they have to own to that.[75]

Turn next to the memories of Antoniette Price.

3. Antoniette Price.—

> It was nice to look at it. It used to lean slightly. We had no idea it was a problem, a health problem.[76]
>
> —Antoniette Price

Like the chronicles of Delores Patterson Baine and Theodore W. Johnson, the oral history of Antoniette Price describes the burning smoke and "stink" of Old Smokey. Her description refers to lasting, racially motivated discrimination in the allocation of public school and park resources to the West Grove. It also mentions the absence of past, neighborhood-based knowledge of a possible causal connection between Old Smokey and harm to West Grove families and the inconsequence of a public, government-sponsored apology for such harm.

> There was certain days you didn't go out there when Old Smokey was smoking. We used to, after we got out of school, it was like a hill, we used to run up on the hill. We would walk up there with homemade skates and get on them and skate back down. The boys would go up there and roll back down. That was our fun. We never thought anything of it. But with certain days it used to stink.

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75. *Id.* at 4–12.

76. Interview by Ariel Mitchell with Antoniette Price, in Miami, Fla. 16 (Jan. 10, 2014) (transcript on file with author).

> Sometimes the teacher would have the boys close the windows. Monday morning usually was the heaviest of burning, that was the bad day.
>
> We had no idea it was a problem, a health problem. We were close in this neighborhood. I heard they went up there to Blanche Park and Merrie Christmas Park. Well, what about us? We were right under Old Smokey. Why are they going that far and this late in the game to look for arsenic? Did they dig up down here?
>
> What good would an apology do? That's not going to help us. They're dead now. If it was a contributing factor to our family members' health, if you want to reimburse us to a certain percentage. But apologies are not going to help us because they're dead now. And if it caused or contributed to that, you know, an apology won't help that. Apology, what's that going to do? In my brother's case we just thought he, you know, was the weakest one. We just thought, hey, got a bad cold. Come to find out it was asthma. As far as contributing from Old Smokey, we had no idea.[77]

Turn next to the reminiscences of Francina Hopkins.

4. Francina Hopkins.—

> Where else was they gonna put it but in the black neighborhood?[78]
>
> —Francina Hopkins

Like the narratives of her West Grove neighbors, the oral history of Francina Hopkins describes the burning fire, blowing smoke, and rotting smell of Old Smokey. Her description mentions the widely shared unfamiliarity with environmental health risks and alludes to the local economics of segregated labor markets. It also links her own cancer-marred family history to a rising fear that West Grove children remain vulnerable to the risk of harmful environmental exposure for which only monetary compensation, rather than public apology, will suffice as a remedy.

> My father worked at the Old Smokey. I know he used to ride on the garbage truck picking up garbage. One sister, she had asthma since she was a little girl. Real bad asthmatic, but she died of lung cancer. And my mom died of pancreatic cancer. My brother died of esophagus cancer. And Peg, she died of lung cancer.
>
> When we were kids we didn't pay no attention. Cause we had our PE out there on the park. That's where we had all our festivities, football games and everything. We didn't know it was dangerous

77. *Id.* at 5, 7, 10, 14, 16–19, 22–24.

78. Interview by Ariel Mitchell with Francina Hopkins, in Miami, Fla. 9 (Jan. 10, 2014) (transcript on file with author).

> breathing all that. We used to play up there, me and my other two sisters. We used to go up there with our skates. We had, like, a homemade skateboard we made with two-by-four and Union Aid skates we put on there and made our scooters. We would go up there late in the afternoon, all the way up the hill and come back down. And the dangerous part my other two sisters used to do which I thought was very dangerous, they held onto something and they used to swing over that fire while that fire was burning. It had to, you know, calm down some, but they used to do that, them two. When all that ash and stuff be blowing, it used to smell real bad, it smelled like old rotten food.
>
> I feel like they still got the park open and they still utilizing it, so they not afraid that them kids that go out to that park every day, they're not afraid that they might get cancer? I think they should close it down until they resolve the problem. What, all these many years we been living around Old Smokey, now they coming up with this? I don't think they owe no apology. They should pay us off. All of my siblings, my mom, everybody dead from cancer.[79]

Turn next to the remembrances of Jimmie Ingraham.

> *5. Jimmie Ingraham.—*
>
> Now could you imagine in a community where they be burning the garbage, could you imagine the smell? My, my, my, my, it was terrible. I think it was a miracle that we survived.[80]
>
> —Jimmie Ingraham

Like the recorded stories of other West Grove residents, the oral history of Jimmie Ingraham describes the smoke, ash, dust, noise, and smell of Old Smokey. His description evokes a community-wide struggle to survive garbage trucks, trash dumps, soiled clothes, fire-scorched homes, and tainted school classrooms and playgrounds. It attests to the pervasive unawareness of public-health risks in spite of everyday evidence of cancer and respiratory-related illness. It also confirms the racially disparate supply of municipal services (e.g., fire, water, and sewer) to the West Grove and the broader racial geography of class and political power in Miami, a geography enforced by police force and vigilante violence. Most vividly, it captures the ethnic and racial diversity of West Grove families, their enmeshed multigenerational culture, and their perceived lack of socioeconomic alternatives.

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79. *Id.* at 1–2, 4–10.
80. Interview with Jimmie Ingraham, *supra* note 1, at 12–13.

Old Smokey, it was a big old, big tall thing, that we was kinda excited to see it because of the frightening smoke and the fire that's coming out. You would see all these garbage trucks going all day up there, dumping, dumping, dumping, dumping trash. And fire and smoke and ashes and dust, yeah, it was a mess. Your house was full of dust, ashes. It was terrible.

All our sports that we had to do was right there at Carver, on the field. We played basketball, football, tennis, ping-pong, track. You was running and you're inhaling that smoke. And you can't run down the court with your mouth closed, you gotta run with your mouth open. When we was in class the smoke was terrible. We would be sitting in class and all the windows was up. We had to close them or we had to go out to the cafeteria and lockup in there to try to make the day through. And then you would look out the window, and from the chimney, ashes and fire and all that stuff on the buildings. Like I said, in trying to learn, it was kinda hard on us. The smell was terrible, the smoke smell, it would get in your clothes. Some of us would have a little rag or something to put over our face.

Some of them had emphysema. It was just a mess. In fact, my wife, she was down there. She died from emphysema. I don't know if it's from the smoke or cigarettes. At that age, we didn't know all about all this contaminated stuff, cause we didn't have the knowledge of it. We were still compassionate about how we were living. We loved where we were, we loved the Grove. It was just nice, it's hard to explain.

The houses used to catch fire. They were wooden shacks. And you call the fire department, it was just like calling nobody because they wouldn't come 'til it was all over with. Some of the people had to go out with buckets of water, no water holes [i.e., fire hydrants], because they didn't have the outlet like there is now.[81] They didn't care if we breathed it or whatever. Then, when it got over in the other section,[82] that's when the ball started rolling, see. Some of their houses caught fire.

But the community itself really suffered back in the days. At that time people didn't know anything about suing or contamination. You had all these people from Georgia, Alabama, Mississippi, Bahamas, they didn't think about anything like that. People didn't talk about contamination. Some of 'em got sick. We were put through something that we had no control over because we were here

81. For background on the municipal history of water segregation in the West Grove, see generally Margaret Hickey, *Communities Face Their Slums . . . in Coconut Grove, Florida*, LADIES HOME J., Oct. 1950, at 23.

82. The term "other section" refers to white-majority neighborhoods on the eastern border of the City of Coral Gables. Matthew Fowler, *Building Social Capital Through Place-Based Lawmaking: Case Studies of Two Afro-Caribbean Communities in Miami—The West Grove and Little Haiti*, 45 U. MIAMI INTER-AM. L. REV. 425, 440 (2014).

> to stay with our parents, and our parents had us here. A lot of us was born right here in this Grove. They didn't care what it was until it went to the other side of the track.
>
> The city should do something, even if they have to tear up everything over there and clean it up. I think they should compensate those people for their illness for all those years. It's just amazing that a lot of us didn't really get sick and die. It was bad for the community and for us to be breathing stuff like that, but we had no alternative. We had to take it. But we had nobody to care. Noise, that thing would run early in the morning, late in the evening.
>
> They talking about this dog park. Every time they talk about people's lives over here, and they over there across talking about the darn dogs. But when we started this one with Old Smokey you couldn't find no reports. You couldn't find Sarnoff,[83] you couldn't find none of them. What about these people down there for the old—70, 80 years down there getting all them fumes going inside their bodies? We weren't even allowed over there [in Coral Gables] after dark. I'm serious, you had to have a pass or a card. Anything pertaining to the black community, it seem as if it get whitewashed away. But soon as something happen across McDonald [Avenue]—McDonald's the dividing line—they jump to it. So just like this incident here with the park, it ain't nothing compared to what's down there on Washington [Avenue across the street from Old Smokey]. Now they go all the meeting down there, they wanna take pictures, they wanna have a meeting at Merrie Park,[84] this and that.
>
> It's not right. Back in the day the black police couldn't arrest a white person. That was out of the question. That was seriously out of the question. You could come down there and beat up any black you wanted and call the police, you couldn't arrest 'em. It was terrible.[85]

Last turn to the recollections of Dr. Joyce Price.

83. The name "Sarnoff" refers to City of Miami District 2 Commissioner Marc D. Sarnoff. *District 2*, CITY MIAMI, http://www.miamigov.com/district2/, *archived at* http://perma.cc/9DG6-MG4Z.

84. The name "Merrie Park" refers to Merrie Christmas Park, one of a number of Old Smokey contaminated-ash dump sites located in the affluent eastern section of Coconut Grove.

85. Interview with Jimmie Ingraham, *supra* note 1, at 2–10, 13–14, 16, 18–24.

6. Dr. Joyce Price.—

> It makes me feel like really that nobody cared about the health status of the poor blacks in the area. It was just another thing that, you know, those people—those people, we don't care about them.[86]
>
> —Dr. Joyce Price

Like the account of Jimmie Ingraham and others, the oral history of Dr. Joyce Price describes the soot, smoke, and stench of Old Smokey and the suffering of local students trapped in segregated classrooms and consigned to sullied playing fields. Her description points to a lack of health and environmental education, economic and political power, and rights consciousness among West Grove residents. It also calls for remedial soil testing and medical monitoring, invoking the moral, spiritual, and legal obligations of city and county government to inform, protect, and compensate the citizens of the West Grove.

> Old Smokey was very active at the time. Two times a week we could not go out on the field to play physical education because Old Smokey would be booming and the soot and the smoke and the stench would be coming from the smokestack which is right across the street, as neighbors to the Carver High School. It was a very active incinerator and sometimes we would even watch the trucks go up the hill and dump their contents, and the next thing we knew they were booming out the smoke. The smell was powerful, the stench was really loud and potent. There were times they would just close the windows because of the powerful smell of the burnings. The football team really suffered the most, especially in the afternoons when they had to go out there. I think every other day in Miami was a horrible day. We were bused from South Miami to Coconut Grove and our buses lined up on the side where Old Smokey is, and we had to stand out there and wait for the bus to come, and if they were still burning at that time it was horrible.
>
> The incinerator was an in-grown thing in the community. We all knew it was there and we all hated it, and realized when it was being used, that it was something that we had to suffer through. I don't think anybody thought about rights—their rights at that time. They always put things in our area, where they wouldn't put them in other areas. There wasn't one in Coral Gables, there wasn't one even in South Miami, but it was in a concentrated black area. They thought it was land they figured they could use and nobody would object to.

86. Interview by Ariel Mitchell with Dr. Joyce Price, in Miami, Fla. 10 (Jan. 10, 2014) (transcript on file with author).

I think a remedy would be for them to complete the needed tests that are being asked of them to complete. And I think that there should be something gone back to see about the health status of those people that lived in the area. There are several people who have had several deaths, we don't know why. The cause has not been known. But I think they owe it to the community to go back and find out the content of the soils, and the health status of their families. There are several people that I thought died young with respiratory issues, with cancer, with heart disease, that could be a contributing factor. I'm very concerned about the children and lead poisoning.

People in Coral Gables are very powerful and they have had money to get a lawyer—get lawyers to fight their case. And they were more knowledgeable about the effects of it than the blacks in Coconut Grove. I think had the blacks been more knowledgeable and have the type help that we have now with the Center of Ethics [and Public Service], I think we would have had a good chance of stopping it many years ago. I think they owe more than an apology. Ethically and spiritually they need to come together and do something for that community because those people that have lived through that, they need to make sure that their health status is not compromised. That's my biggest problem, the health status of the people and the people that are still playing on those fields. I was an asthmatic. There are other people who had respiratory problems, asthma, and a high incidence of cancer and heart disease in that area. You've got to really look at it and follow-up clinically about how those things happened and how effective they've been to the people involved.

The city of Miami has a duty because they're supposed to protect the citizens. Morally they need to go out and comply, find out exactly what the status of the area is. Notify the people, and if need be, do some remuneration for those people that are involved. But they definitely need to come out and defend their actions one way or the other because they're supposed to be taking care of all the people of Miami and the surrounding area. Miami-Dade County needs to get involved in this also. The Barnyard is next door to Old Smokey, right down the street St. Alban's, [a nonprofit preschool] they're in close proximity. I think that this is an item that needed to come out for the community's sake. And I think that there should be something that the city owes to the community, the city administration, the commissioners, to come out and say what they plan to do about it. And to say that we don't have money to do a study is ludicrous. They need to come together and fund whatever project is necessary to let the people know what's really happening. They owe it to us as citizens of Miami-Dade County, Miami, for our

> protection. We pay taxes, we live, we work, and we support the city. They owe it as a moral obligation to us.[87]

The Old Smokey stories collected here from the recently assembled oral histories of current and former West Grove residents—Delores Patterson Baine, Theodore W. Johnson, Antoniette Price, Francina Hopkins, Jimmie Ingraham, and Dr. Joyce Price—illustrate the complexity of environmental accommodation and survival strategies during Jim Crow segregation and the civil rights era. Recounted in multiple, overlapping narratives, these strategies seem intertwined with individual, family, and group struggles against political disenfranchisement, socioeconomic subordination, and racial inequality and violence. At times the strategies, or the residual traces of those strategies, give current voice to legal rights and restorative justice claims. At other times, marked by a lack of full rights awareness and by a lack of meaningful access to counsel and courts, the strategies, or their trace effects, lend themselves more to the preservation of private relationships (e.g., family, church, school, or neighborhood associations).

To the extent that the West Grove and other poor communities of color never experienced a robust, civil rights era turn to public engagement in local interest-group politics and in federal and state court-managed legal remedies or, alternatively, to the extent that those same communities experienced a post-civil rights era retreat to private relationships due to the collapse of public and nonprofit urban infrastructure, concentrated inner-city poverty, and socio-cultural isolation, VanderVelde's originating question—who instructs such communities in their legal rights and leads the way—gains greater import for both advocates and lay activists. The answer to that question may explicate why some individuals, families, and groups adversely affected by Old Smokey continue to delay and wait to consider Old Smokey-specific civil rights and environmental lawsuits, and, likewise, what "factors" influence in-court and out-of-court outcomes of such lawsuits. To search out these questions, turn to a further exploration of VanderVelde's vision of redemption songs.

II. Redemption Songs

> These voices sound, these songs of freedom. Redemption songs.[88]
>
> —Lea Vandervelde

87. *Id.* at 1–3, 5–9, 11–12, 14–16.

88. VANDERVELDE, *supra* note 3, at 22.

This Part examines VanderVelde's interpretation of the St. Louis freedom suits and the Missouri legal rule of freedom by residence. The first subpart considers her analysis of subordinate clients and communities. The second subpart addresses her assessment of freedom-suit cases and the decisions of the St. Louis courts.

A. Subordinate Clients and Communities

VanderVelde's account of subordinate clients and communities appraises the law and rights of the subordinated, as well as the role of lawyers for the subordinated. Consider first the law of the subordinated in the nineteenth-century legal–political context of Missouri.

1. Law of the Subordinated.—VanderVelde evaluates both the function and the "tensile strength" of the Missouri rule of law in protecting the rights of slaves in the early-to-middle nineteenth century.[89] Canvassing St. Louis court records, she reports that for three decades antedating the *Dred Scott* decision the Missouri legal rule of freedom by residence "held" in spite of retaliatory action and remedial (e.g., financial recoupment) litigation by slave masters.[90] During this period, she points out, the St. Louis freedom suits upended the "power relations" buttressing the law of slavery.[91] To that extent, VanderVelde observes, the "contested discourse" of freedom suits destabilized and stressed the Missouri legal system.[92] She adds, however, that the degree of instability and stress varied in accordance with the nature of the entitlement or redemptive claim. Freedom suits seeking to restore free blacks to their "rightful status" or "to uphold a dead master's promise of freedom" scarcely destabilized the slavery system.[93] Of the 239 freedom-suit claims asserted in St. Louis courts, only 43 litigants asserted "rightful" or "mistaken" status claims in attempting to regain their freedom.[94] By contrast, suits that granted "free status and a new independent life to slaves without their master's consent and even over their master's objection" effectively transformed the Missouri system of slavery.[95] Significantly, transformational free-status claims comprised the largest group of petitioners, grounding their entitlement claim directly on residence, or derivatively on their mother's residence, in free territory. In this group of cases, VanderVelde emphasizes, "the master never intended, consented, contracted, or

89. *Id.* at 194.
90. *Id.* at 6–7, 202.
91. *Id.* at 7.
92. *Id.*
93. *Id.* at 7–8.
94. *Id.*
95. *Id.*

voluntarily tried to manumit the petitioner."[96] Instead, free-status petitioners "opposed their owner-master's volition" and "petitioned the state to override their master's wishes."[97]

To VanderVelde, the Missouri freedom-by-residence cases sharply tested the strength of the rule of law and challenged "contrary social norms and pressures" bolstering the legality and desirability of slavery.[98] Unlike rightful or mistaken status cases, emancipatory, free-status cases offered no claim that the petitioning slaves "had intentionally been taken into free territory with the purpose of effecting their manumission."[99] Yet, St. Louis courts declared freedom for enslaved petitioners more than 100 times to the detriment of slave masters and the dominant, slave-upholding classes of Missouri and the western territories.[100] For VanderVelde, the free-status cases taken together prove "the strength and fragility of the rule of law to withstand political pressures and continue to protect the least well-off."[101]

Consistent with VanderVelde's nineteenth-century analysis, the fairly stable formalism of the rule of law and the relative independence of the judiciary in Missouri may partially explain how subordinated communities of color learned of their emancipatory legal rights from the culture and society of the antebellum period. Yet, antebellum legal culture and society fail to explain in a more thoroughgoing sense how freedom petitioners advanced their rights claims without equal access to courts or counsel and without inside instruction from emancipated or enslaved subcommunities or outside leadership from abolitionist or freedmen subcommunities. To gain a fuller understanding of antebellum rights education and freedom-suit claims, consider the rights of the subordinated that emerged under the aegis of the Missouri freedom-by-residence statute.

2. Rights of the Subordinated.—VanderVelde's embrace of the rule of law applied by St. Louis courts under the Missouri freedom-by-residence statute recognizes the power and agency of enslaved people to assert "their legal rights in suing to establish their freedom in direct contravention of their masters' wishes."[102] To her credit, VanderVelde concedes that neither power nor agency ensures the "full vindication" of a "subordinated" person's legal rights in court.[103] Frequently, she notes, subordinated people must "settle for accommodation."[104] In the process, they may lose their

96. *Id.* at 8.
97. *Id.*
98. *Id.* at 18.
99. *Id.* at 19.
100. *Id.* at 20–21.
101. *Id.* at 21.
102. *Id.* at 11.
103. *Id.* at 203.
104. *Id.*

litigant voices in court.[105] In fact, VanderVelde remarks, none of the freedom-suit petitioners actually testified on the witness stand.[106] Rather, they "spoke" through their uncompensated and sometimes opportunistic attorneys, themselves regularly slave owners.[107] Conspicuously, she finds "very little evidence of cause lawyering"[108] within this group of attorneys, and furthermore, "no direct evidence of antislavery sentiment at all."[109] On this ground, it seems unlikely that the antebellum bar in St. Louis and Missouri led the way in educating or instructing freedom-suit petitioners with respect to the nature and scope of their legal rights. On the same ground, however, it seems likely that the antebellum St. Louis and Missouri bar influenced, at least to a degree, the in-court and out-of-court outcomes of freedom-suit controversies. In this respect, turn to VanderVelde's treatment of cases and courts in the Missouri freedom-suit era.

B. Subordinate Cases and St. Louis Courts

This subpart addresses VanderVelde's assessment of freedom-suit cases and courts in St. Louis during six decades of the nineteenth century. The first section probes her understanding of subordinate accommodation and survival strategies. The second section explores her analysis of freedom-suit triggering actions and court outcomes.

1. Accommodation and Survival.—VanderVelde construes the freedom-suit cases to "suggest that survival is a much more significant objective in influencing human behavior than attaining freedom."[110] For the enslaved and for subordinated and vulnerable populations more generally, she comments, the move or path toward exit "must be survivable."[111]

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105. On the silencing of litigant voices in administrative and judicial proceedings, see Anthony V. Alfieri, *The Ethics of Violence: Necessity, Excess, & Opposition*, 94 COLUM. L. REV. 1721 (1994) (book review) and Anthony V. Alfieri, Essay, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L. J. 2107 (1991).

106. VANDERVELDE, *supra* note 3, at 197. VanderVelde clarifies that the prevailing "rules of competency for witnesses precluded parties with a direct interest in the case from testifying because their testimony would be deemed legally incompetent as self-interested." *Id.*

107. *Id.* at 9, 201. VanderVelde reports that petitioner attorneys attempted at times "to extract compensation from their client in one way or another: by carrying a debit on their accounts book in the slave's name, by negotiating with the slave to do work for the lawyer, or by attempting to collect from some free person in the slave's extended family who had the wherewithal to pay." *Id.* at 9.

108. *Id.* On race and lawyering, see generally Anthony V. Alfieri, Gideon *in White*/Gideon *in Black: Race and Identity in Lawyering*, 114 YALE L.J. 1459 (2005) and Colin Bailey, *Winning Against the Odds: Race-Conscious Community Lawyering and Organizing for Environmental Justice*, 46 CLEARINGHOUSE REV. 456 (2013).

109. VANDERVELDE, *supra* note 3, at 9. VanderVelde notes that Missouri prohibited advocating abolitionism as a crime after 1837. *Id.*

110. *Id.* at 194.

111. *Id.*

Indeed, she points to circumstances under which subordinated people—here enslaved Missouri freedom petitioners—may "find it reasonable to endure continued enslavement as a means of survival and family preservation rather than to risk uncertain survival as a means to freedom."[112] The instrumental logic of submitting oneself to enslavement for purposes of personal survival or family preservation turns compelling "when the path to freedom requires the bravery of challenging one's master and the perseverance to endure those extra burdens imposed on slave litigants while awaiting judgment."[113]

VanderVelde explicates the "extra burdens" befalling freedom-suit litigants when publicly "exposed" to their masters' cruelty and to harsh antebellum labor-market practices in the western territories during prolonged litigation battles.[114] Such burdens, she notes, included "more stringent captivity,"[115] imprisonment in jail with nonslave convicts,[116] and "hiring out" to "third-party bidders" willing and able to post bond.[117] VanderVelde reports that many petitioners, beset by the weight of additional material burdens, "accepted accommodation" vis-à-vis their masters by declining to "further prosecute" their cases or by defaulting altogether "either through attorney neglect or litigant fatigue."[118] The compelling force of material burdens on freedom petitioners may help explain not only why certain out-of-court outcomes fell short of emancipation but also why some individuals, families, and groups delayed and waited to file suit. And yet, for many prospective freedom petitioners, triggering actions from both inside and outside their communities continued to embolden their legal rights claims.

2. Triggering Actions and Court Outcomes.—VanderVelde enumerates a range of triggering actions that sparked freedom suits in Missouri courts even though such courts stood institutionally ill-equipped to protect the rights of the vulnerable.[119] Repeatedly referenced by the enslaved,

112. *Id.* at 195.

113. *Id.*

114. *Id.* at 195–98.

115. *Id.* at 198. VanderVelde comments that "expressing the desire for freedom was likely to bring sanction or at least tighter constraints." *Id.* at 196.

116. *Id.* at 198. VanderVelde elucidates this practice, citing the court's "first offer to return the petitioners to their master, who could work the individual and feed them, if the master posted bail to ensure their security. If the master did not post bail, the petitioners were jailed, to prevent their escape *and* for their own security." *Id.* at 199.

117. *Id.* at 199. VanderVelde adds that "[s]everal petitioners died while hired out to the highest bidder. There was little incentive for any of the temporary custodians of the freedom litigant to provide adequate food or clothing." *Id.*

118. *Id.*

119. *Id.* at 196–98.

particularly women,[120] commonplace lawsuit triggers included the seizure of slaves by creditors, the death of a master in a stable household, the disbanding of a household, the sale of slaves to a slave trader, the threat of transport to a southern state, and the threatened removal of children.[121] To translate action into pleading, VanderVelde explains, petitioners "ritually recited" a statutory claim of assault as a "necessary element" of their suit even if the specific allegation proved to be false.[122]

Surprisingly, for VanderVelde, the identity of the lower court judge assigned to hear the petitioner's suit "seemed to make little difference to the outcome."[123] On her inspection, the court cases offer "no evidence" that the judges of record "behaved ideologically" in adjudicating the freedom suits.[124] The same court data, by contrast, "suggest that juries cannot be trusted as much as judges to uphold the law when the law designed to protect the weak runs counter to social norms."[125] In fact, she underscores, "juries ruled for the petitioners less often."[126] Nonetheless, VanderVelde recounts, when judges and juries ruled in favor of the petitioners, some gained their freedom "immediately or within a relatively short time" or "registered as free Blacks," some were "later found still within their masters' estates" or "advertised as runaways," and some "disappeared without a trace."[127]

Even when joined together with her thorough catalogue of triggering actions, VanderVelde's particularized compilation of judge- and jury-influenced outcomes does little to answer fully the chief questions posed by the newly discovered antebellum freedom-suit archives. From the standpoint of those archives, certain limited inferences pertaining to legal–political or social movements may be drawn. First, subordinated communities may very well learn of their legal rights from extrajudicial, at-large sources in culture and society. Second, subordinated communities may effectively advance their rights claims without fair access to courts or counsel and without organized instruction or leadership from lawyers. Third, material circumstances may weigh heavily on individuals, families, and groups from subordinated communities to delay remedial legal or political action. And fourth, various in-court and out-of-court factors, especially the role of lawyers, judges, and juries, and the function of political and socioeconomic power, may shape both litigated and negotiated outcomes. To gain a fuller

120. VanderVelde mentions that "[m]ost St. Louis freedom suits were initiated by women." *Id.* at 195.

121. *Id.* at 196–97.

122. *Id.* at 196.

123. *Id.* at 6.

124. *Id.*

125. *Id.* at 202.

126. *Id.*

127. *Id.* at 203.

answer to these questions, return to the resistance songs still heard echoing in the West Grove.

III. Resistance Songs

> So what's your value? Am I not as valuable as any other human being? Are my children any less valuable of the ones living in Coconut Grove, as the kids living around the affluent areas around Merrie Christmas Park?[128]
>
> —Delores Patterson Baine

This Part recasts VanderVelde's interpretive stance on redemption stories against the backdrop of Old Smokey to consider legal–political rights campaigns and community resistance strategies in the context of the West Grove specifically and in the setting of civil rights and environmental-justice disputes generally. VanderVelde links the notion of rights-inspired redemption stories to defiance—spoken or written—in the face of power and violence. In the legal–political confrontation between master and slave or between white privilege and black disadvantage, she contends, redemption songs or stories enable a subordinate person to speak "truth to power,"[129] albeit only a partial truth. Too destabilizing and too stressful for most hierarchical social and economic relationships, the full truth oftentimes remains unspoken.[130]

For VanderVelde, each redemption song or story imports a sequential structure and engrafts a pattern that conveys the cultural and social history of a community or multiple subcommunities. Sounded in the public forum of St. Louis courts and in the private space of West Grove homes, churches, and schools, the story asserts previously unheard claims and entitlements (for example, the right to emancipation or the right to live in a healthy and safe environment), thereby altering the status of the speaker and his or her affiliated group and community. To VanderVelde, even the partial truth and the muted voice of a subordinate speaker furnish an authentic account or record of the complex personal, psychological, and emotional life of a community, however scripted by legal conventions and mediated by political negotiations and socioeconomic relationships.

In her survey of freedom-suit archival records, VanderVelde highlights the importance of an intervening "triggering" event to mobilize action and, correspondingly, to provoke retaliation.[131] The triggering event may bear no correspondence to the outcome of the legal–political confrontation. That

128. Interview with Delores Patterson Baine, *supra* note 72, at 12, 14.

129. VANDERVELDE, *supra* note 3, at 1.

130. *See id.* at 1–2 (describing how and why the full truth can be only partially discovered).

131. *See supra* notes 61–67 and accompanying text.

outcome in fact may turn on other variables such as the level of speaker defiance or litigant resistance, the quality of legal representation and political organization, and the degree of countervailing institutional power exercised by public and private actors. The next subpart explores the law and rights of the subordinated in the West Grove, past and present, by revisiting the Old Smokey stories collected previously from the oral histories of Delores Patterson Baine, Theodore W. Johnson, Antoniette Price, Francina Hopkins, Jimmie Ingraham, and Dr. Joyce Price.

A. Subordinate Clients and Communities in the West Grove

1. Law of the Subordinated.—VanderVelde points to the strength of the rule of law in protecting the rights of the vulnerable in spite of private retaliatory action, public reprisal litigation, and legislative interference. Embedded in formal constitutional, statutory, and common law injunctions, the rules may serve a protective and even transformative function, upending power relations and destabilizing legal agents (judges and lawyers), institutions (courts and legislatures), and relationships (lawyer–client, lawyer–judge, and lawyer–jury). For VanderVelde and for West Grove legal advocates, the level of systemic instability and stress often hinges on the gravity of the redemptive claim of entitlement—here the community right to a healthy and safe environment—and the weight of competing social norms and political pressures—here the dominant norms of white power and privilege and the subordinating politics of black disenfranchisement and economic impoverishment.

In the West Grove, the law of the subordinated has persisted for decades largely without the enforcement of applicable civil rights and environmental laws. Consequently, the law of the subordinated in the West Grove continues to be woven into the history of Jim Crow housing and school segregation, the economics of an increasingly low-wage, unskilled labor market, and the legacy of white-on-black police and vigilante racial violence. Francina Hopkins alludes to the labor-market vulnerability and the economic trade-off embodied by Old Smokey, remarking that her "father worked at the Old Smokey. I know he used to ride the garbage truck picking up garbage."[132] Omitted from but implicit in this remark is the material reality of municipal employment discrimination by the City of Miami and the material value or necessity of Old Smokey to full-time employment and household economic stability in the West Grove from 1925 to 1970.

Delores Patterson Baine engages in the same practice of omission or elision when she speaks of public school and incinerator-site segregation, explaining that G.W. Carver High School "was earmarked for us, and so

132. Interview with Francina Hopkins, *supra* note 78, at 1–2.

that's where we went."[133] In this respect, the term "earmarked" seems especially striking, connoting a school-assignment process tainted by invidious discrimination, force, and sometimes violence. Mrs. Baine grows bolder, however, in recounting Old Smokey and its deep-seated links to race and inequality. She bluntly states: "The same thing when they put Old Smokey there and all the black faces were surrounding. Old Smokey, they didn't care enough for them, so it's inequality. Same as it was back when."[134]

In the same way, Theodore W. Johnson connects Old Smokey to the local history of segregation, adding "[w]e were in segregated communities, predominantly black people, and we got accustomed to it."[135] Indeed, he dolefully recalls:

> There was an acceptance of it because we felt that, okay, it has to be somewhere. It's in our area. But you feel that if it was really bad for you it wouldn't be there. It wouldn't—smoke and ashes and soot—wouldn't be falling down on a whole group of people because it would be harmful and why would someone do something like that?[136]

Dr. Joyce Price likewise draws on the pain and injustice of municipal segregation. She mentions: "It makes me feel like really that nobody cared about the health status of the poor blacks in the area. It was just another thing that, you know, those people—those people, we don't care about them."[137] For Dr. Price, the pain of callous neglect was enflamed by discrimination. She adds:

> They always put things in our area, where they wouldn't put them in other areas. There wasn't one in Coral Gables, there wasn't one even in South Miami, but it was in a concentrated black area. They thought it was land they figured they could use and nobody would object to.[138]

Antoniette Price also adverts to the legacy of segregation and ongoing unequal treatment in Miami. She exclaims: "I heard they went up there to Blanche Park and Merrie Christmas Park. Well, what about us? We were

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133. Interview with Delores Patterson Baine, *supra* note 72, at 6. Dr. Joyce Price also mentions that public school segregation increased exposure to Old Smokey. She states: "We were bused from South Miami to Coconut Grove and our buses lined up on the side where Old Smokey is, and we had to stand out there and wait for the bus to come, and if they were still burning at that time it was horrible." Interview with Dr. Joyce Price, *supra* note 86, at 3.

134. Interview with Delores Patterson Baine, *supra* note 72, at 18.

135. Interview with Theodore W. Johnson, *supra* note 74, at 7–8.

136. *Id.* at 8.

137. Interview with Dr. Joyce Price, *supra* note 86, at 10.

138. *Id.* at 6.

right under Old Smokey. Why are they going that far and this late in the game to look for arsenic? Did they dig up down here?"[139]

Jimmie Ingraham amplifies the legacy of state-sanctioned racism in Miami tying segregation to disparate municipal services such as fire-department assistance, water supply, and sewer access. He observes:

> The houses used to catch fire. They were wooden shacks. And you call the fire department, it was just like calling nobody because they wouldn't come 'til it was all over with. Some of the people had to go out with buckets of water, no water holes, because they didn't have the outlet like there is now.[140]

In point of fact, Miami segregated its municipal water and sewage systems until the 1960s.[141] Furthermore, Mr. Ingraham points to continuing, present-day evidence of municipal inequity. He notes: "They talking about this dog park. Every time they talk about people's lives over here, and they over there across talking about the darn dogs. But when we started this one with Old Smokey you couldn't find no reports. You couldn't find Sarnoff, you couldn't find none of them."[142] Invoking the gospel of community, he demands:

> What about these people down there for the old—70, 80 years down there getting all them fumes going inside their bodies. So just like this incident here with the park, it ain't nothing compared to what's down there on Washington. Now they go all the meeting down there, they wanna take pictures, they wanna have a meeting at Merrie Park, this and that. It's not right.[143]

In addition, Mr. Ingraham cites the threat of publicly condoned white-on-black violence in the state-enforced segregation of the West Grove. He recalls: "Back in the day the black police couldn't arrest a white person. That was out of the question. That was seriously out of the question. You could come down there and beat up any black you wanted and call the police, you couldn't arrest 'em. It was terrible."[144] Retracing the forgotten urban geography of race and segregation in Coconut Grove, he adds: "We weren't even allowed over there after dark. I'm serious, you had to have a pass or a card. Anything pertaining to the black community, it seem as if it

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139. Interview with Antoniette Price, *supra* note 76, at 19.

140. Interview with Jimmie Ingraham, *supra* note 1, at 4.

141. *See The Civil Rights Movement and the Black Experience in Miami*, U. MIAMI, http://scholar.library.miami.edu/miamiCivilRights/biography.html, *archived at* http://perma.cc/7XGJ-QZW7 ("In the 1960s, [Reverend Theodore R. Gibson] joined forces with Grove activist Elizabeth Verrick and the Coconut Grove Slum Clearance Committee to ameliorate the standard of living of residents in the Black Grove. These efforts led to the establishment of indoor plumbing and improvements in the sewage disposal system.").

142. Interview with Jimmie Ingraham, *supra* note 1, at 19–20.

143. *Id.* at 20–21.

144. *Id.* at 5–6.

get whitewashed away. But soon as something happen across McDonald —McDonald's the dividing line—they jump to it."[145]

From VanderVelde's interpretive stance, the resistance songs of the West Grove seem to echo the post-Jim Crow politics of black disenfranchisement and economic impoverishment rather than to articulate vigorously or coherently a redemptive claim of entitlement to community health and environmental safety. This lack of vigor and coherence may indicate the need for expanded, peer-to-peer legal rights education and outreach efforts in the West Grove by the Historic Black Church Program and affiliated community groups. It may also signal the need for enlarged access to lay and legal counsel specializing in civil rights and environmental-justice advocacy and organizing. Standing alone, however, it does not suggest the need for unilateral lawyer instruction or leadership in mobilizing the legal–political energies of the West Grove. Paternalistic, triage intervention of this sort requires a higher threshold showing of need and urgency to justify.[146] To better grasp such existing legal–political energies, consider the rights of the subordinated in the West Grove.

2. Rights of the Subordinated.—VanderVelde's vision of the rule of law recognizes the power and agency of vulnerable people to assert their legal rights in opposition to the interests of a dominant class or group. She admits, however, that neither power nor agency may be sufficient fully to vindicate a "subservient" person's legal rights in courthouses or before legislative bodies. In the post-*Brown* era of modern civil rights advocacy, vindication rests not only on rights consciousness but also on access to lawyers and courts adequate to enforce existing constitutional, statutory, and common law entitlements and corresponding governmental duties of compliance and enforcement.

In the West Grove, the rights of the subordinated were and continue to be hampered by a continuing lack of environmental-rights consciousness among residents, a failure of legal compliance throughout local and state government, and an entrenched system of unequal access to justice limiting lawyer retention and court intercession. Delores Patterson Baine explains: "They put Old Smokey in there in a time when nobody was aware of what was happening and what the causes and effects were going to be farther down the line. We all complained about it."[147] She adds:

> I think they need to stop making too little of this and think about how many lives have been impacted from things that happened way back

145. *Id.* at 20–21.

146. On paternalistic, triage interventions in litigation and transactional legal services settings, see generally Paul R. Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475 (1999) and Paul R. Tremblay, *Transactional Legal Services, Triage, and Access to Justice*, 92 WASH. U. L. REV. (forthcoming 2015).

147. Interview with Delores Patterson Baine, *supra* note 72, at 7, 17.

> when. And the fact that they knew that this was a problem and didn't say anything until it came to light. It is sickening to know that this is the case. Do your job. Do what you're supposed—what you need to do to make sure that this isn't revisited years and years later. It's just the same old, same old over again.[148]

Theodore W. Johnson similarly comments:

> I never really heard that much dissension or overly concern about it. I don't remember any—when I went to church, there was a lot of concern about desegregation and the plight of black people as far as jobs and poverty. But there is seldom that I hear anything about Old Smokey as really something that people were up in arms or fired up about. Hopefully it will cast light on the administrations and governments around here to realize this was something wrong that shouldn't have been done.[149]

Antoniette Price confirms this posture, mentioning: "We had no idea it was a problem, a health problem."[150] And Francina Hopkins reiterates: "We didn't know it was dangerous breathing all that."[151] Jimmie Ingraham also notes:

> At that age, we didn't know all about all this contaminated stuff, cause we didn't have the knowledge of it. At that time people didn't know anything about suing or contamination. You had all these people from Georgia, Alabama, Mississippi, Bahamas, they didn't think about anything like that. People didn't talk about contamination.[152]

Elaborating on the pervasive absence of rights consciousness, political disenfranchisement, and government duty, Dr. Joyce Price states:

> I don't think anybody thought about rights—their rights at that time. People in Coral Gables are very powerful and they have had money to get a lawyer—get lawyers to fight their case. And they were more knowledgeable about the effects of it than the blacks in Coconut Grove. I think had the blacks been more knowledgeable and have the type help that we have now with the Center of Ethics, I think we would have had a good chance of stopping it many years ago. The city of Miami has a duty because they're supposed to protect the citizens. Morally they need to go out and comply, find out exactly what the status of the area is.[153]

Seen from VanderVelde's perspective, the resistance songs of the West Grove portray the thwarted power and frustrated agency of a vulnerable

148. *Id.* at 12–14.
149. Interview with Theodore W. Johnson, *supra* note 74, at 8, 10.
150. Interview with Antoniette Price, *supra* note 76, at 16.
151. Interview with Francina Hopkins, *supra* note 78, at 4.
152. Interview with Jimmie Ingraham, *supra* note 1, at 3, 9–10.
153. Interview with Dr. Joyce Price, *supra* note 86, at 5, 9, 14–15.

community seeking to assert its legal rights in a sociolegal situation where lawyers offered no representation, courts afforded no vindication, and government supplied no protection. In this situation and its debilitating aftermath, still today a situation where the rule of law is ostensibly absent and where access to the law is sparsely available, the need for legal rights education, peer-to-peer and otherwise, is compelling. On the same logic, the need for external resources, for example, intensive fact investigation, legal–political research, independent environmental testing, health monitoring, media outreach, faith-based and nonprofit partnerships, and multineighborhood coalition building is profound. Without these collaboratively designed and collectively implemented interventions, subordinate accommodation and survival strategies recur and triggering actions go unheeded. Consider accommodation and survival strategies and triggering actions in the West Grove.

B. Subordinate Cases and Courts

1. Accommodation and Survival.—VanderVelde from the outset maintains that survival rather than freedom stands out as "a much more significant objective in influencing human behavior" within racially subordinated communities.[154] For such vulnerable communities, she insists, defiance "must be survivable" both for individuals and their families.[155] Today, in poor communities, the logic of accommodation and survival increases when defiance puts an individual at risk of retaliation (e.g., workplace demotion or firing) or a group at risk of reprisal (e.g., government defunding or eviction).

In the West Grove, accommodation and survival defined a way of life in the decades-long shadow of Old Smokey. Delores Patterson Baine recalls: "We were often bathed in ash. It was just a part of our lives. It was a way of life. What were we going to do? We had to go to school. We made the best of it."[156] Theodore W. Johnson likewise comments:

> It was there, it was a fact of life, and it was accepted. I guess there's some things, if you get accustomed to it, you get accustomed to it and you move on. I mean, I'm born and raised in this area, I have no control over it. How could we put up with all that? But the fact of life is that we did.[157]

Jimmie Ingraham confirms this acute experience of helplessness. He remarks:

> The community itself really suffered back in the days. We were put through something that we had no control over because we were here

154. VANDERVELDE, *supra* note 3, at 194.
155. *Id.*
156. Interview with Delores Patterson Baine, *supra* note 72, at 6–7.
157. Interview with Theodore W. Johnson, *supra* note 74, at 5–6, 8, 10.

> to stay with our parents, and our parents had us here. A lot of us was born right here in this Grove. It was bad for the community and for us to be breathing stuff like that, but we had no alternative. We had to take it.[158]

Dr. Joyce Price remembers as well. She notes: "The incinerator was an ingrown thing in the community. We all knew it was there and we all hated it, and realized when it was being used, that it was something that we had to suffer through."[159]

Under VanderVelde's view of human behavior operating in vulnerable communities like the West Grove, modern survival strategies must contemplate the risk of socioeconomic retaliation against individuals, their families, and their affiliated organizations or institutions. Retaliation may come from private, nonprofit, and public sources, sometimes in combination. To withstand covert and overt retaliatory efforts of racial intimidation or economic punishment (e.g., bullying and harassment in private communications, social ostracism, withdrawal of nonprofit or foundation support, and termination of public funding), lay and legal advocates must openly and publicly treat pernicious, class- or race-motivated acts directed against individuals, organizations, and institutions as *creative opportunities* for legal–political organizing, that is as triggering actions for community mobilization. Put simply, it is not sufficient to bear public witness to acts of cultural, political, or socioeconomic injustice. Rather, it is necessary to name and to call out private and public power brokers and to exploit their class- or race-motivated conduct to rally community opposition, doubly so when the "official" conduct includes constitutional, ethical, or statutory lawbreaking. Indeed, to be a civil rights lawyer, Lani Guinier repeats, "is to be a part of a historic tradition of resistance to overreaching by private and public power."[160] Consider triggering actions in the West Grove.

2. Triggering Actions and Court Outcomes.—VanderVelde catalogues a wide range of triggering actions that spurred defiance and resistance among the enslaved in the nineteenth-century courts of Missouri. Translating isolated acts of defiance and resistance into broader emancipatory or remedial campaigns requires legal–political strategies of mobilization. To mount legal–political rights campaigns and community resistance strategies behind the cause of civil rights and environmental justice in the West Grove and in local communities elsewhere requires a constellation of triggering actions, including public education and outreach; collecting and disseminating independent environmental testing and clean-up information; compiling and distributing health registry and medical

158. Interview with Jimmie Ingraham, *supra* note 1, at 9, 13, 16.
159. Interview with Dr. Joyce Price, *supra* note 86, at 5.
160. GUINIER, *supra* note 12, at 220.

monitoring data; gathering and sharing evidence of personal injury and property damage, and, if and when litigation proves fruitless, encouraging community-wide dialogue about alternative, non-litigation remedies, such as restorative justice remedies (e.g., reconciliation, reparation, and apology).

Recalling the history of Old Smokey in the West Grove, Delores Patterson Baine asserts: "Now when I think about it, it angers me that this was done, and how many people that was affected by this stuff."[161] Equally indignant, Theodore W. Johnson declares: "Do something about it, clean it up. And definitely I think an apology should be forthcoming, and recognition that this is something that shouldn't have been done. I think they have to own to that."[162] But Dr. Joyce Price admonishes both, invoking a higher public duty. She states: "I think they owe more than an apology. Ethically and spiritually they need to come together and do something for that community because those people that have lived through that, they need to make sure that their health status is not compromised."[163]

Others, like Antoniette Price, decry any talk of apology. She scoffs: "What good would an apology do? That's not going to help us. They're dead now. If it was a contributing factor to our family members' health, if you want to reimburse us to a certain percentage."[164] More powerfully, she observes: "Apologies are not going to help us because they're dead now. And if it caused or contributed to that, you know, an apology won't help that. Apology, what's that going to do?"[165] Francina Hopkins similarly reasons: "I don't think they owe no apology. They should pay us off. All of my siblings, my mom, everybody dead from cancer."[166] Likewise Jimmie Ingraham proclaims: "The city should do something, even if they have to tear up everything over there and clean it up. I think they should compensate those people for their illness for all those years."[167]

The refrain repeated by the survivors of Old Smokey—public education and indignation, environmental testing and clean-up, health registry data and medical monitoring, remedial compensation for personal harm and property damage, and restorative justice—maps a potential legal–political rights campaign and community resistance strategy for environmental justice applicable to the West Grove, the City of Miami, and Miami-Dade County. The shared goal of that community-based campaign strategy—to redeem the collective right to live in a healthy and safe environment—inevitably must grapple with VanderVelde's key historical

161. Interview with Delores Patterson Baine, *supra* note 72, at 15.
162. Interview with Theodore W. Johnson, *supra* note 74, at 10, 12.
163. Interview with Dr. Joyce Price, *supra* note 86, at 11.
164. Interview with Antoniette Price, *supra* note 76, at 22.
165. *Id.*
166. Interview with Francina Hopkins, *supra* note 78, at 9–10.
167. Interview with Jimmie Ingraham, *supra* note 1, at 13–14.

interrogations of legal rights education, judicial and legislative law reform strategies, movement leadership, outside intervention, and legal–political accommodation and resistance.

Plainly, the task of fully pursuing and resolving these inquiries falls beyond the ambit of this Review. Nevertheless, for the impoverished past and present residents of the West Grove, VanderVelde's main theoretical concerns underline the centrality of community to any practical formulation, implementation, and resolution of a civil rights and environmental-justice campaign. The same concerns highlight the elusive and perhaps unknowable quality of community to outsiders, even well-intentioned advocates laboring in constructive, good faith partnership. As Delores Patterson Baine and Theodore W. Johnson observe: "We had a community and we had our school and we had each other,"[168] and "somehow we survived as a community."[169] For Jimmie Ingraham and many others, the West Grove ultimately outlasted Old Smokey because of the strength of its now disintegrating community. "It was just nice," he reminds us, "it's hard to explain."[170]

Conclusion

> I thank God I'm here today, able to say something. It might not mean too much, but to me it feels like I'm doing a great job in telling some of the stuff that occurred in this community.[171]
>
> —Jimmie Ingraham

This Review investigates the environmental-justice-based legal and political mobilization today slowly rising out of the public and private contamination wrought by Miami's Old Smokey incinerator. Spurred by VanderVelde's historical findings in *Redemption Songs*, the instant sociolegal investigation builds upon her own research on *Dred Scott v. Sandford* and the work of historians in the field of slavery to revisit the nineteenth-century practices of antebellum freedom suits in Missouri. Gathering up the fabric of freedom suits, VanderVelde remarkably uncovers hundreds of St. Louis municipal court case records comprising 239 litigants and 38 family groups accumulated between 1814 and 1860. The cases enable VanderVelde to track critical lines of inquiry helpful to historians of race and advocates for the legal–political rights of impoverished racial communities. The inquiries raise hard questions for community-based lay and legal advocates enmeshing rights education and outreach strategies;

168. Interview with Delores Patterson Baine, *supra* note 72, at 15.
169. Interview with Theodore W. Johnson, *supra* note 74, at 10.
170. Interview with Jimmie Ingraham, *supra* note 1, at 3–4.
171. *Id.* at 13.

judicial, legislative, administrative, and street-level tactics; indigenous leadership prerogatives and outside interventions; decision-making protocols; and end-game negotiations.

VanderVelde pursues many of these inquiries in reviewing freedom suit petitions in order, more perceptively, to discern stories of caste, class, and racial status in nineteenth-century America. This Review revisits similar ground to understand the place of caste, class, and racial status in modern civil rights and environmental-justice suits. Although distinguished by time and place, both pathways integrate the lessons of antebellum freedom suits and modern civil rights and environmental-justice suits to learn how best to describe stories, and to prescribe strategies, of community power and resistance. Tailored to enlarge upon VanderVelde's notions of subordination, voice, and redemption, those stories and strategies link the antebellum freedom suits of enslaved men and women to the oral histories of Old Smokey survivors through unexpectedly traditional legal–political rights discourse. For long-impoverished, segregated communities like Miami's West Grove, the dignitary and egalitarian claims of rights discourse remain the starting point for individual hope and collective renewal.

Lost Ground: Catholic Schools, the Future of Urban School Reform, and Empirical Legal Scholarship

LOST CLASSROOM, LOST COMMUNITY: CATHOLIC SCHOOLS' IMPORTANCE IN URBAN AMERICA. By Margaret F. Brinig & Nicole Stelle Garnett. Chicago, Illinois: The University of Chicago Press, 2014. 224 pages. $45.00.

Michael Heise*

The central themes in Margaret Brinig and Nicole Garnett's Lost Classroom, Lost Community: Catholic Schools' Importance in Urban America *distill as easily as they haunt. Well understood is that the United States needs to improve the quality of education as well as its equitable distribution across various subgroups of students. Paradoxically, students most in need of high-quality education services—including minority students, particularly those from low-income households in urban areas—are more likely assigned to under-performing public schools. Historically, the nation's Catholic schools provided urban students, including many minority students from low-income households, with more efficacious yet less expensive educational services than their urban public school counterparts. Brinig and Garnett's book identifies and discusses an especially lethal interaction of an array of key trends: While the need for high-quality, low-cost education services continues its ascent, Catholic school closures accelerate and, in so doing, threaten efforts to help improve the urban education landscape. To make matters even worse, as Brinig and Garnett also argue, the consequences of Catholic school closures extend beyond the education realm and degrade the stability of urban communities. Brinig and Garnett's work on this topic is important as the policy issues remain timely and novel, and they enlist data and empirical methods into their analyses. As a result, Brinig and Garnett's book is not only important for what it says but also how it says it.*

I. Introduction

Lost Classroom, Lost Community: Catholic Schools' Importance in Urban America explores a difficult and discomforting issue with important policy consequences: What happens when an increasing number of Catholic schools "vanish from the urban landscape forever"?[1] The story that

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1. MARGARET F. BRINIG & NICOLE STELLE GARNETT, LOST CLASSROOM, LOST COMMUNITY: CATHOLIC SCHOOLS' IMPORTANCE IN URBAN AMERICA 2 (2014).

unfolds—buttressed by careful empirical legal research—is an unhappy story for many, and one with distressing educational and public policy consequences. While any school closure warrants careful attention and analysis, what Brinig and Garnett tell us is that the accelerating trend of Catholic school closures in urban America poses particular problems for education reform efforts generally and, more particularly, for the many families, including many low-income minority families, who now have fewer education options. But that is not all. Brinig and Garnett's additional—and more provocative—claim is that Catholic school closures pose important deleterious consequences for many urban neighborhoods and communities.

Despite a relatively robust and well-developed scholarly literature on Catholic schools, *Lost Classroom* contributes in two important ways. First, while much of the existing literature frames Catholic schools as educational institutions, Brinig and Garnett expand the traditional analytic frame by assessing Catholic schools not only as educational institutions but also as community institutions. In so doing, the authors endeavor to better understand the complex relations between Catholic schools and the "neighborhoods where they are (or were) situated."[2] Second, also critical to *Lost Classroom*'s success is that it brings a sophisticated and creative empirical perspective to timely research questions. As a consequence, *Lost Classroom* is an important scholarly contribution not only for what it says but also how it says it.

II. Background

Public perceptions about the persistent and substantial challenges confronting America's public schools, particularly its urban public schools, are well-known, well rehearsed, and, to some degree, too quickly devolve into caricature.[3] Public perceptions about urban Catholic schools are similarly both well understood and well rehearsed.[4] Public and political rhetoric aside, some, perhaps even many (but certainly not all), of the perceptions about urban public and Catholic schools benefit from well accepted and robust empirical support.

Perceptions about urban public and Catholic schools, particularly those flowing from the inevitable comparisons among schools, contribute to uneasy relations among public and private schools. Further exacerbating already

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2. *Id.* at 3.

3. Insofar as *Lost Classroom* focuses on urban public and Catholic schools, my discussion adopts a similar focus where possible. For a discussion of public perceptions of American urban public schools, see, for example, Lillemor McGoldrick, *Reforming Urban School Systems: Putting the Public Back in Public Education*, 6 GEO. J. ON POVERTY L. & POL'Y 111 (1999).

4. *See, e.g.*, John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 363 (2001) (alluding to "evidence that Catholic parochial schools often outperform their public counterparts, even when educating racially and economically diverse students").

strained relations is the growing presence of market forces found in the education setting. As the need for higher quality educational services increases, so too does parental demand for increased control over their children's educational destiny. As the locus of control over educational decisions continues to migrate from the state to individual households, competition between public and non-public (including Catholic) schools increases. The combination of the Supreme Court's decisions in *Pierce v. Society of Sisters*[5] and *Zelman v. Simmons-Harris*[6] legally preserves Catholic schools as one viable alternative to public schools[7] or, more accurately, at least for those families who can afford such options. Where urban public and Catholic schools may have uneasily coexisted in the past, these schools increasingly find themselves competing with each other for market share and students. While increased competition may further strain relations between urban public and Catholic schools, it underscores why policymakers need to better understand the consequences triggered by the acceleration of Catholic school closures in many cities.

A. Urban Public School Challenges

An array of reasons warrants attention to urban public schools. One involves the sheer scale of urban schools. The largest 100 urban districts enroll more than 22% of the nation's public school students.[8] Moreover, a sizable majority of the students attending these largest districts are nonwhite (71.1%) and eligible for reduced-price lunch programs (55.9%).[9] Notwithstanding the particular challenges that confront the vast range of American urban public schools, critiques typically flow from two broad charges: Urban public schools do not adequately generate desired student academic achievement levels, and they are too expensive.[10] The challenges that confront many urban public schools, while important, are no longer important enough to obscure the stark and persistently uncomfortable data on urban public school performance.

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5. 268 U.S. 510 (1925).

6. 536 U.S. 639 (2002).

7. *See id.* at 644–45, 652–55 (upholding Ohio's voucher program against an Establishment Clause challenge); *Pierce*, 268 U.S. at 516–20 (invalidating a statute that forced students to attend public schools instead of private and parochial schools).

8. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NCES 2011-301, CHARACTERISTICS OF THE 100 LARGEST PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS IN THE UNITED STATES: 2008–09, at 1 tbl.1 (2010) [hereinafter CHARACTERISTICS OF THE 100 LARGEST PUBLIC SCHOOL DISTRICTS].

9. *Id.* at 2 tbl.2.

10. *See, e.g.*, Joel Klein, *The Failure of American Schools*, ATLANTIC, Apr. 26, 2011, http://www.theatlantic.com/magazine/archive/2011/06/the-failure-of-american-schools/308497/?single_page=true, *archived at* http://perma.cc/29CU-XL9Y (discussing the "negligible" improvements to public schools' academic achievements while their costs have continued to rise).

In terms of one critical school-level outcome—graduation rates—large urban school districts lag behind national averages. In 2007–2008, for example, the national average freshman graduation rate was 75%; for the largest 100 school districts it was 65%.[11] Of course, in many ways worrisome graduation rates merely reflect the culmination of persistent and complex challenges relating to student academic achievement.

More granular assessments of student academic achievement require data. For generations, however, data limitations hamstrung efforts to compare student achievement across schools, districts, states, and, increasingly, nations. While critical student academic data limitations persist, the terrain shifted for the better by the turn of the twenty-first century. The array of critiques of the No Child Left Behind Act of 2001 (NCLB), some of which are important, are already well documented.[12] Notwithstanding deserved (and some undeserved) criticism, however, for the narrow purpose of gaining greater clarity into student academic progress, NCLB possesses two critical attributes. First, NCLB requires the production—and distribution—of student achievement data.[13] Prior to NCLB, efforts to assess student achievement in the United States proved far more difficult, likely by design, principally owing to a paucity of consistent, coherent data.[14] Second, one key provision in NCLB involves "adequate yearly progress" (AYP).[15] Whether a school or district achieves AYP flows from whether annual student test results required under NCLB achieve *state-defined* proficiency thresholds.[16] As one might imagine, many states have lowered proficiency thresholds in light of the consequences that flow from

11. CHARACTERISTICS OF THE 100 LARGEST PUBLIC SCHOOL DISTRICTS, *supra* note 8, at 7–8. Actual graduation rates remain in some dispute. *See, e.g.*, Clint Bolick, *Civil Rights and the Criminal Justice System*, 20 HARV. J.L. & PUB. POL'Y 391, 394 (1997) ("[I]n most urban areas in the United States today, the graduation rate from public high schools is less than 50%, and it is substantially less than 50% for minorities.").

12. For various critiques and commentaries, see, for example, Michael Heise, The 2006 Winthrop and Frances Lane Lecture: *The Unintended Legal and Policy Consequences of the No Child Left Behind Act*, 86 NEB. L. REV. 119 (2007); Damon T. Hewitt, *Reauthorize, Revise, and Remember: Refocusing the No Child Left Behind Act to Fulfill* Brown*'s Promise*, 30 YALE L. & POL'Y REV. 169 (2011); Crystal L. Jones, *No Child Left Behind Fails the Reality Test for Inner-City Schools: A View from the Trenches*, 40 CUMB. L. REV. 397 (2010); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932 (2004). *See generally* No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

13. 20 U.S.C. § 6311(b)(3)(C)(vii) (2012).

14. *See* Sandy Kress et al., *When Performance Matters: The Past, Present, and Future of Consequential Accountability in Public Education*, 48 HARV. J. ON LEGIS. 185, 194–95 (2011) (describing how differences between each state's metric made it difficult to undertake comparative assessments).

15. 20 U.S.C. § 6311(a)(2)(C).

16. *Id.* § 6311(b)(2)(B)–(C).

NCLB.[17] That is, NCLB has effectively transformed what was once a "race to the top"—where states competed with one another for higher proficiency thresholds—into a "race to the bottom."[18] As a consequence, schools and districts today who fail to achieve AYP under NCLB increasingly fail to do so in a context of diluted state standards.[19]

A relevant and helpful summary of data on urban public school student achievement, some of which is now required under NCLB, comes from the annual reports from the Council of Great City Schools, a consortium of the nation's 67 largest urban public school districts.[20] The 2010–2011 school-year student achievement data presented in a recent Council report convey grim news. Specifically, for fourth grade students, only 29% of the urban districts performed at (or above) state proficiency levels in math.[21] The percentage drops to 15% for eighth graders.[22] Results for reading are slightly worse, with only 17% of the urban districts performing at state proficiency levels for fourth graders.[23] The percentage rises to 19% for the eighth graders.[24] Moreover, National Assessment of Educational Progress test data from the 2009–2010 school year convey a similarly unsatisfactory picture of student achievement and illustrate the degree of the achievement gap that separates many urban public schools from national public school averages.[25]

If questions about urban public schools' academic performance were not damaging enough, that they are more expensive than their Catholic school counterparts only makes a challenging situation even more so. As Table 1

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17. For discussion of the "race to the bottom" created by the NCLB's ever-increasing performance standards see, for example, Michael Heise, *The Political Economy of Educational Federalism*, 56 EMORY L.J. 125, 144–47 (2006); Ryan, *supra* note 12, at 944, 948 & n.77; David J. Hoff, *States Revise the Meaning of 'Proficient,'* EDUC. WEEK, Oct. 9, 2002, http://www.edweek.org/ew/articles/2002/10/09/06tests.h22.html, *archived at* http://perma.cc/S9CM-SFGG; Diana Jean Schemo, *Sidestepping of New School Standards Is Seen*, N.Y. TIMES, Oct. 15, 2002, http://www.nytimes.com/2002/10/15/us/sidestepping-of-new-school-standards-is-seen.html, *archived at* http://perma.cc/7K39-WXL6.

18. Heise, *supra* note 17, at 144.

19. *See, e.g.*, *id.* at 144–45 (illustrating the trend by describing Connecticut's dilution of its student-performance standards to a level lower than its "own definition of 'goal level'").

20. COUNCIL OF THE GREAT CITY SCH., BEATING THE ODDS XI EXECUTIVE SUMMARY: ANALYSIS OF STUDENT PERFORMANCE ON STATE ASSESSMENTS, at iii (2012), *available at* http://www.cgcs.org/cms/lib/DC00001581/Centricity/Domain/87/BTO%20Executive%20Summary%202012.pdf, *archived at* http://perma.cc/MAZ2-ZE9D.

21. *Id.* at 6 fig.6.

22. *Id.*

23. *Id.* at 5 fig.5.

24. *Id.*

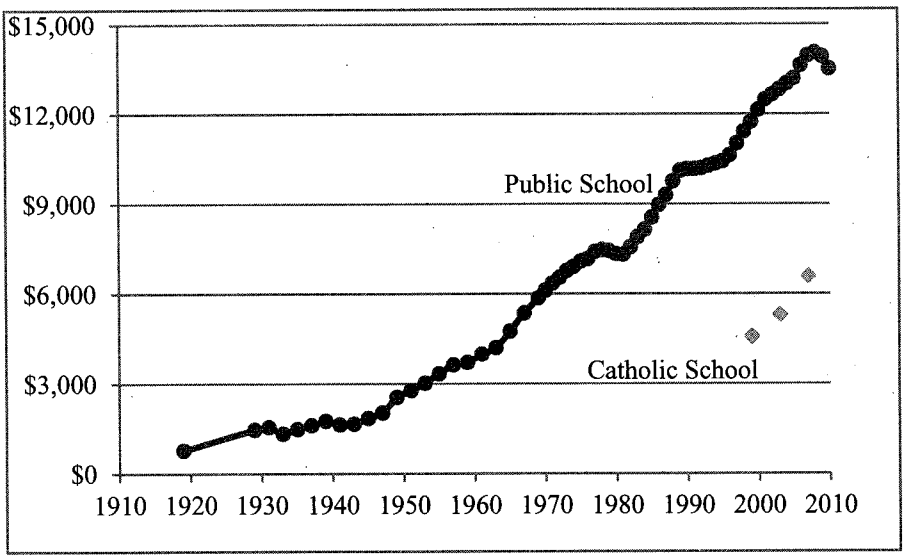
25. *See* COUNCIL OF THE GREAT CITY SCH., BEATING THE ODDS: ANALYSIS OF STUDENT PERFORMANCE ON STATE ASSESSMENTS AND NAEP, RESULTS FROM THE 2009–10 SCHOOL YEAR 24 fig.15 (2011), *available at* http://www.cgcs.org/cms/lib/DC00001581/Centricity/Domain/35/BTO_2010_analysis.pdf, *archived at* http://perma.cc/R98L-HZ6J (showing, among other things, that urban student achievement for the 2009–2010 school year was below state averages in mathematics).

makes quite clear, public school (not just urban public schools) per pupil spending since just after World War I, adjusted to constant 2012 dollars, reveals a virtually unbroken upward trend.[26] While per pupil spending for urban public schools, relative to the national trend, may have evolved over the years, it is highly unlikely that urban public schools departed too dramatically from the national average. If anything, during the past few decades per pupil spending in most urban public schools likely exceeded the national average.

Regardless of how urban public school per pupil spending fared compared with the national average, more germane to Brinig and Garnett's book is its relation to Catholic schools. National data on Catholic school annual tuition prove elusive, but Table 1 includes what little data are readily (and publicly) available. Even a paucity of Catholic school annual tuition data cannot obscure one obvious point: Catholic schools operate less expensively than public schools. To observe only that Catholic schools operate less expensively than public schools, however, misses the main, larger point: Catholic school students report higher levels of academic achievement *despite* lower per pupil spending levels.

26. Perhaps reflecting the recent economic downturn, public school per pupil spending dropped slightly in the most recent two years.

Table 1: Total Public School Per Pupil Spending & Average Catholic School Tuition[27]



NOTE: Constant 2012 dollars.

B. Catholic Schools

While it certainly remains the case that many wonderful public schools, including urban public schools, exist, it also remains painfully clear that far too many struggle. Similarly (and not surprisingly), Catholic schools range in quality and efficacy. Nonetheless, for an array of reasons, including self-selection, the general descriptive claim that, on average, Catholic schools outperform their public school counterparts is no longer controversial. Indeed, such a claim is now remarkably unremarkable and well understood. Core findings from James Coleman's path-breaking research beginning in the 1970s generally withstood the test of time.[28] Even more salient, of course, is

27. Data were obtained from the *Revenues and Expenditures for Public Elementary and Secondary Education* and the *Schools and Staffing* survey data files available on the National Center for Education Statistics' website. *Common Core of Data (CCD)*, NAT'L CENTER FOR EDUC. STAT., http://nces.ed.gov/ccd/pub_rev_exp.asp, *archived at* http://perma.cc/F29Y-HBD9; *Schools and Staffing Survey (SASS)*, NAT'L CENTER FOR EDUC. STAT., https://nces.ed.gov/surveys/sass/, *archived at* https://perma.cc/2434-DY8A.

28. JAMES S. COLEMAN ET AL., HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS 176, 178 (1982) (observing that there are multiple ways in which "private schools produce higher achievement outcomes than public schools"); *see also, e.g.*, ANTHONY S. BRYK ET AL., CATHOLIC SCHOOLS AND THE COMMON GOOD 297 (1993) (finding four foundational characteristics to explain the efficacy of Catholic high schools); ANDREW M. GREELEY, CATHOLIC HIGH SCHOOLS AND MINORITY STUDENTS 107 (1982) (identifying the "apparently superior performance of young people . . . in Catholic schools"); TIMOTHY WALCH, PARISH SCHOOL: AMERICAN CATHOLIC PAROCHIAL EDUCATION FROM COLONIAL TIMES TO THE PRESENT 241

that many Catholic schools succeed amid "urban chaos."[29] As Brinig and Garnett note, Nicolas Lemann's *Atlantic Monthly* essay in 1986 advanced the strong form of this point by observing that in many American cities today, "the only institutions with a record of consistently getting people out of the underclass are the parochial schools."[30] Moreover, as Richard Kahlenberg observes paradoxically, many Catholic schools "better approached the middle-class culture of the common school than high-poverty public schools themselves."[31]

Assuming a key and, by this point, largely uncontested premise—that many Catholic schools serving urban areas outperform their public school counterparts in critical ways, including student achievement—frames a devastating conclusion: The acceleration of Catholic school closures in urban areas reduces the supply of efficacious educational institutions that serve a disproportionate number of children most in need of quality educational services.

While evidence of an acceleration of Catholic school closures is obvious to most who live in an urban area—particularly those with school-age children—a brief summary of the salient macrotrends warrants attention. As Table 2 illustrates, the raw number of Catholic schools has slowly but steadily declined since the early 1960s. The rate of decline, while generally stable since approximately 1975, steepened since approximately 2002. The trend line in Table 2 comports with Brinig and Garnett's claim that "[n]ationwide, over 1,600 Catholic schools have closed in the past two decades."[32]

(1996) (highlighting the fact that "[s]tudents in parish schools outperform their friends in public schools"). For a more recent study on the "Catholic School Effect," see Derek Neal, *The Effects of Catholic Secondary Schooling on Educational Achievement*, 15 J. LAB. ECON. 98, 99–100 (1997).

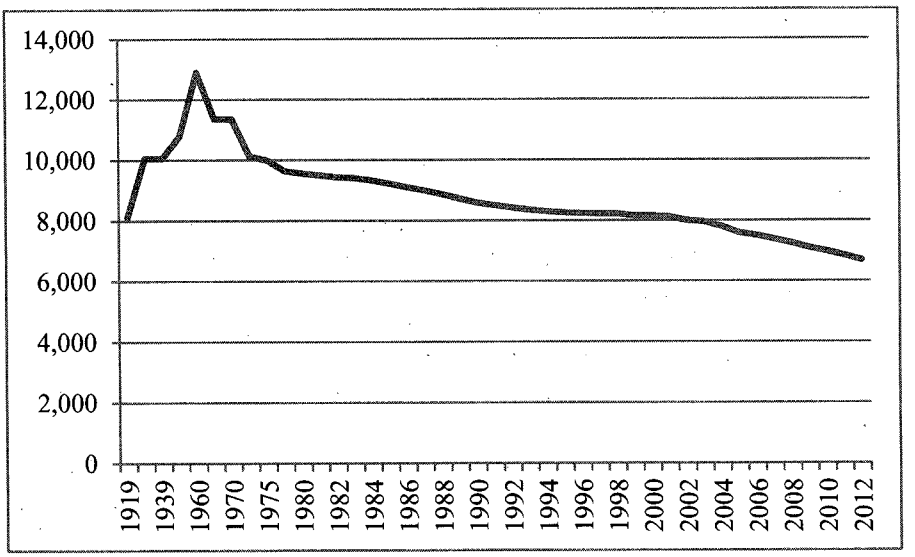
29. BRINIG & GARNETT, *supra* note 1, at 28.

30. *Id.* (quoting Nicholas Lemann, *The Origins of the Underclass: Part I*, ATLANTIC MONTHLY, July 1986, at 54, 67).

31. Richard D. Kahlenberg, *Learning From James Coleman*, PUB. INT., Summer 2001, at 54, 72.

32. BRINIG & GARNETT, *supra* note 1, at ix.

Table 2: Number of Catholic Schools[33]



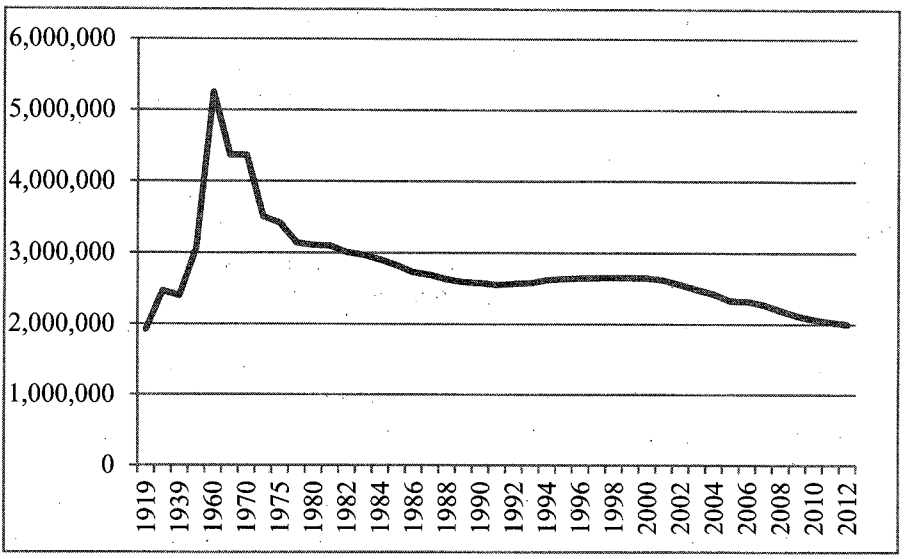
NOTE: Horizontal axis not scaled.

Notwithstanding evidence of a long-standing, steady, and recently accelerating trend of Catholic school closures, optimists might try to grasp at the hypothetical possibility that an accelerating decline in the total number of Catholic schools over time need not necessarily translate into a decline in the number of students served by the diminishing supply of Catholic schools. That is, perhaps the data in Table 2 merely reflect school consolidations or a shift from smaller to larger Catholic schools. Data in Table 3, however, dampen any optimism and reveal that, as one would more realistically expect, the magnitude in the decline in the total number of Catholic schools parallels a similar decline in the number of Catholic school students. Indeed, the trend line in Table 3 more or less mirrors the trend line in Table 2. Thus, in the context of Catholic education, fewer Catholic schools results in fewer Catholic school students. As Brinig and Garnett note, during the past two decades alone, Catholic school closures have displaced more than 300,000 students.[34]

33. Data obtained from the National Catholic Educational Association's annual statistical reports on Catholic schools. *Data & Information*, NAT'L CATHOLIC EDUC. ASS'N, http://www.ncea.org/data-information/catholic-school-data, *archived at* http://perma.cc/RYW5-538B.

34. BRINIG & GARNETT, *supra* note 1, at ix.

Table 3: Catholic School Enrollment[35]



NOTE: Horizontal axis not scaled.

III. From Lost Classrooms to Lost Communities

Lost Classroom advances two central claims that flow from subtle interactions. The first claim, while easier to support, poses immediate consequences for urban school reform. Specifically, the very student population most in need of quality educational service—students from low-income homes that include a disproportionate number of nonwhite students—are most exposed to the acceleration of Catholic school closures. *Lost Classroom*'s second and more far-reaching claim flows from the first. Catholic school closures—triggering a net reduction in social capital-building institutions—contribute to a broader destabilization of many urban neighborhoods. To support their claims, the authors turn to data and empirical methods, which are entirely appropriate to their research questions and which reflect and contribute to broader trends in legal academic research.

A. Lost Classrooms and the Impact on Urban School Reform

A diminishing number of urban Catholic schools implicates school reform efforts at both the individual and institutional levels. Obviously, those students (and their families) literally displaced by Catholic school closures confront immediate challenges associated with the need to transfer schools. More broadly, however, individual students—and households—now

35. Data obtained from the National Catholic Educational Association's annual statistical reports on Catholic schools. *Data & Information*, *supra* note 33.

confronting reduced opportunities to access urban Catholic schools, and their enviable record of success, must navigate among more limited educational opportunities. One irony, of course, is that the decrease in urban Catholic schools coincides with an increase in the demand for school choice, as well as publicly and privately funded programs supporting greater school choice.[36]

A diminishing supply of urban Catholic schools also poses threats to school reform at the institutional level. As Kahlenberg correctly underscores, the "social capital of the sort found in Catholic schools is vital to improving our educational system."[37] As *Lost Classroom* makes clear, the supply of schools that serves as one obvious model of how to better serve those students most in need of quality schooling, Catholic schools, is *decreasing* (rather than increasing) over time. Even more alarming is that the diminishing number of Catholic schools hits urban America with disproportionate force.

To illustrate one important way in which urban Catholic school closures intersects with system-wide urban school reform efforts, one need only look to Cleveland, Ohio. The very program that gave rise to the litigation that culminated in the U.S. Supreme Court's *Zelman* decision began as a state-wide effort to address Cleveland's struggling public schools. Confronting decades of underperforming public schools in Cleveland, the Ohio General Assembly responded in 1995 by passing the Ohio Scholarship and Tuition Program.[38] While the statute was drafted to benefit any family in any Ohio school district "under federal court order requiring supervision," when the program began only the Cleveland public school district fell into that category.[39] The program permitted eligible families to direct a limited amount of public funds for tuition aid at eligible and participating public and private (including religious) schools.[40]

Similar to Chicago, the focus of Brinig and Garnett's study,[41] Cleveland's private school landscape is noted for successful Catholic schools. As the Justices dissenting in *Zelman* emphasized, many (82%)[42] of the private schools that participated in the Ohio voucher program were religiously affiliated,[43] and these religiously affiliated schools served most (96%) of the participating students during the 1999–2000 school year.[44] While scholars may debate the educational efficacy of Ohio's voucher

36. For a summary of the various voucher programs, many (but not all) of which include Catholic schools, see generally CLINT BOLICK, VOUCHER WARS: WAGING THE LEGAL BATTLE OVER SCHOOL CHOICE (2003); PRIVATE VOUCHERS (Terry M. Moe ed., 1995).

37. Kahlenberg, *supra* note 31, at 55.

38. OHIO REV. CODE ANN. §§ 3313.974–.979 (West 2012 & Supp. 2014).

39. *Id.* § 3313.975(A); Zelman v. Simmons-Harris, 536 U.S. 639, 644–45 (2002).

40. *Zelman*, 536 U.S. at 645–46.

41. BRINIG & GARNETT, *supra* note 1, at 57.

42. *Zelman*, 536 U.S. at 647.

43. *Id.* at 687 (Souter, J., dissenting).

44. *Id.* at 647 (majority opinion).

program, few contest the important role that religiously affiliated schools, notably Cleveland's Catholic schools, played in the implementation and execution of the Ohio program. (Paradoxically, Cleveland religious schools' relative and absolute success in competing for students benefitting from publicly funded vouchers was pointed to by dissenting Justices as a reason to strike down the Ohio program as a constitutionally impermissible establishment of religion.)[45] Indeed, to the extent that the program succeeded by offering more low-income Cleveland families access to Catholic schools, the viability (and replicability) of such success is directly challenged by *Lost Classroom*'s findings. That is, ironically, as new voucher programs (in various forms) continue to emerge and existing programs expand, they now do so in an environment with fewer urban Catholic schools.[46]

B. Losing Classrooms and Communities

Catholic school closures' deleterious impact on urban school reform efforts, however, are only part of Brinig and Garnett's story, as they extend their thesis from classrooms and urban school reform efforts to the neighborhoods and communities that lose Catholic schools. In so doing, *Lost Classroom* broadens the conceptual focus of Catholic schools from educational institutions to community institutions. Once reconceptualized more broadly as community institutions, the risk to neighborhood stability posed by Catholic school closures comes into sharper focus. Specifically, the authors argue that Catholic school closures trigger a net reduction in social capital-building neighborhood institutions and, as a result, contribute to the further destabilization of many already stressed urban areas.[47] Brinig and Garnett's broader claim is both ambitious and difficult to sustain, particularly given limited data and especially knotty and complex causation and endogeneity issues. This is not to say that Brinig and Garnett's instincts are incorrect. Rather, readers' views may differ on the sufficiency of the evidence upon which the authors base their claims.

Lost Classroom construes the threat to neighborhood destabilization in terms of social cohesion measures (drawn from survey data) and data on major crimes at the police-beat level from 1999 to 2005 (in Chicago) and at the census-tract level in Philadelphia and Los Angeles.[48] The authors set out

45. *Id.* at 727 (Breyer, J., dissenting) (arguing that the "considerable shift" of taxpayer dollars to private religious schools exacerbates constitutional problems).

46. *See* BRINIG & GARNETT, *supra* note 1, at 9–32 (detailing the increasing number of closures of Catholic schools). For an inventory of school choice programs, see, for example, ALLIANCE FOR SCH. CHOICE, SCHOOL CHOICE YEARBOOK 2013–14, at 9 (2014). For a description of how the Ohio program expanded, see *EdChoice Scholarship Program*, OHIO DEPARTMENT EDUC., http://education.ohio.gov/Topics/Other-Resources/Scholarships/EdChoice-Scholarship-Program, *archived at* http://perma.cc/6Z2K-4AJQ.

47. BRINIG & GARNETT, *supra* note 1, at 3–4.

48. *Id.* at 3, 5 (Chicago); *id.* at 103 tbl.6.3 (Philadelphia); *id.* at 106 (Los Angeles).

to exploit the comparative potential offered in Chicago by the existence of Catholic and public charter schools. They find that the presence of a Catholic school correlates with a higher level of social cohesion[49] and comparatively less crime.[50] In Chapter 5, the authors endeavor to refine their analyses further by comparing Catholic and public charter schools' independent influence on neighborhood crime rates. Notably, Brinig and Garnett report that while the presence of a Catholic school correlated with a lower neighborhood crime rate, the presence of a public charter school did not influence neighborhoods at any statistically significant level.[51] While the authors convey confidence in their causal claims regarding Catholic school closures and increased crime rates, the authors soften their conclusions relating to public charter schools due to technical and complex causation issues.[52]

While *Lost Classroom* admittedly focuses on Catholic school closures and their implication for neighborhood cohesion, greater attention to research on school closures in other contexts might be warranted and helpful. For example, a nod to the public school consolidation literature may have assisted (and supplemented) the authors' difficult task of tethering Catholic school closures and neighborhood degradation. Economies of scale, shifting demographic patterns, birth rates, and an array of other factors have increased stress on many public school districts and individual schools.[53] The public school consolidation trend, which gained steam during the 1980s, was (and continues to be) acutely felt in many rural communities.[54] Setting aside more mundane concerns—such as the implications for athletic team rosters that inevitably arise when a school closes and its students are absorbed into another school—more troubling are the broader and deeper threats to a rural community's very economic existence following the closure of its local high school. Scholars have noted that rural school consolidations generate harms that implicate students and threaten rural communities' vitality.[55]

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49. *Id.* at 75.

50. *Id.* at 82–83.

51. *Id.* at 95–98 & fig.5.1, tbl.5.2.

52. *Id.* at 98 ("[W]e strongly suspect that the link between open Catholic schools and reduced crime is a causal one. We have no similar hunches about [public] charter schools.").

53. *See generally* AMY STUART WELLS ET AL., CTR. FOR UNDERSTANDING RACE AND EDUC., DIVIDED WE FALL: THE STORY OF SEPARATE AND UNEQUAL SUBURBAN SCHOOLS 60 YEARS AFTER *BROWN V. BOARD OF EDUCATION* (2014) (describing how "changing racial and ethnic demographics" are impacting school districts); Robert J. Tholkes & Charles H. Sederberg, *Economics of Scale and Rural Schools*, RES. RURAL EDUC., Fall 1990, at 9 (analyzing the potential impact of economics of scale on rural school districts).

54. *See generally* Outi Autti & Eeva Kaisa Hyry-Beihammer, *School Closures in Rural Finnish Communities*, 29 J. RES. RURAL EDUC., no. 1, 2014, at 1 (studying rural school closures in Finland); Keith A. Nitta et al., *A Phenomenological Study of Rural School Consolidation*, 25 J. RES. RURAL EDUC., no. 2, 2010, at 1 (studying rural school closures in Arkansas).

55. Joan Blauwkamp et al., *School Consolidation in Nebraska: Economic Efficiency vs. Rural Community Life*, 6 ONLINE J. RURAL RES. & POL'Y, no. 1, 2011, at 1, 3.

C. *Catholic Schools, Public Charter Schools, and Social Capital Theory*

The complex research design and data demands that complicate Brinig and Garnett's analyses (discussed below) reveal a broader question with potentially important educational policy ramifications: Assuming Brinig and Garnett's findings are correct, what explains why Catholic and public charter schools may differ when it comes to generating neighborhood-level social capital? To be sure, as the authors correctly note, given the political dynamics incident to any public school system and institution, charter schools can vary, sometimes tremendously. And some—perhaps much—of this variation is intended.[56]

Despite critical variation, public charter and Catholic (and other non-public) schools share certain key attributes. For example, charter and Catholic schools share some amount of entrepreneurial activity. Catholic schools, of course, are private religious organizations nested within the Catholic Church. While charter school laws vary across states, charter schools, similar to Catholic schools, are typically "created as the result of private, entrepreneurial action—that is, at the request of a private entity (the charter 'operator') for permission to open a school made to a governmental entity (the charter 'sponsor') . . . [and] operate more or less independently of local school authorities."[57] Another—or, perhaps, the—key shared ingredient, of course, is that parents and students *choose* to attend charter and Catholic schools rather than schools assigned to them by the government.

Thus, for the narrow purpose of comparing schools' potential for social capital building, theory (and common sense) suggests that owing to key shared attributes charter and Catholic schools would also share a similar potential and capacity for generating desirable social capital. If so, then there is no particular reason to assume, *ex ante*, that public charter and Catholic schools would behave differently when it comes to social capital building.

Yet this is precisely what *Lost Classroom* implies. Specifically, to help build their case that Catholic schools contribute important social capital to their neighborhoods and communities (in terms of crime reduction), Brinig and Garnett suggest that Catholic schools generated social capital that Chicago's public charter schools did not.[58] The empirics behind their claim are complicated and limited by existing data. Assuming Brinig and Garnett are correct, we need to explore possible explanations for their findings.

Prior work by one of the authors, developed further in *Lost Classroom*, provides one possible explanation. Garnett has previously argued (relying

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56. *See generally* CHESTER E. FINN, JR. ET AL., CHARTER SCHOOLS IN ACTION (2000) (noting the different types of schools that constitute the charter movement).

57. BRINIG & GARNETT, *supra* note 1, at 36; *see also* Nicole Stelle Garnett, *Are Charters Enough Choice? School Choice and the Future of Catholic Schools*, 87 NOTRE DAME L. REV. 1891, 1896–97 (2012) (discussing private efforts to keep much-needed Catholic schools open).

58. *See infra* notes 59–60 and accompanying text.

on prior work by James Coleman and Anthony Bryk[59]) that what distinguishes charter and Catholic schools is the latter's capacity for developing "intentional communities," which, in turn, make unique social capital contributions.[60] If correct, and if a "Catholic school effect" in fact exists, this would at the very least explain why charter and Catholic schools—both of which share the critical aspect of choice—may not share similar outcomes when it comes to social capital production. But even if this account is correct, it does not explain the potentially more troubling point about why other educational institutions, including some public educational institutions, seem unable to replicate the Catholic school effect.

While Chapter 7 helpfully explores this precise question,[61] in the end readers are left still grasping at some straws on two key points. First, whether Catholic schools possess something of a monopolistic lock on generating both the educational and more general social capital building (or "positive externalities") consistent with the authors' main empirical findings. Second, if a Catholic school effect exists, is it replicable by public (or other) educational institutions that benefit from some level of parental choice? That is to say, in the popular policy parlance, can policymakers replicate and "scale-up" the traditional successes enjoyed by urban Catholic schools? As more and more Catholic schools close and depart urban areas, answers to these questions become increasingly important.

While Brinig and Garnett dutifully catalogue an array of possible explanations for urban Catholic schools' comparative successes, ranging from Jane Jacobs's defense of urban life to Professor William Fischel's neighborhood networks thesis,[62] one critical explanation—selection effects[63]—injects itself once again as plausibly salient. The very household characteristics that prompt families to select into urban Catholic schools may also spill over into the observed neighborhood-level positive externalities.

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59. *See generally* BRYK ET AL., *supra* note 28, at 272–76 (discussing the "impact of communal organization" affected by Catholic schools); COLEMAN ET AL., *supra* note 28 (applying statistical analysis to determine both the individual student and community outcome difference between public, Catholic, and private schools).

60. Garnett, *supra* note 57, at 1908.

61. BRINIG & GARNETT, *supra* note 1, at 112–36.

62. *Id.* at 119–23; *see also* WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS 142–43, 154–55 (2001) (explaining that neighborhoods with better performing schools have higher property values and that efforts to equalize spending in school districts with high and low property values have not caused "measurable academic improvement"); JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 119–21 (1961) (highlighting the importance of the "self-government functions of streets" in creating successful neighborhoods); William A. Fischel, *Why Voters Veto Vouchers: Public Schools and Community-Specific Social Capital*, 7 ECON. GOVERNANCE 109, 112–17 (2006) (emphasizing the role of local public schools in generating "social capital" between parents and stating that this does not happen in private schools because the parents all live in different communities).

63. *See* Garnett, *supra* note 57, at 1908 (describing selection bias as "the possibility that Catholic schools attract better students with more highly motivated parents than public schools").

That is, the positive externalities may be a function of the students and their families—independent of the Catholic schools that they attend. For the technical reasons described below, efforts to "control" for this aspect through comparisons to public charter schools—while helpful—remain underdeveloped.[64] Again, this is not to say that the authors' articulation of a theoretical foundation is wrong; rather, it is only that, owing to data and research design limitations, tests of the competing theoretical explanations remain inconclusive. And, candidly, perhaps social science is only capable of "inconclusiveness" in this context.

D. An Empirical Lens

If what *Lost Classroom* says is not important enough, *how* it seeks to persuade readers also warrants attention. Data and research design contribute to the foundation upon which Brinig and Garnett's argument rests. *Lost Classroom*'s adoption of an empirical lens is welcome, appropriate, and helpful. Indeed, the nature of the authors' claims lends them to empirical exploration and testing. The book's empirical turn both reflects—and contributes to—a broader trend in legal scholarship. Finally, *Lost Classroom*'s empirical lens identifies strains of research that warrant further scholarly attention. At some risk of getting bogged down in the technical, arcane thicket, however, this subpart briefly places the authors' decision to approach their topic from an empirical perspective into some context and focuses on the *Lost Classroom*'s core empirical chapters.

1. Lost Classroom's Quantitative Turn.—While *Lost Classroom*'s turn toward the empirical is both noteworthy and adds to the work's contribution, it is not without technical difficulty and some peril. Empirical accounts, such as *Lost Classroom*, must squarely address, among other issues, data limitations and causation questions.

Chapter 3's focus on a neighborhood's social cohesion and order culminates with the conclusion: "All of these results suggest that Catholic schools are important, stabilizing forces in urban neighborhoods and that [Catholic] school closures lead to less socially cohesive, more disorderly, neighborhoods."[65] The authors' support for this empirical proposition involves survey data from the Project on Human Development in Chicago Neighborhoods (PHDCN).[66] Not surprisingly, the authors make much of these admittedly troubling findings.

Less well developed in the analysis, however, are questions concerning potential data limitations. Understood more narrowly, the PHDCN data permit conclusions about respondents' *perceptions* of social cohesion and

64. *See infra* section III(D)(1).

65. BRINIG & GARNETT, *supra* note 1, at 71.

66. *Id.* at 57–58.

neighborhood disorder.[67] To be sure, while perceptions can accurately reflect objective reality, sometimes perceptions do not. Moreover, it may well be that in certain contexts perceptions are more important than objective reality, particularly as it relates to parental decisions about residential and school options for their kids. Finally, the PHDCN data used in this study are cross-sectional rather than the preferred longitudinal.[68] In any event, even if the survey results mean what they say, they nonetheless remain just that: respondents' perceptions rather than observable conduct.

The book's transition from Chapter 3 to 4 moves readers from survey to observational (here, crime) data. In so doing, Brinig and Garnett move from one set of methodological issues to another. On the one hand, the reliance on Chicago crime data speaks directly to the question addressed: Namely, did evidence of increased social disorder presented in Chapter 3, triggered by Catholic school closures (between 1990 and 1996), correlate with increased crime (between 1999 and 2005).[69] The reliance on standard crime data (here, the authors exploit police beat-level data on six major crimes for six years)[70] benefits from a growing scholarly lineage.

On the other hand, however, because the authors seek to isolate the unique contribution to crime rates from Catholic school closures, if any, complex causation problems lurk. One standard confounder, the independent influence of crime trends over the course of the relevant time period, warrants attention. As the authors note, crime declined nationally and in Chicago between 1999 and 2005.[71] Thus, any independent Catholic school effect must be assessed within a dynamic environment noted for decreased crime. The authors' effort to do just this warrants praise for ingenuity and creativity and reveals the authors' deep granular understanding of Catholic schools and the parochial school setting. Specifically, the authors crafted pastor-level instrumental variables, including "irregular" pastor leadership signals, designed to coherently predict Catholic school closures.[72] Analytically, the key assumption is that these pastor-level instrumental variables predict Catholic school closures *independent of* surrounding demographic variables.[73] After endeavoring to adjust for the relevant, likely confounding time trends, the authors find the rates of decline in crime in neighborhoods that include Catholic schools were systematically steeper than the rates of

67. *Id.* at 68–70.

68. *See id.* at 66 (noting that the PHDCN data could not be used "to analyze how school closures affect disorder and social cohesion over time").

69. *Id.* at 67–75.

70. *Id.* at 78.

71. *Id.* at 79 & fig.4.1.

72. *Id.* at 59–68 & tbl.3.1.

73. *Id.* at 67–68.

decline in neighborhoods that experienced a Catholic school closure between 1990 and 1996.[74]

A randomization strategy (the proverbial "gold standard" research design) assists in identifying possible causation between or among frequently interacting variables.[75] Obviously, randomization efforts are both more common and possible in sterile laboratory environments. In the real world of social science, however, research design possibilities for those seeking to study legal rules and educational institutions—contexts that involve human beings—are frequently more limited and randomization strategies prove far more difficult.[76] Similarly, the data used by Brinig and Garnett are, by definition, not purely randomized. From a research design perspective, one would want a pool of literally identical neighborhoods in which a random draw of Catholic schools would close. Real-world constraints (as well as increasingly aggressive university institutional review boards) render ideal research designs in most studies virtually impossible. As it stands, *Lost Classroom* draws heavily from one city (Chicago) and exploits more limited data from Philadelphia and Los Angeles that, perhaps unsurprisingly, introduce further complicating wrinkles into the results.[77] While I am persuaded that Brinig and Garnett's general intuition is generally correct, as it stands now it remains just that—largely intuition. Greater clarity on whether *Lost Classroom*'s core findings are generalizable to other cities and contexts will remain for future research.

An even more nuanced empirical concern involves causal direction. In an effort to tether this work to James Wilson and George Kelling's influential "Broken Windows" thesis,[78] not surprisingly Brinig and Garnett would like to tell a neat, tidy, and concise story about how Catholic school closures trigger social disorder, which, in turn, contributes to increased crime rates. Indeed, they go on to note that they "strongly suspect" such a causal link.[79] Given the enormous complexities incident to such issues and mindful of data limitations, Brinig and Garnett prudently (and correctly) push away from any strong claims on this front and concede that they cannot "know the order of

74. *Id.* at 80–81 & tbl.4.1.

75. *See* Katherine Y. Barnes, *Against Judgment*, 93 CORNELL L. REV. 689, 700–01 (2008) (book review) (noting that randomization "creates unbiased data").

76. For examples of empirical legal studies that exploit a randomization strategy, see generally D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901 (2013); D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118 (2012).

77. *See supra* note 48 and accompanying text.

78. *See generally* James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29 (illustrating that increases in "untended" property cause many residents to think that crime is increasing and to "modify their behavior accordingly").

79. BRINIG & GARNETT, *supra* note 1, at 98.

the causal chain linking school closures, disorder, social cohesion, and crime."[80] Many readers, of course, may wish for greater clarity on such a core question. Whether satisfactory clarity is possible, however, is unclear given inherent data and methodological limitations.

In Chapter 5, the authors describe their efforts to exploit (admittedly limited) charter school data in Chicago in an effort to better distill a potential Catholic school effect.[81] The effort—while certainly creative and holding promise—also introduces additional causal questions as the interactions involving the array of motivations—political, social, educational, and economic—behind decisions to open charter schools and background demographic factors inject further methodological complications. Unlike their efforts involving the Catholic schools, the authors decline to opine about the complex causation issues incident to the need to disentangle the location of charter schools (principally, K–6 or K–8 schools) from the surrounding neighborhood demographics.[82] By not doing so the analysis cannot statistically cabin various neighborhood-level demographic factors that plausibly influence crime rates. Data and methodological limitations notwithstanding, the authors report that while the presence of a Catholic school correlates with reduced crime, the presence of a Chicago charter school did not materially influence crime rates in any direction.[83] To their credit, the authors recognize the data and modeling limitations they confront, and when it comes to Chicago's charter schools, the authors appropriately limit their causal claims.[84]

Just as *Lost Classroom* identifies serious challenges for students, their parents, and urban neighborhoods that, given current trends, will likely only increase in scope over time, the complex nature of the research challenge imposes serious methodological difficulties on researchers seeking to understand with precision relations among highly complicated variables that can interact in unanticipated ways. By standing down a bit, resisting an impulse for full-throttled claims, and recognizing important boundaries beyond which empirical data and research designs cannot reasonably sustain desired conclusions, *Lost Classroom* gains more than it loses. The authors' modest and cautious tone increases readers' confidence in their analyses and more accurately reflects the technical degree of difficulty associated with their research project.

2. Empirical Legal Studies.—Technical and methodological difficulties notwithstanding, *Lost Classroom*'s empirical turn both reflects—and

80. *Id.* at 88.
81. *Id.* at 90–98.
82. *Id.* at 92–94.
83. *Id.* at 96–97 & tbl.5.2.
84. *Id.* at 97–98.

contributes to—a broader trend in legal scholarship. The growth of empirical legal scholarship is, for better or worse, undeniable.[85] While fuller accounts of empirical legal study's intellectual development reveal various false starts in the past, over the past few decades an increase in sophisticated empirical legal studies became increasingly difficult to ignore.[86] For example, Professor Robert Ellickson's citation study of legal scholarship trends included an assessment of empirical legal scholarship's growth in law reviews between 1982 and 1996.[87] Professor Ellickson's conclusion—that the data only "hint that law professors and students have become more inclined to produce (although not consume) quantitative analyses"—generally comported with prevailing wisdom grounded in growing anecdotal evidence.[88] Five years later, Professor Tracey George updated Ellickson's study and analyzed a more recent cohort of publications (1994–2004).[89] Professor George concluded that empirical legal scholarship, or more accurately the number of references to it, "continues to grow."[90] Writing in 2006, Professor George described empirical legal scholarship as "arguably the next big thing in legal intellectual thought."[91] Five years later in 2011, I updated the Ellickson (and George) study once again and found that what Ellickson described as a "hint" one decade earlier had emerged into a palpable trend that has sustained over time.[92] Even more recently Professor Joshua Fischman declared: "Today, empirical legal scholarship is flourishing again . . . ."[93] *Lost Classroom* both reflects and contributes to this flourishment.

3. Next Steps.—Having successfully carved new scholarly terrain, one important test of any piece of original scholarship, such as *Lost Classroom*, is the degree to which it stimulates future research that builds upon or expands it. While only time will tell whether *Lost Classroom* will succeed in this manner, one must certainly hope for such success. In this regard, two particular areas that *Lost Classroom* identifies strike me as unusually ripe for

85. In the interest of full disclosure, I co-edit the *Journal of Empirical Legal Studies* and, as such, am especially partial to this particular field and its growth.

86. For a fuller account of several examples of empirical research, see generally JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995).

87. Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 517, 517 (2000).

88. *Id.* at 528–29 & tbl.4.

89. Tracey E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools*, 81 IND. L.J. 141, 147 (2006).

90. *Id.* at 147.

91. *Id.* at 141.

92. Michael Heise, *An Empirical Analysis of Empirical Legal Scholarship Production, 1990–2009*, 2011 U. ILL. L. REV. 1739, 1745.

93. Joshua B. Fischman, *Reuniting 'Is' and 'Ought' in Empirical Legal Scholarship*, 162 U. PA. L. REV. 117, 120 (2013).

further research attention. First, in an effort to consider whether their core findings in Chicago are present elsewhere, Brinig and Garnett incorporate two other large American cities, Los Angeles and Philadelphia, into their study. Los Angeles and Philadelphia receive comparatively less attention, however, as the authors correctly note.[94] By making their analytic template clear and preliminarily extending their research on Chicago to other cities, *Lost Classroom* serves as a virtual research roadmap for future scholars seeking to expand upon Brinig and Garnett's work into other cities.

Second, as previously discussed, *Lost Classroom*'s effort to press Chicago's public charter school data into the service of identifying the unique influence of Catholic school closures introduced necessary methodological complexity. While the causal issues are knotty, further work developing (in Chicago and elsewhere) this aspect may yield important insights. Moreover, an intriguing theoretical anomaly persists: Insofar as both public charter schools and Catholic schools share the parental choice variable, why only Catholic schools are capable of generating "intentional communities" warrants further attention.

IV. Conclusion

Imagining cities without Catholic schools (or far fewer of them), as the authors expressly do in Chapter 9,[95] is not for the faint of heart. The acceleration of Catholic school closures threatens a two-part punch to many urban areas. First, Catholic school closures reduce access to what for many is a more efficacious educational opportunity in areas (urban centers) that desperately need higher performing educational institutions. The second punch, while perhaps more subtle or diffused, nonetheless damages as well. To fully thrive, many urban centers would benefit from a higher proportion of middle-income households, especially those with school-age children. To either attract or retain such middle-income households, however, stable, successful schools remain critical. For generations, urban Catholic schools contributed mightily toward both deflecting middle-income families from departing urban areas for suburban areas and, most prominently, suburban schools. Catholic school closures, then, will likely accelerate the migration out of urban areas of those families (regardless of race or ethnicity) who benefit from the economic means to move to suburbs. And, of course, these families are among those particularly well positioned to add social capital to many urban neighborhoods. If such a migration reaches a tipping point, previously functioning urban neighborhoods could destabilize.

Discomfort aside, we must remain unflinchingly frank—what *Lost Classroom* tells us is not good. It is certainly not good for many urban

94. *See* BRINIG & GARNETT, *supra* note 1, at 99 (describing their attention to Los Angeles and Philadelphia as "more summary").

95. *Id.* at 157–66.

households with school-age children, education reform efforts, and, as well, though perhaps with less empirical certainty, for many American cities. What makes this bad news even more difficult to digest is that we understand with acute clarity the many negative consequences that flow from an acceleration of Catholic school closures. What helps transform this bad news into tragic news is that the consequences are—and will continue to be—borne by those most in need of high-quality educational services: low-income urban families, principally of color.

Also contributing to public unease over the implications flowing from Brinig and Garnett's important research is that, to some degree, this problem could have been abated. Counterfactuals remain difficult, as we will never truly know whether the Chicago Archdiocese (and archdioceses in Los Angeles, Philadelphia, and elsewhere) would have continued to cross-subsidize parochial schools and, if so, for how long into the future. Also, while an array of macroeconomic and demographic trends can easily overwhelm, that "irregular" parish-level pastoral leadership helped facilitate Catholic school closures, and that some of these irregularities relate to the devastating sexual abuse scandals, convey an unpleasant level of self-infliction at play as well.[96]

In the end, however, this is a sad and important story for an array of reasons. If the Catholic school closure trend does not look like it will abate anytime soon, perhaps policymakers can learn from *Lost Classroom* and devise policies that will help to better preserve effective classrooms and urban neighborhoods. That is, perhaps Catholic schools' legacy can at least partially offset the consequences from Catholic school closures in American cities.

96. *Id.* at 64.

The Return of the King: The Unsavory Origins of Administrative Law

IS ADMINISTRATIVE LAW UNLAWFUL? By Philip Hamburger. Chicago, Illinois: The University of Chicago Press, 2014. 648 pages. $55.00.

Gary Lawson*

Philip Hamburger's Is Administrative Law Unlawful? *is a truly brilliant and important book. In a prodigious feat of scholarship, Professor Hamburger uncovers the British and civil law antecedents of modern American administrative law, showing that contemporary administrative law "is really just the most recent manifestation of a recurring problem." That problem is the problem of power: its temptations, its dangers, and its tendency to corrupt. Administrative law, far from being a distinctive product of modernity, is thus the "contemporary expression of the old tendency toward absolute power—toward consolidated power outside and above the law." It represents precisely the forms of governmental action that constitutionalism—both in general and as specifically manifested in the United States Constitution—was designed to prevent. Accordingly, virtually every aspect of modern administrative law directly challenges the Constitution.*

This extraordinary book will be immensely valuable to anyone interested in public law. My comments here concern two relatively minor points that call for more clarification. First, Professor Hamburger does not clearly identify what it means for administrative law to be "unlawful." Does that mean "in violation of the written Constitution"? "In violation of unwritten constitutional norms"? "In violation of natural law"? There is evidence that Professor Hamburger means something more than the former, but it is not clear what more is intended. In order to gauge the real status of administrative law, we must have a more direct conception of law than Professor Hamburger provides.

Second, much of Professor Hamburger's historical and constitutional analysis focuses on the subdelegation of legislative authority. While his discussion contains numerous profound insights, including some that require correction in my own prior scholarship on the subject, it does not discuss how to distinguish interpretation by judicial and executive actors from lawmaking by those actors. Presumably, the prohibition on subdelegation of legislative authority prohibits only the latter. Figuring out where interpretation ends and lawmaking begins is one of the most difficult questions in all of jurisprudence,

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and I am not convinced that Professor Hamburger can successfully perform an end run around it.

But these are modest nitpicks about a path-breaking work that should keep people of all different persuasions engaged and occupied for quite some time.

Introduction

When one has taught and researched a subject for more than a quarter of a century, one does not normally expect to encounter a 500-plus page book on that subject from which one learns something new on almost every page. Even less does one normally expect such a book from an author whose scholarly expertise lies outside the relevant field of study. But Philip Hamburger's brilliant book, *Is Administrative Law Unlawful?*, defies expectations, transcends boundaries, and extends the domain of human knowledge in too many directions to encapsulate in a brief Review. I am honored to have the opportunity to comment on this extraordinary work, and I am profoundly grateful to Professor Hamburger, as should be anyone interested in administrative law or the American Constitution, for the insights that he provides. This is a book that will (or at least ought to) change the way even long-time scholars—and I suppose that I am unhappily old enough to bear that title—will look at the history, practice, and doctrine of administrative law.

Professor Hamburger, a legal historian by trade, has turned his prodigious talents to uncovering the British and civil law antecedents of modern American administrative law. Contrary to the common misperception that there is something distinctive about modernity that gives rise to the administrative state, he shows that contemporary administrative law "is really just the most recent manifestation of a recurring problem."[1] That problem is the problem of power: its temptations, its dangers, and its tendency to corrupt. The nature of power—and of the people who seek it—has changed little over time. Administrative law is thus the "contemporary expression of the old tendency toward absolute power—toward consolidated power outside and above the law."[2]

To some extent, those antecedents of modern administrative law have been hiding in plain sight for centuries. It is no great secret that the American Constitution "was designed specifically to prevent the emergence of the kinds of institutions that characterize the modern administrative state"[3] and that this eighteenth-century design was inspired largely by

1. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 5 (2014).

2. *Id.* at 16.

3. Gary Lawson, *Burying the Constitution Under a TARP*, 33 HARV. J.L. & PUB. POL'Y 55, 55 (2010).

events in American colonial and British history. Professor Hamburger's great achievement is to systematize and document this history, to integrate it into a coherent narrative, and to provide a comprehensive account of the myriad ways in which modern administrative law recreates governmental pathologies that the founding generation in this country thought "were safely buried in the past."[4]

Nestled within the broader narrative is a treasure trove of detailed information about numerous topics in public law. Careful readers of this book gain deeper understandings of, *inter alia*, the problem of legislative delegation (or subdelegation),[5] the nature of executive power,[6] the proper limits on agency investigatory authority,[7] the seriously under-analyzed line between civil and criminal proceedings,[8] the dangers of administrative waivers,[9] and even the executive role in awarding patents.[10] More broadly, one acquires new perspectives on such matters as the role of specialization of knowledge as a foundation for separation of powers;[11] the class bias that underlies the expansion of the administrative state, in which power systematically flows to those with appropriate credentials and connections;[12] and the role played—both today and in the past—by judicial deference in the rise of administrative governance.[13] After scrutinizing this book, one will never think of *Chevron*,[14] or even of *Crowell v. Benson*,[15] in quite the same way again.

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4. HAMBURGER, *supra* note 1, at 130

5. *See, e.g.*, *id.* at 37–39, 43–44, ch. 20 (chronicling the shift from the absolute exercise of executive power during the sixteenth century to the contemporary system of delegation of executive and legislative duties to administrative bodies).

6. *See, e.g.*, *id.* at 51–54, 89–95 (tracing the practice of executive legal interpretation from the English Civil War era through the American nineteenth century).

7. *See id.* at 183–90, 237–40 (describing America's historical limitation on administrative authority to issue general warrants and writs of assistance and the process of contemporary administrative adjudication).

8. *See id.* at 228–30, 265–68 (providing historical background to and stressing the blurry distinction between civil and criminal administrative adjudication).

9. *See id.* at 120–27 (considering administrative waivers, the justifications for those waivers, and the dangers of administrative waiver practice).

10. *See id.* at 198–202 (summarizing the development of modern patent law and the Executive's role in granting patents).

11. *See id.* at ch. 17 (contrasting the benefits of specialization of powers among the three branches of government with the dangers of administrative consolidation of powers).

12. *See id.* at 370–74 (characterizing the development of administrative power as formation of a new "class" and describing the concentration of power in that group).

13. *See id.* at chs. 15–16 (recounting the historical development of judicial deference to administrative agencies and enumerating the types of deference currently afforded to these agencies).

14. Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837 (1984).

15. 285 U.S. 22 (1932). Strictly speaking, *Crowell* ruled against deference to agency fact-finding in the particular circumstances at issue, but its dictum broadly approving of such deference in most cases has proven far more influential. *See id.* at 56–58 (clarifying the role of administrative agencies as proxies for the judiciary). For an enlightening account of *Crowell*'s

Professor Hamburger also definitively puts to rest the shibboleth that modern circumstances are somehow unique and call for novel forms of governance.[16] Professor Hamburger surgically dissects this claim by showing that every important aspect of modern administrative government has precedents in British legal history. He writes:

> It thus is not a coincidence that administrative law looks remarkably similar to the sort of governance that thrived long ago in medieval and early modern England under the name of the "prerogative." In fact, the executive's administrative power revives many details of [the] king's old prerogative power. Administrative law thus turns out to be not a uniquely modern response to modern circumstances, but the most recent expression of an old and worrisome development.[17]

The administrative state is not something that the founding generation simply could not have imagined. The founders did not need to imagine it, because they and their ancestors lived it—and resoundingly rejected it.[18]

Most fundamentally, Professor Hamburger's scholarship makes it impossible for serious thinkers to overlook the crucial distinction between executive acts that purport to bind subjects[19] and executive acts that purport merely to instruct executive agents or exercise coercion against non-subjects.[20] This distinction runs through much of the book, and it helps to explain a host of historical and doctrinal puzzles that continue to arise today. For example, it is only the former kind of executive actions—attempts by the executive, with or without statutory authorization, to constrain subjects—that raises constitutional problems of adjudication outside of Article III and raises broader jurisprudential problems of extralegality and absolutism. Professor Hamburger makes this point with clarity and emphasis, and for this reason alone *Is Administrative Law Unlawful?* serves as a prolegomenon to any future work involving the separation of powers.

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evolution and influence, see generally Mark Tushnet, *The Story of* Crowell: *Grounding the Administrative State*, *in* FEDERAL COURTS STORIES 359 (Vicki C. Jackson & Judith Resnick eds., 2010).

16. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 372 (1989) ("[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."); JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 1 (1938) ("[T]he administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems.").

17. HAMBURGER, *supra* note 1, at 5–6.

18. *Id.* at 495–96.

19. Professor Hamburger uses the term "subjects" to mean "all persons who, on account of their allegiance to a sovereign, are subject to its laws." *Id.* at 2 n.a. This includes citizens as well as non-citizen aliens who are lawfully present within the sovereign's jurisdiction. *Id.*

20. *See, e.g.*, *id.* at 2–5 (defining "administrative power" as "acts that bind" and "impose legally obligatory constraints on subjects of the government").

The book's sheer scope, of course, invites fair criticism. Administrative law scholars can justly claim that Professor Hamburger's treatment of modern administrative law doctrine is very thin, and constitutional law scholars can say much the same thing about his treatment of constitutional doctrine. But, apart from the fact that extended treatment of either topic would expand an already lengthy book, Professor Hamburger was not really writing a book on administrative or constitutional doctrine. Nor is it a straightforward work in legal history, as it devotes much attention to relating that history to modern conditions and problems. In some sense, the book is best viewed as a call to arms—and perhaps a literal one[21]—to recognize some very profound dangers of administrative governance.[22] Professor Hamburger writes—repeatedly—that administrative power "runs outside the law,"[23] "abandons rule through and under the law,"[24] "threatens the liberty enjoyed under law,"[25] "has resuscitated the consolidated power outside and even above the law that once was recognized as absolute,"[26] and constitutes a form of "soft absolutism or despotism."[27] But to emphasize this feature of *Is Administrative Law Unlawful?* may downplay the book's scholarly erudition and depth, which can surely be appreciated even by the staunchest supporters of the modern state who might scoff at these characterizations of administrative governance as hyperbole.[28] This is a book that defies easy categorization, and it should prove invaluable to almost anyone interested in public law.

Any substantive comment on so ambitious and integrated a book risks diminishing its significance by focusing on particular matters, especially on matters that the reviewer regards as shortcomings, but that is unavoidable. Accordingly, I will direct my comments here to one conceptual gap and to one important doctrinal implication that requires more elaboration, with no suggestion that these are the most significant aspects of the book, or even representative of it, rather than simply reflections of my own idiosyncratic interests.

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21. *See id.* at 488–89 (comparing administrative governance to the absolute power of the English Crown and positing that like the Crown administrative power will also require a forceful end).

22. *See id.* at 9 ("[T]he argument of this book is of a more expansive sort than may be expected by legally trained readers. Whereas most legal arguments rest on doctrine, the argument here . . . is more substantively from the underlying danger.").

23. *Id.* at 6.

24. *Id.* at 7.

25. *Id.*

26. *Id.* at 494.

27. *Id.* at 508.

28. To be very clear, Professor Hamburger is (alas!) hardly a libertarian. He lodges no objection to the *scope* of the modern state. He objects only to the administrative *forms* through which the power of the modern state is exercised. *See id.* at 2 (stating that the book "does not ordinarily question the policies pursued by the government").

Conceptually, the book's biggest defect is its failure to define precisely what it means by the term "unlawful." Does that mean "in violation of the written Constitution"? "In violation of unwritten constitutional norms"? "In violation of natural law"? Professor Hamburger seems to mean something more than the former, but it is not clear what more is intended, and that ambiguity hangs over the entire project.

Doctrinally, Professor Hamburger's work sheds valuable light on the problem of delegation—or, more precisely, subdelegation—of legislative power. His analysis clarifies, and in some vital ways corrects, my own writing on the subject. But more remains to be said on the relationship between legislation and interpretation, and I hope in this Review to flesh out that relationship a bit.

I emphasize that both of these points are relatively minor in the context of Professor Hamburger's project, and nothing that I say here should detract from the fact that this is one of the most important books to emerge in my lifetime.[29]

I. The Concept(s) of Law

The unlawfulness of administrative law highlighted by the book's title appears constantly as a theme throughout the work. At every stage of Professor Hamburger's analysis, we are reminded that modern administrative practices, as well as their pre-modern forbearers, are "extralegal," "above and outside the law," expressions of "absolute power," and the like.[30] At the end of the day, however, it is unclear exactly what Professor Hamburger means when he describes administrative law as "unlawful."

To be sure, Professor Hamburger specifically defines how he is using terms such as "extralegal," "supralegal," and "absolute power." The term "extralegal," as employed by Professor Hamburger, does *not* mean "legally unauthorized." For

> quite apart from the question of legal authorization, there remains the underlying problem of extralegal power—the problem of power imposed not through the law, but through other sorts of commands. On this basis, when this book speaks of administrative law as a power outside the law—or as an extralegal, irregular, or extraordinary power—it is observing that administrative law purports

29. Barely a week after I wrote this sentence, Scott Johnson on Powerline blog said that *Is Administrative Law Unlawful?* "is the most important book I have read in a long time." Scott Johnson, introduction to *Is Administrative Law Unlawful? A Word From the Author*, POWERLINE (July 2, 2014), http://www.powerlineblog.com/archives/2014/07/is-administrative-law-unlawful-a-word-from-the-author.php, *archived at* http://perma.cc/W3ZT-X28K.

30. I wanted to say that these expressions appear on almost every page, but documenting such a claim would be tedious. So I randomly opened the book to five pages (60, 118, 174, 250, and 308), and discussions of "extralegal" or "absolute" power appeared on three of them.

> to bind subjects not through the law, but through other sorts of directives.[31]

Extralegal power is thus "power exercised not through law or the courts, but through other mechanisms."[32]

Supralegal power, for its part, "rose above the law in the sense that it was not accountable to law. Supralegal power thus stood in contrast to ideas about the supremacy of the law, and judges were expected to defer to it, without holding it fully accountable under the law."[33] And absolute power, as defined by Professor Hamburger, is not necessarily unlimited power but rather is power "exercised outside the law[,] . . . exercised above the law[,] . . . [a]nd where, as usual, [] combine[s] the otherwise separate legislative, judicial, and executive powers."[34]

Putting all of this together, it appears as though administrative law is "unlawful" in Professor Hamburger's terms because it involves the exercise of coercive power against subjects through forms other than legislation or court adjudication implemented by bodies specializing in these functions. To which a defender of modern administration will likely respond with something on the order of, "Well, duh."[35] No one disputes that agency rulemaking is not legislation (though some may argue that it is authorized by legislation) or that agency adjudication is not judicial action (though some may argue that agencies are in some sense adjuncts to courts or in a kind of collaborative partnership with courts). Many will claim that such agency rulemaking or adjudicative action is nonetheless lawful, but that is simply because they do not agree with Professor Hamburger that lawful coercive action against subjects can occur only through legislation and court adjudication not because they think agency action actually conforms to the requirements set forth by Professor Hamburger. Professor Hamburger claims that "[e]ven the defenders of executive legislation do not ordinarily call it 'law.'"[36] That is manifestly not so,[37] and even if it was, I am quite confident that champions of administrative government would be very happy to change their vocabulary if it actually was important so to do.

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31. HAMBURGER, *supra* note 1, at 23.

32. *Id.* at 24.

33. *Id.*

34. *Id.* at 25.

35. *See, e.g.*, Alan B. Morrison, *Administrative Agencies Are Just Like Legislatures and Courts—Except When They're Not*, 59 ADMIN. L. REV. 79, 80–82 (2007) (outlining the general structure of administrative law as specialized agencies exercising rulemaking and adjudicative power).

36. HAMBURGER, *supra* note 1, at 351.

37. *See, e.g.*, CORNELIUS M. KERWIN & SCOTT F. FURLONG, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 4 (4th ed. 2011) ("The rules issued by the departments, agencies, or commissions are law . . . ."). Professor Hamburger recognizes this in spots. *See* HAMBURGER, *supra* note 1, at 23 ("[A]pologists for administrative law may be inclined to suggest that it is not an extralegal power, but another sort of law.").

Of course, if the very concept of lawfulness necessarily requires action through legislation or court adjudication, then administrative law is unlawful. Does this mean that Professor Hamburger's central thesis is definitional and therefore trivial?

It certainly is very far from trivial if agency exercises of nonlegislative, noncourt power are *unconstitutional* and thus unlawful in that specific sense. There is much in Professor Hamburger's book to indicate how and why a good deal of modern administrative practice is rather flagrantly unconstitutional. Delegation of legislative power; the combination of legislative, executive, and judicial powers in the same institution; adjudication without full judicial process; and the circumvention of both grand and petit juries are just among the most obvious ways in which administrative law subverts the United States Constitution.[38] As Professor Hamburger details at great length, some of the most fundamental features of the American Constitution, as well as its uncodified British predecessor, were constructed precisely to foreclose many of the institutions of modern governance. He thus writes that "administrative law revives a sort of power that constitutions were emphatically designed to prohibit."[39] At more length:

> Like the English Crown before the development of English constitutional law, the American executive seeks to exercise power outside the law and the adjudications of the courts. . . .
>
> Constitutional law, however, developed precisely to bar this sort of consolidated extra- and supralegal power. . . . The [English] constitution . . . clarified that the government had to rule through regular law and adjudication. Indeed, it was understood to place the lawmaking and judicial powers in specialized institutions and to subject these powers to specific processes and rights.
>
> Americans echoed all of this in their constitutions. They made clear that their governments enjoyed power only under the constitutional law made by the people and that the law of the land was supreme. They specified that their governments were to exercise legislative power through the acts of their legislatures, and judicial power through the adjudications of their courts, and they subjected these powers to constitutional processes and rights. . . .

38. Professor Hamburger's potent elaborations on and extensions of this point are too numerous even for a string citation. Indeed, they are the central themes of the book. For further discussion of the rampant unconstitutionality of modern administration, see Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233–49 (1994).

39. HAMBURGER, *supra* note 1, at 8.

> As a result, the governments established by Americans could bind them only through regular legislation and adjudication, not through executive acts.[40]

If consistency with the Constitution is the relevant species of lawfulness, then much, and indeed most, of federal administrative law is rather plainly unlawful. There are more than occasional suggestions in the book that this is precisely what Professor Hamburger has in mind by unlawfulness.[41]

Nonetheless, I do not believe that Professor Hamburger's argument about administrative unlawfulness is reducible to strictly constitutional terms, at least not as the word "constitutional" is generally used by American scholars. Several considerations feed into this belief.

First, Professor Hamburger states outright that simple constitutional analysis does not communicate everything that he thinks is important about the unlawfulness of administrative law. A constitutionalist approach, he says, "reduces administrative law to an issue of law divorced from the underlying historical experience and thus separated from empirical evidence about the dangers."[42] Again, he states, "[t]he danger of prerogative or administrative power . . . arises *not simply from its unconstitutionality*, but more generally from its revival of absolute power."[43] Yes, Professor Hamburger argues in great detail that administrative law is unconstitutional—or, more precisely, anticonstitutional. But that does not seem to be all that he is arguing.

Second, Professor Hamburger does not directly engage the originalism-versus-living-constitutionalism debate, much less the numerous subdebates within those broad categories, and he does not stake out a particular theory of constitutional interpretation. If his argument was grounded solely on a constitutionalist account of law, one would expect to see a very different kind of argument than he offers. He criticizes a "living constitutionalism" defense of administrative governance, but that critique already presupposes that administrative law is unlawful on some basis.[44] It is not a full-throated argument about constitutional interpretation.

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40. *Id.* at 493–94.

41. *See, e.g.*, *id.* at 30 ("The Constitution . . . was framed to bar any such extralegal, supralegal, and consolidated power. It *therefore* must be asked whether administrative power is unlawful . . . ." (emphasis added)); *id.* at 281 (equating being "outside the law" with being "outside the acts, institutions, processes, and rights established by the Constitution"); *id.* at 480 (identifying illegitimacy with unconstitutionality); *id.* at 496 (identifying "real law" with the Constitution).

42. *Id.* at 15.

43. *Id.* at 493 (emphasis added).

44. *See id.* at 481–85 (arguing that adopting a living constitutional reading of the United States Constitution calls into question, rather than resolves, the lawfulness of administrative powers).

Third, Professor Hamburger's argument is not only about the particular governmental scheme represented by the United States Constitution. At times his account of constitutionalism includes references to state constitutions,[45] and at other times it seems to include the British constitution as well.[46] He often seems to use the term "constitutionalism" to describe a very broad set of principles that are part of the Anglo-American legal and political tradition rather than simply adherence to concrete norms in the United States Constitution.[47] Thus, his point seems to be that there is something lawless about administrative governance that goes above and beyond inconsistency with the governmental scheme embodied by the federal Constitution.

Fourth, when discussing the problem of subdelegation (of which I will say much more shortly), Professor Hamburger observes that subdelegation of legislative power "departs not merely from the constitution, but from republican government itself,"[48] thereby suggesting a much deeper unlawfulness than mere (?) unconstitutionality.

If that is correct, so that lawfulness and unconstitutionality (in the sense of inconsistency with the United States Constitution) are not completely co-extensive terms in Professor Hamburger's analysis, then one might be tempted to conclude that Professor Hamburger is employing some conception of natural law, in which lawfulness is a concept that cannot be reduced to compliance with particular authoritative sources. But while there is nothing wrong (and, I happen to believe, a great deal right) about a natural law metaphysics, I do not think it is accurate to cast Professor Hamburger's argument in natural law terms either.

In support of some kind of natural law understanding of Professor Hamburger's argument, one could point to his account of legal obligation. "[A]dministrative governance," he writes, "is a sort of power that has long been understood to lack legal obligation. It is difficult to understand how laws made without representation, and adjudications made without independent judges and juries, have the obligation of law; instead, they apparently rest merely on government coercion."[49] Indeed, administrative forms of governance are so fundamentally unlawful that they historically have served as grounds for revolution in both England and America,[50] thus suggesting that their unlawfulness goes beyond inconsistency with formal,

45. *E.g.*, *id.* at 494.

46. *See, e.g.*, *id.* at 12 (comparing prerogative adjudication and lawmaking in historical English legal systems with contemporary American administrative power).

47. *See, e.g.*, *id.* at 488–89 (identifying common elements of constitutional law across both American and British legal systems—for example, the inclusion of specific grants of legislative and judicial power).

48. *Id.* at 385.

49. *Id.* at 489.

50. *Id.*

positive norms. This notion is reinforced to some degree by Professor Hamburger's account of the binding quality of law. As I read Professor Hamburger, for something to be law it must be not simply coercively enforced but also perceived as binding, presumably through acquiring a representative pedigree.[51] And "the postmedieval foundation of legal obligation has been the consent of the people,"[52] which in a large society necessarily translates into government through representation.[53] "Early Americans embraced this vision of consent and self-government. They assumed that legislation was without obligation unless the people imposed it on themselves in their representative legislature, and they eventually established the nation and its constitution on this ideal."[54] Importantly, Professor Hamburger presents this account of lawfulness as consent through representation as a *preconstitutional* norm that was the *foundation* for the actual Constitution (and the nation that it created) but not a *product* of that Constitution. Indeed, much of Professor Hamburger's account of this "central principle of American constitutional law"[55] involves evidence from colonial times. Thus, one might think, Professor Hamburger's argument assumes that the very concept of law requires a normatively sound theory of representation to back it up.[56]

I believe that this comes closer to Professor Hamburger's real account of lawfulness than either definitional fiat or narrow constitutionalism, but it still leaves some questions. Bruce Ackerman has famously argued that the Constitution of 1788 was effectively "amended" during the New Deal to authorize precisely the kind of administrative governance to which Professor Hamburger objects.[57] I have elsewhere argued that Professor Ackerman's argument does not validate the administrative state,[58] and I am quite certain that Professor Hamburger would find Professor Ackerman's non-Article V "amendment" process lacking in transparency.[59] But suppose

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51. *See id.* at 356 (illustrating, through the example of traffic laws, the difference between coercive enforcement and an obligation to follow the law).

52. *Id.*

53. *See id.* at 356–58 (tracing the development of the consent theory of obligation in the English Parliament's House of Commons, which is comprised of representatives of the people).

54. *Id.* at 358.

55. *Id.* at 358–60.

56. For Professor Hamburger's detailed response to those who would defend the "representative" character of administrative law through its link to presidentialism or some form of public participation, see *id.* at 360–69.

57. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 47–50 (1991) (postulating the New Deal era as a crucial period of constitutional transformation, dramatically increasing the Presidency's role in higher lawmaking).

58. Lawson, *supra* note 38, at 1250–52.

59. *See* HAMBURGER, *supra* note 1, at 482–83 (noting that the Constitution provides for structured deliberation and debate prior to amendment and that circumvention of that procedure via judicial decisions likely denies the public of proper notice and the opportunity to give adequate consent).

that Professor Ackerman is "right" in some important sense involving constitutionalism. Or even more directly, suppose that some amendments validating administrative governance were formally adopted using the procedures of Article V. In those circumstances, one could not say that administrative governance was unconstitutional in the narrow sense of lacking conformance to the United States Constitution. But would it be lawful? A natural lawyer could comfortably say no if such a constitution is sufficiently lacking in normative bite. A positivist could also say no if there is some recognized norm of legality that is preconstitutional, to which any constitution must conform in order to be lawful and that rules out administrative governance as a valid form of social organization. Or one could, at that point, concede the legality of administrative law (without necessarily conceding its wisdom).

What would be Professor Hamburger's answer? In other words, what underlying conception of lawfulness drives his analysis? I honestly do not know, and for me that is the most nagging difficulty with this amazing book.

II. Taking Subdelegation Seriously

Many of the issues involving administrative governance revolve around the problem of delegation of legislative authority. Administrative agencies make rules that have the force and effect of law—that function as though they are statutes—but that do not go through the constitutionally prescribed (and representative) lawmaking process.[60] Because the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,"[61] Congress is the only institution authorized to exercise federal legislative power. If agency rulemaking amounts to the exercise of legislative power, it is rather obviously forbidden by the Constitution—unless something in the Constitution authorizes Congress to delegate its legislative authority to another actor. Much of Professor Hamburger's book explains the origins and fundamentality of this nondelegation principle.[62] Without the shield of delegation, a great deal of

60. *See* U.S. CONST. art. I, § 7, cls. 2–3 (detailing the process of bill creation, objection, reconsideration, passage by the United States Congress, and bill approval by the President). Administrative agencies, of course, also issue adjudicative orders that function like court judgments but that do not have the procedural pedigree of legitimate court proceedings. Martin H. Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197, 216–17. I tried to find something with which to disagree in Professor Hamburger's too-lengthy-to-cite discussion of why administrative adjudication is unlawful but was unable to find enough of consequence to warrant discussion here. Suffice it to say that this discussion is among the best and most important in the book.

61. U.S. CONST. art. I, § 1.

62. *See, e.g.*, HAMBURGER, *supra* note 1, at 388–402 (exploring the delegation debate of administrative law and associated issues of subdelegation to municipalities, territories, military orders, and the judiciary).

modern executive action amounts to precisely the kind of prerogative or rump legislation that both British and American revolutionaries worked hard to abolish.

I have elsewhere written at great length, from the standpoint of formal constitutional analysis, about why many modern statutes constitute delegations of legislative power and thus fly in the face of the Constitution's allocation of institutional authority.[63] Most of my prior writing focused on the Necessary and Proper Clause as the textual foundation for a constitutional nondelegation principle. Congress can only do anything, including authorize other agents to act, if there is some affirmative grant of power permitting it so to do. There is no express "delegation of legislative power" clause, so the question (my past analysis reasoned) is whether the Necessary and Proper Clause serves as an implicit authorization for delegations.[64]

Suppose, for example, that Congress mandates that all health insurance policies provide "essential health benefits" as part of their coverage.[65] Congress could enumerate by statute the precise content of what counts as "essential health benefits," but could it instead provide that the Secretary of Health and Human Services shall designate the appropriate "essential health benefits"?[66] The constitutional argument in favor of such a law would be that the instruction to the Secretary to define the relevant term is "necessary and proper for carrying into Execution"[67] the congressional scheme and is thus authorized on Congress's end. The Secretary, for his or her part, would simply be executing the law by following to the letter its instruction to fill out the law if he or she promulgated rules defining "essential health benefits," and what could be a more straightforward exercise of "executive Power"[68] than following to the letter the instruction in a statute?

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63. *See* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 339–40 (2002) [hereinafter Lawson, *Delegation and Original Meanings*] (criticizing the practice whereby legislative power is arguably improperly exercised under "the guise of interpretation"); Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 249–67 (2005) (expounding on the argument that attaches a limiting function to the Necessary and Proper Clause).

64. Lawson, *Delegation and Original Meaning*, *supra* note 63, at 345–50.

65. Of course, Congress in reality—meaning constitutional reality, not political or doctrinal reality—has no enumerated power to regulate the content of insurance policies, but never mind for the moment. *See* Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 585–86 (2010) (arguing that Congress lacks power over the health insurance business under the original interpretation of the Commerce Clause).

66. *Cf.* 42 U.S.C. § 18022(b)(1) (2012) (instructing the Secretary of Health and Human Services to define "essential health benefits" that must be provided by qualified health plans that are authorized to be sold on exchanges under the Patient Protection and Affordable Care Act).

67. U.S. CONST. art. I, § 8, cl. 18.

68. U.S. CONST. art. II, § 1.

In past years, I would have analyzed such a statute by asking two complementary questions: (1) whether it granted so much legislative-like discretion to executive agents that it was not a proper law for carrying federal power into effect and therefore exceeded Congress's power to enact and (2) whether it involved so much legislative-like discretion that it did not constitute executive power and thus exceeded the executive's power to implement. Professor Hamburger insists that this analysis, while fine as far as it goes, is impoverished and incomplete, because it overlooks "two more basic points"[69]:

> First, delegation is a principle underlying all grants of power by the people, and thus the barrier to subdelegation is not merely a doctrine or implication derived from the Constitution's text. And because the barrier to subdelegation arises from the initial delegation of power by the people, it precludes much more than the subdelegation of legislative power through the necessary and proper clause. More broadly, it bars any subdelegation of legislative power.[70]

Professor Hamburger is absolutely right on all fronts, and any sound analysis of delegation must take his argument into account.[71]

For starters, he is right that one should never speak of the "delegation" of congressional legislative authority. One instead should speak of its "subdelegation."[72] This is not a mere matter of terminology; it goes to the substance of the constitutional problem with executive (and, for that matter, judicial) exercises of lawmaking discretion. The Constitution creates all of the institutions of the national government and vests them with all of the powers that they have. In that sense, the "legislative Powers herein granted"[73] to Congress are a delegation of those powers from "We the People" who initially possessed them.[74] If Congress attempts to pass those powers onto someone else, it is attempting to delegate a delegated power, which is subdelegation. Both constitutional and conceptual analysis must thus focus on the propriety vel non of subdelegation of legislative authority.

Professor Hamburger is also right that, once viewed as subdelegation, *all* transfers of legislative power are invalid, whether effectuated through the Necessary and Proper Clause or some other means. The principle

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69. HAMBURGER, *supra* note 1, at 379 n.b.

70. *Id.*

71. Since my previous analysis did not take into account Professor Hamburger's not-yet-existent book, does that mean that this analysis was unsound? In some respects yes—which I hope to rectify in this Review.

72. *Id.* at 377.

73. U.S. CONST. art. 1, § 1.

74. U.S. CONST. pmbl. On the significance of "We the People" as the legal authors of the Constitution, see generally Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47 (2006).

against subdelegation does not depend on the language of a particular clause but instead infuses the entire Constitution.

If there is any textual hook through which Professor Hamburger's historical account of subdelegation finds constitutional expression, it is the Preamble. The Preamble provides:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[75]

By "ordain[ing] and establish[ing]" the various institutions of governance created by the Constitution, "We the People" purported to authorize various agents—Congress, the President, the Vice President, the federal courts, appointed federal officers, presidential electors, amending conventions, and in a few instances state officials—to manage some portion of "We the People['s]" affairs. Instruments that authorize some people to exercise power on behalf of others were commonplace in the eighteenth century—as they are today. Guardians, executors, factors, attorneys under powers or letters of attorney, and the like all function as fiduciaries, exercising power on behalf of others pursuant to authorization through "agency instruments." In form, the Constitution is an agency instrument within this broad category. It is, as James Iredell termed it at the North Carolina ratifying convention, "a great power of attorney."[76]

A full discussion of the reasons for viewing the Constitution in agency or fiduciary terms and the implications of that characterization of the document for constitutional interpretation would require a book. Such a book is forthcoming;[77] until then, one can find a brief introduction to the argument in a short article[78] and foundational background in several articles by Robert Natelson,[79] who deserves credit for reintroducing the fiduciary

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75. U.S. CONST. pmbl.

76. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 148 (Jonathan Elliot ed., 2d ed. 1836).

77. GARY LAWSON & GUY I. SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDERSTANDING THE FIDUCIARY CONSTITUTION (forthcoming).

78. Gary Lawson, Guy I. Seidman & Robert G. Natelson, *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415, 428–30 (2014).

79. *See* Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1083–86 (2004) (highlighting the fiduciary principles underlying the Constitution's nativity and adoption); Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, *in* GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 52 (2010) [hereinafter Natelson, *The Legal Origins*] (introducing and subsequently defending the proposition that the Necessary and Proper Clause should "be exercised in accordance with fiduciary principles—and in particular, in accordance with the principles of agency"). I am profoundly grateful to Rob Natelson for pointing my eyes at

conception of the Constitution into modern law and scholarship. For now, the key point is that agency instruments in the eighteenth century—and today—were read in light of a thick set of interpretative rules. One of the most basic interpretative features of agency or fiduciary instruments is that agents exercising delegated power generally *could not subdelegate that power without specific authorization in the instrument.* Rob Natelson has articulated the relevant background rule as of the late eighteenth century:

> When not authorized in the instrument creating the relationship, fiduciary duties were nondelegable. The applicable rule was *delegatus non potest delegare*—the delegate cannot delegate. As Matthew Bacon phrased it in his *A New Abridgment of the Law*, "One who has an Authority to do an Act for another, must execute it himself, and cannot transfer it to another; for this being a Trust and Confidence reposed in the Party, cannot be assigned to a Stranger." In England, positions whose holders could assign them to others were designated "offices of profit," but positions that were unassignable without prior authorization were "offices of trust."[80]

Thus, because the Constitution is a species of agency instrument, the presumption is that delegated powers cannot be subdelegated absent an express delegation authorization. There is no such express delegation clause. The Necessary and Proper Clause is not nearly express enough to authorize delegation of legislative power. Indeed, as my previous arguments demonstrate at length, the Necessary and Proper Clause is more easily read, in the context of the Constitution, affirmatively to forbid delegations than affirmatively to permit them.

The agency law conception of the Constitution, and its implication of non-subdelegation of legislative authority, gibes perfectly with Professor Hamburger's historical analysis of the problem of subdelegation (which, I submit, is quite likely the consequence of both arguments being correct). Indeed, after tracing the prohibition on legislative delegation from John Locke through Whig theory through Tory arguments into American republican theory,[81] Professor Hamburger explicitly notes the agency law connection to delegation:

> [I]f the principal selects his agent for her knowledge, skill, trustworthiness, or other personal qualities, he presumably gave the power to her, not anyone else. Of course, a principal could expressly authorize subdelegation, but he could not otherwise be understood to have intended this. . . .

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the obvious agency law character of the Constitution, which I somehow missed for two decades even while studying a clause (the Necessary and Proper Clause) that plainly exemplifies it.

80. Natelson, *The Legal Origins*, *supra* note 79, at 58–59 (footnote omitted).

81. HAMBURGER, *supra* note 1, at 380–85.

> On such reasoning, the principle of delegation bars any subdelegation of legislative powers to Congress. . . . The people, moreover, specify that they grant the legislative powers to a Congress "consist[ing] of a Senate and House of Representatives," with members chosen in specified ways. The delegation to Congress thus is to a body chosen for its institutional qualities, including members chosen by their constituents for their personal qualities. Congress and its members therefore cannot subdelegate their power.[82]

The overwhelming force of these considerations can be seen graphically by examining a list of constitutional provisions and subsequent amendments that deal with the selection, structure, and operation of Congress. This list does *not* include provisions that describe the scope of Congress's legislative powers or prescribe the requirements for valid lawmaking; it includes only provisions dealing with the *composition* and *mechanics* of the federal legislature:

Article I, § 1
Article I, § 2, cl. 1
Article I, § 2, cl. 2
Article I, § 2, cl. 3
Article I, § 2, cl. 4
Article I, § 2, cl. 5
Article I, § 3, cl. 1
Article I, § 3, cl. 2
Article I, § 3, cl. 3
Article I, § 3, cl. 4
Article I, § 3, cl. 5
Article I, § 4, cl. 1
Article I, § 4, cl. 2
Article I, § 5, cl. 1
Article I, § 5, cl. 2
Article I, § 5, cl. 3
Article I, § 5, cl. 4
Article II, § 2, cl. 3
Article II, § 3
Amend. XIV, § 2
Amend. XIV, § 3
Amend. XV
Amend. XVII
Amend. XIX

82. *Id.* at 386.

Amend. XX
Amend. XXIV
Amend. XXVI
Amend. XXVII.

In view of the attention paid by the Constitution to the selection and activity of the members of Congress, it is nothing short of farcical to argue that the Constitution implicitly countenances delegation of legislative authority through the backdoor of the Necessary and Proper Clause. No agency instrument would contain such detailed selection procedures and then implicitly allow an end run around them. It is not an argument that can be advanced with a straight face by an honest interpreter.[83]

One short detour before the payoff from this analysis: Just as the Constitution contains no clause explicitly authorizing the delegation of legislative power, it also contains no clauses authorizing delegation of executive or judicial power. Are those powers also nondelegable? The answer is yes. In the case of judicial power, judges who, either from laziness or incapacity, delegate the decision-making task to others, such as law clerks, are breaching their fiduciary duties and should be impeached and removed from office. The case of executive power is a bit more involved but ultimately the same. The President need not personally perform every executive function, such as investigations and prosecutions, because the "executive Power" vested in the President is the power *either* personally to execute the law[84] *or* to supervise its execution by subordinates.[85] A president who shirks both of those duties in favor of, for example, extensive golf outings is breaching a fiduciary duty and should be impeached and removed from office. But the nature of executive power leaves room for more dispersal of that power to subordinates than is the case with either the judicial or legislative powers.

Professor Hamburger seems to believe that some portion of the executive power can be allocated to subordinates because the Article II Vesting Clause does not say that *all* "executive Power" is vested in the President.[86] The Constitution, however, vests "[t]he" executive power—meaning all of the executive power—in the President.[87] There is no executive power remaining to be vested in anyone else. If Congress grants

83. So am I saying that constitutional defenders of delegation are dissemblers or dishonest? Not at all. It may well be that they simply are not interpreters. There are, after all, a great many things—and quite possibly many valuable or interesting things—that one can do with a constitutional text other than interpret it.

84. U.S. CONST. art. II, § 1, cl. 1.

85. U.S. CONST. art. II, § 3.

86. *See* HAMBURGER, *supra* note 1, at 387 (stressing that by referring to "*all* legislative powers," the plain language of the Constitution does not authorize Congress to subdelegate its powers).

87. U.S. CONST. art. II, § 1, cl. 1.

power to a subordinate executive official, that executive power automatically vests in the President by virtue of the Article II Vesting Clause. The Constitution creates a unitary executive.[88]

So what kind of power do subordinate executive officials exercise when they apply statutes? The answer is, of course: executive power. Officers exist precisely in order to carry laws into effect; their power to do so is what makes them officers.[89] A law creating executive officers, who can then carry laws into effect, is the quintessential law "necessary and proper *for carrying into Execution*" federal powers.[90] The Constitution thus specifically contemplates the creation of officials other than the President who will exercise executive power. The Article II Vesting Clause provides, however, that whenever an official is granted power to execute federal law, the President is also granted that power whether or not the statute so specifies, along with a corresponding obligation either to exercise the power personally or to supervise its execution. That ultimate power of exercise or supervision cannot be delegated. Thus, there is no problem at all with Congress authorizing subordinate officials to exercise executive power—so long as that exercise is subject to supervision, oversight, and, if necessary, veto by the President.

Can one argue that Congress similarly satisfies its constitutional obligations by supervising the exercise of lawmaking power by agencies? One can argue anything; the question is whether the argument is good or bad, and this argument would be very, very bad. Legislative power and executive power are different powers, which is why they are vested in different institutions and subject to different procedural and substantive checks. The Constitution specifies precisely how legislative power must be exercised: Article I, Section 7 is quite detailed on the point. There is nothing in that Section about alternative lawmaking methods subject to congressional supervision. There is nothing in the centuries-old Anglo-American conception of legislative power, as it would have been understood by a reasonable person in 1788, which treats legislative power as a supervisory power over other legislators. Gooses and ganders may take the same sauces, but legislative power and executive power are very different birds.

Executive power can be dispersed, up to a point, because of the nature of the power, but legislative power is not divisible in this fashion. Representative William Findley of Pennsylvania expressed this idea very

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88. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1159 (1992); Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1378 (1993).

89. The Supreme Court was absolutely right to define officers of the United States for purposes of the Appointments Clause as "any appointee exercising significant authority pursuant to the laws of the United States . . . ." Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam).

90. U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

eloquently in 1792 when he declared that "it is of the nature of Executive power to be transferrable to subordinate officers; but Legislative authority is incommunicable, and cannot be transferred."[91] End of detour.

What does it matter whether a non-subdelegation principle is found in the Necessary and Proper Clause or in the background rule of agency instruments? For most of the agency actions that concern Professor Hamburger's book, it matters not a bit. It makes a difference only when someone attempts to justify subdelegation through some mechanism other than the Necessary and Proper Clause. The most obvious candidate is the Territory and Property Clause of Article IV, which grants Congress "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."[92] This clause could be thought to authorize broad delegations to executive officials in federal territories and over federal property management—and I once so believed.[93] I was wrong[94] and Professor Hamburger is right that all exercises of federal power are subject to the non-subdelegation rule. Does that mean that Congress must pass meaningful rules for the management of the one-third of the nation's land mass owned by the federal government? Yes, that is what it means. This is not a startling conclusion, as the Constitution never contemplated that Congress would maintain ownership and control over one-third of the nation's land mass. If managing that property is too much for Congress, Congress needs to unload the property either onto states or private citizens. Does this mean that Congress cannot allow self-government in federal territories because territorial legislatures violate the non-subdelegation doctrine? Professor Hamburger sees territorial governance as a limited and justified exception to the non-subdelegation principle,[95] though I frankly find his reasons for justifying it difficult to grasp.[96] More than two decades ago, I disagreed and argued that territorial legislatures were unconstitutional.[97] I changed my mind after deciding that the Necessary and Proper Clause, which is not needed to create territorial legislatures, was the source of the non-subdelegation

91. 3 ANNALS OF CONG. 712 (1792). Of course, perhaps the reporter rather than Representative Findley was eloquent; the accuracy of the Annals of Congress in those days is quite spotty. *See* James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEXAS L. REV. 1, 36 (1986) (describing the egregious inaccuracies of one early congressional reporter).

92. U.S. CONST. art. IV, § 3, cl. 2.

93. Lawson, *Delegation and Original Meaning*, *supra* note 63, at 392–94.

94. *See* Lawson et al., *supra* note 78, at 448 n.173 (confessing error).

95. HAMBURGER, *supra* note 1, at 389–90.

96. I do not mean by this, as is sometimes connoted, that they are bad reasons. I mean that they are difficult to grasp. I literally do not understand them and therefore cannot judge them to be good or bad.

97. Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 900–05 (1990).

principle, but I now think I was right the first time. If that conclusion seems hard to swallow, it would not be difficult to devise fast-track legislative methods for rubber-stamping the work product of territorial legislatures and giving it the formal imprimatur of the Constitution's lawmaking process.

Thus, Professor Hamburger and I disagree on some minor aspects of delegation, but we agree on the big picture: there is no constitutional authorization for subdelegation of legislative power. The devil, however, is often in the details, and the details of subdelegation can be quite vexing.

Suppose that Congress enacts a statute requiring employers to bargain collectively with recognized groups of "employees." A group of foremen, who "carry the responsibility for maintaining quantity and quality of production, subject, of course, to the overall control and supervision of the management,"[98] seeks recognition as a bargaining unit. In one sense, the foremen are obviously "employees" because the company pays their salaries. But the company also pays the salary of the CEO, so the statute must have something more specific in mind by the term "employee" than simply a contractual relationship with a company. Foremen have responsibility, including possibly disciplinary responsibility, over other employees, but it seems unlikely that the statutory term "employee" means only those people with no responsibility. The applicability of the statute in these circumstances is not absolutely clear.

If the case goes directly to a court—pretend for the moment that there is no National Labor Relations Board—should the court rule that the statute is invalid because it unconstitutionally delegates legislative power to the court? I believe that Professor Hamburger would say no. Certainly, this statute requires a degree of interpretation in these circumstances. But more facts about the particular duties of the foremen, the relationship of the foremen to the company's senior management and lower level workers, the customs and practices in the relevant industry, the surrounding context of the statute, etc. might shed light on the proper application of the statute. One can imagine a theory of statutory interpretation, and even multiple theories of statutory interpretation, that could ultimately find a resolution to this question. This kind of interpretative enterprise, using "artificial reason and judgment of law,"[99] seems part and parcel of the judicial office. Statutes do not delegate legislative authority merely by failing to resolve every possible application on their faces. Interpretation is an activity distinct from lawmaking.

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98. Packard Motor Car Co. v. NLRB, 330 U.S. 485, 487 (1947). This example is based on *Packard*—for no better reason than that I opened my Administrative Law casebook to the page containing it.

99. HAMBURGER, *supra* note 1, at 54 (quoting *Prohibition del Roy*, 12 REPORTS 63–65 (1608) (internal quotation marks omitted)).

Interpretation, however, can shade into lawmaking under certain conditions. Suppose that Congress makes it unlawful "to maintain a borfin that schlumps on publicly-accessible property whenever it is accompanied by . . ." and then the Statutes at Large contains an ink blot (that roughly resembles a profile of the late Robert Bork) where one would expect the next word. There is no additional relevant information about the statute. If a judge was to construe this statute to reach any particular conduct, the judge would not be interpreting but would be legislating. The judge would be creating rather than ascertaining meaning, even if the judge described the operation as interpretation. Not every action that takes the form of interpretation is actually interpretation. Some activities *really are* interpretation and some *really are not.* Action in the form of interpretation that does not involve the true activity of interpretation is unlawful legislation. A judge exercising judicial power should simply give this collection of words in the statute books no effect in any particular case.

Now consider a statute that prohibits the importation and provides for the civil forfeiture of any tea brought into the United States that, "in the opinion of the judge presiding over the forfeiture proceeding, is inferior in quality" to certain standard samples of tea designated by law.[100] Unlike the ink-blot statute, this one is perfectly comprehensible. There is no difficulty at all in grasping the law's instructions. The problem is that it calls upon the judge to make a decidedly un-judge-like determination of the quality of tea. The statute, in essence, makes it unlawful to import tea that certain judges think does not taste good enough. Is applying that statute a proper exercise of the judicial power, and is a statute that calls for such a judicial decision a valid exercise of legislative power? Has Congress in effect subdelegated legislative power to the courts?

To me, the answer to the last question is very clearly yes—that is an unconstitutional delegation of legislative power. Even if Congress itself could pass bills of attainder against particular shipments of tea,[101] it cannot give that power to courts in the false guise of "interpretation." Courts interpret laws because and when the exercise of the judicial power requires it, but not every activity that takes the form of interpretation is actually an exercise of the judicial power.

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100. This fictitious statute is based on the old Tea Importation Act, ch. 358, 29 Stat. 604 (codified as amended at 21 U.S.C. §§ 41–50 (2012), which was repealed by the Federal Tea Tasters Repeal Act of 1996, Pub. L. No. 104-128, 110 Stat. 1198 (1996). For a brief summary of the old law, see GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 59–60 (6th ed. 2013).

101. Whether it could do so is actually a quite interesting question. The answer depends on the scope of the "equal protection" principle that is part of the fiduciary backdrop of all congressional powers. *See generally* Lawson et al., *supra* note 78. There would have to be some reason for focusing on one particular shipment of tea and not others. I can imagine a random selection process passing muster, though until my coauthor and I work out the details of Congress's fiduciary responsibilities (which we will do in a forthcoming book that we have not yet written), *supra* note 77, I would not want to make any bold pronouncements.

How to draw the line between permissible interpretation and impermissible exercise of legislative authority is a perennial nightmare. I have elsewhere catalogued at interminable length the efforts of courts and scholars to come up with an accurate formulation for telling valid from invalid statutes[102] and ended up agreeing with Chief Justice John Marshall that one must separate "those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."[103] In other words, "Congress must make whatever policy decisions are sufficiently important to the statutory scheme at issue so that Congress must make them."[104] The line between interpretation and legislation turns on impossible-to-quantify and difficult-to-describe distinctions among kinds and qualities of discretion conferred by statutes. Or so I think. For his part, Professor Hamburger does not really address this question. I would be very interested to hear how he draws the line between interpretation and legislation. I do not see how one can have a subdelegation doctrine without some such line.

Executive officials also interpret statutes in the course of their activities. Is there any meaningful difference between executive and judicial interpretation?

Professor Hamburger seems to suggest that the answer is yes. By his lights, judicial interpretation—when it is actually interpretation of a valid statute—results in actual legal consequences. If the statute is constitutionally valid, so is the judgment entered as a result of (legitimate) interpretation of that statute. But as I understand Professor Hamburger, there is no circumstance in which executive interpretation can have the same effect. Of course executives can offer interpretations of statutes, but those are merely offerings—just as any random citizen can offer an interpretation. They are not entitled to any deference from judges,[105] and they have no independent legal force. As Professor Hamburger describes the early English history:

> Moreover, the exposition of law was a matter of judgment about law, and the law gave the office of judgment, at least in cases, to the judges. It thus became apparent that the judges—indeed, only the judges in their cases—had the power to give authoritative expositions of the law. Lawyers recited this in constitutional terms—for example, when a lawyer argued in King's Bench that "a power is implicitly given to this court by the fundamental constitution, which makes the judges expositors of acts of

102. Lawson, *Delegation and Original Meaning*, *supra* note 63, at 355–78.

103. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).

104. Lawson, *supra* note 38, at 1239.

105. HAMBURGER, *supra* note 1, at 291–98, 313–19.

> Parliament." The judges therefore could not defer to interpretations by persons who were not the constitutional expositors, let alone interpretations that were administrative exercises of legislative will.[106]

Professor Hamburger's argument against binding executive statutory interpretation[107] is more powerful than I think many are likely to credit, but matters may be more complicated than he lets on. First, I do not think this argument can be confined just to laws that constrain subjects. If Congress passes a benefits law that does not constrain, Congress's exercise of lawmaking power is just as subject to the fiduciary obligations inherent in the Constitution's delegation of legislative power to Congress as it is when Congress passes constraining laws. The Constitution's enumerated powers of Congress do not sort themselves into constraining and non-constraining powers. The permissible activities of the *executive* may well depend on the constraint and non-constraint distinction, but it is not clear to me that the permissible activities of the legislature follow the same dichotomy. If that is right, there may be large classes of activity involving statutory interpretation that take place *only* in the executive with no role for the courts. In those circumstances, it is hard to operationalize the idea that executive interpretations have no legal force. It is quite easy to grasp the implications of that idea when courts are involved: the executive can say anything that it wants, but the courts will ultimately make up their own minds. If it is a decision that is not subject to judicial review, perhaps because of sovereign immunity, then . . . what? I would be interested to know if Professor Hamburger thinks that there are any circumstances in which executive interpretation is legally significant.

Second, the proper relationship between executive and judicial interpretation may be more muddled than Professor Hamburger lets on. To be sure, I am no big fan of judicial deference. I hold no brief for *Chevron*,[108] and I think it is affirmatively unconstitutional for Congress to order courts to defer to agencies (or even to tell courts what evidence they can hear).[109] Courts have an obligation to try their best to get the right answers to legal questions. But sometimes executive interpretations are

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106. *Id.* at 289 (footnote omitted) (quoting The Earl of Shaftsbury's Case, (1677) 86 Eng. Rep. 792 (K.B.) 795; 1 Mod. 144, 148).

107. It is crucial to note that Professor Hamburger has no objection to executive statutory interpretation that controls the activities of executive officials. The President or the Secretary of Treasury can give instructions on how to apply and understand the law to subordinate officials and discipline (or overrule) them if they fail to heed the instructions. *Id.* at 89–95.

108. *See* Gary Lawson & Stephen Kam, *Making Law out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1, 4 (2013) ("The *Chevron* decision itself is a very poor well from which to draw because it did not create, or purport to create, the doctrine that bears its name.").

109. Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 194 (2001).

good evidence of the right answer. If there are whole classes of cases in which that is likely to be true, there may be reasons for giving weight to the entire class of cases if the costs of sorting out the considerations in each case are too high. Courts do not have unlimited resources. Time spent figuring out the right answer in one case is time not spent on other cases. I have no general theory of how hard decision makers need to work in any particular instance to get the right answer. Without such a general theory, it is difficult to see how one can make categorical judgments about the permissibility of deference.

To be sure, Professor Hamburger is surely on safe ground criticizing the current regime of deference. Categorical condemnations of any kind of deference regime are much trickier. I am not saying that they cannot be made. I am just not sure that Professor Hamburger (or anyone else, including most especially myself) has laid the full jurisprudential foundation necessary to make them.

In sum, Professor Hamburger largely elides the line-drawing problem posed by any attempt to distinguish interpretation from legislation by categorically removing all executive statutory interpretation from the table. This move may be more problematic than it seems at first glance. If such a move is not available, then I think that Professor Hamburger needs to say more about what kinds of executive interpretations cross the line into legislation.

Conclusion

On both counts—the meaning of lawfulness and the appropriate line between interpretation and legislation—my call is for more explanation from Professor Hamburger. Of course, more of anything from Professor Hamburger is always welcome. Topping *Is Administrative Law Unlawful?* is going to be difficult, even for him, but I fervently hope that he gives it a try.

No

IS ADMINSTRATIVE LAW UNLAWFUL? By Philip Hamburger. Chicago, Illinois: The University of Chicago Press, 2014. 648 pages. $55.00.

Adrian Vermeule*

Introduction

Philip Hamburger has had a vision, a dark vision of lawless and unchecked power.[1] He wants us to see that American administrative law is "unlawful" root and branch, indeed that it is tyrannous—that we have recreated, in another guise, the world of executive "prerogative" that would have obtained if James II had prevailed, and the Glorious Revolution never occurred. Administrative agencies, crouched around the President's throne, enjoy extralegal or supralegal power;[2] the Environmental Protection Agency, with its administrative rule making and combined legislative, executive, and judicial functions, is a modern Star Chamber;[3] and *Chevron*[4] is a craven form of judicially licensed executive tyranny,[5] a descendant of the Bloody Assizes. The administrative state stands outside, and above, the law.

But before criticism, there must first come understanding. There is too much in this book about Charles I and Chief Justice Coke, about the High Commission and the dispensing power. There is not enough about the Administrative Procedure Act; about administrative law judges; about the statutes, cases, and arguments that rank beginners in the subject are expected to learn and know. The book makes crippling mistakes about the administrative law of the United States; it misunderstands what that body of law actually holds and how it actually works. As a result the legal critique, launched by five-hundred-odd pages of text, falls well wide of the target.

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1. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

2. *See id.* at 31 ("Just as English monarchs once claimed a prerogative power to make law outside acts of Parliament, so too the American executive now claims an administrative power to make law outside acts of Congress."); *id.* at 51 ("These days, administrative agencies have revived the imposition of extralegal interpretation, regulation, and taxing.").

3. The book is studded with sentences like these: "Although the Star Chamber's issuance of regulations came to an end with the court itself, administrative regulations have come back to life. Not merely one administrative body, but dozens now issue regulations that constrain the public." *Id.* at 57.

4. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

5. *See id.* at 316 ("[T]he deference to interpretation is an abandonment of judicial office. . . . [T]hey thereby deliberately deny the benefit of judicial power to private parties and abandon the central feature of their office as judges.").

In the first Part, I'll try to reconstruct Hamburger's critique, whose basic ambiguity arises from the fact that Hamburger is impenetrably obscure about what he means by "lawful" and "unlawful." Those terms are only loosely related to the ordinary lawyers' sense. In my view, the best reconstruction is that Hamburger thinks that there are deep, unwritten principles of Anglo-American constitutional order, derived from the views of English common law judges; departures from those principles are "unlawful." In the second Part, I'll try to show that the book's arguments are premised on simple, material, and fatal misunderstandings of what is being criticized and never do engage the common and central arguments offered in defense of the administrative state. In the conclusion, I'll consider a suggestion[6] that the book is only masquerading as legal theory and should instead be understood as a different genre altogether—something like dystopian constitutional fiction. Although the suggestion is illuminating, and tempting, I don't think it applies here.

I. Reconstruction

Let me very briefly summarize the surface content of the book in subpart A and then, in subpart B, try to reconstruct what Hamburger means when he calls administrative law "unlawful."

A. On the Surface

The book's modus operandi, which gives it a visionary atmosphere, is its relentless raising of the stakes about the administrative state and administrative law. If Hamburger is correct, it's not just that this or that decision is wrong, or that the "nondelegation doctrine" should be revived, or that the combination of functions in agencies should receive renewed judicial scrutiny. The usual debates of constitutional lawyers are small bore, fiddling around the edges of the problem—a far greater and darker problem.[7] If Hamburger is correct, the administrative state is a political abomination, an engine of tyranny: "At stake is nothing less than liberty under law."[8]

6. Offered by my colleague Charles Fried at a conference on the book manuscript at Columbia Law School.

7. According to Hamburger, "The dark possibilities for America were evident already in the nineteenth century." HAMBURGER, *supra* note 1, at 450.

8. *Id.* at 496. Other dangers of administrative law, according to Hamburger, are the risk of "overwhelm[ing] the Constitution," *id.* at 493; "evad[ing] a wide range of regular law, adjudication, institutions, processes, and rights," *id.* at 494; giving rein to the "lust for power outside the law," *id.* at 495; generating feelings of alienation from government, *id.* at 498; and allowing the "knowledge class" to "enlarge[] its own power," *id.* at 503. Most ominously, Hamburger writes that "the longer this coercion persists, the more one must fear that the remedy also will be forceful." *Id.* at 489.

Modern administrative law is a soft form of "absolutism," Hamburger tells us over and over again.[9] Indeed it is a specifically *continental* absolutism, a betrayal of the Anglo-American rule of law and legal liberty that was rooted in the constitutionalism of the common law judges developed in the 16th and 17th centuries. In passages reminiscent of Albert Venn Dicey's alarmism over *droit administratif*,[10] Hamburger traces the origins of administrative law to both French[11] and German[12] legal theory, most importantly Prussian *Ordnung* or bureaucratic ordering of an absolutist cast.[13] Administrative law represents the "Prussification" of our society.[14]

In England, absolutism was the road not taken, the path urged by civilian lawyers influenced by Roman imperial law.[15] On that path lay "prerogative"—not merely the "ordinary" prerogative within the common law, namely the various royal powers themselves recognized by common law judges, but instead a far more sweeping "extraordinary" prerogative outside and above the law.[16] The heroes of the resistance to the imperial prerogative, the Jedi Knights of the story, are first and foremost the English common law judges.[17] Hamburger also credits the statesmen who opposed James II, invited the invasion of a foreign king, William III, and brought about the Glorious Revolution,[18] but he does not adore them the way he adores Chief Justice Coke.[19]

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9. *E.g.*, *id.* at 6–7, 25–26; *id.* at 411–17 (discussing the "serious charge" of claiming that "administrative law is a form of absolute power"); *id.* at 508 ("Although it would be an exaggeration to denounce administrative power as mere tyranny or despotism, this power is profoundly worrisome. Even soft absolutism or despotism is dangerous.").

10. *See, e.g.*, A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 370–71 (10th ed. 1960) (comparing *droit administratif* to the tyranny of Star Chamber).

11. *See* HAMBURGER, *supra* note 1, at 444 (discussing Jean Bodin).

12. *See id.* at 447–50 (discussing von Treitschke, von Jhering, Lorenz von Stein, Rudolph von Gneist, and especially Hegel).

13. *See id.* at 445–47 (discussing how anxieties about order justified broad general powers in the Prussian code).

14. *Id.* at 505.

15. *See id.* at 34 ("[T]he English self-consciously rejected civilian jurisprudence . . . [which] became a vehicle for justifying absolute power."); *id.* at 443 (arguing that the source of absolute power was an academic focus on "Roman-derived canon and civil law" that "threatened English law" but was checked, *inter alia*, by King Stephen, who "declared Roman law should have no place or at least no authority in England").

16. *Id.* at 26–29.

17. *See id.* at 45–47 (describing how *The Case of Proclamations* came before the judges).

18. *See id.* at 48 (explaining that after the Revolution of 1688, "there was a substantial body of opinion that Parliament could not transfer its lawmaking power").

19. *See, e.g.*, *id.* at 46 ("Coke, however, refused to be bullied."); *id.* at 47 ("[King James' maneuvering] could only have given greater resolve to Coke and his colleagues. The next month they reported back what the king did not want to hear."); *id.* at 319–20 ("James I expected his judges literally to bow before him. But even when Chief Justice Coke had to get down on his knees before his king, he refused to defer. He kept on speaking his mind, exercising his independent judgment. . . . Eventually Coke was dismissed for his temerity, but his common law understanding of judicial office survived . . . .").

What has all this to do with us? Our present embodies the very fate the English common law judges, and the Parliamentary statesmen of 1689, thought they had averted. As of 2014, we have recreated the absolutist rule of imperial prerogative, perhaps in a somewhat softer form (Hamburger equivocates about this[20]) or in a milder disguise, but with essentially the same results.[21] Liberty is at the mercy of extralegal bureaucratic *Ordnung*, lightly cloaked in various constitutional and legal fictions about delegation and authorization but substantively the same.[22]

The hallmarks of extralegal absolutism are everywhere to be seen in the system of administrative law created since the Progressive Era. Agencies engage in "extralegal legislation," meaning the issuance of binding general rules,[23] and "extralegal adjudication," meaning the issuance of binding orders.[24] Procedurally, agencies wield combined powers and functions. In contrast to a system of separated powers and specialized functions, their decisions are "unspecialized,"[25] "undivided,"[26] and "unrepresentative,"[27] among other failings. The judges, cravenly, have created an "entire jurisprudence of deference"[28] that provides a sinister twist on the ideal of rule "through the law and its courts."[29] The jurisprudence of deference amounts to "an abandonment of judicial office."[30]

What then is to be done? In a few cursory final sections, Hamburger offers some brief suggestions, vague and ill defined. The main one is that judges should engage in an "incremental approach to administrative law," meaning "[s]tep-by-step corrections" that will "bring judicial opinions back into line with the law."[31] (In a moment, I will suggest that by "law" here, Hamburger necessarily means law in a substantive and unwritten sense—"law" as the deep principles of a common law Anglo-American constitutional order.) The resulting pragmatic problems are dismissed in the most cursory fashion imaginable; Hamburger merely says that "[u]ndoubtedly, in some

20. *Compare id.* at 493 (calling administrative law a "revival of absolute power" and a "consolidated governmental power outside and above the law" that "threatens to overwhelm the Constitution"), *with id.* at 508 (suggesting that administrative law may more prudently be deemed only "soft absolutism or despotism," although nonetheless dangerous).

21. *Id.* at 494 ("[P]rerogative power has crawled back out of its constitutional grave and come back to life in administrative form.").

22. *See id.* at 508 (discussing the German system of *Ordnung* and the "familiar dangers" of "the order imposed by an administrative class").

23. *Id.* at 31–32.

24. *Id.* at 129–31.

25. *Id.* at 325.

26. *Id.* at 347.

27. *Id.* at 355.

28. *Id.* at 319.

29. *Id.* at 280.

30. *Id.* at 316.

31. *Id.* at 491.

areas of law, concerns about reliance, the living constitution, precedent, and judicial practicalities can be very serious. It is far from clear, however, that they are substantial enough to justify absolute power . . . ."[32] Hamburger's interest obviously flags in this section; his passion lies in articulating his dark vision, in the diagnosis of our ills, rather than in prescribing remedies.[33]

B. "Unlawful"?

What exactly does Hamburger's title mean? Patently, he must be using the word law in two different senses to say that a body of "law" is "unlawful." Others have noted that Hamburger never makes clear what exactly he intends[34]—in a book over six-hundred-pages long.

Given his historical interests, the most obvious possibility is that Hamburger means to advance an originalist claim: that administrative law is inconsistent with the original understanding of the Constitution of 1789. But this has already been done as well as it can be,[35] and in any event I don't believe that's what Hamburger is getting at.[36] If Hamburger were an originalist in the conventional American sense, he would spend far more time on the ordinary meaning of the text as of 1789 and on the ratification debates, and far less time on subterranean connections between the Stuart monarchs and German legal theory.[37] His main interest, his intellectual center of gravity, is elsewhere.

I think I perceive, through a glass darkly, what Hamburger means by "unlawful." I think—although the ambiguities and obscurities of the tome make it irreducibly unclear—that the key to understanding Hamburger is that he isn't an ordinary constitutional positivist. The main point, for him, isn't that administrative law is inconsistent with this or that constitutional clause or even the best overall interpretation of the Constitution. Hamburger is emphatic that "popular and scholarly debates" get off on the wrong foot by addressing the problem of administrative law "as if it were merely a flat legal question about compliance with the Constitution."[38] Passages like this one abound: "[T]he legal critique of administrative law focuses on the flat

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32. *Id.* at 492.

33. *Compare id.* at 491–92, 509–11 (describing some practical responses), *with id.* at 1–491, 493–509 (describing the problem).

34. *See, e.g.*, Gary Lawson, *The Return of the King: The Unsavory Origins of Administrative Law*, 93 TEXAS L. REV. 1521, 1527–32 (2015) (book review).

35. *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231–32 (1994) ("[T]he modern administrative state, without serious opposition, contravenes the Constitution's design.").

36. Nor does Gary Lawson. *See* Lawson, *supra* note 34, at 1529 (expressing belief that Hamburger's argument is not "reducible to strictly constitutional terms").

37. *See id.* at 1530 ("[Hamburger's] point seems to be that there is something lawless about administrative governance that goes above and beyond inconsistency with the governmental scheme embodied by the federal Constitution.").

38. HAMBURGER, *supra* note 1, at 5.

question of unconstitutionality, and . . . this is not enough. Such an approach reduces administrative law to an issue of law divorced from the underlying historical experience and thus separated from empirical evidence about the dangers."[39]

Hamburger has, in other words, a historically grounded but entirely *substantive* and ironically extra-constitutional vision of the true Anglo-American constitutional order, emphatically with a small-c.[40] That vision is rooted in the historical experience of the common law judges who resisted (or did not—I will explain the qualifier later) the prerogative despotism of the Stuarts. Hamburger's deepest commitment is to this common law version of Anglo-American constitutionalism. It is of secondary interest to him whether the written constitutional rules of the United States, as of 1789, correspond to that substantive vision.

Or rather he *assumes* that they do, quite casually. What makes the book blurry, and what makes my reconstruction tentative, is that the book typically elaborates an English constitutional principle at some length and then offers a few brief pages and perhaps a few citations to connect up that principle with the American Constitution and its original understanding.[41] So it is necessarily an exercise of judgment on my part to say that the English materials are where the book's heart lies, as it were. It would not be crazy, although I think it would be misleading, to see Hamburger as a conventional originalist who just goes very deeply into the English background and who tends to assume, typically without much proof, that the English background transposes directly to the American case.

In the reconstruction I suggest, Hamburger offers a highly stylized constitutional vision derived from the English experience, interestingly crossbred with American high-school civics—and also premised on a desperately shaky understanding of administrative law, or so I will argue. In this vision, legislatures hold the exclusive power to "legislate," while judges exercise all "judicial" power and exercise independent judgment in the sense that they decide all legal questions for themselves without "deference." As for the executive, its only power is to "execute" the laws, understood very narrowly—basically the power to bring prosecutions and other court proceedings to ask judges to enforce statutes. The thing to avoid at all costs is that the executive should issue "binding" orders or rules; where that occurs, the executive is necessarily exercising "legislative" power and has arrogated

39. *Id.* at 15; *see also id.* at 493 ("The danger of prerogative or administrative power . . . arises not simply from its unconstitutionality, but more generally from its revival of absolute power.").

40. Lawson seems to agree. *See* Lawson, *supra* note 34, at 1530 (noting Hamburger uses "constitutionalism" to refer to "a very broad set of principles that are part of the Anglo-American legal and political tradition").

41. Take, for example, Hamburger's discussion of deference. *Compare* HAMBURGER, *supra* note 1, at 285–91 (discussing English background), *with id.* at 291–92 (discussing the American Constitution and its immediate context).

to itself "extralegal" or "supralegal" prerogative of the sort claimed by James II in his most extravagant moments.

When Hamburger says administrative law is "unlawful," this, I think, is the way to understand him. He means, in other words, that American administrative law is out of step with the deep substantive principles of the small-c constitutional order of the Anglo-American legal culture. Administrative law allows the executive to exercise "legislative" power by allowing agencies and the President to issue "binding" orders and rules, and in that sense allows the agencies a prerogative to act extralegally or supralegally, like the Court of Star Chamber. I will call this "the reconstructed thesis."

II. Administrative Law Is Lawful

A. Responses

Now, the reconstructed thesis could fail in one of several ways. One way would be that the thesis is simply wrong about what the deep principles of Anglo-American constitutional history actually are (assuming *arguendo* that such principles exist). I'm not qualified to judge whether the book offers a fair reading of English constitutional history, although I suspect that the story is far more nuanced than Hamburger lets on. On Adam Tomkins' lucid account, the common law judges failed altogether in their resistance to royal prerogative.[42] When in 1637, nine of twelve judges allowed Charles I to levy "ship-money" taxes in peacetime and without statutory authorization,[43] the game was essentially over. Royal pretensions were eventually curbed, but by civil war, Parliamentary resistance, and William III, not by common law judges. Distilled to its essence, "the reality of the common law constitution—and the reason for its failure—was that, as Coke himself explained it in the House of Commons in 1628, 'in a doubtful thing, interpretation goes always for the king.'"[44] *Chevron avant la lettre.*

A second way the thesis might fail is that it might have no pragmatic implications whatsoever. It would be the easiest thing in the world to dismiss Hamburger's book with the glib observation that it will change nothing. If one means by this that the administrative state will be essentially unchanged in its large institutional outlines for the foreseeable future and that administrative law will also, the observation is certainly correct. Hamburger's main proposal for rolling back the administrative state, step-

42. *See* ADAM TOMKINS, OUR REPUBLICAN CONSTITUTION 69–87 (2005) (challenging the period's characterization as "the moment at which the common law courts stood up to the power of the Crown's government").

43. *See id.* at 83–85.

44. *Id.* at 87.

by-step judicial correction,[45] verges on self-refutation. Weren't the American judges who decided cases like *Chevron* the ones who helped get us into this mess in the first place, in Hamburger's view? If they are a large part of the problem, why does he think they are also the source of the solution? Hamburger hasn't thought through the relationship between his diagnosis and his prescription, which are patently in tension with one another.[46]

Yet I don't think that the pragmatic dismissal is a fair response to Hamburger. That the administrative state is going nowhere does not mean that books like Hamburger's have no effect or that they can be ignored on pragmatic grounds. The effect of such books, if accepted, is to quietly delegitimate the administrative state, to tear out its intellectual struts and props while leaving the building itself teetering in place—a dangerous game.[47] The indirect and long-run effect of Hamburger's thesis on the intellectual culture of the legal profession, and perhaps even of the broader public, might be pernicious and worth opposing, even if there are no direct and short-run effects.

So I will not take either the route of disputing Hamburger's account of "lawfulness" or the route of dismissing his book as ineffectual. However, there is yet another, simpler way that the book's reconstructed thesis might go wrong. It might go wrong not in the major premise, about what the deep principles of the (putative) Anglo-American constitutional order are, but in the minor premise—about whether American administrative law violates those principles, or at least whether Hamburger has shown that it violates those principles. That's the avenue I will follow. The book is light on knowledge of administrative law, fatally so.

B. Why Administrative Law Is "Lawful" or Not Proven To Be "Unlawful"

So let me accept Hamburger's premises, as I've tried to reconstruct them, and show that even given those premises, administrative law is lawful. Or, at a minimum, I hope to show that the book hasn't come close to showing that administrative law is "unlawful," for the simple reason that it hasn't understood what administrative law says; the book veers off target because it doesn't know where the target actually is. I'll sort the discussion into three main topics: delegation, the taxing power, and the separation of powers, including the separation of functions in agencies.

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45. HAMBURGER, *supra* note 1, at 491.

46. *Cf.* Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1788–90 (2013) (pointing out the problems that arise due to tension between external and internal perspectives).

47. *See, e.g.*, HAMBURGER, *supra* note 1, at 509–11 (advocating for changes in legal and absolutist vocabulary under the title "Candor").

1. Delegation.—The delegation issue hangs over the whole book. Hamburger's basic charge, recall, is that administrative law rests on "prerogative" and is thus "extralegal." Whatever that means exactly, it would become a far more difficult claim to defend to the extent that administrative law enjoys valid statutory authorization. If administrative agencies exercise whatever powers they possess under the authority of valid statutory grants, then they act lawfully in the ordinary sense. Now of course agencies may go wrong in other ways—for example, they may happen to exercise their delegated powers in an arbitrary and capricious manner—but that is not a wholesale problem with the administrative state, and it's not the sort of wholesale critique of the administrative state's lawfulness that Hamburger wants to offer.

So Hamburger will have to deny that the statutory authorizations are indeed otherwise "lawful," in his special sense. He will have to say that even if the authorizing statutes are valid in the ordinary legal sense, they violate the deep principles of Anglo-American constitutionalism. As we will see, he does say that—on the basis of an argument that it is predicated on a straightforward mistake about American administrative law.

Let me start with a critical example of the delegation problem: Hamburger's treatment of *Chevron*. In Chapter 4, the main point is that administrative "interpretation" is a form of "extralegal lawmaking."[48] Hamburger contrasts two approaches, one in which judges decide what the law means in the course of deciding cases, and one—putatively imperialistic, derived from Roman law—in which the king or executive assumes a kind of "prerogative" or "extralegal" power to fill in gaps in the law. Hamburger's target here is *Chevron* deference to agency interpretations; he wants to draw an analogy between *Chevron* and the more luridly imperialistic pronouncements of James II and his servants about the king's gap-filling authority: "[B]ecause the office of judgment belonged to the judges, the king could not interpret with judicial authority, and they could not defer to his views."[49]

In Chapter 16, his central treatment of "deference," Hamburger makes the target explicit. I will quote some passages from his discussion, in part to give the reader a taste of the panoramic, conceptual, and largely question-begging flavor of Hamburger's prose:

> The most basic judicial deference is the deference to binding administrative rules. When James I attempted to impose legal duties through his proclamations, the [English common law] judges held this void without showing any deference .... The English thereby rejected extralegal lawmaking, and in the next century the American people echoed the English constitutional response by placing all legislative

48. HAMBURGER, *supra* note 1, at 51–55.

49. *Id.* at 54.

> power in Congress. Nonetheless, the courts nowadays defer to the executive's extralegal lawmaking. . . .
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> . . . .
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> This deference to the executive is incompatible with the judicial duty to follow the law.[50]

But what if validly enacted statutes themselves instruct the courts to defer? Legislative delegation of interpretive authority to agencies, if otherwise valid, would square the circle, reconciling the two approaches that Hamburger wants to contrast. If the law itself includes a valid delegation of law-interpreting authority to the agencies, then faithful judges, independently applying all relevant law in the case at hand, would conclude that the agency's interpretive authority is not extralegal but securely intralegal. This is of course the delegation theory of *Chevron*, now reigning as the official theory after its adoption by the Supreme Court more than a decade ago.[51]

I hasten to add that I think that the delegation theory is an erroneous and insufficient justification for *Chevron*, both because it is rankly fictional[52]—there just is no general delegation of that sort to administrative agencies—and because the *Chevron* opinion itself is irreducibly ambiguous, or ambivalent, on the topic of delegation. At some points it endorses a version of the delegation theory.[53] At others it explicitly disavows that theory[54] and

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50. *Id.* at 313–14.

51. *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."). For precursors, see, for example, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996).

52. *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013) ("*Chevron* is rooted in a background presumption of congressional intent: namely, 'that Congress, when it left ambiguity in a statute' administered by an agency, 'understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'" (quoting *Smiley*, 512 U.S at 740–41)); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 ("In the vast majority of cases I expect that Congress . . . didn't think about the matter at all. If I am correct in that, then any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate.").

53. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (stating that statutory gaps rest on explicit or implicit delegations of law-interpreting power to agencies).

54. *See id.* at 865. As the *Chevron* majority explains:

> Congress intended to accommodate both [environmental and economic] interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the

instead rests deference on the benefits of political accountability and expertise.[55]

But the issue of the correct justification for *Chevron* is irrelevant for present purposes. All that matters here and now is that the official delegation theory is critical for Hamburger because, if correct, it scrambles his categories. Indeed the very point of the delegation theory of *Chevron* is precisely to refute the charge that *Chevron* is lawless. The point of the theory, right or wrong, is to reconcile the traditional lawyer's conscience with deference to administrative agencies on questions of law.

All this is intended to illustrate the centrality of the delegation issue. What then does Hamburger say about delegation? How does he attempt to show that the authorizing statutes are themselves "unlawful"? With an argument, it turns out, that rests on a simple misunderstanding of American administrative law. Hamburger's major charge is that administrative law permits "subdelegation" or "re-delegation" of legislative power from Congress to agencies.[56] With the exception of a few asides, to which I will return, Hamburger relentlessly, repetitively urges that when the people have delegated legislative power to a certain body (Congress) in the Constitution, subdelegation or re-delegation of legislative power by that body to another is forbidden under the old maxim: *delegata potestas non potest delegare*.[57] The whole of Chapter 20 is devoted to elaborating this argument.[58]

Unfortunately there is no one, or almost no one, on the other side of the argument. Administrative law is in near-complete agreement with Hamburger on this point.[59] The official theory in administrative law is *precisely* the one Hamburger thinks he is offering as a *critique* of administrative law: namely, that Congress is constitutionally barred from

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> scheme devised by the agency. *For judicial purposes, it matters not which of these things occurred.*
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> Judges are not experts in the field, and are not part of either political branch of the Government.

Id. (emphasis added).

55. *See id.* at 865–66 (stressing the political accountability and expertise of administrative agencies in the Executive Branch). Thanks to Ron Levin for clarifying my thinking about the issues in this paragraph (although the views expressed here are mine alone).

56. *E.g.*, HAMBURGER, *supra* note 1, at 377.

57. *Id.* at 386.

58. *Id.* at 377–402.

59. I said that administrative law is in near-complete agreement about the official theory of delegation. The qualifier is necessary only because of a few judges here and there, most notably Justice John Paul Stevens, who have advanced a different, nonstandard theory: that some delegations of legislative power are valid, while some are not (with the "intelligible principle" test sorting between the two). *E.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 488–90 (2001) (Stevens, J., concurring). But this has never been the mainstream of American legal theory, as Justice Stevens himself very candidly showed with a long string citation. *Id.* at 488 & n.1. For a defense of Justice Stevens' view, see generally Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003 (2015).

subdelegating or re-delegating legislative power to agencies. Very oddly, Hamburger never cites the mainline of delegation cases that say exactly this, including most centrally *Loving v. United States*,[60] which doesn't appear in Hamburger's index.[61] *Loving* is explicit about all this: the official theory is that "the lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity."[62] More recently, in *City of Arlington v. FCC*, the Court emphatically reaffirmed that legislative power is "vested exclusively in Congress."[63] Hamburger's elaborate proof that subdelegation of legislative power is forbidden amounts to pounding on an open door.

The difference between Hamburger and the official theory is that administrative law denies that there *is* any delegation of legislative power at all so long as the legislature has supplied an "intelligible principle" to guide the exercise of delegated discretion.[64] Where there is such a principle, the delegatee is exercising executive power, not legislative power. As the Court put it in *City of Arlington*:

> Agencies make rules ("Private cattle may be grazed on public lands *X*, *Y*, and *Z* subject to certain conditions") and conduct adjudications ("This rancher's grazing permit is revoked for violation of the conditions") and have done so since the beginning of the Republic. These activities take "legislative" and "judicial" forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the "executive Power."[65]

One might think this distinction merely semantic. Nothing could be farther from the truth. The distinction results from a serious, substantive view of the nature of executive power, a view worked out in a line of cases beginning, at the latest, with *Field v. Clark* in 1892,[66] and continuing with

60. Loving v. United States, 517 U.S. 748 (1996).

61. HAMBURGER, *supra* note 1, at 626.

62. *Loving*, 517 U.S. at 758 (citation omitted) (citing U.S. CONST. art. I, § 1).

63. City of Arlington v. FCC, 133 S. Ct. 1863, 1873 n.4 (2013).

64. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

65. *City of Arlington*, 133 S. Ct. at 1873 n.4.

66. *See* Field v. Clark, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The act [in question] is not inconsistent with that principle. It does not, in any real sense, invest the president with the power of legislation."); *id.* at 694 ("'The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government.'" (quoting Locke's Appeal, 72 Pa. 491, 498–99 (1873))).

United States v. Grimaud[67] in 1911 and *J.W. Hampton v. United States* in 1928.[68] On that view, the whole problem of delegation is to navigate between Scylla and Charybdis.

On the one hand, if the only requirement were that the delegatee must act within the bounds of the statutory authorization—the *Youngstown*[69] constraint[70]—the legislature could in effect delegate legislative power to the executive by means of an excessively broad or open-ended authorization. On this view, requiring the agency to act within the bounds of the statutory authorization is not enough. *Youngstown* must be supplemented by an additional standard—in the rules and standards sense—that courts use as a backstop to police overly broad or vague statutory authorizations. Excessive breadth or vagueness means that the authorization *in effect* amounts to a delegation of legislative power *de facto*, even if not *de jure*.

On the other hand, the dilemma continues, it would itself be a misunderstanding of the constitutional scheme to require the legislature to fill in every detail necessary to carry its chosen policies into execution and to adjust those details as circumstances change over time.[71] To require that would equally confound legislative power with executive power, just in the opposite direction. In order to prevent legislative abdication to the executive, it would in effect force the legislature to act as the executive itself. The "intelligible principle" doctrine steers between these perils, attempting to sort executive power to "fill in the details" from legislative power to set the overall direction for policy.

At this point critics of the administrative state, Hamburger very much included, tend to go wrong by assuming that the argument in favor of allowing the executive to fill in the details and against requiring legislatures to handle all the details themselves is all just an argument from practicality, expediency, or necessity. It is not; it is emphatically an *internal* legal and constitutional argument, just as much as any of the arguments against delegation. The internal legal argument is that the power to fill in the details

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67. *See* 220 U.S. 506, 516 (1911) (holding that a delegation to the Secretary of Agriculture to manage public lands was not a delegation of legislative power but a conferring of "administrative functions").

68. *See supra* note 64.

69. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579 (1952).

70. *See id.* at 585 (explaining that the Executive must derive authority to act either from an act of Congress or directly from the Constitution).

71. *See, e.g.*, Yakus v. United States, 321 U.S. 414, 424 (1944). As the *Yakus* Court clarifies:

> The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations . . . . The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct . . . .

Id.

is an indispensable element of what executive power means; that to execute a law inevitably entails giving it additional specification, in the course of applying it to real problems and cases.

To be clear, the official theory of delegation in American administrative law is not a view that I agree with.[72] The better theory, and indeed the one with better Founding era credentials,[73] is that so long as an agency acts within the boundaries of the statutory authorization, obeying the *Youngstown* constraint, the agency is necessarily exercising executive rather than legislative power, intelligible principle or no.[74] But right or wrong, the merits of that nonstandard view are not relevant here, and the official theory of American administrative law is by no means trivially or obviously flawed. Before one discards it, one must first understand and respond to it. Hamburger's main, exhaustive argument about delegation simply fails to come to grips with the official theory.

So Hamburger seems largely unaware of the true grounds of his central disagreement with American administrative law. The true issue in controversy is not whether legislative power can be delegated (all concerned agree that it can't); the issue is whether administrative issuance of "binding" commands under statutory authority always and necessarily *counts as* an exercise of "legislative" power. Hamburger would have to say that it does; the main line of American administrative law says that it doesn't, at least not necessarily. So long as agencies are guided by an "intelligible principle," they are exercising executive power, not legislative power, even when they issue binding commands.

In various unfocused remarks,[75] Hamburger seems to recognize the problem implicitly and seems to say that officials exercise "legislative" power whenever, and just so long as, they issue "binding" commands.[76] This

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72. *See generally* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002). There are a number of excellent responses to and critiques of this paper, by Larry Alexander and Sai Prakash, Gary Lawson, and others; the citations are collected in Hamburger's book, in the notes to Chapter 20. HAMBURGER, *supra* note 1, at 594–602.

73. *See* Posner & Vermeule, *supra* note 72, at 1732–40 (arguing that the nondelegation doctrine is unsupported by originalist evidence, including original understanding, early legislation and legislative history, and early judicial decisions).

74. *See id.* at 1725–26 (arguing that *any* rule making engaged in by the Executive pursuant to congressional authorization is a simple case of Executive power).

75. *See, e.g.*, HAMBURGER, *supra* note 1, at 378 ("The subdelegation problem thus arises primarily where Congress authorizes others to make legally binding rules, *for this binding rulemaking, by its nature and by constitutional grant, is legislative.*" (emphasis added)). There are remarks of this sort scattered through the book.

76. For simplicity's sake, I focus here on rule-making commands issued by an agency acting as a minilegislature, as distinguished from adjudicative commands issued by an agency acting as a minicourt. Hamburger considers the latter "unlawful" also. *See* HAMBURGER, *supra* note 1, at 227. That conclusion is susceptible to objections that are parallel to the arguments that I make in the text regarding agencies' exercises of "legislative" power in rulemaking. (Thanks to Ron Levin for clarifying my thinking here and for suggesting the formulation in this note.)

is the argument he needs, and it is woefully underdeveloped. And in any event, as the Supreme Court has always recognized, the argument simply can't be correct. There are several ways to put the problem, which end up at the same place, and have the same cash value.

One way is in terms of the distinction between "interpretation" and "lawmaking." Hamburger seems to concede, as anyone must, that agencies can interpret statutes in the course of their work; he just assumes that in the proper scheme of things, judges will review those interpretations without deference, setting them aside freely if they are incorrect, in the judges' independent view. But as others have pointed out, the line between "interpretation" and "lawmaking" is hardly self-evident.[77] Are agencies confined to parroting the exact language of the statute, or can they add specification? Hamburger gives no account of how to distinguish the two.

Furthermore, such interpretations are themselves "binding" in one straightforward sense. Executive officials necessarily and inescapably issue "binding" interpretations, just so long as the statute they are charged with applying is binding. Every time a taxing authority or customs officer interprets a statute and applies it to a person or firm, the interpretation is "binding" in the sense that it provides law for the addressee unless and until overturned by a higher administrative tribunal or by a judge. Metaphysically speaking, it is the underlying statute rather than the administrative interpretation that "binds"; but the interpretation will inevitably add specification to the statute, even if only by applying it to a new case. Speaking practically rather than metaphysically, the agency interpretation is binding in the sense that it determines the legal position for the time being.

Finally, the Supreme Court has never—not once, not in 1935, not ever—accepted Hamburger's position that *every* "binding" rule made by an administrative agency necessarily represents an exercise of "legislative" power. The Court specifically denied this in *Grimaud* in 1911 and described administrative rule-making power as a longstanding principle of American constitutionalism. It is worth quoting the key passages:

> From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions "power to fill up the details" by the establishment of administrative rules and regulations . . . .
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> . . . .

77. *See, e.g.*, Lawson, *supra* note 34, at 1541–45 (discussing the difficulties of distinguishing cleanly between lawmaking and interpretation).

> That "Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." . . . *But the authority to make administrative rules is not a delegation of legislative power* . . . .[78]

The point of *Grimaud*, the theory it embodies, is not to be waved aside. The theory is that it is an indispensably *executive* task to "fill in the details" of statutes with binding regulations. That sort of regulation does not compete with legislative power, or displace it, but complements and completes it[79]—*fulfilling*, not compromising, the system of separated powers. Moreover, *Grimaud* claims that the theory has been adopted in American constitutional law from the beginning, as evidenced by unbroken legislative and executive practice. It just is part and parcel of the American system of separated powers, whatever Chief Justice Coke might have said about it.

Hamburger may disagree with that theory or with the historical claim, but shouldn't he address them squarely? It isn't enough to just repeat, and repeat, the claim specifically disputed and denied in *Grimaud* and other leading cases—the claim that "[w]hen Congress authorizes administrative lawmaking, it shifts legislative power to the executive . . . ."[80] The whole question, again, is *whether* authorized administrative rule-making amounts to "lawmaking" or "legislative power." In a note, Hamburger says that *Grimaud* should be read narrowly, as a case about regulation on public lands.[81] Of course the rationale of the decision is not so confined, but that's not even the point. Where is the *positive* evidence, in American legal sources, for the view that Hamburger wants to describe as a deep constitutional principle—the view that any and all binding administrative regulations promulgated under statutory authority count as forbidden exercises of legislative power? There is none.

2. Delegation and the Taxing Power.—The same basic problem cripples the book's treatment of delegation and the taxing power. Hamburger's discussion illustrates the sheer strangeness of the book's analysis, its remoteness from American constitutional and administrative law. Hamburger acknowledges that "[n]owadays, the question about extralegal taxation is not whether there is a prerogative or administrative

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78. United States v. Grimaud, 220 U.S. 506, 517, 521 (1911) (emphasis added) (citation omitted) (quoting Field v. Clark, 143 U.S. 649, 692 (1892)).

79. *See generally* Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2282 (2006) (discussing "the President's authority to prescribe incidental details needed to carry into execution a legislative scheme, even in the absence of any congressional authorization to complete that scheme").

80. HAMBURGER, *supra* note 1, at 428.

81. *Id.* at 596 n.3 ("[T]he Court [in *United States v. Grimaud*] was speaking about the rules governing the use of public property, and whether it meant more than this [is] far from clear.").

power to tax without statutory authorization, but rather whether the executive can tax with such authorization."[82] But he insists that "in placing the power to tax in the legislature, constitutional law barred it from relinquishing this power."[83] By "constitutional law," here, Hamburger seems to mean constitutional law in his own sense, the small-c constitutionalism propounded by English common law judges of the 17th century.[84]

The same mistake appears here as in the delegation discussion more generally: the theory of administrative law isn't that Congress delegates its legislative power to tax to the executive; the theory is that there has been no such delegation of legislative power at all, so long as an intelligible principle exists. But Hamburger clearly appears to think that there is some *special* problem about statutory authorizations of the power to impose taxes. The United States Supreme Court, however, addressed this very question in 1989 in *Skinner v. Mid-America Pipeline Co.*[85] Rejecting a claim that statutory authorization of the taxing power is subject to special heightened scrutiny, *Skinner* examined the text and structure of Article I, and the history of legislation from "[Congress's] earliest days to the present,"[86] and found no reason to treat taxation differently.[87]

Skinner doesn't appear in Hamburger's index; one searches the book in vain for any trace of it (although I cannot swear it is not lying around somewhere in the vast expanse of the book).[88] Hamburger seems to think he can discuss American administrative law without reading the cases. But knowing what Chief Justice Holt said in 1698 doesn't necessarily entitle one to pronounce on the administrative law of the United States. The system of American administrative law is complex, and there is much to be read, considered, and discussed by anyone who would venture large-scale opinions about it.

3. The Separation of Powers and of Functions.—Hamburger sees the main virtue of the separation of powers as institutional specialization of functions, which in turn limits arbitrary decision making. The separation of powers underlying the Anglo-American constitutional order "forc[es] the

82. *Id.* at 62.

83. *Id.*

84. *See id.* at 63 ("To repeat the words of Chief Justice Holt, taxes were legislative, and therefore under 'the original frame and constitution of the government,' they 'must be by an act made by the whole legislative authority.'" (quoting Brewster v. Kidgell, (1698) 90 Eng. Rep. 1270 (K.B.) 1270; Holt, K.B. 669, 670)).

85. 490 U.S. 212 (1988).

86. *Id.* at 220–22.

87. *Id.* at 222–23 ("We find no support, then, for Mid-America's contention that the text of the Constitution or the practices of Congress require the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power.").

88. HAMBURGER, *supra* note 1, at 626–27.

government to work through specialized institutions with specialized powers[,] . . . forcing it to work in a sequence of legislative, executive, and judicial power."[89] (Here Hamburger echoes a recent wholesale critique of the administrative state by Jeremy Waldron, who also emphasizes the importance of sequencing.)[90] The administrative state blatantly violates this principle: "Rather than follow the Constitution's orderly stages of decisionmaking, an agency can blend these specialized elements together—as when it legislates through formal adjudication [sic], or secures compliance with its adjudicatory demands by threatening severe inspections or regulation."[91]

There are at least two independently fatal problems with this treatment. One is the delegation problem in a different form. The problem is that the institutionally specialized process of lawmaking that Hamburger likes, with its sequence of legislative, executive, and judicial action, is *itself* the source of the combined functions that Hamburger abhors.[92] Agencies exercise combined functions when, and only when, an institutionally specialized decision, an exercise of lawmaking through sequenced and separated powers, has concluded that they should and enacted a statute to that effect. The following sequence has occurred many times: Congress enacts, the President approves, and the Court sustains against constitutional challenge a statute that delegates sweeping powers to agencies and allows combination of functions—with important limitations and qualifications I will come to in a moment. Where on earth does Hamburger think combined agency functions come from? The combination of functions in agencies *results from* the operation of the system of separated legislative, executive, and judicial powers. Does Hamburger think agencies have awarded such powers to themselves on the basis of some sort of "prerogative"?

The second problem is that administrative law does not actually allow "agencies" to exercise "combined powers." Hamburger's repeated implicit claim to that effect is the sort of claim that is partly right, partly wrong, and entirely simplistic. What administrative law does is to allow sometimes, in certain ways and through certain carefully specified procedures, agencies to exercise combined powers. But from reading this book, one would never

89. *Id.* at 334.

90. *See* Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. REV. 433, 441 (2013) (describing how the separation of powers may be conceived of as giving the legislature an "initiating place on the assembly line"); *id.* at 456 (describing the tripartite division of powers as "phases" in a "process"). For a critique of Waldron's view, see generally Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. (forthcoming 2015) (manuscript at 18–23) (on file with author).

91. HAMBURGER, *supra* note 1, at 334.

92. *See* Vermeule, *supra* note 90 (manuscript at 21) ("If the delegating statute has itself been deliberated by the legislature, approved by the executive, and reviewed for constitutionality by the judiciary, why hasn't the force of the separation-of-powers principle at the constitutional level been entirely exhausted?").

guess that administrative law spends as much time limiting the combination of functions as enabling it.

The scheme of the Administrative Procedure Act (APA) is complex and reticulated. Very roughly, it requires strict separation of adjudicative functions from prosecutorial and investigative ones, in formal on-the-record adjudication before an administrative law judge, but not in rule making, and not at the top level of the agency.[93] There are separate rules against ex parte contacts in formal adjudication; those rules *do* apply at the top level of the agency. And at any level, due process remains a fallback constraint that allows courts to police prejudgment of adjudicative facts, conflicts of interest, or other forms of bias. The overall scheme, as Justice Jackson observed in *Wong Yang Sung v. McGrath*,[94] represents a hard-fought compromise.[95] The APA's approach to combination of functions recognizes and trades off both the common law vision that animates Hamburger and also the value of competing goods, such as the activity level of agencies, their expertise, and the benefits of a unitary policymaker.[96]

Presumably Hamburger thinks that all this trading off is a covenant with Hell—that the decisions, judicial, legislative, and executive, upholding the combination of functions as a constitutional matter represent a betrayal of the Anglo-American constitutional order. (Here too, of course, all three branches, exercising their separated and specialized powers, have cooperated in setting up the current scheme of partially combined functions. Is this a betrayal of the separation of powers, or instead its offspring and fulfillment?) On this view, both the organic statutes that combine functions and even the APA to the extent that it allows and endorses combined functions are unconstitutional in a small-c sense and probably also a large-C sense.

Of course I think that isn't so. But anyone who does think so should at least consider and discuss—shouldn't they?—the arguments offered by the architects of the combination of functions: by the generations of politicians, officials, lawyers, and law professors who constructed the system and by the cases that both uphold it and, in various ways, constrain it. Here too,

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93. *See, e.g.*, 5 U.S.C. § 554(d) (2012). Hamburger's treatment of administrative law judges accuses them of pervasive institutional bias—principally on the basis of a discussion of Montesquieu (!) and citations to works from 1903, 1914, and 1927. HAMBURGER, *supra* note 1, at 337–39, 588 nn.23, 25–26. (He does briefly cite a 2011 textbook.) *Id.* at 588 n.27. All these were written well before the enactment of the APA in 1946 and are thus more or less irrelevant to the incentives and possible biases of the modern administrative law judge. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). The vast literature on the (putative) biases of administrative law judges is nowhere to be found.

94. 339 U.S. 33 (1950).

95. *See id.* at 39–40 (describing the tangled legislative history leading up to the APA). As Justice Jackson put it: "The Act . . . represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities . . . ." *Id.* at 40.

96. Vermeule, *supra* note 90 (manuscript at 10).

however, one searches in vain for any evidence that Hamburger even knows what he is attacking. Where are *Chenery II*,[97] *FTC v. Cement Institute*,[98] *Wong Yang Sung*,[99] *Marcello v. Bonds*,[100] *Withrow v. Larkin*?[101] All of these offer *arguments* (some of great plausibility and sophistication) about the administrative combination of functions, its justification, scope, and limits, both under the Constitution and under the APA. Bizarrely, none of these are to be found in the index to the book. It's as though one tried to launch a deep critique of American-style constitutional judicial review without happening to mention the line of cases stemming from *Marbury v. Madison*.[102]

Conclusion

One reaction to Hamburger's book might be that it is interestingly wrong in an unbalanced sort of way. On that view, the book could be seen as offering a kind of constitutional fiction, an oddly skewed but engagingly dystopian vision of the administrative state[103]—one that illuminates through its very errors and distortions, like a caricature or the works of Philip K. Dick. The book might then be located in the stream of legalist-libertarian critique of the administrative state, the line running from Dicey, through Hewart and Pound and Hayek, to Richard Epstein. That work is nothing if not interesting, if only because it is so hagridden by anxiety about administrative law.

On further inspection, though, this book is merely disheartening. No, the Federal Trade Commission isn't much like the Star Chamber, after all. It's irresponsible to go about making or necessarily implying such lurid comparisons, which tend to feed the "tyrannophobia" that bubbles unhealthily around the margins of popular culture and that surfaces in disturbing forms on extremist blogs in the darker corners of the Internet.[104]

It's especially irresponsible to go around saying that the administrative state is "unlawful," whatever that may mean, without understanding what administrative law says, and seemingly with little idea about what exactly is being attacked—little idea about the intellectual architecture that underpins administrative law and that many generations of the legal profession have labored to build up. Trying to tear down the intellectual props of the administrative state, without understanding exactly what one is tearing down or what the consequences of doing so would really be, is an act of practical

97. SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194 (1947).

98. 333 U.S. 683 (1948).

99. 339 U.S. 33 (1950).

100. 349 U.S. 302 (1955).

101. 421 U.S. 35 (1975).

102. 5 U.S. (1 Cranch) 137 (1803).

103. As mentioned above, I owe this idea to Charles Fried, who offered it at the Columbia conference on the book manuscript.

104. *See generally* Eric Posner & Adrian Vermeule, *Tyrannophobia*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 317 (Tom Ginsburg ed., 2012).

interest but no theoretical interest, like a child wrecking a sculpture by Jeff Koons. Some admire Koons's work, some detest it, but the child isn't in a position to understand *why* it might be detestable, and the act is purely destructive with no illuminating import. It's a sign of the times, a portent of the dimming of the legal mind, that this book is described in some quarters as "brilliant" and "path-breaking."[105] It isn't, and the only sensible response to Hamburger's question, as far as I can see, is "no."

105. Lawson, *supra* note 34, at 1522.

Notes

Agency for International Development v. Alliance for Open Society International: An Alternative Approach to Aid in Analyzing Free Speech Concerns Raised by Government Funding Requirements*

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Introduction

In 2013, the Supreme Court struck down a requirement that nongovernmental organizations combating HIV/AIDS must explicitly oppose prostitution to be eligible for government funding through a HIV/AIDS program created in 2003,[1] a program commonly referred to as the Leadership Act. Congress imposed this restriction as part of this "comprehensive" program to address HIV/AIDS, in part, by eradicating prostitution throughout the world.[2] The Court found that the requirement violated the right to free speech because an organization could be ineligible for certain funding due to its beliefs regarding the legalization of prostitution.[3]

This Note proposes a new approach to analyzing speech requirements imposed for potential recipients to be eligible for federal funding: the government should be allowed to enforce any such speech requirements as a condition for federal funding as long as the potential recipient has other opportunities to engage in that speech. This view protects the government's interest in ensuring that its money is spent in a manner that is not only in accord with Congress's purpose for the program but that also protects the public's free speech interest in hearing a multitude of viewpoints.

In discussing this new approach to analyzing speech requirements imposed on potential recipients for federal funding, this Note focuses heavily on the Court's recent decision in *Agency for International Development v. Alliance for Open Society International*.[4] While this new approach would be applicable to all cases in which Congress imposes some speech requirement as a condition for federal funding eligibility, *Alliance for Open Society International* provides a good framework—and one of the more recent examples—of how this new approach would work.

Part I of this Note summarizes basic background information regarding First Amendment jurisprudence on free speech and government conditions

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1. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2322–23, 2332 (2013).

2. United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act), Pub. L. No. 108-25, 117 Stat. 711 (codified as amended at 22 U.S.C. §§ 7601–7682 (2012)).

3. *Alliance for Open Soc'y Int'l*, 133 S. Ct. at 2332.

4. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2332 (2013).

on monetary grants. Part II examines the Supreme Court's decision in *Alliance for Open Society International*, explaining the majority's (and the dissent's) reasoning in the case. This Part also includes a discussion of the background and Congressional intent behind the Leadership Act. Part III criticizes the decision and examines an alternative approach to considering freedom of speech claims in circumstances where an organization claims the government violated its right to free speech by requiring the organization to affirm a particular belief.

I. The Right of Free Speech Can Restrict Congress from Imposing Restrictions on Government Funding

Under the First Amendment freedom of speech guarantee, Congress cannot pass a law "telling people what they must say."[5] Nonetheless, in some contexts, the government can impose "a condition on the receipt of federal funds" that requires an individual (or an organization) to engage in certain speech under the Spending Clause.[6]

Congress's ability to condition funds on an individual engaging in particular speech is limited: the requirement can become an "unconstitutional burden" on the individual's free speech rights.[7] The line between what is permitted and is not permitted is "hardly clear"[8]—in part, because the Supreme Court has never defined that line and gives contradictory rationales for the permissibility or impermissibility of such restrictions.[9]

II. *Agency for International Development v. Alliance for Open Society International*

Subpart A will discuss the background of the Leadership Act at issue in *Agency for International Development v. Alliance for Open Society International*. Subpart B discusses Congress's rationale for the pledge requirement that the Supreme Court subsequently struck down. In subpart C, the Note examines the private party's reasons—both from a policy standpoint and from a constitutional standpoint—for opposing the pledge requirement. Subparts D–F discuss the case itself and the reasoning of the Supreme Court.

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5. Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 61 (2006).

6. *Alliance for Open Soc'y Int'l*, 133 S. Ct. at 2327–28.

7. *Id.* at 2328.

8. *See infra* note 67 and accompanying text.

9. For a discussion of the inconsistency of the Supreme Court's decision in this area, see *infra* subpart III(A).

A. *Congress Provides Federal Funds to Nongovernmental Organizations Combating HIV/AIDS*

In 2003, Congress passed the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 to provide a plan from the federal government to combat HIV/AIDS internationally.[10] Finding that "HIV/AIDS has assumed pandemic proportions, spreading from the most severely affected regions, sub-Saharan Africa and the Caribbean, to all corners of the world, and leaving an unprecedented path of death and devastation,"[11] Congress passed the Act to provide for a "comprehensive, long-term, international response focused upon addressing the causes, reducing the spread, and ameliorating the consequences of the HIV/AIDS pandemic."[12]

Congress also noted that prostitution and other forms of "sexual victimization" contribute significantly to the HIV/AIDS pandemic—up to 40% of victims of sex trafficking contracted HIV/AIDS—and established that one of the goals of the "comprehensive" program is to eradicate prostitution throughout the world.[13]

The Leadership Act also included congressional findings that nongovernmental organizations (NGOs) had "proven effective in combating the HIV/AIDS pandemic"[14] and fashioned the *comprehensive* international response to include a program in which the federal government would give aid to NGOs to combat HIV/AIDS.[15] To be eligible for such aid, an NGO must, among other requirements, meet two requirements dealing with prostitution: first, the NGO could not use any funds from the program to "promote or advocate the legalization or practice of prostitution or sex trafficking,"[16] and second, the NGO must have a policy "explicitly opposing prostitution and sex trafficking."[17] The Supreme Court refers to the second requirement as the "Policy Requirement."[18]

B. *Congress Imposes the "Policy Requirement" as Part of a "Comprehensive" HIV/AIDS Message*

The key to understanding the rationale for the Policy Requirement is that the HIV/AIDs program created by the Leadership Act is a

10. 22 U.S.C. § 7601(22) (2012).
11. *Id.* § 7601(1).
12. *Id.* § 7601(21).
13. *Id.* § 7601(21), (23).
14. 22 U.S.C. § 7601(18) (2012).
15. *Id.* § 2151b-2(c)(2).
16. *Id.* § 7631(e).
17. *Id.* § 7631(f).
18. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2324–25 (2013).

comprehensive approach to the United States' international policy to combat HIV/AIDs.[19] As part of the *comprehensive* approach, the United States was attempting to send an "educational message[]" that the international community must fight HIV/AIDS by attempting to eradicate prostitution throughout the world.[20]

Congress viewed recipients of funding from the program as an "integrated" part of the overall United States strategy in opposing HIV/AIDS;[21] Congress did not view recipients as merely a recipient of funds with no link to the message that Congress was attempting to promote.[22] By requiring recipients of funds from the HIV/AIDS program to explicitly oppose prostitution,[23] Congress intended to ensure that any recipient of funding did not undermine the United States' uniform foreign policy message of eradicating prostitution around the world.[24]

Members of Congress who were responsible for including the pledge in the legislation also noted that verifying the use of the funds once the funds were sent out of the country could be difficult.[25] Congress thus required NGOs to sign the pledge to reduce the likelihood that the NGO would channel any funds from the program to "pimps and brothel owners" and thus "unwittingly fund or promote commercial sex activities," reasoning that NGOs that oppose prostitution would be more likely to ensure that the funds in no way assisted prostitution.[26]

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19. *See supra* note 12 and accompanying text.

20. 22 U.S.C. § 7611(a)(4) (2006) (amended 2008).

21. *Id.* § 7611(a) (2012).

22. *Id.* § 7631(e).

23. *Id.* § 7631(f).

24. The Supreme Court recognized that the success of a government program often depends on the message sent by the operation of the program as a whole; for example, in the context of pregnancy help centers, the Supreme Court allowed Congress to require that a pregnancy help center have a certain mission or hold certain beliefs because "selectively fund[ing] a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way" does not constitute a violation of the right to free speech. Rust v. Sullivan, 500 U.S. 173, 193 (1991).

25. *See, e.g.*, Cheryl Wetzstein, *Supreme Court Strikes Down Obama-backed 'Prostitution Pledge' in AIDS Funding*, WASH. TIMES, June 20, 2013, http://www.washingtontimes.com/news/2013/jun/20/supreme-court-nixes-prostitution-pledge-aids-funds/, *archived at* http://perma.cc/8GK9-JV58 (noting that one motivation behind the requirement was to ensure the U.S. government did not "unwittingly fund or promote" prostitution).

26. *Id.*

C. *Some NGOs Opposed the Pledge Because the Requirement Would Discourage Victims of Sex Trafficking from Seeking Help*[27]

A group of NGOs opposed the pledge requirement because they believed that the requirement would discourage sex-trafficking victims—who, as Congress noted, are far more likely to suffer from HIV/AIDS—from seeking help from the organizations.[28] According to these NGOs, the pledge puts organizations combating HIV/AIDS in an impossible position: either they are denied aid from the federal program, which "they need" to effectively operate or they are, in practice, banned from supporting sex-trafficking victims because these victims will not seek aid from the NGO.[29]

If this policy disagreement constituted the sole reason for opposing the pledge, the Supreme Court likely would have never heard the case.[30] The NGOs, however, also argued that the pledge requirement violated the Free Speech Clause of the First Amendment, arguing that mandating the NGO to *explicitly* oppose prostitution to qualify for funding forced the NGO to engage in certain speech and hold certain views.[31]

D. *NGOs Challenge the Pledge Requirement*

In 2006, two NGOs, the Alliance for Open Society International and Pathfinder International, challenged the pledge requirement in the U.S. District Court of the Southern District of New York arguing that the Policy Requirement violated the organizations' right to free speech.[32] Alliance for Open Society International channeled money from the HIV/AIDS program to local NGOs in foreign countries, some of which did not have a policy explicitly opposing prostitution.[33] The district court granted a preliminary injunction against the enforcement of the pledge requirement.[34]

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27. The validity or reasonableness of this underlying policy argument against the pledge requirement is beyond the scope of this Note. While I have—as I imagine many of my readers will have—thoughts on the policy arguments behind the pledge, this Note simply addresses the free speech issues in this controversy.

28. Sex workers are 13.5 times more likely to have HIV than women of the same income level and the same age. *US Supreme Court Strikes Down Policy Requiring AIDS Groups to Oppose Prostitution in Order to Receive US Government Funds*, UNAIDS (June 21, 2013), *available at* http://www.unaids.org/en/resources/presscentre/featurestories/2013/june/20130621us supremecourtdecision, *archived at* http://perma.cc/7ST7-YBQY.

29. *Id.*

30. *See* Petition for Writ of Certiorari at 22, Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321 (2013) (No. 12–10) (citing a circuit split as one of the reasons that the Supreme Court should grant review).

31. *Agency for Int'l Dev.*,133 S. Ct. at 2326–27.

32. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 430 F. Supp. 2d 222, 228–29 (S.D.N.Y. 2006).

33. *About the Plaintiffs*, USAID v. AOSI, http://www.pledgechallenge.org/about-plaintiffs/, *archived at* http://perma.cc/7A87-3Y6T ("AOSI makes and receives grants to support and cooperates with other charitable organizations for the foregoing purposes.").

34. *Alliance for Open Soc'y Int'l*, 430 F. Supp. 2d at 278.

The government appealed the district court's injunction to the Second Circuit Court of Appeals.[35] After the appeal, the United States Agency for International Development (USAID) issued guidelines on whether an NGO (like Alliance for Open Society International or Pathfinder International) could receive funding from the HIV/AIDS program and channel the money to an "affiliated organization" (such as the local NGOs in the foreign country).[36] The guidelines stated that the USAID would consider the "totality of the facts" to ensure that the recipient had "objective integrity and independence" from an affiliate organization "that engages in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking."[37] If the NGO had "objective integrity and independence" from such an affiliate organization, the NGO could still receive funding from the HIV/AIDS program even if the affiliate organization did not explicitly oppose prostitution.[38]

The Second Circuit remanded the case to the district court to consider whether this new guideline alleviated the alleged free speech violation.[39] On remand, the district court again granted a preliminary injunction against the Policy Requirement.[40] The government appealed the district court's injunction to the Second Circuit, which affirmed the district court's decision and found the pledge requirement unconstitutional.[41] The government appealed the Second Circuit's decision to the Supreme Court, which granted certiorari.[42]

E. The Supreme Court Holds that the Pledge Requirement Violates Free Speech

In a six-to-two decision, the Supreme Court affirmed the Second Circuit, with Justice Elena Kagan recused from the case.[43] Justice Antonin Scalia wrote the dissenting opinion, which Justice Clarence Thomas joined.[44]

The majority opinion ignored the government's interest in ensuring that the NGOs sent a consistent message in opposing prostitution as part of

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35. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 254 F. App'x 843, 845 (2d Cir. 2007).

36. U.S.A.I.D. Organizational Integrity of Recipients, 45 C.F.R. § 89.3 (2010).

37. *Id.*

38. *Id.*

39. *Alliance for Open Soc'y Int'l*, 254 F. App'x at 846.

40. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 570 F. Supp. 2d 533, 550 (S.D.N.Y. 2008).

41. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 651 F.3d. 218, 223–24 (2d Cir. 2011).

42. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 928 (2013).

43. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2324 (2013).

44. *Id.* at 2332 (Scalia, J., dissenting).

its integrated effort to combat HIV/AIDS and instead focused solely on the government's interest in ensuring that the funds from the program did not promote the legalization of prostitution.[45] The Court found that this interest did not justify a restriction on free speech because the Leadership Act already prohibited the use of funds from the program to promote prostitution or the legalization of prostitution.[46] In addition, the condition that an NGO must explicitly oppose prostitution was outside the scope of the HIV/AIDS program, which the Court narrowly defined as reducing the occurrence of HIV/AIDS internationally instead of developing a *comprehensive* response to HIV/AIDS to include eradicating practices that increased the likelihood of HIV/AIDS[47]—like prostitution—as stated by Congress and summarized above in subpart A.

The majority was particularly concerned that the pledge requirement required an organization seeking funding to hold a particular belief: namely, that prostitution should not be legalized.[48] The Court held that Congress cannot require an organization to hold any particular belief as a prerequisite to receiving funding, quoting *West Virginia Board of Education v. Barnette*[49] :"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[50]

By requiring an NGO to oppose prostitution, Congress prescribed an "orthodoxy" in politics, and by requiring an NGO to *explicitly* oppose prostitution forced citizens to "confess by word or act their faith therein."

F. *The Dissent Urges the Constitution Does Not Mandate a "Viewpoint-Neutral Government"*

Justice Scalia's dissent notes that the majority ignored the government's interest in developing a *comprehensive* HIV/AIDS strategy and selecting NGOs that would not undermine the United States' message in addressing HIV/AIDS internationally.[51] The Policy Requirement, Justice Scalia argued, constituted "nothing more than a means of selecting suitable agents to implement the Government's chosen strategy to eradicate HIV/AIDS."[52] The Constitution does not mandate a "viewpoint-neutral government"; Congress should be allowed to both explicitly state a

45. *Id.* at 2331–32 (majority opinion).

46. *Id.* at 2330–32.

47. *Id.* at 2332–33 (Scalia, J., dissenting).

48. *Id.* at 2327 (majority opinion).

49. 319 U.S. 624 (1943).

50. *Alliance for Open Soc'y Int'l*, 133 S. Ct. at 2332 (quoting *Barnette*, 319 U.S. at 642) (internal quotation marks omitted).

51. *Id.* at 2332–33 (Scalia, J., dissenting).

52. *Id.* at 2332.

particular policy goal that is a matter of judgment (such as opposing prostitution) and be allowed to select agents who will not seek to undermine such an objective.[53]

In fact, prohibiting the government from only giving money to organizations that support the goal of the program would lead to absurd results. Justice Scalia hypothesizes about a federal program whose purpose is to explicitly promote *only* healthy eating programs (similar to the HIV/AIDS program at issue in *Alliance for Open Society* whose purpose is to reduce HIV/AIDS, in part, by fighting against the legalization of prostitution).[54] Similar to the NGOs that challenged the HIV/AIDS program but did not completely fit the qualifications of the program, an organization like the American Gourmet Society may have "nothing against healthy food" but does not promote only healthy eating habits—in fact, many of its products are not necessarily healthy food choices.[55]

Justice Scalia's concern—while not directly expounded upon in his dissent—seems to be that, under the majority's analysis, Congress could not prohibit an organization like the American Gourmet Society from receiving funds from the program because its decision not to explicitly promote *only* healthy eating habits would be viewpoint discrimination in violation of the First Amendment. In a similar way, denying funding to the NGOs in this case constituted viewpoint discrimination because of their view on the legalization of prostitution. Obviously, giving money to any food society—regardless of its commitment to the goals of the program—would make the program completely useless.

In the international context, the government has a special interest in ensuring that NGOs that receive funding under a particular program hold views similar to the government's view in the context of the program.[56] Again, Justice Scalia resorts to a hypothetical scenario.[57] He asks whether the United States be required to give funding to Hamas, an organization which is involved in terrorism and which opposes Israel, solely because only giving weapons to NGOs that supported Israel constitutes an impermissible violation of the organization's right to free speech?[58] According to Justice Scalia's reasoning, the majority's analysis would require giving funding to Hamas because the only reason the government would deny funding to Hamas would be because the government disagreed with Hamas's viewpoint.

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53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*

Justice Scalia next addresses the majority's arguments. The dissent would not have rejected the government's interest in ensuring that funds do not support prostitution: the dissent viewed the prohibition on spending the money from the HIV/AIDS program for prostitution as ineffective because money is fungible—the government is still supporting an organization that supports prostitution.[59]

The dissent also rejects the majority's appeal to *Barnette*: the government, as explained above, does not have to be viewpoint neutral, and holding that the government must not discriminate based on a relevant ideological commitment will lead to absurd results.[60] "One can expect, in the future, frequent challenges to the denial of government funding for relevant ideological reasons."[61]

Ironically, the Constitution itself requires certain viewpoints in some circumstances: for example, all legislators and the President must take an oath to support the Constitution, indicating that these government officials must hold a certain viewpoint—namely, some level of support for the U.S. Constitution—as a precondition for holding office.[62]

G. *After the Supreme Court's Decision*

After the Supreme Court's decision, Pathfinder International and Alliance for Open Society International filed an action against USAID for a permanent injunction against USAID, claiming USAID continued to apply the Policy Requirement.[63] The U.S. District Court for the Southern District of New York converted the preliminary injunction at issue in the Supreme Court decision to a permanent injunction enjoining the government from enforcing the Policy Requirement based on the Supreme Court's determination that it violated the First Amendment.[64]

During the hearing for the permanent injunction, the government argued that it should be allowed to enforce the Policy Requirement against applicants for funding that were not named parties in the case.[65] The Court rejected this argument finding "no constitutional application of the Policy Requirement . . . . For the same reasons that the Policy Requirement cannot be applied to the Plaintiffs without violating their constitutional rights, applying it to other NGOs or their affiliates would likewise violate their constitutional rights."[66]

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59. *Id.* at 2334.

60. *Id.* at 2335.

61. *Id.*

62. *Id.*

63. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., No. 05 Civ. 8209, 2015 WL 706668, at *1 (S.D.N.Y. Jan. 30, 2015).

64. *Id.* at *18–19.

65. *Id.* at *18.

66. *Id.*

III. Criticism of the Supreme Court's Decision

Subpart A examines the current case law on the permissibility of speech restrictions the government may place on a potential recipient of funding before the recipient can receive the funding. Subpart B outlines a proposed new approach to analyzing such restrictions to solve the "mess" in this area of the law.

A. Current Case Law Is "Hardly Clear" as to What Speech Conditions the Government May Impose

Chief Justice John Roberts, in the majority opinion in *Alliance for Open Society International*, acknowledges that the entire line of case law on when the government can impose restrictions on an organization receiving funds is "hardly clear."[67] One commentator has noted: "If there is any consensus with respect to the doctrine of unconstitutional conditions, it is that the doctrine is a mess."[68]

Generally, Congress can only pass laws that fall under one of the enumerated powers—one of the powers listed under Article I, Section Eight of the U.S. Constitution.[69] If the Constitution does not explicitly grant Congress the authority to pass a certain piece of legislation, Congress cannot enact the legislation constitutionally.[70] Of course, in the context of international HIV/AIDS assistance, without even considering the potential free speech violation, Congress clearly could not require that any organization that helps HIV/AIDS victims to explicitly oppose prostitution—Congress is not granted the authority to pass such a regulation.[71]

Nonetheless, the spending power in Article I of the U.S. Constitution allows Congress to spend money for purposes not specified by the enumerated powers.[72] By establishing conditions for a group's eligibility for grants of federal money, Congress can attempt to attain objectives that may not be enumerated in Article I, Section Eight of the Constitution.[73] In

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67. *Alliance for Open Soc'y Int'l.*, 133 S. Ct. at 2328.

68. Lloyd Hitoshi Mayer, *Nonprofits, Speech, and Unconstitutional Conditions*, 46 CONN. L. REV. 1045, 1047 (2014).

69. U.S. CONST. art. I, § 8.

70. *See* U.S. CONST. art. 1, § 8 (describing the powers that Congress has and excluding the powers that Congress does not have by negative implication); United States v. Lopez, 514 U.S. 549, 552 (1995) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." (quoting THE FEDERALIST NO. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961)) (internal quotation marks omitted).

71. U.S. CONST. art. I, § 8 (presenting a list of Congress's powers which does not include such regulation of private organizations).

72. South Dakota v. Dole, 483 U.S. 203, 207 (1987).

73. *Id.* at 207.

fact, this practice of establishing conditions on grants of federal money has been "repeatedly employed" by Congress "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives."[74] The limitations on Congress's ability to impose conditions, however, are far from clear.

Indeed, the Supreme Court has only held that imposing conditions on government funding could violate the free speech clause relatively recently: the Court never held that conditions on government funding to NGOs could constitute a violation of free speech until the 1940s.[75] In the past, the Court simply recognized that a person had no "right" to government funding, and thus, the government could impose any restriction on such funding.[76] The Court eventually held that the government could not "deny a benefit to a person because of his constitutionally protected speech or associations."[77]

The problem with a rule that Congress cannot deny funding to a person or organization because of the organization's speech or activities is that *every* condition for funding is essentially a restriction on the organization's speech or activities in some way. For example, a requirement that government funding be used to combat HIV/AIDS means that the organization cannot use the funding for another purpose, thereby restricting the organization's activities.

As the Court attempted to grapple with its new rule, the permissible restrictions that Congress could impose on an organization receiving funds became "hardly clear," as Justice Roberts put it.[78] The Court has engaged in a case-by-case analysis to determine whether, in the Court's eyes, the restriction the government places on the recipient's speech in exchange for the funds is reasonable in light of the purpose of the government program.

A brief overview of the Supreme Court's decisions over the past seventy-five years confirms the Chief Justice's statement that what is permissible in the context of imposing speech restrictions as a requirement for eligibility for government funding is far from clear.[79] Much of this confusion stems from the fact that the Supreme Court has given conflicting rationales in different cases.

1. Cases in Which the Court Held That the Restrictions on Speech as a Condition for Receiving Government Funds Violated Free Speech.—In

74. *Id.* (quoting Fullilove v. Klutznick, 448 U.S. 448, 474 (1980) (plurality opinion)) (internal quotation marks omitted).

75. Nicole B. Cásarez, *Public Forums, Selective Subsides, and Shifting Standards of Viewpoint Discrimination*, 64 ALB. L. REV. 501, 505–07 (2000).

76. Perry v. Sindermann, 408 U.S. 593, 597 (1972).

77. *Id.*

78. *See supra* note 67 and accompanying text.

79. *See supra* note 67 and accompanying text.

some contexts, the Court seems to impose a blanket rule that the government can *never* refuse to give funding to an individual or a group because of the person's or group's viewpoint. Below is a summary of some of the major cases in which the Court seems to impose this blanket rule.

For example, in *Rosenberger v. Rector & Visitors of the University of Virginia*,[80] the Supreme Court held that if the government provides funds for one viewpoint, the government must provide funding for *all* opposing viewpoints.[81] The University of Virginia would generally subsidize the cost of publications by extracurricular groups at the school but refused to fund a Christian student group's newspaper because the group "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality."[82] The Court held that the University, as a government entity, *must* provide funding to the Christian group because it "may not discriminate based on the viewpoint of private persons whose speech it [subsidizes]."[83]

Congress cannot prohibit a lawyer from arguing for changes to welfare laws when government funds pay the attorney. In the program at issue in *Legal Services Corp. v. Velazquez*,[84] Congress created the Legal Services Corporation to provide financial support for legal assistance in civil proceedings to people who cannot afford legal assistance.[85] One of the conditions for an attorney to receive funding from the program was that the attorney could not use the funds to "amend or otherwise challenge existing welfare law."[86] Relying on the *Rosenberger*[87] decision discussed above, the Court held that the funding condition violated the right to free speech because the Court viewed the restriction on the attorney's ability to speak out in favor of reforms to the welfare system as unreasonable and unnecessary.[88] The Court viewed the restriction as unreasonable because Congress formed the Legal Service Corporation to "facilitate private speech, not to promote a governmental message"[89]—in direct contrast to *Alliance for Open Society International*, where the Court held that the government could not promote a message against prostitution through a requirement that NGOs held that view.[90]

The Court has held that a state school cannot refuse to renew a professor's contract because of the views that he expressed in *Perry v.*

80. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995).
81. *Id.* at 834.
82. *Id.* at 823.
83. *Id.* at 834.
84. Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001).
85. *Id.* at 536.
86. *Id.* at 537.
87. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995).
88. *Id.* at 542, 549.
89. *Id.* at 542.
90. *See supra* Part II.

Sinderman.[91] A professor at a state junior college in Texas, employed under successive one-year contracts, became involved in public disputes with the college's Board of Regents.[92] The professor began to advocate that the junior college make a transition to becoming a full four-year university—in direct opposition to the Board of Regents.[93] The board voted not to offer the professor a new contract after his contract expired.[94] The Court found that an issue of material fact existed as to whether the professor was dismissed for criticism of the school and remanded for trial while proclaiming, in passing, that dismissing for such a reason was a violation of free speech.[95] As a state institution, the college could not restrict the professor's free speech rights, and thus, the board could not refuse to renew the professor's contract on this basis.[96]

2. Cases in Which the Court Held That the Government Could Impose Restrictions on Speech as a Condition for Receiving Government Funds.— At other times, the Court seems to grant Congress considerable leeway in imposing restrictions on the use of government funds—even if those restrictions impose on a recipient's right to free speech.

Congress can refuse to fund libraries that do not block pornography on library computers according to the Court in *United States v. American Library Association*.[97] Under the Children's Internet Protection Act, a public library cannot receive federal funds to provide Internet access in the library unless the library installs software to block obscene images or child pornography.[98] Holding that the government was allowed "to define the limits of that program," the Court found that the requirement that libraries block internet access to pornography fell within the government's "broad limits" to place restrictions on speech.[99] Nonetheless, the Court never gave a rationale—or a limit—for these "broad limits,"[100] and thus, squaring this cause with the cases mentioned in Part II becomes practically impossible. As the dissent points out—correctly in light of the other cases in this area—the government cannot impose a restriction that "impose[s] controls" on a medium of expression.[101]

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91. 408 U.S. 593, 596–97 (1972).
92. *Id.* at 594–95.
93. *Id.* at 595.
94. *Id.*
95. *Id.* at 597–98.
96. *Id.*
97. 539 U.S. 194, 211–12 (2003).
98. *Id.* at 198–99.
99. *Id.* at 211 (quoting Rust v. Sullivan, 500 U.S. 173, 194 (1991)) (internal quotation marks omitted).
100. *Id.* at 211–12.
101. *Id.* at 227–28 (Stevens, J., dissenting).

In a highly controversial case, *Rust v. Sullivan*,[102] the Supreme Court held that Congress can require publicly funded institutions to refrain from engaging in abortion-related activities using federal funds.[103] Under Title X of the Public Health Service Act, family planning centers that receive federal funds cannot use those funds in programs where "abortion is a method of family planning."[104] Some family planning centers argued that this restriction prevented them from engaging in speech to promote abortions.[105]

Nonetheless, despite the fact that the Title X requirements restricted speech, the Court held "[t]here is *no question* but that the statutory prohibition contained in [the statute] is constitutional."[106] The government "may make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds."[107] Requiring the government to fund activities without considering the beliefs of those receiving the funds "would render numerous Government programs constitutionally suspect."[108]

Congress permissibly imposed viewpoint restrictions on grants for the arts when Congress required that any person receiving a grant from the National Endowment for the Arts only use the grant to create artwork that meets "standards of decency" and shows a "respect for diverse beliefs and values."[109] According to the Court in *National Endowment for the Arts v. Finley*,[110] the "nature of arts funding" requires the government to consider the content of the art.[111] The government may deny certain art for a "wide variety of reasons" and considering the content of the art is constitutionally permissible.[112] "Favoritism" for "decency and respect for [diverse] beliefs and values" does not "abridge" anyone's freedom of speech as the artist is still allowed to create such art—though without government funding.[113]

The dissent, again, points out the arbitrariness of allowing Congress to impose viewpoint-based restrictions in some instances while prohibiting such restrictions in others.[114] Neither the government nor the majority

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102. 500 U.S. 173 (1991).

103. *Id.* at 177–78.

104. 42 U.S.C. § 300a-6 (2012).

105. *Rust*, 500 U.S. at 180, 192.

106. *Id.* at 192 (emphasis added).

107. *Id.* at 192–93 (quoting Mayer v. Roe, 432 U.S. 464, 474 (1977)) (internal quotation marks omitted).

108. *Id.* at 194.

109. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 572–73 (1998) (quoting 20 U.S.C. § 954(d)(1) (1994)) (internal quotation marks omitted).

110. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

111. *Id.* at 585.

112. *Id.*

113. *Id.* at 598 (Scalia, J., concurring).

114. *Id.* at 600–01 (Souter, J., dissenting).

provided any reason why the "decency and respect proviso" differed from the government firing an employee because of the employee's speech against the board or requiring the government to fund speeches of all viewpoints as the Court held was required in other cases discussed above.[115]

3. The Bottom Line: The Case Law Is Inconsistent.—The inconsistency of the case law in this area is evidenced by the statements of the Court in two cases. In one case, the Court states that the government may "make a value judgment"[116] as to which viewpoints it will provide funding, and in another case, the Court holds that the government "may not discriminate based on [] viewpoint"[117] in determining who is eligible for funding. Because the Court engages in a case-by-case analysis of what is "reasonable" and "just," the case law is, as the Chief Justice says, "hardly clear" as to what conditions on funding are permissible.[118] A new approach is required to resolve the inconsistency of the law.

B. An Alternative: A Funding Condition Is Permissible as Long as the Potential Recipients Can State Their Views in Some Other Way

This Note suggests that Congress should be allowed to impose a condition requiring a recipient of government money to engage in certain "speech" *as long as the potential recipient can state its views without participating in the government program.*

To give an example of this approach in practice: suppose the government banned any organization from giving funding to combat HIV/AIDS unless the organization received its funding from the federal government.[119] Then assume that the government then, as in the Leadership Act, required an organization to explicitly oppose prostitution. In such a hypothetical scenario, an organization would have no possible way to operate *and* to state its support for the legalization of prostitution. In such a case, the potential recipient of government funds *cannot* state its views at all *and* engage in HIV/AIDS relief—the organization would have to shut down its HIV/AIDS relief operation. Under the proposed test, *because no practical way exists for the potential recipient to state its views*, the restriction on speech would be unconstitutional.

On the other hand, in the actual scenario dealt with in *Alliance for Open Society International*, NGOs had ample opportunity to engage in any speech the organization chose regarding prostitution because the NGO

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115. *Id.*

116. Rust v. Sullivan, 500 U.S. 173, 192–93 (1991) (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)) (internal quotation marks omitted).

117. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834 (1995).

118. *See supra* note 67 and accompanying text.

119. Such a provision would likely violate numerous other provisions of the U.S. Constitution. This example assumes, for the sake of illustration, that such a provision would be constitutionally enforceable.

could refuse to accept the government funding.[120] These organizations had operated before 2003 without government funding from the Leadership Act, which did not exist until 2003—in fact, Pathfinder International had existed since 1957 and provided international aid for HIV/AIDS since the 1990s.[121] If an NGO did not agree with the *comprehensive* government policy to eradicate prostitution globally—or would not care to agree explicitly—the NGO could continue to operate like Pathfinder International had for over forty-five years. Because the organization had another option—namely, to refuse to accept the funding and still hold their beliefs regarding the legalization of prostitution—no free speech violation would exist under the approach outlined above.

The judiciary should be especially reluctant to strike down acts of Congress because Congress represents the most democratic unit of the federal government—it is directly elected by the people—while the judiciary is far removed from the democratic process—judges are unelected and unthreatened by removal through elections.[122] When the (unelected) judiciary strikes down a law, the judges are essentially prohibiting a policy option and thereby restricting the democratic process.[123] The proposed approach expands Congress's power by solely focusing on the original intent of the right to free speech to maximize *Congress's*—and not the judiciary's—power to decide (instead of the judiciary) on a case-by-case basis the permissibility of speech requirements for eligibility for federal funding.

Such an approach satisfies the original intent behind the free speech protection in the First Amendment. The Supreme Court has long recognized that the interest protected by the First Amendment is to provide for an "unfettered interchange of ideas for the bringing about of political and social changes."[124] In other words, the right to free speech only intends to ensure that a "multitude of tongues"—an exchange of ideas in the marketplace of ideas—can be heard in the United States.[125]

Current case law, in view of the original intent of the right to free speech, errs by using the right to free speech to limit permissible government conditions in funding NGOs. The approach to free speech proposed in this Note ensures that the purpose of the right to free speech is met by refocusing the analysis of any restriction on an organization's

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120. *See supra* subparts II(A)–(B).

121. *About Us*, PATHFINDER INT'L, http://www.pathfinder.org/about-us/our-history, *archived at* http://perma.cc/UY8C-MVRM.

122. Lino A. Graglia, Essay, *"Interpreting" the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019, 1020–21 (1992).

123. *Id.*

124. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 548 (2001) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964)) (internal quotation marks omitted).

125. United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

speech on whether the *idea could be heard* in the United States rather than the "hardly clear" line on whether the restriction on speech impermissibly burdens the organization.

The proposed approach also recognizes that a government often has to "speak" in order to administer a program effectively: the government, in order to address a problem, often must take a specific approach that generates dissent.[126] The government's approach to addressing HIV/AIDS internationally provides a perfect example: the government had to determine the root causes of HIV/AIDS and take a (at least partially) subjective approach to *how* the government should go about *comprehensively* dealing with the issue. Part of the approach, as discussed in Part I, included eradicating prostitution around the world and educating people on HIV/AIDS through the help of previously successful NGOs. The First Amendment should not provide a "heckler's veto" of the "government's power to speak . . . [t]o govern."[127]

In fact, although the Supreme Court has never adopted this approach as the rule for speech requirements as a condition for government funding, the reasoning in past Second Circuit decisions has hinted that no free speech violation can occur when the recipient has "adequate alternative channels of protected expression."[128]

Such an approach is in line with the Supreme Court's decision in *Rust v. Sullivan*, in which the Supreme Court held that a federal prohibition on pregnancy centers performing abortions with federal funds did not violate the right to free speech because the pregnancy centers could still engage in abortion-related activities as long as the pregnancy center did not use federal funds for those activities.[129] Mere ineligibility for federal funds is not a restriction on a right to free speech because an organization has no constitutional right to government money.[130] A party, "[a]s a general matter[,]" can "decline the funds. This remains true when the objection is that a condition may affect the recipient's exercise of its First Amendment rights."[131]

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126. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 574 (2005) (Souter, J., dissenting).

127. *Id.*; *see also* Bd. of Regents of the Univ. of Wisc. Sys. v. Southworth, 529 U.S. 217, 229 (2000) ("It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens.").

128. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 430 F. Supp. 2d 222, 249 (S.D.N.Y. 2006) (quoting Velazquez v. Legal Servs. Corp., 164 F.3d 757, 766 (2d Cir. 1999)) (internal quotation marks omitted).

129. *See supra* notes 102–08 and accompanying text.

130. *See* Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2327–28 (2013) (stating that Congress has "broad discretion to tax and spend" without "affect[ing] the recipient's exercise of its First Amendment rights").

131. *Id.* at 2328.

In keeping with the reasoning of past free speech decisions, as well as the original intent of the right to free speech, the Supreme Court should refocus its analysis of speech requirements. The Court should determine whether the condition for receiving funding *blocks* a particular viewpoint from being heard.

Such an approach would provide clarity by replacing the "hardly clear" line created by the Court in determining whether the restriction on speech is reasonable on a case-by-case basis. Thus, the government should be allowed to impose a condition requiring a recipient of government money to engage in certain "speech" *as long as the potential recipient can state their views in another way.*

Conclusion

The Court's *Agency for International Development v. Alliance for Open Society International* decision struck down a requirement that NGOs combating HIV/AIDS internationally must explicitly oppose prostitution to be eligible for government funding through a new HIV/AIDS program. This decision ignored the original intent behind the First Amendment, which was to ensure that people had the *opportunity* to express their viewpoints and beliefs—not to restrict the policy choices Congress could make.

Congress should be allowed to impose conditions on government funding under its Spending Clause power—regardless of free speech concerns—in order to further the government's interest in restricting spending.

The Court should adopt a new approach to analyzing speech requirements imposed for an organization to be eligible for federal funding. The government should be allowed to enforce any such speech requirements as long as the potential recipient of the funds has other opportunities to engage in that speech. That view protects government's interest in restricting its spending and ensuring that the money is spent in a view in accord with the government purpose for the program and protects the public's free speech interest in hearing a multitude of viewpoints.

—Nicholas Bruno

Theorizing Disability Discrimination in Civil Commitment*

I. Introduction

The Supreme Court has described involuntary commitment as "a massive curtailment of liberty."[1] Commitment infringes a host of fundamental rights—"the right to liberty, to freedom of association, . . . to freedom from unreasonable searches and seizures," to privacy,[2] to keep and bear arms,[3] and in some cases to vote[4]—and confines people who have committed no crime. It entails a profound loss of personal autonomy—even bodily integrity[5]—including the precious right to be let alone.[6] People who are committed are separated from their family, friends, and community—"held under lock and key"—and made to lead a life they did not choose.[7]

But commitment also imposes less tangible burdens, many of which persist long after a person's release. The stigma associated with commitment is significant and may serve not only as a source of embarrassment and shame but also as a serious impediment to obtaining future employment, housing, and education.[8] Hurdles in these areas often arise unexpectedly, years after

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1. Humphrey v. Cady, 405 U.S. 504, 509 (1972).

2. ROBERT M. LEVY & LEONARD S. RUBENSTEIN, THE RIGHTS OF PEOPLE WITH MENTAL DISABILITIES 15 (1996).

3. Typically, commitment permanently strips a person of her Second Amendment rights. *See* 18 U.S.C. § 922(g)(4) (2012) ("It shall be unlawful for any person . . . who has been committed to a mental institution . . . [to] possess . . . any firearm or ammunition . . . which has been shipped or transported in interstate or foreign commerce."). *But see* Tyler v. Hillsdale Cnty. Sheriff's Dep't, 775 F.3d 308, 311, 344 (6th Cir. 2014) (applying strict scrutiny to strike down the state's application of § 922(g)(4) to a presently "non-dangerous" and "mentally healthy" man who was committed to a mental institution for less than a month 28 years prior in the wake of an "emotionally devastating divorce").

4. *See* Sally Balch Hurme & Paul S. Applebaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 MCGEORGE L. REV. 931, 936–46 (2007) (analyzing state voting rights laws and concluding that in some states "the right to vote may be determined . . . in a civil commitment proceeding").

5. LEVY & RUBENSTEIN, *supra* note 2, at 15.

6. *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (describing "the right to be let alone" as "the most comprehensive of rights and the right most valued by civilized men").

7. LEVY & RUBENSTEIN, *supra* note 2, at 15.

8. *See* PRESIDENT'S NEW FREEDOM COMM'N ON MENTAL HEALTH, SMA-03-3832, ACHIEVING THE PROMISE: TRANSFORMING MENTAL HEALTH CARE IN AMERICA 4 (2003) [hereinafter ACHIEVING THE PROMISE], *available at* http://govinfo.library.unt.edu/mentalhealth

a commitment has ended, frustrating efforts to leave the past behind.[9] Prejudice against people with mental illness pervades our social institutions, including our mental-health system.[10] Mental-health professionals[11] are susceptible to the same prejudices about people with mental illness as society at large, and when these prejudices inform decisions about diagnosis and treatment—including involuntary commitment—people with mental illness (and people mistakenly regarded as having mental illness) suffer harmful discrimination and violations of their civil rights.

But what does discrimination in the context of involuntary commitment look like? And how might the law provide a remedy? This Note attempts to answer both questions. Part II situates involuntary commitment in its historical context and describes the standards and practices that characterize it today. Part III explores how and why stereotypes about mental illness can influence commitment decisions. Part IV sets out a two-pronged theory of discriminatory commitment that focuses on two phases of the commitment process: the decision phase, in which it is decided that a person meets the standards for involuntary commitment, and the provision phase, in which the treatment service—the commitment—is provided or carried out. As to the first phase (the decision phase), I argue that commitment is discriminatory when the commitment decision is based on prejudice or stereotypes about people with mental illness, and I address the thorny question of how to identify such decisions. I refer to discrimination that occurs in this phase of the commitment process as "discriminatory-decision." As to the second phase (the provision phase), I argue that commitment is discriminatory when its provision—that is, its administration—fails to reasonably accommodate

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commission/reports/FinalReport/downloads/downloads.html, *archived at* http://perma.cc/ZM8X-MGBL (identifying discrimination arising from the stigma of mental illness as a significant barrier to securing health care, employment, and housing).

9. For example, a recent op-ed in the *New York Times* documented how a Canadian tourist traveling to an American cruise ship was turned away at the U.S. border because of a past hospitalization for depression. Andrew Solomon, Op-Ed., *Shameful Profiling of the Mentally Ill*, N.Y. TIMES, Dec. 7, 2013, http://www.nytimes.com/2013/12/08/opinion/sunday/shameful-profiling-of-the-mentally-ill.html, *archived at* http://perma.cc/56QR-EM5D. Such incidents are disturbingly common. *Id.*

10. *See, e.g.*, ELYN R. SAKS, THE CENTER CANNOT HOLD: MY JOURNEY THROUGH MADNESS 232 (2007) ("Stigma against mental illness is a scourge with many faces, and the medical community wears a number of those faces."); *id.* at 331 (naming among the "myths held by many mental-health professionals themselves—that people with a significant thought disorder cannot live independently, cannot work at challenging jobs, cannot have true friendships, cannot be in meaningful, sexually satisfying love relationships, cannot lead lives of intellectual, spiritual, or emotional richness"). Elyn Saks carries a diagnosis of schizophrenia. *Id.* at 167. She is a former Marshall Scholar and is currently the Orrin B. Evans Professor of Law, Psychology, and Psychiatry and the Behavioral Sciences at the University of Southern California Gould School of Law and an adjunct professor at the University of California, San Diego School of Medicine. *Elyn Saks*, USC GOULD SCH. L., http://weblaw.usc.edu/contact/contactinfo.cfm?detailID=300, *archived at* http://perma.cc/4QY9-H2LN.

11. I use this term loosely to refer to psychiatrists and other physicians, psychologists, clinical social workers, counselors, and others who may provide mental-health services.

the committed person's disability. I refer to this kind of discrimination as "discriminatory-provision." I examine each kind of discrimination with the help of a case study that illustrates how it manifests and, I hope, why its victims deserve a remedy. Part V concludes.

The theory of discriminatory commitment elaborated here has several advantages. First, it posits a viable remedy under existing federal law because it tracks the language of the Americans with Disabilities Act (ADA).[12] It requires no legislative action—only an interpretation of the ADA already embraced by some courts.[13] This is not to say, of course, that this theory of discriminatory commitment is incompatible with legislative reform. It is not. At turns, I point out specific reforms that would likely aid the theory's implementation. For example, I argue that the baseline standard for commitment common to all of the states—the so-called "dangerousness standard"—should include the requirement of proof of a recent, overt act showing dangerousness.[14] This requirement would give teeth to existing laws, which, as discussed in Part IV, are routinely flouted by mental-health professionals and by courts. I also argue that states should furnish independent psychiatrists to serve as expert witnesses for proposed patients who are indigent and cannot afford an expert.[15] When there is room (as often there is) for psychiatrists to reach different conclusions about whether a proposed patient meets the legal standard for commitment, courts would benefit from a broader range of psychiatric opinions. In particular, courts would benefit from the opinions of psychiatrists who do not work for the state and who did not help initiate the commitment process in the first place.

Lurking in the background of this Note is the question of whether *all* commitment is discriminatory—that is, whether commitment is itself discrimination against people with mental illness. A theory of discriminatory commitment that answered this question in the affirmative may indeed answer it correctly as an intellectual matter, but such a theory would be neither original nor presently very useful, as society considered and rejected abolitionist arguments decades ago and has not seen fit to revisit them.[16] Indeed, society is unwilling in many instances even to enforce the reforms it

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12. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)); *see infra* section IV(A)(2).

13. *E.g.*, Bolmer v. Oliveira, 594 F.3d 134, 146 (2d Cir. 2010).

14. As a matter of due process, an overt act would require proof satisfying at least the "clear and convincing" standard. *See infra* note 78 and accompanying text.

15. For an excellent article arguing that constitutional due process entitles indigent proposed patients to evaluation by an impartial psychiatrist, see Scott F. Uhler, *The Constitutional Right of the Indigent Facing Involuntary Civil Commitment to an Independent Psychiatric Examination*, 20 AKRON L. REV. 71 (1986). In part because Uhler's doctrinal analysis is so thorough, I focus on the wisdom of independent psychiatric evaluations from a policy perspective.

16. *See, e.g.*, THOMAS SZASZ, PSYCHIATRIC SLAVERY 9 (1977) (arguing for the abolition of involuntary commitment and analogizing it to chattel slavery).

enacted at that time.[17] The theory of discriminatory commitment developed here points to grave problems with commitment as it is now practiced, but this Note is ultimately an argument for reform not abolition.

Implicit in this argument for reform is the idea that commitment is a legal institution worth retaining. Commitment serves a valuable function for people whose alternative is incarceration. When a person is truly dangerous—when she attacks others, for example, because of hallucinations or delusions caused by mental illness—it is only a matter of time before she enters the criminal justice system. As a philosophical matter, this is a wrong outcome because the legitimacy of the criminal justice system depends on the moral culpability of the offender.[18] We punish offenders not only to deter future crimes but also on the belief that they deserve punishment.[19] But punishing people who commit crimes because of serious mental illness may serve virtually no deterrent or desert function at all.[20] Further, as a practical matter, the shunting of people with mental illness into the criminal justice system is a wrong outcome because the principal punishment that the criminal justice system metes out—incarceration[21]—in many cases only aggravates mental illness.[22] This is both cruel and counterproductive. For

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17. *See infra* notes 74–76 and accompanying text.

18. *See, e.g.*, United States v. Cordoba-Hincapie, 825 F. Supp. 485, 489–90 (E.D.N.Y. 1993) (noting that criminal law has historically "looked to the wrongdoer's mind to determine both the propriety and the grading of punishment"); Frances Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 (1932). As Frances Sayre emphasized:

> For hundreds of years the books have repeated with unbroken cadence that *Actus non facit reum nisi mens sit rea*. There can be no crime, large or small, without an evil mind . . . . It is therefore a principle of our legal system . . . that the essence of an offence is the wrongful intent, without which it cannot exist.

Sayre, *supra* (citation omitted) (quoting I JOEL PRENTISS BISHOP, BISHOP ON CRIMINAL LAW § 287 (John M. Zane & Carl Zollmann eds., 9th ed. 1923)) (internal quotation marks omitted).

19. *See, e.g.*, JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 83 (John Bowring ed., 1843), *reprinted in* JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 33, 34 (5th ed. 2009) ("The general object which all laws have . . . is to augment the total happiness of the community; and therefore . . . to exclude mischief."); IMMANUEL KANT, THE PHILOSOPHY OF LAW 194–98 (W. Hastie trans., Edinburgh, T. & T. Clark 1887), *reprinted in* DRESSLER, *supra*, at 40, 40 ("The penal law is a categorical imperative . . . ."); Kent Greenwalt, *Punishment*, *in* 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1282, 1284 (Joshua Dressler ed., 2d ed. 2002), *reprinted in* DRESSLER, *supra*, at 31, 32 ("The dominant approaches to justification [for punishment] are retributive and utilitarian. Briefly stated, a retributivist claims that punishment is justified because people deserve it; a utilitarian believes that justification lies in the useful purposes that punishment serves . . . .").

20. *See* Herbert Morris, *Persons and Punishment*, 52 MONIST 475, 478–79 (1968), *reprinted in* DRESSLER, *supra* note 19, at 43, 44 ("Sometimes [the rules] provide a defense if . . . a person lacked the capacity to conform his conduct to the rules. Thus, someone who in an epileptic seizure strikes another is excused. Punishment in these cases would be punishment of the innocent . . . .").

21. *Incarceration*, SENT'G PROJECT, http://www.sentencingproject.org/template/page.cfm?id=107, *archived at* http://perma.cc/2LRL-W8D2.

22. *Position Statement on Persons with Mental Illness Behind Bars*, AM. ASS'N OF COMMUNITY PSYCHIATRISTS (Mar. 15, 2001), http://www.communitypsychiatry.org/pages.aspx?PageName=Position_Statement_of_AACP_on_Persons_With_Mental_Illness_Behind_Bars, *ar-*

these reasons, a basic premise of this Note is that commitment's existence as a legal institution is justified on both normative and utilitarian grounds. The question, then, is the proper character of that institution and the reforms needed to ensure its fairness. This is the question taken up here.

II. The Evolution of Commitment in Theory and Practice

A. Brief History of Commitment in the United States

The American "asylum" emerged in the United States as an institution distinct from the general hospital "in the second quarter of the nineteenth century."[23] The term "asylum," which reflected the intention that it serve as a refuge for patients "from the stresses of the outside world,"[24] speaks both to its original humanitarian purpose and deep paternalism. From the beginning, it was presumed that most patients would be admitted involuntarily on the rationale that mental illness vitiated, if not destroyed, the capacity to seek and consent to treatment.[25] Early asylums housed not only people with mental illness but also myriad other "undesirables," including immigrants and the poor.[26] Initially, the only requirement for commitment was that a person "need" or be "likely to benefit from treatment."[27] This permissive standard, coupled with an absence of procedural safeguards, ensured that physicians initially exercised almost exclusive control over commitment decisions.[28] After the Civil War, however, publicity about abuses—perhaps the most sensational of which involved collusion between a physician and his patient's family to commit the patient so they could embezzle her fortune[29]—and squalid conditions in asylums prompted

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chived at http://perma.cc/MD5B-G3A8; Terry Smerling, Op-Ed., *L.A. County Needs to Construct Mental Health Programs, Not Just Jails*, L.A. TIMES, May 4, 2014, http://touch.latimes.com/#section/-1/article/p2p-80087705/, *archived at* http://perma.cc/3CQR-CFHR.

23. PAUL S. APPELBAUM, ALMOST A REVOLUTION: MENTAL HEALTH LAW AND THE LIMITS OF CHANGE 18–20 (1994).

24. *Id.* at 19.

25. *Id.* at 20.

26. LEVY & RUBENSTEIN, *supra* note 2, at 18 (quoting DAVID J. ROTHMAN, DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 286 (1971)).

27. APPELBAUM, *supra* note 23, at 20.

28. *Cf. id.* (stating that admission to asylums was "essentially left in the hands of family members and physicians").

29. *See, e.g.*, APPELBAUM, *supra* note 23, at 20 ("Following the Civil War, allegations began to be heard that persons had been railroaded into mental institutions by greedy relatives and conniving physicians."). Such abuses continue today. In *Musko v. McClandless*, a local official responsible for enforcing housing ordinances conspired with a psychiatrist to commit the official's neighbor (a repeat violator of housing ordinances), whose innovations in domestic design the judge described in colorful detail:

> He has placed signs and other "communicative materials" outside his home, and . . . expressed unorthodox views about decorating the exterior of his home, such as placing blinds not on the inside of his windows, which seems to be the normal practice, but on the outside, where they can better shade the entire window, and perhaps protect it from

reform.[30] In some places, this reform included the adoption of jury trials to improve the integrity of commitment proceedings and to imbue them with a measure of the layperson's common sense.[31] Still, reformers succeeded only in adding procedural safeguards, and even those proved impermanent.[32]

Over the next century, the rigor of commitment procedures oscillated as states sought to balance the need for expedience in the commitment process with concerns about the protection of civil liberties.[33] For the most part, though, commitment received little critical attention, in part because of the convenience of simply confining people.[34] The substantive standards for commitment did not change during this period and required only a "need for treatment," so physicians continued to dominate the commitment process.[35] The need for treatment standard remained in place until the mid-twentieth century when a wave of public interest in the civil rights of people with disabilities produced a sea change in the laws of commitment.[36] Until the reforms came, however, institutions continued to swell in size and in number, undergoing a "massive expansion" at the turn of the twentieth century that coincided with increasing urbanization and immigration.[37] The expansion of institutions during this period was driven in part by disciples of the eugenics movement "who saw people with disabilities as a threat to the social order."[38] In 1902, Dr. Walter Fernald, one-time eugenicist and a leader of the Association of Medical Officers of American Institutions for Idiotic and

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> the elements. Indeed, it would appear that he is pressing domestic design expression to its utter outer limits. "Fallingwater" he leaves in his wake. He alleges that his unorthodox expression motivated defendants to retaliate against him [by conspiring successfully to commit him].

No. 94-3938, 1995 WL 262520, at *5 (E.D. Pa. May 1, 1995). The court found for the plaintiff. *Id.*

30. *See* LEVY & RUBENSTEIN, *supra* note 2, at 18 (noting the "inadequate conditions" in asylums).

31. APPELBAUM, *supra* note 23, at 20–21.

32. *See id.* (explaining that many of the "criminal-style" procedural changes advocated by postwar reformers were undone in later decades due to concerns that commitment had become too difficult to secure).

33. *See id.* at 20–21; JUDITH LYNN FAILER, WHO QUALIFIES FOR RIGHTS?: HOMELESSNESS, MENTAL ILLNESS, AND CIVIL COMMITMENT 78–83 (2002) (correlating the fluctuation between tighter and looser procedural protections with the prevailing opinion about individual rights and the role of state police powers). Regarding this "cyclic quality," Paul Appelbaum observed:

> When public attention was directed primarily toward the obstacles placed in the path of rapid hospitalization and treatment, a push was made to loosen or do away with criminal-style procedures. In contrast, when the abuse of civil liberties held the public's eye, such moves were resisted and greater oversight supplied.

APPELBAUM, *supra* note 23, at 20–21.

34. ROTHMAN, *supra* note 26, at 283.

35. LEVY & RUBENSTEIN, *supra* note 2, at 18.

36. *See* FAILER, *supra* note 33, at 80–83 (discussing the impact of the newfound societal focus on rights of individuals with disabilities in the mid-twentieth century).

37. FRED PELKA, WHAT WE HAVE DONE: AN ORAL HISTORY OF THE DISABILITY RIGHTS MOVEMENT 48–49 (2012).

38. *Id.* at 48.

Feeble-Minded Persons, asked pointedly: "What is to be done with the feeble-minded progeny of the foreign hordes that have settled and are settling among us?"[39] As noted scholar Fred Pelka explains, "[b]y the mid-twentieth century th[e] institutional system had grown into an insular and extensive disability gulag" that employed tens of thousands of staff represented by powerful unions that "actively impeded" the development of less restrictive, community-based treatment alternatives.[40]

Reform of civil commitment laws did not happen quickly or in a vacuum. Rather, it happened as part of a much larger project of reform by the disability-rights movement, which sought (broadly) to redefine the nature of disability and to ensure that people with disabilities could participate fully in society's institutions on their own terms and without the fetters of stigma and discrimination.[41] In addition to spurring reform of state laws on involuntary commitment,[42] the disability-rights movement also made possible the passage of federal reforms, including the Rehabilitation Act of

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39. *Id.* at 49 (quoting 56TH ANNUAL REPORT OF THE TRUSTEES OF THE MASSACHUSETTS SCHOOL FOR THE FEEBLE-MINDED AT WALTHAM, FOR THE YEAR ENDING SEPTEMBER 30, 1903, at 14 (1904)). Fernald later changed his tune. His views on institutionalization flipped after he conducted a study in which formerly institutionalized persons with developmental disabilities fared much better in community settings than expected. *See* Walter E. Fernald, *After-Care Study of the Patients Discharged from Waverly for a Period of Twenty-Five Years*, 5 UNGRADED 25, 26, 31 (1919) (presenting evidence that contrary to his assumption "that nearly all of these people [with developmental disabilities] should remain in the institution indefinitely," many could in fact lead productive lives in the community). He later served as an early advocate in the disability-rights movement. *See Leadership in the History of the Developmental Disabilities Movement: Walter Fernald*, DISABILITY HIST. PROJECT, http://www.disabilityhistorywiki.org/leadership/presentation page.asp?presentation=4, *archived at* http://perma.cc/T5EG-LAT5 (describing the impact of Fernald's after-care study on his views on institutionalization).

40. PELKA, *supra* note 37, at 49.

41. Lauren E. Jones, *The Framing of Fat: Narratives of Health and Disability in Fat Discrimination Litigation*, 87 N.Y.U. L. REV. 1996, 2013 (2012) (describing the modern disability-rights movement as seeking "access, deinstitutionalization, an end to discrimination, and a mainstream understanding of disability that no longer views disabled people as inferior to nondisabled people"). In an article on the deinstitutionalization movement, Professor Samuel Bagenstos offered the following account:

> [T]he disability rights movement started with the observation that people with disabilities share a common experience of systematic exclusion, but it took the point a step further. It added the insight that the very notion of "disability" depends crucially on the social practices that create that shared experience. To most disability rights advocates, "disability" is not an inherent trait of the "disabled" person. Rather, it is a condition that results from the interaction between some physical or mental characteristic labeled an "impairment" and the contingent decisions that have made physical and social structures inaccessible to people with that condition. The proper remedy for disability-based disadvantage, in this view, is civil rights legislation to eliminate the attitudes and practices that exclude people with actual, past, or perceived impairments from opportunities to participate in public and private life.

Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 426 (2000).

42. *See* FAILER, *supra* note 33, at 80–83 (explaining how disability advocates' shift to "rights-talk" led courts and legislatures to "rethink" involuntary hospitalization and "require more stringent standards for civil commitment").

1973,[43] the Education for All Handicapped Children Act of 1975,[44] and later the Americans with Disabilities Act of 1990,[45] among others.[46]

Most commentators trace the beginnings of the contemporary disability-rights movement to the 1970s,[47] when a remarkably diverse coalition coalesced behind the banner of disability rights. According to Samuel Bagenstos, a leading authority on disability antidiscrimination law, "[t]he frame of 'independent living' offered a means of aiding the effort to forge a collective identity of people with disabilities" because it "promised to resonate with a broad group of people with a wide range of conditions":

> [W]heelchair users . . . were not the only ones who sought independence from medical and other professionals who attempted to run their lives. Blind activists . . . also sought to escape dependence on rehabilitation professionals and charities that controlled and limited their opportunities. People with mental retardation, confined to . . . institutions throughout the country, organized . . . to seek freedom from institutionalization and the constant control of institution staff. People with psychiatric disabilities, too, sought deinstitutionalization, and many sought the establishment of consumer-controlled alternatives to the physician-dominated mental health system. . . . Deaf [people] . . . sought to escape the control of professionals who thought they knew what was best (in this case, professionals who forced individuals with hearing impairments to struggle to speak orally and read lips, rather than permitting them to speak sign language). Although there were many differences among these groups, all sought to make their own decisions concerning their lives, with all the risks that would entail. All sought freedom from professionals and welfare bureaucracies that paternalistically made decisions for them. All sought self-reliance rather than dependence on the state or charity.[48]

Given the shared experience of disabled people with the paternalism of the medical establishment, it is not surprising that so many rallied in support of deinstitutionalization. Perhaps a bit more surprising is that deinstitutionalization also resonated with conservatives who, faced with the "tight fiscal environment" wrought by stagflation in the 1970s, recognized an opportunity to rein in spending by closing large, expensive state

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43. Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.).

44. Pub. L. No. 94-142, 89 Stat. 773 (codified as amended in scattered sections of 20 U.S.C.).

45. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)).

46. *See* PELKA, *supra* note 37, at 28 (listing additional disability-rights legislation).

47. JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT 130 (1998).

48. Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 1010–12 (2003) (citations omitted).

institutions.[49] Advocates of deinstitutionalization argued effectively that "people with psychiatric and developmental disabilities could be served just as well, and far more cheaply, in the community" at outpatient treatment centers.[50] At the same time, the enactment of the Supplemental Security Income program in 1972, which "used federal funds to provide cash benefits to people with mental disabilities living in the community, further enabled states to shift costs off of their budgets by deinstitutionalizing."[51] Many commentators believe that "it was ultimately this coalition between civil liberties lawyers and fiscal conservatives that ensured that states would close and downsize their institutions."[52]

The deinstitutionalization project also benefited from the social consciousness of the times. The culture wars of the 1960s and 1970s saw a firestorm of criticism directed at the mental-health professions—in particular, psychiatry.[53] Ironically, psychiatrists found themselves on the proverbial couch, subject to intense scrutiny by other professionals—perhaps most disagreeably by lawyers[54]—and even by fellow psychiatrists. Among psychiatry's most strident critics was the academic Thomas Szasz, himself a psychiatrist, who declared mental illness a social construct—a "myth"[55]—and decried commitment as "psychiatric slavery," which like chattel slavery, he said, demanded abolition not reform.[56] Szasz's radical claims had

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49. Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1, 20–21 (2012).

50. *Id.* at 20.

51. *Id.* at 21.

52. *Id.*

53. *See* Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 39 (1999) (observing that the media and civil rights lawyers during that period challenged institutionalization and the legitimacy of psychiatry).

54. Writing in the midst of these culture wars, the psychiatrist Michael Peszke summarized the typical attorney's view of psychiatrists:

> [I]n the commitment process, [the attorney] sees the physician—and specifically the psychiatrist—as usurping to himself those inherent rights which the constitution guarantees exclusively to the legal process. He sees that physician as being unwilling to become more open, as claiming all kinds of privileged status and as defending his monopoly at the expense of society.

MICHAEL ALFRED PESZKE, INVOLUNTARY TREATMENT OF THE MENTALLY ILL 135 (1975). Peszke had even harsher words for the legal academy, accusing it of exhibiting at times "a gross ignorance or even a conscious malevolence and dishonesty alien to worthy scholarship." *Id.* (But maybe he was projecting.)

55. THOMAS S. SZASZ, THE MYTH OF MENTAL ILLNESS (rev. ed. 1974).

56. *See* SZASZ, *supra* note 16, at 9 (claiming that involuntary commitment "is an unjustifiable moral and legal wrong" that should be abandoned). Szasz's claim that mental illness is a mere social construct can be understood as a radical echo of the disability-rights movement's broader claim that disability is socially contingent—that is, "result[ing] [from] an interaction between biological restrictions and the broader physical and social environment." Bagenstos, *supra* note 41, at 431.

rhetorical appeal but lacked a sound scientific basis.[57] However, empirical studies conducted at the time did raise genuine concerns about the scientific foundations of psychiatry and concluded that in many cases psychiatrists "were not relying on any body of scientific expertise to reach their conclusions" but rather were "expressing their personal biases as if they represented professional opinion."[58] Advocates of deinstitutionalization criticized commitment as psychiatrists' "stock response" to "any personality deviation" or other characteristic "mentioned in any standard textbook of psychiatry."[59] In one study, healthy individuals whom researchers familiarized with psychiatric diagnostic criteria feigned mental illness and were admitted at twelve different hospitals "without question."[60] Thus, the paternalism of psychiatry, which apologists defended (obliviously) as necessary to rescue "a group of helpless people,"[61] received widespread condemnation.

As a result of the public outcry over the unjustified warehousing of people with mental illness, the financial cost of institutionalization in the face of cheaper alternatives, and pharmacological advances that made outpatient care more attractive than ever, states undertook fundamental changes in the structure of their mental health-care systems.[62] The Supreme Court, accepting arguments grounded in constitutional due process, tightened the standards for commitment and demanded that psychiatrists treat patients in the least restrictive available setting.[63] Perhaps the most significant reform was the replacement of the need for treatment standard with the dangerousness standard—subject to minor variation among the states—requiring that a person who is committed pose a danger to himself or others.[64] The mental-health system moved on a national scale from the institutional-based to the community-based treatment model, resulting over time in a reduction in the number of institutionalized people from the hundreds of

57. *See, e.g.*, Bruce C. Poulsen, *Revisiting the Myth of Mental Illness: Some Thoughts on Thomas Szasz*, REALITY PLAY, PSYCHOL. TODAY (Sept. 17, 2012), https://www.psychologytoday.com/blog/reality-play/201209/revisiting-the-myth-mental-illness-some-thoughts-thomas-szasz, *archived at* https://perma.cc/6JC2-K8MH ("[Szasz's] central view that mental illness is a myth has been dismissed, if not outright rejected, by the American Medical Association, America Psychiatric Association, and National Institute of Mental Health.").

58. APPELBAUM, *supra* note 23, at 9.

59. PESZKE, *supra* note 54, at 117.

60. APPELBAUM, *supra* note 23, at 9.

61. PESZKE, *supra* note 54, at 134.

62. LEVY & RUBENSTEIN, *supra* note 2, at 19.

63. *See id.* at 32–33 (summarizing the Court's reliance on notions of due process when it declared that a state cannot constitutionally confine a nondangerous person who is capable of surviving on his own).

64. *See id.* at 26–30 (observing that most states have adopted stringent standards for involuntary commitment that require a subject to present a substantial likelihood of serious physical harm to himself or others).

thousands to almost the tens of thousands.[65] The reforms also transferred, at least in theory, a significant amount of decision-making authority from the medical profession to the legal profession. (Whether a person would benefit from treatment is a medical question, but whether she is dangerous is manifestly not.) Thus, whereas physicians until then had exercised almost complete discretion in commitment decisions, lawyers and judges came to play an increasingly important gatekeeping role.[66]

Unlike other civil rights movements of the era, the deinstitutionalization movement enjoyed broad bipartisan support[67] because it spoke not only to the liberal conscience but also to the conservative ideal of less intrusive government. Despite this fact, deinstitutionalization—or at least the manner in which many states executed it—has been widely criticized in the intervening years. The most powerful *ex post* criticism of deinstitutionalization is that it caused an epidemic of homelessness among people with mental illness[68]—thus the evocative phrase "rotting with your rights on."[69] Indeed, there is strong evidence that homelessness increased in the wake of deinstitutionalization.[70] However, there is also evidence that concurrent cuts to social welfare programs are best viewed as the proximate cause.[71] The National Coalition for the Homeless (NCH) maintains that "[d]espite the disproportionate number of severely mentally ill people among the homeless population, increases in homelessness are not attributable to the release of severely mentally ill people from institutions."[72] Rather, the NCH says, a

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65. *Id.* at 19. *See generally* ROBERT D. MILLER, INVOLUNTARY CIVIL COMMITMENT OF THE MENTALLY ILL IN THE POST-REFORM ERA 188–90 (1987) (showing the reduction in involuntary admissions across various states due to statutory changes).

66. *See* LEVY & RUBENSTEIN, *supra* note 2, at 20, 26–28 (describing the increased role of the courts in placing restrictions, such as the dangerousness standard, on commitments).

67. Bagenstos, *supra* note 49, at 21.

68. *See, e.g.*, Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 609 (1999) (Kennedy, J., concurring) (quoting E. FULLER TORREY, OUT OF THE SHADOWS: CONFRONTING AMERICA'S MENTAL ILLNESS CRISIS 11 (1997)) (acknowledging that deinstitutionalization led to homelessness); APPELBAUM, *supra* note 23, at 51 ("Of the formerly institutionalized patients . . . many ended up on the streets.").

69. Thomas G. Gutheil, Editorial, *In Search of True Freedom: Drug Refusal, Involuntary Medication, and "Rotting With Your Rights On,"* 137 AM. J. PSYCHIATRY 327, 327 (1980).

70. *See* Bagenstos, *supra* note 49, at 10 ("[H]omelessness rose as the population of state mental hospitals fell . . . ."); Martha R. Burt, *Causes of the Growth of Homelessness During the 1980s*, *in* UNDERSTANDING HOMELESSNESS: NEW POLICY AND RESEARCH PERSPECTIVES 169, 181 (Dennis P. Culhane & Steven P. Hornburg eds., 1997) (stating that the number of homeless people in the United States tripled in the 182 largest American cities over the course of the 1980s).

71. *See* Bagenstos, *supra* note 49, at 11 (suggesting that a "failure to invest in community-based services and supports" rather than deinstitutionalization is a leading cause of homelessness); *cf.* David Mechanic & David A. Rochefort, *Deinstitutionalization: An Appraisal of Reform*, 16 ANN. REV. SOC. 301, 317–18 (1990) ("There is little evidence to support the contention that deinstitutionalization is the primary cause of homelessness; it is one of many interacting causes.").

72. NAT'L COAL. FOR THE HOMELESS, WHY ARE PEOPLE HOMELESS? (2007), *available at* http://www.nationalhomeless.org/publications/facts/Why.pdf, *archived at* http://perma.cc/U4ER-QBF7.

lack of access to supportive housing and community-based treatment are to blame.[73] Moreover, deinstitutionalization has been more successful in some places than in others,[74] suggesting that the concept itself is not inherently flawed but that its success depends on the particulars of its implementation. Professor Bagenstos has argued persuasively that the shortcomings of deinstitutionalization resulted from the failure of the politically diverse parties advocating for it to come to terms on its critical back end: community-based care.[75] The bipartisan alliance held together, he says, "just long enough to move people with disabilities out of expensive institutional placements," but it broke down "when the time came to invest in community services."[76]

B. The Standards and Practices of Commitment in the States Today

Today, substantive standards for commitment vary by state (which is nothing new),[77] but the constitutional bottom line is that a person cannot be committed unless judged by at least clear and convincing evidence[78] to pose a danger to self or others because of mental illness.[79] Some states impose the additional requirement that the danger be imminent or substantial; fewer than half require proof of an overt act showing dangerousness.[80] A handful of states, including Texas, have effectively broadened the scope of the dangerousness-to-self criterion by defining it to include the inability to provide for one's basic needs by reason of grave disability.[81] This

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73. *Id.* (citing SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., SMA-04-3870, BLUEPRINT FOR CHANGE: ENDING CHRONIC HOMELESSNESS FOR PERSONS WITH SERIOUS MENTAL ILLNESSES AND CO-OCCURRING SUBSTANCE USE DISORDERS (2003)).

74. *See, e.g.*, MICHAEL L. PERLIN, THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL 203 (2000) (noting that contrary to negative rhetoric surrounding deinstitutionalization, "[t]he pages of journals such as *American Psychologist* or *Psychiatric Services* are regularly filled with reports of successful deinstitutionalization programs").

75. Bagenstos, *supra* note 49, at 5, 9–12.

76. *Id.* at 5.

77. Addington v. Texas, 441 U.S. 418, 431 (1979).

78. *Id.* at 433.

79. CHRISTOPHER SLOBOGIN, MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY 6–7 (2006).

80. LEVY & RUBENSTEIN, *supra* note 2, at 29–30, 32.

81. For example, the grave disability language in Texas's commitment statute requires that by reason of mental illness the proposed patient be:

> (i) suffering severe and abnormal mental, emotional, or physical distress;
> (ii) experiencing substantial mental or physical deterioration of the proposed patient's ability to function independently, which is exhibited by the proposed patient's inability, except for reasons of indigence, to provide for the proposed patient's basic needs, including food, clothing, health, or safety; and
> (iii) unable to make a rational and informed decision as to whether or not to submit to treatment.

TEX. HEALTH & SAFETY CODE ANN. § 574.034(a)(2)(C) (West 2010 & Supp. 2014).

interpretation of the dangerousness-to-self criterion has created, in effect, a new standard commonly referred to as the "grave disability" standard.[82]

Data show that states' adoption of the dangerousness standard had "little impact on the real world" and that commitment rates in most states did not fall significantly when dangerousness replaced need for treatment as the legal standard.[83] Numerous studies have documented this phenomenon. Professor of psychiatry Paul Appelbaum conducted a meta-analysis of such studies and concluded that decision makers have in practice replaced the dangerousness standard with a "commonsense" approach—essentially, the old need for treatment standard.[84] Indeed, there is a near consensus among commentators that the legal standards for commitment are typically "not respected or followed," in part because "lawyers do not advocate that existing legal standards be applied to their clients, and judges frequently do not enforce them,"[85] but also because mental-health professionals routinely fudge their clinical findings in order to commit people who in their judgment need treatment but who nonetheless decline it.[86] Moreover, courts defer to the judgments of psychiatrists at commitment hearings almost as a matter of

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82. *See* LEVY & RUBENSTEIN, *supra* note 2, at 30 (discussing the contours of behavior that can lead to an individual's categorization as "gravely disabled" in some states). In addition, people who are admitted involuntarily to psychiatric hospitals are typically entitled to a preliminary hearing to determine whether there is probable cause to believe that the legal standard for commitment is met. *See* APPELBAUM, *supra* note 23, at 27–28 (discussing a case marking a "[r]eformation of [c]ommitment [l]aw" in which the court "ruled that a preliminary hearing must be held within 48 hours of [involuntary] detention to determine whether probable cause existed to believe that the person was committable"). In Texas, these hearings use a relaxed version of the rules of evidence in which hearsay is admissible such that a person can be detained on the basis of hearsay alone—offered, for example, by a family member, social worker, psychiatrist, or police officer—until the commitment hearing up to two weeks later. *See* TEX. HEALTH & SAFETY CODE ANN. § 574.005 (West 2010) (designating a two-week time period during which the commitment hearing following the initial application for commitment must be held); *id.* § 574.025(e) (providing that the judge presiding over such a probable cause hearing "may consider evidence, including letters, affidavits, and other material, that may not be admissible or sufficient in a subsequent commitment hearing").

83. LEVY & RUBENSTEIN, *supra* note 2, at 34; *see also, e.g.*, PESZKE, *supra* note 54, at 115 (finding "no evidence" that the number of people committed in Connecticut decreased after the state changed its commitment laws to require a finding of dangerousness). Note that it was the policy mandating that treatment occur in the least restrictive setting—not the adoption of the dangerousness standard—that was the impetus for deinstitutionalization. *See supra* notes 62–66 and accompanying text.

84. *See* APPELBAUM, *supra* note 23, at 33–48 (assessing studies of the effects of commitment law reforms and finding that there was an "underlying consensus" among major participants in the civil commitment system that mental illness and an evident need for treatment, rather than imminent physical harm, were sufficient for involuntary commitment).

85. LEVY & RUBENSTEIN, *supra* note 2, at 34.

86. *See* PERLIN, *supra* note 74, at 85–86 (noting this phenomenon and quoting a doctor's reaction to the changed civil commitment standards: "Doctors will continue to certify those *whom they really believe* should be certified. They will merely learn a new language" (quoting William O. McCormick, *Involuntary Commitment in Ontario: Some Barriers to the Provision of Proper Care*, 124 CANADIAN MED. ASS'N J. 715, 717 (1981)).

course,[87] despite overwhelming evidence that psychiatrists cannot reliably predict dangerousness.[88] The result, of course, is that the process afforded proposed patients at commitment hearings "is often grossly inadequate."[89]

Not only does this circumstance demean the law, it also increases the chance for prejudice to influence commitment decisions because so-called common sense is often infused with stereotypes about—and prejudice toward—people with mental illness.[90] Arguably, the practice of ignoring the laws on commitment itself evinces prejudice toward people with mental illness by implicitly designating them as unworthy of the law's protection. Because stereotypes tend to be baked in—often unconsciously—to judgments based on "ordinary common sense,"[91] it is likely that a great many commitments would not satisfy the dangerousness standard if faithfully applied.[92] As a prominent psychiatrist argued in the 1970s in protest of the states' adoption of the dangerousness standard, if dangerousness is understood "in its legal sense and in the sense that it is commonly used, then very few patients will be or can be committed."[93] Because the dangerousness standard frequently yields to common sense in commitment decisions, and because common sense is susceptible to bias, many commitment decisions likely constitute discrimination.

III. How and Why Stereotypes About Mental Illness Influence Commitment Decisions

To lay the foundation for a theory of discriminatory commitment based on stereotyping, the concept of a "stereotype" must be fleshed out. It may also be helpful to consider some specific, common stereotypes about people

87. BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 48 (2005) [hereinafter WINICK, CIVIL COMMITMENT]; Winick, *supra* note 53, at 41 ("In practice, commitment hearings tend to be brief and non-adversarial episodes in which judges appear to 'rubber stamp' the recommendations of clinical expert witnesses.").

88. *See, e.g.*, LEVY & RUBENSTEIN, *supra* note 2, at 30 ("There is a substantial body of research documenting the inability of psychiatrists to make reliable predictions of future violent behavior."); JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 60 (1981) (noting psychiatrists and psychologists predict incorrectly two out of three times); PERLIN, *supra* note 74, at 84–87 (remarking on the unreliability of psychiatric predictions of dangerousness); PESZKE, *supra* note 54, at 115–16 (conceding that psychiatrists "have poor predictive ability" as to dangerousness and that "[i]n those jurisdictions in which dangerousness is invoked as the only criterion [for commitment], then society might as well employ sociologists, statisticians and attorneys to make predictions, and there is no reason for psychiatrists or physicians to intervene").

89. LEVY & RUBENSTEIN, *supra* note 2, at 34.

90. *See* Michael L. Perlin, *On "Sanism,"* 46 SMU L. REV. 373, 400–02 (1992) (describing "ordinary common sense" as reinforcing stereotypes about people with mental illness).

91. *Id.* at 375, 400–02.

92. APPELBAUM, *supra* note 23, at 33–48 (discussing studies that conclude that people are committed even though they do not meet the dangerousness standard).

93. PESZKE, *supra* note 54, at 116.

with mental illness that have already been identified. I take up these projects in turn.

Stereotype entered our lexicon as the name for a printmaking process used to make metal printing plates from papier-mâché molds created from the composed type.[94] In modern usage, however, stereotype is almost always used to mean "[a] preconceived and oversimplified idea of the characteristics which typify a person, situation, etc."[95] The public intellectual Walter Lippmann minted this new, figurative sense of the word in 1922 to describe the phenomenon by which "we do not first see, and then define, we define first and then see."[96] Lippmann put it eloquently: "In the great blooming, buzzing confusion of the outer world we pick out what our culture has already defined for us, and we tend to perceive that which we have picked out in the form stereotyped for us by our culture."[97] As a cognitive heuristic or shortcut, stereotyping saves time but is necessarily reductive.[98] Thus, although stereotypes purport to describe objective reality, they often bear only a warped, tangential relation to it.[99] Soon after Lippmann coined the modern, figurative sense of stereotyping, the concept became a "major theme in American civil rights discourse"—especially in the areas of race and gender discrimination.[100] Thanks to the robustness of this discourse, most of the common stereotypes about race and gender are easily identified as such. But stereotypes about people with mental illness are somewhat less easy to identify, perhaps because they are so reflexively accepted as true—even by people quick to decry analogous prejudices involving sex, race, ethnicity, or sexual orientation[101]—that many (if not most) people fail to recognize them as stereotypes.

Among the most harmful stereotypes about people with mental illness is that they are prone to violence. The pervasiveness of this stereotype[102]—and the harm it causes both individuals with mental illness and the public at

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94. THE OXFORD ENGLISH DICTIONARY 651 (2d ed. 1989).

95. *Id.*

96. WALTER LIPPMANN, PUBLIC OPINION 81 (Transaction Publishers 1998) (1922); *see also* THE OXFORD ENGLISH DICTIONARY, *supra* note 94, at 651 (citing Lippmann as the originator of this sense of the word).

97. LIPPMANN, *supra* note 96, at 81.

98. Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 106 (2010) (discussing LIPPMANN, *supra* note 96, at 96).

99. *See* Perlin, *supra* note 90, at 389 (highlighting how stereotypes serve to perpetuate social and cultural myths).

100. Franklin, *supra* note 98, at 107. The Oxford English Dictionary notes the term's appearance in a psychology handbook as a synonym for bias and prejudice. THE OXFORD ENGLISH DICTIONARY, *supra* note 94, at 651.

101. Perlin, *supra* note 88, at 373–74.

102. *E.g.*, BERNICE A. PESCOSOLIDO, ET AL., AMERICANS' VIEWS OF MENTAL HEALTH AND ILLNESS AT CENTURY'S END: CONTINUITY AND CHANGE 3 (2000); Henry J. Steadman et al., *Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, 55 ARCHIVES GEN. PSYCHIATRY 393, 399–401 (1998).

large[103]—is well documented. The stereotype is also likely baseless: there is overwhelming evidence that there is at most a very weak link between mental illness and violence.[104] In the wake of national tragedies perpetrated by active shooters, this stereotype has become even more pervasive,[105] in part because of its frequent deployment as a cheap political countermeasure. In response to the massacre in Newtown, Connecticut, in 2012, the National Rifle Association used the stereotype as political chaff—evidence "that mental illness, and not the guns themselves, was at the root of recent shooting sprees."[106] The group even "called for a national registry of people with mental illness."[107] Legislators in several states introduced bills that would infringe the privacy rights of people with mental illness, drawing sharp criticism from disability-rights advocates and others who decried the

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103. *See* ACHIEVING THE PROMISE, *supra* note 8, at 4. As the President's New Freedom Commission on Mental Health warned:

> Stigma leads others to avoid living, socializing, or working with, renting to, or employing people with mental disorders . . . . It leads to low self-esteem, isolation, and hopelessness. It deters the public from seeking and wanting to pay for care. Responding to stigma, people with mental health problems internalize public attitudes and become so embarrassed or ashamed that they often conceal symptoms and fail to seek treatment.

Id. (citation omitted).

104. *See* Erica Goode & Jack Healy, *Focus on Mental Health Laws to Curb Violence Is Unfair, Some Say*, N.Y. TIMES, Jan. 31, 2013, http://www.nytimes.com/2013/02/01/us/focus-on-mental-health-laws-to-curb-violence-is-unfair-some-say.html?pagewanted=1, *archived at* http://perma.cc/R22R-B72T (noting studies that show that people with severe mental illness are involved in only about 4% of violent crimes). A recent study found a link only where mental illness is coupled with substance abuse. Jeremy Laurance, *Mentally Ill Not More Violent, Study Says*, INDEPENDENT, Sept. 7, 2010, http://www.independent.co.uk/life-style/health-and-families/health-news/mentally-ill-not-more-violent-says-study-2072187.html, *archived at* http://perma.cc/F5G9-3ZB5.

105. Laura Ungar, *Mental Illness Stigma Grows in Wake of Conn. Shootings*, USA TODAY, Mar. 18, 2013, http://www.usatoday.com/story/news/nation/2013/03/18/mental-illness-stigma-increase/1996159/, *archived at* http://perma.cc/J8T2-7UPZ; *see also Violence and Mental Illness: The Facts*, SAMSHA, http://promoteacceptance.samhsa.gov/publications/facts.aspx, *archived at* http://perma.cc/BH77-FEQL (asserting that the stereotype is "often promoted by the entertainment and news media" and citing studies).

106. Goode & Healy, *supra* note 104. Similarly, the Fox News commentator, gun-rights activist, and psychiatrist Charles Krauthammer used the shooting tragedy at the Washington Navy Yard as an occasion to trumpet his opinion that, in the eyes of the gun-control movement, "It's always the weapon and never the shooter." Charles Krauthammer, Op-Ed., *The Real Navy Yard Scandal*, WASH. POST, Sept. 19, 2013, http://www.washingtonpost.com/opinions/charles-krauthammer-the-real-navy-yard-scandal/2013/09/19/ddfde26a-2162-11e3-a358-1144dee636dd_story.html, *archived at* http://perma.cc/UF9P-NQ4Y.

107. Goode & Healy, *supra* note 104. In light of human rights atrocities, including holocausts, perpetrated in the twentieth century on the heels of registration requirements (and with the aid of the resulting registries), any demand that social minorities register is rightly viewed as ominous indeed. *See, e.g.*, Andrew E. Kramer, *Demands That Jews Register in Eastern Ukraine Are Denounced, and Denied*, N.Y. TIMES, Apr. 17, 2014, http://www.nytimes.com/2014/04/18/world/europe/efforts-to-register-jews-in-ukraine-are-denounced-and-denied.html?hpw&rref=world&_r=0, *archived at* http://perma.cc/9T79-YB9Q (reporting on international alarm arising from demands, purportedly by a pro-Russian revolutionary organization, that Jews in eastern Ukraine register).

proposals as a politically expedient means to avoid engaging the gun lobby.[108] The data on the relationship between mental illness and violence speak for themselves, yet the stereotype that people with mental illness are prone to violence persists. It is not difficult to imagine how the stereotype might influence assessments of dangerousness not only by mental-health professionals but also by courts.

Professor Michael Perlin, a leading authority on disability rights, catalogued what he considers the most pervasive stereotypes about people with mental illness in his article *On 'Sanism,'* which identifies prejudice against people with mental illness as an "ism" no less objectionable than others such as sexism or racism.[109] According to Perlin, society believes that people with mental illness—and I summarize—"simply don't try hard enough"; "give in too easily to their basest instincts, and do not exercise appropriate self-restraint"; "are erratic, deviant, morally weak, sexually uncontrollable, emotionally unstable, superstitious, lazy, ignorant and demonstrate a primitive morality"; are more dangerous than people who are not mentally ill; are easily and accurately identified as dangerous by experts; need to be committed for refusing to take prescribed medication; and "lack the capacity to show love or affection."[110] People with mental illness may also be considered "less than human"[111] and incapable or unworthy of relationships with people without mental illness.[112] As "public attitudes," these stereotypes pervade our social institutions, including our courts, hospitals, and academies.[113] Hence, these institutions can work to reinforce rather than dispel these stereotypes.

Psychiatry, for example, may reinforce stereotypes about people with mental illness by imbuing them with the legitimacy of "science." Until the 1970s, the American Psychiatric Association's Diagnostic and Statistical Manual[114] (known colloquially as the DSM), the foundational text of modern

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108. Goode & Healy, *supra* note 104.

109. Perlin, *supra* note 88, at 373–74.

110. *Id.* at 393–98.

111. *Id.* at 393.

112. *See* Bolmer v. Oliveira, 594 F.3d 134, 137–38 (2d Cir. 2010) (providing an example of the assumption that a person who does not have mental illness would not maintain a romantic relationship with a person with mental illness).

113. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 429 (1979) (contending that Blackstone's formulation that it is better that ten guilty persons escape than that one innocent suffer does not apply in the commitment context because "[i]t cannot be said . . . that it is much better for a mentally ill person to 'go free' than for a mentally normal person to be committed"); Perlin, *supra* note 88, at 397 (noting that although these stereotypes are "public attitudes, it is clear that they pervade all components of the legal system as well").

114. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

psychiatry, described homosexuality as a mental illness.[115] Indeed, stereotypes about mental illness are frequently combined with stereotypes about sex and other immutable characteristics, such as race and ethnicity.[116] In the twentieth century, the erroneous belief that Jews were predisposed to mental illness became so "embedded in scientific (and therefore reliable) dogma" that even many Jews accepted it as true.[117] Similarly, black students have historically been more likely than white students to be assigned to special education programs.[118] Given this, it should come as no surprise that blacks are committed at higher rates than whites.[119] Stereotypes also associate mental illness with femininity and, as already noted, homosexuality. In the 1950s, social science purported to confirm the validity of traditional gender roles with "scientific" evidence that the "masculine male and feminine female . . . typify mental health."[120] Patriarchal society has long gendered madness female,[121] but postnatal women—having just performed (what was viewed as) the ultimate act of womanhood—were regarded as being especially "mentally impaired."[122]

Stereotypes also associate mental illness with creativity.[123] In the twentieth century, psychiatrists fixed on the literary and artistic productions of people with mental illness as a tool for diagnosis and treatment.[124] For a

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115. Gregory M. Herek, *Facts About Homosexuality and Mental Health*, SEXUAL ORIENTATION: SCI., EDUC. & POL'Y, http://psychology.ucdavis.edu/faculty_sites/rainbow/html/facts_mental_health.html#note1_text, *archived at* http://perma.cc/9XSN-8BHC.

116. Perlin, *supra* note 88, at 390.

117. SANDER L. GILMAN, DIFFERENCE AND PATHOLOGY: STEREOTYPES OF SEXUALITY, RACE, AND MADNESS 232–33 (1985). Adolph Hitler even used this stereotype in his anti-Semitic propaganda; later, he experimented with "euthanasia" on many of the patients committed to German hospitals before sending Jews and others to the death camps en masse. *Id.* at 233–37.

118. *See generally* COUNCIL FOR EXCEPTIONAL CHILDREN, ADDRESSING OVER-REPRESENTATION OF AFRICAN AMERICAN STUDENTS IN SPECIAL EDUCATION (2002) (documenting this phenomenon).

119. *See Ethnic and Racial Minorities & Socioeconomic Status*, AM. PSYCHOL. ASS'N, http://www.apa.org/pi/ses/resources/publications/factsheet-erm.aspx, *archived at* http://perma.cc/ZGE2-2UZX ("African Americans are at higher risk for involuntary psychiatric commitment than any other racial group." (citing Chow et al., *Racial/Ethnic Disparities in the Use of Mental Health Services in Poverty Areas*, 93 AM. J. PUB. HEALTH 792, 796 (2003))).

120. Franklin, *supra* note 98, at 112 (quoting Sandra L. Bem & Ellen Lenney, *Sex Typing and the Avoidance of Cross-Sex Behavior*, J. PERSONALITY & SOC. PSYCHOL. 48, 48 (1976)); *see also id.* ("[H]ealthy psychological development depended on the extent to which a child identified with a parent of the same sex.").

121. *See, e.g.*, JANE M. USSHER, THE MADNESS OF WOMEN: MYTH AND EXPERIENCE 8 (2011) (discussing sociocultural theories developed to explain the higher incidence of "madness" in females).

122. Perlin, *supra* note 88, at 390.

123. *See* GILMAN, *supra* note 117, at 241 (asserting that psychiatry has long noted an "association [between] creativity and pathology").

124. *See id.* at 225–26 (observing that "[t]wentieth-century psychiatry has been greatly interested in the implications of the artistic and poetic products of the schizophrenic," which "assumed a greater and greater role in both diagnosis and treatment").

time, psychiatrists scrutinized the "unique artistic productions" of people diagnosed with schizophrenia as projections of the condition's essential structure.[125] In a study that exemplified the circularity of stereotypic logic, researchers "took a group of patients labeled as insane, examined their products . . . and determined that the patients were insane."[126] Another study "drew parallels" between the works of people diagnosed with schizophrenia and members of "the avant-garde [art movement], specifically . . . [Wassily] Kandinsky."[127]

While improvements in the scientific rigor of psychological research since the 1970s have aided the mental-health professions in eschewing quackery,[128] as long as stereotypes about people with mental illness pervade the cultural ether, they will continue to infect judgments made by people in their personal as well as professional capacities—including as doctors, lawyers, and judges. Troublingly, reliance on stereotypes in decision making can "preclude[] empathic behavior," increasing the likelihood that commitment decisions based on common sense will not only miss the mark but will do so in ways that are insensitive and harmful to people with mental illness.[129]

IV. A Two-Part Theory of Disability Discrimination in the Context of Involuntary Commitment

I describe disability discrimination in the context of involuntary commitment as something of a Gordian knot because, to those like Szasz who would argue for the abolition of commitment, commitment is indistinguishable from discrimination—it *is* discrimination.[130] For abolitionists, the knot cannot be untangled; it must be cut. But if we reject this absolutist view and accept that commitment is not *really* discrimination—that is, not discrimination in the pejorative sense—then what does it mean to discriminate in the context of involuntary commitment?

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125. *See id.* (relating the theory, subscribed to by some twentieth-century psychiatrists, that schizophrenics' altered relationship to their sense of self could be "extrapolated from the nature of their art").

126. *Id.* at 227.

127. *Id.*

128. *E.g.*, Susan L. Morrow, *Qualitative Research in Counseling Psychology: Conceptual Foundations*, 35 COUNSELING PSYCHOLOGIST 209, 221–22 (2007).

129. Perlin, *supra* note 88, at 380–81. "We think of the stereotyped as 'them' and not 'us' [and we are therefore] less likely to share in their pain and humiliation." *Id.* at 380 (quoting Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1542 (1991)) (internal quotation marks omitted).

130. SZASZ, *supra* note 16, at 98; *see also* WINICK, CIVIL CONFINEMENT, *supra* note 87, at 102 ("Th[e] discrepancy between [how civil commitment treats] those with mental illness and all others raises a serious equal protection question, and demands that the state justify such discrimination based on compelling necessity.").

This Part sets out a two-pronged theory of discriminatory commitment that intervenes at each of two distinct phases in the commitment process: the decision phase, in which mental-health professionals decide that a person meets the standards for involuntary commitment, and the provision phase, in which the treatment service—the commitment—is actually provided or carried out. As to the first phase (the decision phase), I argue in subpart A that commitment is discriminatory when the commitment decision is based on prejudice toward or stereotypes about people with mental illness, and I suggest several ways that such decisions can be effectively identified. I refer to discrimination that occurs in this phase of the commitment process as "discriminatory-decision." As to the second phase (the provision phase), I argue in subpart B that commitment is discriminatory when its provision—that is, its execution or administration—fails to reasonably accommodate the committed person's disability. I refer to this kind of discrimination as "discriminatory-provision." I introduce each kind of discrimination with a case study that illustrates how it manifests and, I hope, why its victims deserve a remedy.

A. Discriminatory-Decision Commitment: When the Commitment Decision Is Based on Stereotypes or Prejudice

Following is a short case study that illustrates how discriminatory-decision commitment typically manifests. I hope that in addition to performing an illustrative function, it also prods the conscience and evokes an intuitive sense that commitment decisions based on prejudice or stereotypes perpetrate a grave injustice that demands a remedy. Brett Bolmer's case is significant because it is the first and only case in which a federal court of appeals has recognized a cause of action under the ADA for a commitment decision made on the basis of stereotyping.[131] It bears emphasis, however, that Bolmer's case is not unique but is part of a discrete class of cases in which commitment decisions are based on stereotypes about people with mental illness.[132]

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131. Bolmer v. Oliveira, 594 F.3d 134, 149 (2d Cir. 2010).

132. For another archetypical case of discriminatory-decision commitment with an intriguing factual premise—a nudist with bipolar disorder riding her bicycle in the rain, committed because a psychiatrist believed the political and philosophical beliefs informing her choice to lead a "clothing-optional" lifestyle were "clearly delusional" and that riding nude in the rain might lead to assault, see State v. Webb, 63 P.3d 1258, 1259, 1261 (Or. Ct. App. 2003). The discrimination here is that had the nudist not had bipolar disorder, she would not have been committed. Because of her disability status, she was presumed incapable of holding the set of political and lifestyle preferences called nudism—she was presumed, in other words, incapable of being a nudist. It is not difficult to imagine a person with bipolar disorder being committed on account of their participation in a host of other similarly "dangerous" activities such as extreme sports, political protests like Occupy Wall Street, or promiscuous sex. This kind of discrimination singles out people with mental illness for different treatment on account of disability, confining them to cramped, normative conceptions of the good life.

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Brett Bolmer was a resident in a state-run transitional living program that provided community-based housing for people with a history of mental illness.[133] The program appointed a case manager to monitor and facilitate Bolmer's participation in the program.[134] Shortly after the case manager's appointment, she and Bolmer began texting and calling each other frequently.[135] This developed into a sexual relationship, and for several months they met once or twice a week at the caseworker's apartment.[136]

The relationship ended, and Bolmer expressed his anguish to the director of the housing program; the case manager, however, denied the relationship.[137] She reported "that Bolmer had left flowers on her car and had called her twice."[138] Believing the relationship was a delusion, the program staff asked Bolmer to report for a psychological evaluation to determine whether he was manifesting "erotomania," a condition characterized by an erroneous belief in a sexual relationship with another person.[139]

Bolmer was upset upon reporting for the evaluation; he spoke loudly and expressed his sense of indignation.[140] A psychiatrist conducted an examination that lasted fewer than fifteen minutes.[141] According to Bolmer, the hospital staff "kept looking at [him] as if [he] was crazy to be thinking that a case worker could possibly have an affair with a crazy person."[142] When Bolmer realized the psychiatrist was considering whether to commit him, he attempted to express his feelings about the breakup.[143] The psychiatrist rolled his eyes at Bolmer and warned him to calm down.[144] Bolmer tried to convey that he was not angry by stating that "if [he] was really angry that [he] would pick up the chair in the room and throw it."[145] At this point, the psychiatrist opened the door, and police and medical workers rushed into the room.[146]

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133. *Bolmer*, 594 F.3d at 137.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 137–38.
138. *Id.* at 137.
139. *Id.* at 137–38.
140. *Id.* at 138.
141. *See id.* (noting that "Bolmer claims the examination lasted 'no more than five minutes.'"). *But see id.* (noting that the psychiatrist claimed "the examination lasted at least 15 minutes").
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*

The psychiatrist had Bolmer committed.[147] After Bolmer's personal effects were confiscated, he was strapped to a bed and injected with an antipsychotic medication.[148] Only later did the hospital staff discover text messages and calls on Bolmer's cell phone that substantiated his account of the relationship and confirmed it was not a delusion.[149]

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Discrimination involves, most basically, the making of distinctions.[150] In the modern American lexicon, however, the word discrimination is pregnant with political meaning and tends to imply the making of distinctions that are illegitimate or unjustified.[151] In the wake of the civil rights movement, the principle that discrimination is illegitimate when based on race, for example, seems self-evident to most people. Thus, it is probably safe to assume that, in general, people consider decisions more legitimate when not based on discrimination as to a characteristic such as race, sex, or—if our antidiscrimination law is any indication—disability.

But decisions about commitment, I want to suggest, are different. When discrimination is considered in the context of commitment, a curious problem emerges: the legitimacy of commitment *depends on* discrimination. That is, the legitimacy of commitment depends on the ability of decision makers to discriminate perfectly among members of a protected class—people with mental illness—and to commit only those whose disability takes a particular form (i.e., dangerousness to self or others). In this respect, the law of civil commitment is like the criminal law in that its legitimacy depends on discrimination. Whereas the criminal law must discriminate on the basis of criminality, the law of civil commitment must do so on the basis of disability. The difference, of course, is that disability, unlike criminality, is a prohibited basis for discrimination under the law.[152] This may seem to make the very notion of nondiscriminatory commitment incoherent.[153]

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147. *Id.*

148. *Id.*

149. *Id.*

150. *See* BRYAN A. GARNER, GARNER'S MODERN AMERICAN USAGE 264 (3d ed. 2009) (defining "discriminate" as "to make a clear distinction").

151. *See* ROBERT K. FULLINWIDER, THE REVERSE DISCRIMINATION CONTROVERSY 11–12 (1980) ("The dictionary sense of 'discrimination' is neutral while the current political use of the term is frequently non-neutral, pejorative.").

152. *See, e.g.*, Americans with Disabilities Act, 42 U.S.C. § 12112(a) (2012) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to . . . employment.").

153. *See, e.g.*, Estate of Awkward v. Willingboro Police Dep't, No. 07-5083(NLH), 2010 WL 3906785, at *13 (D.N.J. Sept. 30, 2010) ("[An accusation that an individual was involuntarily committed on the basis of a mental disability] cannot serve as a basis for an ADA . . . violation for disability discrimination because such a finding would convert every involuntary commitment . . . into a civil rights violation.").

If commitment necessarily discriminates on the basis of disability, the next question is: when, if ever, is such discrimination legitimate? In other words, when is discrimination not *really* discrimination—that is, when is it not discrimination in the pejorative sense? An obvious answer is: when the discrimination is not based on prejudice or stereotypes about people with mental illness. Under this view, the commitment decision is discriminatory—that is, illegitimate—only when it is based on prejudice or stereotypes. This principle is intuitive because it comports with normative understandings of discrimination as rooted in prejudice.[154] Moreover, as a practical matter, it focuses the inquiry on a single factual question that courts are equipped to answer: whether prejudice or stereotypes about people with mental illness have infected the commitment process.

But answering this question becomes more complicated when a commitment decision is based—as it typically is—on the opinion of a medical expert such as a psychiatrist or psychologist.[155] Medical science, especially in the context of mental illness, is to some extent socially constructed[156] and therefore influenced by the same prejudices and stereotypes that influence public views generally. But courts may fail to recognize this.[157] Moreover, courts routinely defer to the judgments of psychiatrists[158] despite uncontroverted evidence that psychiatrists cannot accurately predict dangerousness[159]—which is, of course, the only legal basis for commitment.[160] Thus, courts should more critically examine the findings of the state's medical experts as to dangerousness and not assume that medical opinions escape the biases inherent in common sense.

1. Legislative Solutions.—This Note's primary focus is the development of a two-pronged theory of discrimination that is actionable under the ADA. This is a back-end approach in that it seeks to remedy discrimination after it occurs. (Of course, the threat of litigation also serves a deterrent function.) But discrimination in commitment decisions also could be reduced—and reduced more directly—through front-end legislative reforms.

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154. *See* FULLINWIDER, *supra* note 151, at 11–12 ("The dictionary sense of 'discrimination' is neutral while the current political use of the term is frequently non-neutral, pejorative.").

155. MILLER, *supra* note 65, at 12.

156. *Cf.* Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492, 541–43 (1993) ("The association of medicine with reason, facts and objectivity has been challenged through efforts to show that medicine is in fact a product of culture, rather than separate and apart from it—that it is socially constructed.").

157. *Id.* at 565.

158. MILLER, *supra* note 65, at 12; *see also* Ehrenreich, *supra* note 156, at 566 ("Legal authorities in general pay great deference to medical expertise.").

159. *See supra* note 88 and accompanying text.

160. That is, the minimum legal basis. As already noted, some states impose additional requirements that result in a heightened standard. *See supra* notes 80–82 and accompanying text.

One such reform is procedural. States could furnish independent psychiatrists to serve as expert witnesses for proposed patients who are indigent and cannot afford an expert.[161] When there is room (as often there is) for psychiatrists to reach different conclusions about whether a proposed patient meets the legal standard for commitment, courts would benefit from a broader range of psychiatric opinion. In particular, courts would benefit from the opinion of psychiatrists who do not work for the state and who did not help initiate the commitment process in the first place.[162] Some jurisdictions have already recognized this.[163] Connecticut, for example, requires that two impartial psychiatrists selected by the court evaluate the proposed patient and report their findings to the court before a commitment order can issue.[164]

For additional precedent, we need look no further than the criminal law, where both federal and state statutes provide indigent defendants with access to expert witnesses when necessary for the mounting of an adequate defense.[165] Writing from the New York Court of Appeals bench in 1929, then-Judge Benjamin Cardozo called it "a matter of common knowledge" that "upon the trial of certain issues, such as insanity . . ., experts are often necessary both for prosecution and for defense," and that in such cases, "a defendant may be at an unfair disadvantage, if he is unable because of poverty to parry by his own witnesses the thrusts of those against him."[166] Cardozo directed his remarks at the criminal context, but they apply with equal force in the context of civil commitment, where personal liberty and other basic rights are likewise at stake.

At most commitment hearings, the psychiatrist is the state's most important witness. Some commentators have gone so far as to argue that the current legal regime "in effect delegates to clinicians who perform evaluations for the courts the power to make decisions about when an

161. *See supra* note 15.

162. The state typically initiates a commitment proceeding by filing an application for court-ordered mental health services supported by a medical certificate completed by a state psychiatrist. Michael Churgin, Raybourne Thompson Centennial Professor, Univ. of Tex. at Austin Sch. of Law, Lecture at the Mental Health Clinic (Jan. 2014).

163. Winick, *supra* note 53, at 40.

164. CONN. GEN. STAT. ANN. § 17a-498(c) (West 2006 & Supp. 2014).

165. *See, e.g.*, 18 U.S.C. § 3006A(e)(1) (2012) (requiring that indigent criminal defendants be provided "expert . . . services necessary for adequate representation"); United States v. Patterson, 724 F.2d 1128, 1130 (5th Cir. 1984) (interpreting that statute as requiring that "where the government's case rests heavily on a theory most competently addressed by expert testimony, an indigent defendant must be afforded the opportunity to prepare and present his defense to such a theory with the assistance of his own expert"); Paul C. Giannelli, Ake v. Oklahoma: *The Right to Expert Assistance in a Post-*Daubert, *Post-DNA World*, 89 CORNELL L. REV. 1305, 1332 (2004) (stating that "most jurisdictions have provisions for court-appointed experts" for indigent criminal defendants).

166. Reilly v. Berry, 166 N.E. 165, 167 (N.Y. 1929).

individual's liberty should be taken away."[167] Even when a proposed patient's family members or friends testify persuasively on the question of whether the proposed patient is dangerous, the court typically relies on the state's psychiatrist to supply the all-important medical frame for the narrative that evolves.[168] Because a proposed patient must be found dangerous *because of* mental illness to be committed, psychiatric testimony is essential to commitment decisions.[169]

Like the opinions of any expert witness, a psychiatrist's judgments are subject to influence by various kinds of bias.[170] For example, a psychiatrist employed by a state hospital may have chosen to practice psychiatry in that setting in part because she sincerely believes in the model of care it provides.[171] Coercion—involuntary commitment and involuntary treatment

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167. WINICK, CIVIL COMMITMENT, *supra* note 87, at 48. Winick locates the problem partly in the "breadth and imprecision of statutory definitions of mental illness," which he says "both allow and mask arbitrariness and discrimination in the application of the law." *Id.*

168. *See* Addington v. Texas, 441 U.S. 418, 429 (1979) ("Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists."); Douglas Mossman et al., *Risky Business Versus Overt Acts: What Relevance Do "Actuarial," Probabilistic Risk Assessments Have for Judicial Decisions on Involuntary Psychiatric Hospitalization?*, 11 HOUS. J. HEALTH L. & POL'Y 365, 366–67 (2011) ("During civil commitment hearings, a portion of the evidence supporting involuntary hospitalization sometimes comes from . . . family members or acquaintances of the respondent . . . . In most cases, however, the crucial evidence bearing on legal satisfaction of commitment criteria comes from mental health professionals . . . ." (citation omitted)).

169. *See Addington*, 441 U.S. at 429 (describing the importance of expert testimony in determining whether or not an individual is dangerous due to mental illness); Mossman et al., *supra* note 168, at 366–67 (same).

170. *See* David E. Bernstein, *Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the* Daubert *Revolution*, 93 IOWA L. REV. 451, 453 (2008) (arguing that expert witnesses are "uniquely vulnerable to 'adversarial bias'"); *id.* at 480–81 (classifying "psychiatric diagnoses based primarily on training and experience" as "connoisseur testimony," meaning that "it has no *objective* basis and, given selection bias, its underlying reliability in any given case is therefore completely opaque").

171. The professional judgments of a psychiatrist at a private hospital may also be subject to influence by economic pressures: private psychiatric hospitals have a strong financial incentive to keep beds filled, and their willingness to tweak diagnoses and to use the threat of commitment to keep patients hospitalized "voluntarily" in order to collect insurance payments is well documented. *See, e.g.*, ARNOLD BIRENBAUM, MANAGED CARE: MADE IN AMERICA 124 (1997) (noting that with the rise of managed care, "some . . . private psychiatric hospitals offered bounties for patients, violating the rights of ordinary citizens to due process in the course of an involuntary commitment"); Peter Kerr, *8 Big Insurers Sue National Medical Enterprises*, N.Y. TIMES, July 31, 1992, at D1, *available at* http://www.nytimes.com/1992/07/31/business/8-big-insurers-sue-national-medical-enterprises.html, *archived at* http://perma.cc/9U7F-6ZE6 [hereinafter Kerr, *8 Big Insurers*] (reporting on a lawsuit filed by eight leading insurance companies alleging that "National Medical Enterprises, one of the nation's largest operators of psychiatric hospitals . . . systematically manipulated the diagnoses of patients to keep them in hospitals until their health insurance coverage was exhausted"). In one harrowing example, Peter Kerr explained:

> In Texas, Susan Alderson, a former patient at a Psychiatric Institutes center in Farmers' Branch, Tex., said the staff had told her they were trying to change her diagnosis . . . to increase her coverage to $1 million from $50,000 and prolong her stay.

(including, in some jurisdictions, electroconvulsive therapy)[172]—is at the heart of this model. Thus, because of self-selection effects, psychiatrists employed at state hospitals may tend to make professional judgments—including judgments of dangerousness—that lead to the proposed patient's being treated in the state hospital because that is the setting they consider most efficacious.[173]

But there is also room in psychiatric practice to draw other conclusions about what treatment setting is most efficacious, including the conclusion that coerced treatment in an institutional setting is less effective than voluntary treatment in the community.[174] This is unqualifiedly the view of Harvard Medical School psychiatrist Christopher Gordon.[175] A psychiatrist holding this view might well tend to make professional judgments—including judgments of dangerousness—that would lead to fewer involuntary commitments.

Without access to an independent psychiatric examination, the proposed patient has only inadequate means to challenge the testimony of the state's psychiatrist. The proposed patient's attorney may, of course, attempt to impeach the psychiatrist's testimony by cross-examination, but the attorney almost certainly lacks the medical expertise—and thus the credibility—to seriously call into question the medical basis of the psychiatrist's opinion. Besides, an attorney's statements in examining a witness are (of course) nontestimonial, so cross-examination affords only a chance to weaken the psychiatrist's testimony—not affirmatively contradict it. The proposed patient's attorney also could use the state's psychiatrist to introduce a learned

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> Ms. Alderson told a legislative committee that when she protested, the hospital punished her by taking away privileges and telling her she would be in a mental hospital the rest of her life.

Peter Kerr, *Mental Hospital Chains Accused of Much Cheating on Insurance*, N.Y. TIMES, Nov. 24, 1991, at A1, A28, *available at* http://www.nytimes.com/1991/11/24/us/paying-for-fraud-special-report-mental-hospital-chains-accused-much-cheating.html?pagewanted=all&src=pm, *archived at* http://perma.cc/V7FV-HQ5M [hereinafter Kerr, *Mental Hospital*].

172. *See, e.g.*, CONN. GEN. STAT. ANN. § 17a-543(c) (West 2006 & Supp. 2014) (specifying circumstances under which an involuntary patient may receive electroconvulsive therapy over her objections); 405 ILL. COMP. STAT. ANN. § 5/2-107(a), (h) (West 2011 & Supp. 2014) (same); MO. ANN. STAT. § 630.130.3 (West 2014 & Supp. 2015) (same).

173. *See, e.g.*, Mossman et al., *supra* note 168, at 452 ("Psychiatrists typically think of civil commitment as a vehicle for making sure their patients get the treatment they need, having made a clinical assessment that such treatment is critical."); *cf.* PAUL S. APPELBAUM & THOMAS G. GUTHEIL, CLINICAL HANDBOOK OF PSYCHIATRY AND THE LAW 37 (4th ed. 2007) ("Often, the only reasonable option for dealing with a psychiatric emergency is to seek the patient's hospitalization.").

174. *See* Christopher Gordon, Letters to the Editor, *Sunday Dialogue: Treating the Mentally Ill*, N.Y. TIMES, Feb. 2, 2013, http://www.nytimes.com/2013/02/03/opinion/sunday/sunday-dialogue-treating-the-mentally-ill.html?pagewanted=all&_r=0, *archived at* http://perma.cc/EJJ5-CG7G (arguing that "mandated treatment" is not the best treatment for most patients).

175. *See id.* (criticizing "mandated treatment" for many patients with psychotic symptoms).

treatise that contradicts the psychiatrist's testimony,[176] but as a practical matter the in-person testimony of a psychiatrist, unless truly far afield, is likely to carry significantly more weight than any treatise offered to contradict it.

Providing for independent psychiatric evaluations would decrease courts' reliance on the state's psychiatrists and help educate courts on medical matters beyond their expertise—matters that might well be controversial within the field of psychiatry itself.[177] Over time, courts with regular access to a broader range of psychiatric perspectives could accumulate valuable, well-balanced institutional knowledge. This would go far in helping courts spot psychiatric testimony informed by stereotypes or prejudice about people with mental illness. And, critically, it would help courts identify stereotypes and prejudices that inform their own judgments as well. When the only psychiatrist in the room testifies in case after case that the proposed patient is dangerous, it is no wonder that courts may come to view people with mental illness as being more dangerous than empirical evidence shows.

Another reform that would improve courts' ability to discern the influence of stereotypes and prejudice in assessments of dangerousness is the requirement of an overt act. Courts are familiar with the concept of overt acts from the law of conspiracy.[178] An overt act requirement makes the dangerousness standard more concrete and renders judicial decisions more transparent because judges cannot base their findings on mere speculation—whose relation to prejudice may be difficult to ascertain—but instead must point to an overt act whose occurrence may be easier as an evidentiary matter to establish or disprove.[179] This makes determinations of dangerousness less subjective and more amenable to appellate review.[180] Moreover, "[t]he strong consensus of the risk literature is that the number and type of prior

176. *See* Bernstein, *supra* note 170, at 472 n.104 (citing admission of psychiatric treatises and textbooks under *Daubert*).

177. For an excellent discussion of the competing views within psychiatry on the efficacy of involuntary treatment, see Gordon, *supra* note 174. For a discussion of the diversity of views held by psychiatrists on the fundamental nature of mental illness, see T.M. Luhrmann, Op-Ed., *Redefining Mental Illness*, N.Y. TIMES, Jan. 17, 2015, http://www.nytimes.com/2015/01/18/opinion/sunday/t-m-luhrmann-redefining-mental-illness.html, *archived at* http://perma.cc/Y54C-YE4U.

178. *See generally* United States v. Connor, 537 F.3d 480, 484 (5th Cir. 2008) (outlining the overt act requirement in a case involving conspiracy to use unauthorized access devices); Note, *Criminal Conspiracy: Bearing of Overt Acts upon the Nature of the Crime*, 37 HARV. L. REV. 1121, 1121–24 (1924) (discussing various types of cases involving the overt act requirement of conspiracy).

179. *See In re* Det. of Anderson, 211 P.3d 994, 1000 (Wash. 2009) ("The purpose behind the recent overt act requirement is to add objectivity to an otherwise subjective determination of mental illness and dangerousness.").

180. *Id.*

violent acts committed by an individual are the factors most germane to a prediction of future behavior."[181]

A shortcoming of the overt act requirement, however, is that it can become a mere formality when courts take a permissive view of what constitutes an overt act. For example, a Texas appellate judge has stated that he "would find the continuous refusal to take medication an overt [act]."[182] A Texas appellate court has held that a woman's "disruptive and disorganized behavior at home" and "bizarre behavior" in a hospital constituted overt acts.[183] And the Montana Supreme Court has held that a man's statement that his psychiatrist "was a pimp" and that "there were political reasons for [the psychiatrist's] going to court to have [him] committed" were overt acts.[184] At the first commitment hearing I observed in a probate court in Travis County, Texas, the overt act on which the commitment order rested was the proposed patient sticking out her foot as though to trip another patient but not in fact tripping him.

Mindful of this shortcoming of the overt act requirement and of the inability of mental-health professionals to predict dangerousness generally, some commentators have called for the replacement of these predictive tools with statistical algorithms that draw on large empirical data sets to predict a person's potential for violence given a set of risk factors.[185] Such methods show promise for improving the accuracy, reliability, and transparency of dangerousness assessments, and courts in at least two jurisdictions with overt act requirements have commented positively on their potential to improve the fairness of the dangerousness standard.[186] However, the problem of deciding how dangerous is too dangerous—like the problem of defining how overt is overt enough—will remain.

2. Judicial Solutions.—As for back-end approaches, there is a strong argument to be made that commitment decisions based on stereotypes or prejudice about people with mental illness are actionable under Title II of the ADA, properly construed. Indeed, as discussed in detail below, the Second Circuit and several district courts have taken this position. Wider recognition of an ADA cause of action for commitment decisions based on stereotypes or prejudice would not only help victims obtain redress but also would help

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181. Christopher Slobogin, *Dangerousness and Expertise Redux*, 56 EMORY L.J. 275, 318 (2006).

182. Johnstone v. State, 961 S.W.2d 385, 391 (Tex. App.—Houston [1st Dist.] 1997, no writ) (Nuchia, J., dissenting).

183. G.H. v. State, 94 S.W.3d 115, 115–17 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

184. *In re* D.D., 920 P.2d 973, 975 (Mont. 1996).

185. *See, e.g.*, Mossman et al., *supra* note 168, at 391 (asserting that "[e]mpirically based, statistical prediction algorithms probably provide more accurate assessments of dangerousness than does the unaided clinical judgment of mental health professionals").

186. *Id.* at 451–53.

deter discriminatory commitment in the first place. Powerful financial incentives operate on physicians at private treatment facilities to keep beds occupied,[187] and commitment—or at least the *threat* of commitment—is a convenient means of securing a steady flow of insurance payments.[188] Short of inviting physicians to commit outright fraud by systematically manipulating the diagnoses of patients to keep them in hospitals until their health insurance coverage is exhausted—a scandal that rocked the psychiatric world in the 1990s[189]—such incentives may nonetheless compromise the clinical objectivity of physicians assessing dangerousness. Recognizing a remedy under the ADA could help keep thumbs off the scales.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[190] Currently, the Second Circuit is alone among the circuit courts in recognizing a Title II cause of action for claims based on stereotypes.[191] In April 2013, the Third Circuit acknowledged the Second Circuit's recognition of "claims of disability discrimination under the ADA . . . based on stereotypic assumptions" but declined to decide the question itself.[192] The issue remains unaddressed by the other circuits.

Some lower courts also have recognized a Title II cause of action based on stereotyping,[193] and others have implied that one might exist.[194] The Supreme Court, too, has used language that might signal its openness to such claims. In *Olmstead v. L.C. ex rel. Zimring*,[195] the Court stated that the "unjustified institutional isolation of persons with disabilities is a form of discrimination."[196] In analyzing the plaintiffs' claims under the ADA, the Court held that "undue institutionalization qualifies as discrimination 'by

187. *See* Kerr, *Mental Hospital*, *supra* note 171 (describing the risks staff may face in some psychiatric institutions if they fail to keep the number of patients in each hospital ward at a certain number).

188. *See, e.g.*, *id.* (providing an example of a hospital staff changing a patient's diagnosis to extend her stay so they could increase her insurance coverage).

189. Kerr, *8 Big Insurers*, *supra* note 171.

190. 42 U.S.C. § 12132 (2012).

191. Bolmer v. Oliveira, 594 F.3d 134, 149 (2d Cir. 2010).

192. Obado v. UMDNJ, Behavioral Health Ctr., 524 F. App'x 812, 817 (3d Cir. 2013).

193. *See, e.g.*, Musko v. McClandless, No. 94-3938, 1995 WL 262520, at *6 (E.D. Pa. May 1, 1995) (determining that the plaintiff's argument that the township treated him differently from others who violate zoning ordinances on account of his disability was sufficient to state a claim under Title II).

194. *See, e.g.*, City of Newark v. J.S., 652 A.2d 265, 276 (N.J. Super. Ct. Law Div. 1993) (describing the ADA as "designed to avoid the risk of stereotyping, bigotry and prejudice by demanding an individualized determination before any adverse action is taken against a person with any disability").

195. 527 U.S. 581 (1999).

196. *Id.* at 600.

reason of . . . disability.'"[197] In his concurrence, Justice John Paul Stevens made clear that "'unjustified institutional isolation[']' constitutes discrimination under the [ADA]."[198]

Taken at face value, the Court's holding that "undue institutionalization qualifies as discrimination 'by reason . . . of disability'"[199] would seem to imply that a Title II cause of action lies whenever a person is wrongly committed because a wrongful commitment is by its very nature "undue." *Olmstead*'s broad language, interpreted in this way, might obviate the need for a theory of discriminatory commitment based on stereotyping or prejudice because commitment on such grounds presumably would come under the umbrella of undue institutionalization. But lower courts have read *Olmstead* more narrowly[200]—and the Court probably intended as much. The plaintiffs in *Olmstead* complained of ongoing, long-term institutionalization that the Court described as undue because the State's own physicians agreed the plaintiffs were qualified for placement in a community-based treatment setting.[201] Thus, courts have interpreted *Olmstead* to mean that undue institutionalization constitutes disability discrimination only as to ongoing, long-term institutionalization not as to initial determinations of whether a person should be committed.[202] Although the essential holding of *Olmstead* remains cabined in this way, the general principle it stands for—that undue institutionalization constitutes disability discrimination—may suggest the Court's receptiveness to a theory of discriminatory commitment under Title II.

A Title II claim brought to contest commitment based on stereotypes or prejudice may be redundant of constitutional and tort claims since a commitment decision made on these grounds fails to satisfy constitutional standards and may constitute the tort of false imprisonment.[203] However, a claim brought under Title II adds value in several ways. First, as a purely semantic matter, it calls commitment based on stereotypes and prejudice what it is—discrimination—and thus confers on it a judgment of moral

197. *Id.* at 597, 600.

198. *Id.* at 607 (Stevens, J., concurring).

199. *Id.* at 597.

200. *See, e.g.*, Winters v. Ark. Dep't of Health & Human Servs., 491 F.3d 933, 936 (8th Cir. 2007) (distinguishing *Olmstead* by noting that the holding of that case was limited to "discrimination arising from isolating persons with mental illness in an institution when the state's own treatment professionals have determined that a community setting would be appropriate").

201. *Olmstead*, 527 U.S. at 593–94. The question considered by the Court in *Olmstead* was "whether [the ADA's] proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions." *Id.* at 587.

202. *E.g.*, *Winters*, 491 F.3d at 936–37.

203. *See generally* RESTATEMENT (SECOND) OF TORTS § 35 (1965) (setting out the elements of a false imprisonment claim).

opprobrium.[204] More practically, a claim under Title II may provide an important strategic advantage in that constitutional and tort claims are often barred by sovereign immunity and tort claims statutes.[205] Title II claims, on the other hand, are not barred by sovereign immunity because Congress "abrogate[d] states' immunity from Title II claims."[206] And, of course, Title II claims are not torts and therefore are not subject to tort claims statutes. Thus, a Title II claim may provide a discriminatory-decision plaintiff a remedy where otherwise she would have none.[207]

B. *Discriminatory-Provision Commitment: When a Provider of a Service Related to the Commitment Fails to Make Reasonable Accommodations for the Patient's Disability*

In this subpart, I argue that commitment is discriminatory when its provision fails to reasonably accommodate a committed person's disability, including at the time the person is being taken into custody following the issuance of a commitment order. I refer to this kind of discrimination as "discriminatory-provision." The premise of my argument is not controversial: it is well accepted that medical service providers who are subject to the ADA must comply with its mandates to reasonably accommodate the disabilities of patients, provided those accommodations do not impose an undue burden. This is the core of Title II. What *is* controversial, however, is the question of when during the commitment process the ADA's protections kick in.[208] This Note argues that the ADA's protections should kick in at the time a person is being taken into custody—for example, during the execution of a commitment order—rather than only *after* custody is achieved. I begin with a case study to illustrate the problem.

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204. *See* FULLINWIDER, *supra* note 151, at 11–12 ("For some, it may be enough that a practice is called discriminatory for them to judge it wrong.").

205. *See, e.g.*, Doe v. Arizona, 240 F. App'x 241, 243 (9th Cir. 2007) (affirming the lower court's ruling that the action was barred because the State "enjoyed sovereign immunity under the Eleventh Amendment"); Estate of Awkward v. Willingboro Police Dep't, No. 07-5083(NLH), 2010 WL 3906785, at *12–13 (D.N.J. Sept. 30, 2010) (holding that police officers were entitled to qualified immunity on § 1983 claims arising from the death of a man with schizophrenia from "positional asphyxia" and that the tort claims arising from the same events failed because the "defendants [were] immune from suit under the New Jersey Tort Claims Act").

206. Bolmer v. Oliveira, 594 F.3d 134, 146 (2d Cir. 2010).

207. In addition, a court's recognition of an ADA claim may also neutralize the defense of qualified immunity as to constitutional claims because "[t]he doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory . . . rights of which a reasonable person would have known.'" *Estate of Awkward*, 2010 WL 3906735, at *5 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Thus, a valid Title II claim may breathe life into a plaintiff's constitutional claim arising from the same events.

208. *See infra* notes 258–61 and accompanying text. This question also arises in the context of criminal arrests, which I distinguish from civil-commitment arrests on several grounds. *See infra* notes 269–72 and accompanying text.

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Tyrone Awkward had a well-established diagnosis of paranoid schizophrenia.[209] Awkward lived with his mother and other family members, who fondly referred to him as a "gentle giant."[210] After a family party where Awkward behaved erratically, his family contacted the state mental-health department to request that he receive treatment.[211] A police officer accompanied a certified mental-health screener to Awkward's home to conduct a psychological evaluation and, if necessary, escort Awkward to a hospital.[212]

When the officer and mental-health screener arrived at the home, Awkward's family told them that Awkward played football and was a big man but that he was a good person and would cooperate.[213] The officer and mental-health screener met with Awkward in the living room and explained "that they were there to help him."[214] After conducting a short examination, the screener determined that Awkward needed treatment.[215] At first Awkward refused to go to the hospital, but after some coaxing by the officer, screener, and his mother, "he acquiesced and stood up to put on his shoes."[216] Even though Awkward agreed to receive treatment voluntarily, the screener completed an involuntary commitment form authorizing the officers to transport Awkward to the hospital.[217]

As an officer escorted Awkward from the house, Awkward stopped abruptly at the door and asked for his hat.[218] The family knew "that [he] always wore a hat outside the home."[219] Awkward's sister handed him a baseball cap, "but it was not the hat he wanted."[220] So Awkward's mother went upstairs to retrieve the right hat.[221] Rather than wait for Awkward's mother to return with his hat, the officer continued to lead Awkward out the front door.[222]

When they were just outside the house, Awkward "stopped again upon seeing . . . a third officer" who had arrived as backup and was standing in the

209. *Estate of Awkward*, 2010 WL 3906785, at *1.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.* At this point, another officer also had arrived. *Id.* at *2.
217. *Id.* at *2.
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*

front yard.[223] The officer escorting Awkward placed his hand on Awkward's lower back and assured him that everything would be fine if Awkward would go to the hospital.[224] Awkward then asked why he was being arrested and stated that he did not want to go to the hospital and did not understand why he was being forced to go.[225] He asked again for his hat.[226] Then he turned around and tried to "push past [the officer] . . . to get back inside the house."[227] At this point, the officer tried to handcuff Awkward, placing one handcuff on Awkward's wrist while reiterating that Awkward was not being arrested.[228] Then another officer, who had just come outside with Awkward's hat, moved to help apply the handcuffs.[229] Together with a third officer, they forced Awkward to the ground.[230]

Within minutes, more officers arrived and joined the effort to restrain Awkward, who according to some witnesses was pinned face down on the ground, crying out that he could not breathe.[231] Witnesses said that as many as ten officers piled on top of Awkward to restrain him.[232] When Awkward stopped resisting, the officers realized he was unconscious.[233] Emergency medical workers failed to revive him, and upon reaching the hospital he was pronounced dead.[234]

* * *

The scene that played out during the execution of Awkward's commitment order is tragic. It is also unnecessary. A number of cases document similar tragedies—some even more dramatic—that result from failures to reasonably modify commitment procedures to account for the individual needs of a person with mental illness.[235] It is easy, of course, to

223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.* at *3.
234. *Id.*
235. *See, e.g.*, Velasquez v. Audirsch, 574 F. App'x 476, 477–78, 480 (5th Cir. 2014) (denying a § 1983 claim based on police officers' warrantless search of the house of a man with paranoid schizophrenia who had threatened his neighbor with a knife); Thao v. City of St. Paul, 481 F.3d 565, 566–67 (8th Cir. 2007) (rejecting Title II claim brought against police officers in the shooting death of a man with paranoid schizophrenia who had barricaded himself inside the family home); Heckensweiler v. McLaughlin, 517 F. Supp. 2d 707, 711–13, 722 (E.D. Pa. 2007) (granting in part and denying in part federal and state law claims arising from the suicide of a man with mental illness following a standoff with police attempting to serve him with a commitment order); Hogan v. City

second-guess police officers' decisions with the benefit of hindsight, but Awkward's case invites the question of what would have happened if the officers had used a different approach—or even just waited for Awkward's mother to retrieve the right hat.[236]

The second part of the two-part theory of discriminatory commitment developed here governs situations in which a provider of the commitment—that is, an authority involved in its administration—fails to reasonably modify the terms or conditions of the commitment to accommodate needs of the committed person arising from her disability. This kind of discriminatory commitment, which I refer to as discriminatory-provision, differs from discriminatory-decision in several important ways.

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of Easton, No. 04-759, 2004 WL 1836992, *1–5 (E.D. Pa. Aug. 17, 2004) (granting in part and denying in part federal constitutional and statutory claims in the shooting of a man with mental illness who was not a "viable threat" following a standoff with police in his home). For more than fifteen additional examples of people with mental illness being seriously injured or killed as a result of law enforcement's failure to make reasonable accommodations, see AMNESTY INT'L, USA: RACE, RIGHTS AND POLICE BRUTALITY 14–20 (1999) [hereinafter POLICE BRUTALITY REPORT], *available at* https://www.amnesty.org/en/documents/AMR51/147/1999/en/, *archived at* https://perma.cc/E7J6-6TP6.

236. Awkward's case is typical of those in which police fail to accommodate a person's disability during an "arrest," but it also is suggestive of discrimination that occurs at the intersection of disability and race. When reading about Awkward's case, you might have intuited that Awkward was black. Police brutality in the United States has long been associated with racial discrimination; images of white police officers brutalizing racial minorities—in particular, young black men—have reached iconic status and are seared into our national memory. *See, e.g.*, J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES, Dec. 3, 2014, http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html, *archived at* http://perma.cc/U99B-NC6Z (describing the civil rights and antiracism demonstrations that occurred after a grand jury failed to indict a police officer for his role in Eric Garner's death by chokehold following a routine police stop in July 2014); Kate Mather, *Rev. Al Sharpton Calls Rodney King 'a Symbol of Civil Rights,'* L.A. NOW, L.A. TIMES (June 17, 2012, 11:12 AM), http://latimesblogs.latimes.com/lanow/2012/06/rev-al-sharpton-calls-rodney-king-was-a-symbol-of-civil-rights.html, *archived at* http://perma.cc/ZA9L-3VJ2 (quoting civil rights leader Al Sharpton as describing Rodney King, whose videotaped beating by police sparked race riots in Los Angeles in 1992, as a "symbol of civil rights" and of the "anti-police brutality and anti-racial profiling movement[s]"); Ted Strickland & Judith Browne Dianis, *From Emmett Till to Michael Brown, a Story as Old as America Itself*, MSNBC (Aug. 30, 2014, 1:36 PM), http://www.msnbc.com/msnbc/emmett-till-michael-brown-story-old-america-itself, *archived at* http://perma.cc/2ZDK-3KG5 (drawing parallels between Emmett Till, a fourteen-year-old black teenager whose 1955 murder for allegedly flirting with a white woman sparked a national outcry and invigorated the Civil Rights Movement, and Michael Brown, whose death by police shooting during an arrest in 2014 sparked nationwide antiracism protests). Indeed, racial minorities are disproportionately victims of police violence. POLICE BRUTALITY REPORT, *supra* note 235, at 1; *see also* RONALD H. WEICH & CARLOS T. ANGULO, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 9 (2000) (calling racial minorities "prime victims of police brutality"). Because of this, coverage under the ADA for people like Awkward could help provide a remedy for victims of police violence who suffer discrimination on account of not only disability but also race. This is significant because victims of race discrimination could obtain a remedy in situations where race antidiscrimination law currently provides none. For a discussion of stereotypes conflating disability and race, see *supra* Part III.

First, whereas discriminatory-decision inquires into the justification for the commitment, discriminatory-provision assumes the commitment is justified and instead inquires only into its administration. Thus, discriminatory-provision does not challenge the basis for the commitment but simply asks whether the provider of the commitment—for example, a treatment facility or law enforcement officer—complied with the ADA by reasonably modifying the commitment's terms or conditions to accommodate needs of the committed person arising from her disability.

This conceptual distinction is reflected in a temporal one. Discriminatory-decision concerns discrimination that occurs at the moment the commitment decision is made. Thus, it focuses on a single point in time that may precede the committed person's actual confinement. By contrast, discriminatory-provision concerns discrimination that occurs during the commitment's execution or administration.[237] Thus, it focuses on the commitment as it unfolds, although as we saw in Awkward's case, discriminatory-provision may be especially likely to assume relevance at discrete, predictable points in the commitment process, such as at the time the commitment order is executed.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[238] A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."[239] The right to such modifications is not absolute but contingent: the modifications must not constitute an "undue burden"—that is, they must not entail "a fundamental alteration in the nature of a service, program, or activity or . . . [impose] undue financial and administrative burdens."[240] Thus, to prevail on a Title II claim for failure to accommodate, a plaintiff must show that she is a qualified individual with a disability who is "denied participation in, or the benefits of, the services, programs, or activities of a public entity because of [her] disability" and that the modifications needed to secure her participation or receipt of benefits are not an undue burden.[241]

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237. I use the terms "execution" and "administration" synonymously in this context.

238. 42 U.S.C. § 12132 (2012).

239. *Id.* § 12131(2).

240. 28 C.F.R. § 35.150(a)(3) (2014). The undue burden inquiry requires a case-by-case assessment that weighs the following nonexclusive factors: "(1) The overall size of the recipient's program or activity with respect to the number of employees, number and type of facilities, and size of budget; (2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and (3) The nature and cost of the accommodations needed." *Id.* § 42.511(c).

241. Gorman v. Bartch, 152 F.3d 907, 912 (8th Cir. 1998).

Section 504 of the Rehabilitation Act makes "essentially the same provision,"[242] though its coverage extends to "programs or activities receiving Federal financial assistance."[243] Except regarding issues related to this difference in coverage, cases interpreting Title II of the ADA and Section 504 of the Rehabilitation Act are "interchangeable."[244] Together, these statutes prohibit discrimination against people with disabilities by public entities and recipients of federal funding, including private organizations.[245]

The Supreme Court held in *Pennsylvania Department of Correction v. Yeskey*[246] that "the ADA plainly covers state institutions."[247] Thus, the ADA applies to "medical services[] and educational and vocational programs" provided to people in the custody of federal or state governments, including "prisoners" and, presumably, people committed to hospitals.[248]

In the criminal context, it is clear that once in custody—and for the duration of custody—a person with a disability is entitled to receive reasonable accommodations.[249] It is less clear, however, whether accommodations must be made at the time a person is being taken into custody—for example, during an arrest. Currently, this question is a matter of some disagreement among the circuit courts: the Fifth,[250] Eighth,[251] Ninth,[252] and Eleventh[253] Circuits have allowed ADA claims arising from

242. Gilbert v. Tex. Mental Health & Retardation, 919 F. Supp. 1031, 1041 (E.D. Tex. 1996).

243. *Id.* (quoting 29 U.S.C. § 794(a) (2012)).

244. *Gorman*, 152 F.3d at 912 (quoting Allison v. Dep't of Corr., 94 F.3d 494, 497 (8th Cir. 1996)). To prevail on a Section 504 claim, "a plaintiff must demonstrate that: (1) he is a qualified individual with a disability; (2) he was denied the benefits of a program or activity of a public entity which receives federal funds; and (3) he was discriminated against based on his disability." *Id.* at 911 (footnote omitted). The Code of Federal Regulations provides that "recipient[s] [of federal financial assistance] shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program." 28 C.F.R. § 41.53.

245. Barnes v. Gorman, 536 U.S. 181, 184–85 (2002).

246. 524 U.S. 206 (1998).

247. *Id.* at 209.

248. *See id.* (holding that the ADA "unmistakably includes State prisons and prisoners within its coverage") (internal quotation marks omitted).

249. *See supra* notes 247–48 and accompanying text.

250. *See* Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000) (holding that although Title II does not apply to officers' "on-the-street" responses, officers must reasonably accommodate an arrestee's disability once an area is secure and there is no threat to human safety).

251. *See* Roberts v. City of Omaha, 723 F.3d 966, 973 (8th Cir. 2013) ("[T]he ADA and the Rehabilitation Act apply to law enforcement officers taking disabled suspects into custody."); Gorman v. Bartch, 152 F.3d 907, 911–13 (8th Cir. 1998) (holding more narrowly that the ADA applied to the transportation of an arrestee with paraplegia).

252. *See* Sheehan v. City & Cnty. of S.F., 743 F.3d 1211, 1217 (9th Cir. 2014) ("[W]e join the majority of circuits that have addressed the issue and hold that Title II of the Americans with Disabilities Act applies to arrests.").

253. *See* Bircoll v. Miami-Dade Cnty., 480 F.3d 1072, 1084 (11th Cir. 2007) (declining to "enter the circuits' debate about whether police conduct during an arrest is a program, service, or

arrests in at least some circumstances.[254] The Fourth Circuit historically has not, but in a recent about-face, it implied strongly that it might do so on appropriate facts.[255] The Sixth[256] and Tenth[257] Circuits have acknowledged the fray but declined to enter it. Among the circuits that have allowed ADA claims arising from arrests, the Fifth Circuit uses the most stringent standard for determining when Title II applies. In the Fifth Circuit, the obligation to make reasonable accommodations "does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human

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activity covered by the ADA" because, "in any event, [an arrestee] could still attempt to show an ADA claim under the final clause in the Title II statute: that he was 'subjected to discrimination' by a public entity, the police, by reason of his disability"). As the Ninth Circuit later did in *Sheehan*, the Eleventh Circuit held in *Bircoll* that the ADA applies categorically to arrests:

> [T]he question is not so much one of the applicability of the ADA because Title II prohibits discrimination by a public entity by reason of [a person's] disability. The exigent circumstances presented by criminal activity and the already onerous tasks of police on the scene go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance.

Id. at 1085. As to the question of under what circumstances accommodation is required, the court explained: "[T]he question is whether, given criminal activity and safety concerns, any modification of police procedures is reasonable before the police physically arrest a criminal suspect, secure the scene, and ensure that there is no threat to the public or officer's safety." *Id.*

254. *Compare Sheehan*, 743 F.3d at 1217 ("[W]e join the majority of circuits that have addressed the issue and hold that Title II of the Americans with Disabilities Act applies to arrests."), *and Hainze*, 207 F.3d at 801 (finding that officers must reasonably accommodate an arrestee's disability once an area is secure and there is no threat to human safety), *and* Gohier v. Enright, 186 F.3d 1216, 1221 (10th Cir. 1999) (stating that "a broad rule categorically excluding arrests from the scope of Title II . . . is not the law"), *with* Rosen v. Montgomery Cnty., 121 F.3d 154, 157 (4th Cir. 1997) ("The most obvious problem is fitting an arrest into the ADA at all."). *See also, e.g.*, Patrice v. Murphy, 43 F. Supp. 2d 1156, 1160 (W.D. Wash. 1999) (holding that "an arrest is not the type of service, program, or activity from which a disabled person could be excluded or denied the benefits").

255. *Compare Rosen*, 121 F.3d at 157 ("The most obvious problem is fitting an arrest into the ADA at all."), *with* Waller v. City of Danville, 556 F.3d 171, 172–73, 177 n.3 (4th Cir. 2009) (analyzing extensively the reasonableness of making accommodations where, after two hours of negotiations broke down, officers shot and killed a man with mental illness who was holding his girlfriend hostage and concluding that "any duty of reasonable accommodation was met in these circumstances").

256. *See* Tucker v. Tennessee, 539 F.3d 526, 536 (6th Cir. 2008) (affirming the district court's grant of summary judgment because, "even if the arrest were within the ambit of the ADA," the facts presented did not show a violation). The district court had held categorically that arrests do not fall within the ADA's ambit; the panel declined to offer guidance. *Id.* at 530, 536.

257. *See Gohier*, 186 F.3d at 1221 (clarifying that "a broad rule categorically excluding arrests from the scope of Title II . . . is not the law" and that the issue of when, if ever, the ADA applies to arrests "remains an open question in this circuit").

life."[258] In *Sheehan v. City and County of San Francisco*,[259] decided by the Ninth Circuit last year, the Ninth Circuit joined the Eleventh in embracing a broader standard. *Sheehan* held that the obligation to make reasonable accommodations applies categorically to arrests and that the presence of exigent circumstances (such as might require an on-the-street response) simply informs the analysis of what accommodations are reasonable.[260] The Supreme Court has not yet addressed whether or to what extent Title II applies to arrests, but it is poised to do so. The municipal defendant in *Sheehan* filed a writ of certiorari, which the Supreme Court granted on November 25, 2014.[261]

Few courts have addressed or even acknowledged the narrower—and meaningfully distinct—question of whether Title II and Section 504 require law enforcement and medical personnel to make reasonable accommodations for people taken into custody under an order of involuntary commitment. As in the criminal-arrest context, there is no question that reasonable accommodations are required once the commitment has been executed and the committed person is in the custody of the state.[262] A person who is committed is entitled to reasonable accommodations for the duration of his confinement.[263] As in the criminal-arrest context, however, courts have reached different conclusions—and in some cases have reached the same conclusion by different lines of reasoning—as to whether reasonable accommodations must be made at the time a commitment order is being executed.[264]

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258. *Hainze*, 207 F.3d at 801; *see also id.* at 802 ("Once the area was secure and there was no threat to human safety, the Williamson County Sheriff's deputies would have been under a duty to reasonably accommodate Hainze's disability in handling and transporting him to a mental health facility.").

259. 743 F.3d 1211 (9th Cir. 2014).

260. *Id.* at 1231–32 (quoting Bircoll v. Miami-Dade Cnty., 480 F.3d 1072, 1085 (11th Cir. 2007)).

261. City & Cnty. of S.F. v. Sheehan, 135 S. Ct. 702, 702 (2014).

262. *See supra* notes 247–48 and accompanying text.

263. *Cf.* Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 209 (1998) (holding that "the ADA plainly covers state institutions").

264. *Compare* Schorr v. Borough of Lemoyne, 243 F. Supp. 2d 232, 235–36, 239 (M.D. Pa. 2003) (relying on the statutory history and remedial nature of the ADA in recognizing a claim for failure to modify police practices to accommodate people with mental illness who are subject to involuntary commitment warrants), *and* City of Newark v. J.S., 652 A.2d 265, 276 (N.J. Super. Ct. Law Div. 1993) ("Compliance is more likely when authorities demonstrate sensitivity to human rights."), *with* Estate of Awkward v. Willingboro Police Dep't, No. 07-5083(NLH), 2010 WL 3906785, at *13 (D.N.J. Sept. 30, 2010) (holding that officers' conduct in using deadly force to subdue a mentally ill person who resisted the execution of an involuntary commitment order "cannot serve as a basis for an ADA . . . violation for disability discrimination because such a finding would convert every involuntary commitment transport into a civil rights violation"). *See also supra* notes 244–51.

Courts answering this question in the affirmative have emphasized the statutory history and remedial nature of the ADA,[265] as well as the practical consideration that authorities may obtain compliance more readily when they demonstrate "sensitivity to human rights."[266] Courts answering it in the negative, on the other hand, have expressed concern that recognizing failure-to-accommodate claims in this context would imperil law enforcement and medical personnel[267] and "convert every involuntary commitment transport into a civil rights violation."[268] This concern seems misplaced, however, because Title II requires modifications only when they are reasonable—this is, when the burden they would impose on the service provider is not "undue." Troublingly, courts and commentators have tended to analyze accommodation in the commitment context in the same way as in the arrest context,[269] even though these contexts—while analogous to the extent they involve gaining custody of a person against her will—are vastly different in several critical respects. This lumping together of commitment and arrest is unfortunate because, on the whole, the rationale for requiring accommodation in the commitment context is considerably stronger than in the arrest context. The Supreme Court should keep in mind the important distinctions between these contexts when it considers the scope of the ADA's protections in *Sheehan*.

First, unlike arrests, commitments always involve a person who is disabled under the ADA.[270] Because of this, law enforcement and medical personnel called upon to execute a commitment order know in advance that the person with whom they will engage has (or is regarded as having) a mental disability, and they can prepare to modify their procedures accordingly. This superior notice, and the opportunity it affords service providers to prepare to make reasonable accommodations, creates a greater moral obligation to actually make them. This is perhaps why even the circuits most reluctant to apply the ADA to arrests nonetheless have held that whenever police have sufficient time and information to deliberately plan and execute a criminal arrest—that is, so long as the arrest is not an on-the-street response—they must make reasonable accommodations.[271]

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265. *E.g.*, *Schorr*, 243 F. Supp. 2d at 235–36, 238–39.

266. *City of Newark*, 652 A.2d at 276.

267. *See, e.g.*, Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000) ("To require the officers to factor in whether their actions are going to comply with the ADA, in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and nearby civilians, would pose an unnecessary risk to innocents.").

268. *Awkward*, 2010 WL 3906785, at *13.

269. *Cf.* Sheehan v. City & Cnty. of S.F., 743 F.3d 1211, 1232 (9th Cir. 2014) ("[E]xigent circumstances inform the reasonableness analysis under the ADA, just as they inform the distinct reasonableness analysis under the Fourth Amendment.").

270. This is because people who are committed are by definition either disabled or regarded as such.

271. *Hainze*, 207 F.3d at 801.

Indeed, the superior notice that marks the commitment context may change what constitutes an "undue burden" because improved notice of the need to make a modification necessarily reduces the burden of making it. Moreover, since the ADA may apply to the commitment decision itself, there is no reason it should not also apply to every subsequent part of the commitment "service," including the execution of the commitment order. That it might not do so defies logic.

Second, a person under arrest is suspected of having committed a crime, whereas a person being committed is typically suspected only of the potential to commit some (often unspecified) future dangerous act that, even if it occurs, may not constitute a crime.[272] A criminal suspect is thus differently culpable than a person being committed (even assuming he is in fact dangerous on account of mental illness), who may have no culpability whatsoever—at least according to the normative judgments of our criminal law and, I would contend, most people. For these reasons, criminal arrest and civil commitment involve significant functional and moral differences that make the arguments for requiring reasonable modifications in the commitment context considerably stronger than in the arrest context.

The advance notice of the need to make reasonable accommodations that is available to people executing commitment orders, and the non-culpable mental state of the people with disabilities they engage, counsel strongly for the recognition of ADA failure-to-accommodate claims arising from the execution of involuntary commitment orders. Enforcing the ADA's reasonable accommodation requirements at the time the commitment order is executed—consistent with the statute's recognized applicability to all other aspects of the commitment process—would encourage peaceful cooperation on the part of people being committed by respecting their dignity and demonstrating sensitivity to their needs. Moreover, it would help further the remedial purpose of the ADA and make involuntary commitment safer and more humane for all involved.

V. Conclusion

Commitment entails a profound loss of civil rights and opportunity—both during the period of confinement and afterward, long after a person has reentered the community. Because of this, normative conceptions of justice suggest a moral imperative to ensure the commitment process is fair and free from discrimination. People facing commitment deserve a fair shake: they deserve access to independent experts; the right to have dangerousness shown by proof of an overt act; the right to sue when stereotypes or prejudice infect the decision process; and the right to a safe commitment that reasonably accommodates their disability.

272. For example, when a person harms herself.

But we need not rely on abstract notions of justice alone as reason to ensure the integrity of the commitment process. There also is an important practical reason. Commitment is intended to promote therapeutic outcomes: it is supposed to help people with mental illness. Yet studies show that the often-traumatic experience of being committed can inflict severe psychological harm.[273] This possibility is at its zenith when a commitment hearing is a pro forma proceeding whose outcome is all but predetermined,[274] compromising bedrock values such as dignity, trust (in doctors, lawyers, and the state), and equal citizenship. And because people with mental illness are, as a group, chronic victims of discrimination, those facing commitment may be especially sensitive to threats to their status as full and equal shareholders in our justice system.

There is psychological value in participating in a hearing where one's voice is respected and given careful consideration, not automatically discounted as irrational or crazy. When procedural justice is done, an adverse outcome is more difficult to dismiss as the result of psychiatric railroading. At the same time, a psychiatrist who is at risk of losing at the commitment hearing may be more likely to work to cultivate a positive relationship with the patient that, besides giving the patient reason to consent to voluntary treatment, may itself have intrinsic therapeutic value. Perhaps most important, having one's voice heard is empowering—it nurtures the will and inspires self-confidence and, with it, a sense of possibility. As law professor Elyn Saks recalled in her bestselling memoir about her own struggle with schizophrenia: "Even at my craziest, I interpreted [having a say in my treatment] as a demonstration of respect. When you're really crazy, respect is like a lifeline someone's throwing you. Catch this and maybe you won't drown."[275]

A client I helped represent in a commitment hearing at the Austin State Hospital in Travis County, Texas,[276] found himself in a precarious position

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273. *See* Winick, *supra* note 53, at 38 (noting the potential "antitherapeutic consequences" of the commitment process).

274. *Id.* at 41 ("In practice, commitment hearings tend to be brief and non-adversarial episodes in which judges appear to 'rubber stamp' the recommendations of clinical expert witnesses."). Justice Warren Burger used more evocative language in writing that commitment hearings for minor children whose parents sought to have them committed should not simply be "time-consuming procedural minuets before the [child's] admission." Parham v. J. R., 442 U.S. 584, 605 (1979).

275. SAKS, *supra* note 10, at 80; *see also id.* at 130 ("I was going to the hospital for the third time, I knew it. I was going to be an inpatient again, and they would make me take drugs. Every nerve in my body was screaming. I didn't want a hospital. I didn't want drugs. I just wanted help.").

276. Pursuant to Texas's student-practice rule, law students who participate in The University of Texas School of Law's Mental Health Clinic represent proposed patients in commitment hearings and related proceedings in Travis County Probate Court under the supervision of an attorney. TEX. RULES AND REGULATIONS GOVERN. THE PARTICIPATION OF QUALIFIED LAW STUDENTS AND QUALIFIED UNLICENSED LAW SCHOOL GRADUATES IN THE TRIAL OF CASES IN TEXAS R. II (West 2014).

when, during his cross-examination by the state's attorney, he denied that he had a mental illness yet agreed to take psychotropic medication if he were discharged and not committed. (Whether a person diagnosed with a serious mental illness will take medication outside the hospital setting often informs the judicial calculus.)[277] The state's attorney quickly boxed him in: "If you're not mentally ill," she asked, "then why would you agree to take medication?" His response spoke volumes. Pointing his finger as though to simulate an accusation, he responded that the medication helped him feel better but that he just didn't like being told, "*You're mentally ill.*" For many people, understandably, being treated with dignity is a precondition for being treated at all.

—David D. Doak

277. Churgin, *supra* note 162; *see also, e.g.*, Johnstone v. State, 961 S.W.2d 385, 391 (Tex. App.—Houston [1st Dist.] 1997, no writ) (Nuchia, J., dissenting) (opining that continuous refusal to take prescribed medication should alone satisfy the overt act requirement necessary to meet the commitment standard).


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