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CONTENTS

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Transatlantic Justice: Slavery in the Judicial Imagination

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CONTENTS

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Speech given at Birmingham City University School of Law November 3, 2021

Introduction

Throughout the history of humankind, certain challenges have puzzled society. Education, public safety and the economy are issues consistently at the forefront of our collective minds, but no permanent solution appears. However, in the last three hundred years, particularly in the United States and the United Kingdom, the most perplexing and vexing challenge has been race. At its core, race is unsettling because it unearths an intrinsic conflict and oftentimes a contradiction between our words on the one hand and our policies, laws and actions on the other. Are we countries that live up to the lofty ideal of democracy in which we embrace all who seek to join our citizenry or do we systematically exclude persons from the polity on the basis of race?

Many of you are in the throes of your studies. You examine the world as it is. For all its problems, you see some good and some bad. Our respective countries have attempted to eliminate racism and embrace diversity. What is racism? We certainly could have 100 lectures on its origins and progression. At its core, racism relies on the notion of inferiority. Diversity, another exceedingly complex term, is one of the ways society chooses to combat racism.

Each of you has splendid and numerous examples of how we combat racism. One small example, I was both struck and proud that the entire Premier League took a knee against racism and discrimination over a year ago when post-pandemic play resumed in mid-summer. The entire league continues to do so today. Hopefully, the popularity of Ted Lasso in the States will bring the message of fighting racism and discrimination even more resoundingly to all.

Today, I suggest that we take a step back in history to examine how our highest courts addressed racism through the lens of slavery. The crux of the institution of slavery is the subjugation of one's dignity and the enforced capitulation of one's free will. This process inevitably relies on the perceived inferiority of the slave and creates consequential inequality.

My modest objective today is to examine how England and the United States attempted to address this complex topic through the prism of the law at two particular points in time, through two now famous cases, written by two well-respected jurists, each of whom took an entirely different approach. Hopefully, it will help us understand how the law, at times, moves us towards, or away from, achieving our ideals.

I shall examine the words in their judicial opinions and how those words may have affected events, perceptions and the law in the time they lived and beyond.

I am sure you are asking yourselves—Judge, how far back are we going? Our travels will take us to the 1770s in England and Lord Mansfield, the Chief Justice of the King's Bench, and the 1850s in the United States and Roger Taney, the Chief Justice of the Supreme Court of the United States. Each jurist had a very similar task—answer a question that could profoundly affect their nation and the course of history. The question—if a slave moves from a place that allows slavery to a place that does not allow slavery, does that mean the slave is now free? Exactly what they decided and how they each went about it spoke to whom they were as individuals and judges. Why is it important? The study of slavery speaks to the justification of the dehumanization of an entire people for economic reasons

without the responsibility of moral judgments. As tomorrow's leaders, you should hear and understand how the law, as pure and unencumbered as it may seem, can be both steadfast against and responsive to political and economic concerns.

In the United States, every issue that confronts society at one time or another comes to the steps of the courthouse. Judges are asked to resolve complex issues that society cannot resolve on its own. Those resolutions are not perfect. Judges are earnest in their efforts to come to the appropriate resolution, but we are not infallible. Let's take a step back in time.

In the 1770s, England was the most powerful nation in the world. Its hold on commerce was unquestioned. Its dominance of the slave trade was also beyond dispute. Between the Caribbean and the colonies thousands of slaves were in British control. Despite this dominance many sought to end slavery. Clearly there were religious, moral and philosophical reasons to end slavery. There was no uniformity of opinion in the British Empire.

Interestingly, there was no law regarding slavery in England. It was neither permitted nor prohibited under the law. To be sure, slaves existed in England at this time, but not as a matter of law. This was an opportunity to create new law—hence, the *Somerset*[1] case brought before the preeminent jurist in England at that time.

William Murray, Lord Mansfield, has been touted as the best lawyer of the Eighteenth Century and a jurist the equal of Chief Justice of the United States John Marshall. Lord Mansfield was appointed Chief Justice of Court of King's Bench in 1756, at the time England's highest Court. Indeed, his stature is evident to posterity by the fact that the Supreme Court of the United States has cited to his decisions over 330 times, most recently in 2008.

Lord Mansfield

As is true of many transformational jurists, Lord Mansfield was ahead of his time. Thought by many to be the founder of modern commercial law, Lord Mansfield's view on a number of substantive areas was prescient. He viewed the influence of money on elections as a threat to democratic institutions, and he understood and recognized that individuals had a right to privacy. One of his biographers (Norman S. Poser)[2] put it best:

> Mansfield believed that the courts should be engines of social change. He saw morality as the basis of all law, and his court the guardian of public morals. He was willing to supplement the reforms enacted by the legislature and, where it deemed necessary, to make new law in order to achieve justice and to protect the weak.[3]

This view of Lord Mansfield is most telling. How could morality and slavery be reconciled? Certainly, justice would not permit such inconsistency.[4]

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1 Somerset v. Stewart [1772] 98 E.R. 499 (Eng.).

2 Norman S. Poser, Lord Mansfield: Justice in the Age of Reason (2013).

3 *Id.* at 4. *See also id.* at n. 8. *See generally*, Bernard I. Shientag, *Lord Mansfield Revisited: A Modern Assessment*, 10 Fordham L. Rev. 345 (1941).

4 *Somerset,* at 510, "So high an act of dominion must be recognized by the law of the country where it is used. The power of a master over his slave has been extremely

Somerset

The *Somerset* case is thought by some commentators to have ended slavery in England. The opinion did no such thing.[5] It is an example that the essence of any legal opinion is how the issue is framed. But first the facts. Charles Stewart was a Scottish merchant. He held a position of paymaster of customs in Boston. In 1769, he brought his slave, James Somerset, to England. Notwithstanding his status, Somerset was baptized in 1771. Three abolitionists in England acted as Godparents. At the time, some professed that if a slave was baptized that cleared a path to personhood and out of slavery. Two months later, Somerset escaped but was captured by men hired by Stewart. Somerset refused to return to Stewart. He was taken to a ship on the River Thames to be sent to Jamaica and sold at auction. When Somerset's abolitionist Godparents learned of his capture, they petitioned Lord Mansfield for a writ of habeas corpus. The writ of habeas corpus literally means to free the body. The writ demanded that Somerset's captor be hauled into court to explain why Somerset should be forced to leave England against his free will.

Mansfield had gone to great lengths in other cases to avoid the question of the legality of slavery in England. He hoped, much like cases today, that settlement would occur and obviate the necessity of deciding the issue. The slow progress of the case built up momentum and it became a cause célèbre. Both sides not surprisingly argued policy, property and morality interests.

Issue

Lord Mansfield framed the question—Whether colonial slavery laws could be enforced in England in the same way, for example, that a marriage contracted in a foreign country would be recognized in England. Specifically, could Stewart capture Somerset, keep him in captivity and take him out of the country against his will?

Conundrum

On the one hand, to legalize slavery would have many consequences contrary to the law of England. On the other hand, setting free 14,000-15,000 men could also have disruptive consequences.

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different, in different countries. 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. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged." *See also, id.* at 500, "slavery in its full extent be incompatible with the natural rights of mankind, and the principles of good government…"

5 F. Dumont Smith, *Roger Brooke Taney*, 1 Tex. L. Rev. 261, 274 (1923), citing Mansfield as a point of reference in a comment on Chief Justice, "for many years after Mansfield's decision slavery existed in the colleries and salteries of northern England. Mansfield simply held that freedom was the natural state of mankind; that slavery could only exist by virtue of positive municipal law, and as there was no such law in England, Somerset was free while on English soil."

Ruling

Lord Mansfield was a principled jurist and noted "Compassion will not, on the one hand, nor inconvenience on the other, be to decide, but the law . . ."[6]

Mansfield felt a tension between his rational and humane beliefs and his unwavering support of British commerce and the sanctity of property. He understood the importance of the slave trade to British merchants, yet he knew that slavery could not be justified on any rational or humanitarian ground.[7]

Lord Mansfield issued a courageous opinion. Although he may have had both religious and moral reservations about slavery, he understood that there were two sides to the argument. His opinion, resulting in Somerset's freedom, spoke volumes when he quoted the oft-used Latin phrase—*fiat justitia ruat caelum*—let justice be done, though the heavens fall.[8] This is the phrase carved into the beautiful wooden bench in our ceremonial courtroom here in Newark, New Jersey. It is not merely a symbolic phrase to allow the populace to feel good. It is a critical part of our oath as judges.

Apropos of that thought, the following is a quote from the *Somerset* opinion:

> 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 … . It is so odious, that nothing can be suffered to support it, but positive law. Whatever inconvenience, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.[9]

Now, what does the ruling mean—if a slave came to England, ran away while in England, he or she could sue for their freedom and win. There were three important takeaways from the opinion. While Lord Mansfield technically could not deem slavery illegal in England, his opinion did note that an English court would not recognize a slaveowner's control over a slave. Lord Mansfield insisted that the scope of the opinion was merely that Somerset could not be forcibly taken from England since the writ of habeas corpus (freeing the body) protected both blacks and whites.[10]

Similarly, the opinion did not order the end of slavery in England and its colonies.[11] At best, it can be persuasively argued that the case set England on

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6 *id.* at 509.

7 Poser, *supra* note 2, at 290, 296.

8 *Fiat justitia ruat caelum*, Merriam Webster Dictionary (2021), https://www.merriam-webster.com/dictionary/fiat%20justitia%2C%20ruat%20caelum.

9 *Somerset*, at 510.

10 The opinion in *Somerset* left the issue of slavery to the local jurisdictions, *see* David M. Golove & Daniel J. Hulsebosch, *The Federalist Constitution As A Project in International Law,* 89 Fordham L. Rev. 1841, 1867 (2021), "The deaccessioning of slavery from the law of nations, in particular, was energized by Lord Mansfield's 1772 decision in *Somerset v. Stewart* (Somerset's Case),which proclaimed that slavery could not be reconciled with the law of nature but depended instead on the positive municipal law of a particular locality for its existence."

11 Although, it did heighten fears that this may be imminent, *see* Poser, *supra* note 2, at 296. To some extent *Somerset* had the effect of delegitimizing slavery, ultimately with a

a course to engage in a public conversation in which the entire British Empire addressed the economic, political, religious, and moral consequences of slavery. The slave trade ended in 1807 and slavery was ended in the British Empire in 1833 with the aid of reparations of 20 million pounds to all slaveholders (the equivalent of 2.296 billion dollars today). There was no civil war. There was no bloodshed. Were things perfect? Certainly not.

Dred Scott

Fast forward. Eighty-four years after the *Somerset* opinion, in a different place and time, Chief Justice Taney faced a legal challenge that literally had flummoxed preacher, politician, and philosopher from the constitutional convention to that very moment.[12] How can a nation at its nascent stage balance what many believed was a moral and religious wrong on the one hand with an economic reality that the nation relied on slavery for its very existence?

Dred Scott[13] is undoubtedly the most infamous case in the history of the Supreme Court. The opinion was penned by Chief Justice Roger Taney from Maryland. Taney had been appointed by President Andrew Jackson in 1835. The position to be filled was a critical one. Taney was chosen to take over as Chief Justice from the venerable John Marshall—the first Great Chief Justice and thought now to be the greatest in the Court's history.[14]

Taney grew up in a family with slaves. As an adult, he owned slaves for a period of time, but freed them. The freeing of those slaves, coupled with cases in his earlier career, might lead the uninitiated to believe he was against the institution of slavery. Indeed, as a practicing lawyer he represented a Methodist minister from Pennsylvania, Jacob Gruber. Gruber was indicted for inciting slaves to insurrection by preaching a sermon addressing the irony of newspaper advertisements itemizing the sale of slaves alongside horses, cows and sheep.

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transatlantic ripple effect reaching the slave states in the U.S., *id.* at 1872, "The loss of this bulwark of legitimation, reflected most famously in Somerset's Case, sent supporters of slavery searching for new justifications within municipal law." *See also* Christopher Tomlins, *"Law As . . ." II, History as Interface for the Interdisciplinary Study of Law,* 4 UC Irvine L. Rev. 1, 10 (2014), noting the impact of *Somerset* by stating. "Lord Mansfield's decision in Somerset's case, restricted though it was, weakened slavery's metropolitan foundations."

12 Ruth Paley, *Imperial Politics and English Law: The Many Contexts of Somerset*, 24 Law & Hist. Rev. 659, 664 (2006), considering the influence of *Somerset* in the United States, particularly for abolition movements, "*Somerset* has come to enjoy iconic status in the story of emancipation in America for reasons that go far beyond the limited reality of the decision itself. Its place in the history of America and race relations from the nineteenth century to the present day is a cultural phenomenon in its own right--one that is potentially far more interesting and worthy of study than *Somerset* itself."

13 Dred Scott v. Sandford, 60 U.S. 393 (1857).

14 *See generally,* Charles F. Hobson, The Great Chief Justice: John Marshall and the Rule of Law (American Political Thought) (2000), characterizing the Chief Justice as a "towering figure" in United States constitutional law. *See also,* Smith, *supra* note 5, at 263, commenting on the difference between Taney and his predecessor, Chief Justice Marshall.

Taney's summation in that case does not seem like the calculated words of a defense attorney. His prose seemed to earnestly represent his thoughts at the time. He stated:

> A hard necessity, indeed, compels us to endure the evil of slavery for a time. It was imposed upon us by another nation while we were yet in a state of colonial vassalage. It cannot easily or suddenly be removed. Yet, while it continues, it is a blot on our national character; and every real lover of freedom confidently hopes that it will effectually, though it must be gradually, wiped away, and earnestly looks for the means by which this necessary object may be attained.[15]

Although these words may appear to portend what Taney's views are, and therefore how he might rule on the subject of slavery, that form of supposition is a fool's errand. Many a lawyer attempts to guess how a judge might think through a problem based on that judge's background or life experience. Such a pursuit is an inexact science that rarely yields reliable results.[16] Hence, the opinion in *Dred Scott*.

Dred Scott presented a scenario frighteningly similar to the *Somerset* case with an entirely different result.[17] Dred Scott was a slave, who was married and had one child. He and his family had been bought and sold several times. As a result, they had lived in several states and territories. He argued that since he had been in free states, he should no longer be considered a slave, based on the precedent of *Somerset*.

The *Dred Scott* case came at a tumultuous time in American history.[18] The country was severely divided on the issue of slavery. As new states and territories became part of the country, Congress had to grapple with whether the state or territory would be slave or free. The abolitionist movement was gaining tremendous momentum. The country seemed to be headed for civil war. Taney believed a firm opinion could resolve the question and avoid war. He was wrong.

He put the issue in the case as follows: "The question is simply this: Can a Negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States . . .?"[19]

Despite earlier writings to the contrary, Taney relied on a nakedly racist rationale for the key proposition of the case—Blacks are so inferior no whites could

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15 Samuel Tyler, Memoir of Roger Brooke Taney, L.L.D.: Chief Justice of the Supreme Court of the United States 130-31 (1872).

16 *See, e.g.,* Smith, *supra* note 5, at 262-63, commenting upon Taney's interactions with African American people, "One of the little incidents that has been noted shows his attitude towards the Negro. He was passing by a slave's cabin in Washington, and saw a tiny colored girl struggling under a pail of water too heavy for her. The great Chief Justice took the pail from the child's hand and carried it to the cabin."

17 *See generally,* William M. Wiecek, *Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. Chi. L. Rev. 86 (1974).

18 *See generally,* Louise Weinberg, *Dred Scott and the Crisis of 1860*, 82 Chi.-Kent L. Rev. 97 (2007).

19 *Dred Scott*, at 403.

have possibly thought them worthy—whether slave or not—of being part of "our" political community.[20]

Taney used three principal arguments in surmising that Blacks could not be deemed to be part of the political community at the formation of the United States. He started with the Declaration of Independence, the document that colonists relied upon to declare their separation from England. Taney asserted that the now famous words "[w]e hold these truths to be self-evident, that all men are created equal,"[21] could not have possibly meant what they said. Taney declared "[b]ut it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration … ."[22]

The interesting historical note is that free Blacks lived and fought in the American Revolution. Indeed, the first person to lose his life in the fight for independence of the colonies was Crispus Attucks, a Black man.

The second major tactic Taney employed was invoking the notion of inferiority. The following is a revealing quote from the opinion.

> "They [Blacks] had for more than a century before been regarded as being of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so inferior, that they had no rights which the white man was bound to respect; and that the Negro might justly and lawfully be reduced to slavery for his benefit."[23]

Let's just take a step back from the opinion for a moment. Taney's comments undermine the fact that free Blacks at the time were already part of the political community. In many states, Blacks voted and were deemed part of that state's citizenry. His statement about having no rights which the White man was bound to respect[24] was unnecessary and gratuitous. Most important, it undercut any Black's ability to socially or economically participate in society. Lastly, the notion that slavery was actually an institution for the benefit of slaves requires no comment.

> (Back to the opinion.) "He was bought and sold and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every

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20 *Id.* at 404-05, "The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race."

21 The Declaration of Independence para. 2 (U.S. 1776).

22 *Dred Scott*, at 410.

23 *Id.* at 407.

24 *Id.*

> grade and position in society daily and habitually acted upon it in their private pursuits as well as in matters of public concern, without doubting for a moment the correctness of this opinion."[25]

This quote is emblematic of Chief Justice Taney's opinion. He sought in every way possible to leave no stone unturned regarding the issue of whether Blacks could be thought part of the political community and thus citizens.[26]

Taney's third tactic was to reference England and the rest of Europe as adherents to his postulate regarding inferiority.[27] He stated that "It is difficult at this day to realize that the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. (This is key) but the public history of every European nation displays it in a manner too plain to be mistaken." [28] He stated further: "And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English Government and English people."[29]

Taney's reference to England and its position on slavery seems to neglect the persistent moral, political, religious, and economic dilemma that England grappled with from the time of the *Somerset* opinion until the abolition of slavery in 1833. Given the *Somerset* opinion, and subsequent actions throughout the Empire, concluding that Blacks could never be contemplated as part of the English citizenry is certainly subject to question.

Dred Scott lost his case. Interestingly, the son of a former owner bought Scott and his family's freedom and Scott died soon after the opinion was issued. Justice Taney did not save the confederacy. I say confederacy intentionally. The war came a scant 3 years later. You know how it ended. But think of how these events relate to what you did today. As a result of *Dred Scott* and the union victory, the Civil War Amendments to the Constitution were passed.[30] The 13th, 14th, and 15th Amendments were explicitly passed to undo the *Dred Scott* opinion. Blacks were free, Blacks could vote, and no laws could infringe on the rights to due process or equal protection under the law.

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25 *Id,*

26 Michael Meranze, *Hargrave's Nightmare and Taney's Dream,* 4 UC Irvine L. Rev. 219, 236 (2014), commenting on the conflict between race and the Constitution as presented by Taney in *Dred Scott,* "Taney seeks to make the Federal constitutional order coterminous with the entirety of the colonizing process. The history of America, in this telling, was a war of the races and the Constitution simply one moment in that history…. Law-—even constitutional law—was a simple symptom of this underlying racial structure. Put another way, Taney aimed to make his constitutional argument by insisting that the Constitution—at least regarding the enslaved and their rights-—made no difference at all."

27 *Id.* at 478, "But with regard to slavery amongst the Romans, it is by no means true that emancipation, either during the republic or the empire, conferred, by the act itself, or implied, the status or the rights of citizenship."

28 *Id.* at 407.

29 *Dred Scott,* at 407-08.

30 *See generally,* Paul Finkelman, *Scott v. Sandford: The Court's Most Dreadful Case and How It Changed History,* 82 Chi.-Kent L. Rev. 3 (2007), writing on the historical, legal and political impact of the *Dred Scott* case.

What are the takeaways from today's lecture? Racism is not a new malady that has befallen our societies.[31] It is deeply rooted in our histories. It is much more insidious than merely calling someone a hurtful name. It goes to the very essence of our community.[32] What shall we do, what shall you do when racism rears its ugly head? Speak up. Fight. Engage. Often lost in these cases are the two men involved—James Somerset and Dred Scott.[33] Their courage got the proverbial ball rolling. The rest as they say is history. Be participants. Get involved. Do your part. The constitutions and laws of both of our countries can be changed and amended when need be. Be part of the solution, not a complainer on the sidelines.[34]

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31 Laura Kyte, *Admitting A Wrong: Apology for the Historical Injustice of the Dred Scott Case*, 47 B.Y.U. L. Rev. 317, 349 (2021), commenting on the implications of the role of the Supreme Court in interpreting the United States Constitution as being 'colorblind:' "The idea that the Court's interpretation of the Constitution is, or should be, colorblind is a myth. Since the time of Justice Harlan's dissent from *Plessy*, the Court has often referred to the Constitution as colorblind. Or, at least that a colorblind Constitution is an ideal that our systems of governance should strive for. However, this fails to take into account the reality that race has played since the founding of our nation. *See also,* A. Leon Higginbotham, Race, *Racism and American Law. by Derrick A. Bell, Jr.*, 122 U. Pa. L. Rev. 1044-46 (1974), considering how racism is perceived in the American legal and political system, "Despite the millions of words espoused by lawyers, by lawyer-politicians, and sometimes even by law professors proclaiming the progress of American law, among many there still persists the nagging doubt whether legally sanctioned racism of the past and its present impact will be eradicated in this decade or even in this century. Did the nation reach its highest plateau of racial options and understanding in the late 1960's? Will future improvements be miniscule at best, or will the progress of the 1960's suffer a steady erosion?" *See generally,* Derrick A. Bell, Jr., Race, Racism and American Law (1973).

32 *Id.* "The colorblind ideal fails to acknowledge that our nation was founded on a system that rewarded and incentivized slavery, leading to its expansion in the decades that preceded the Civil War. And it ignores the struggle that black Americans have had to continuously fight in order to obtain equality. The Court's striving for an "ideal" of colorblindness inflicts another type of historical erasure. Ignoring the historical role that race has played perpetuates racism by erasing the racial context that remains as a vestige of racial hierarchy without ever directly confronting or changing the systems that built that hierarchy. Asserting colorblindness as an ideal is simply a way to avoid directly confronting racism with anti-racism. "To be a racist is to constantly redefine racist in a way that exonerates one's changing policies, ideas, and personhood." By failing to see color in its interpretation of the Constitution, the Court fails to grapple with the racial inequities it has effectuated through its holdings" (quoting Ibram X. Kendi, How to Be an Antiracist 17 (2019)).

33 *See generally,* Alfred L. Brophy, *Slaves as Plaintiffs*, 115 Mich. L. Rev. 895 (2017)

34 A. Downs, *Racism in America, and How to Combat It*, in Urban Problems and Prospects 77 (1970), provides a definition of what constitutes racism in the U.S.: "Perhaps the best definition of racism is an operational one. This means it must be based upon the way people actually behave, rather than upon logical consistency or purely scientific ideas. Therefore racism may be viewed as any attitude, action or institutional structure which subordinates a person or group because of his or their color. Even though "race" and "color" refer to two different kinds of human characteristics, in America it is the visibility of skin color—and of other physical traits associated with particular color or groups—that marks individuals as "targets" for subordination by members of the white majority."

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Rise of Complete Substitutes and Fall of the Origination Clause in the Post-Ratification Era

Daniel J. Smyth*

ABSTRACT

The Constitution's Origination Clause requires the House of Representatives, the chamber considered closest to the people, to originate all bills for raising revenue. This clause allows Senate amendments to these bills. However, may Senate amendments completely replace House revenue bills with new revenue bills, as occurred with the Affordable Care Act of 2010?

My previous research argued the original public meaning of amendment—how a "reasonable speaker of English" would have understood that word in the founding era—disallows complete substitutes. Historical legal arguments justifying the Senate's complete substitutes rely on quotes from Thomas Jefferson's important Manual of Parliamentary Practice *(1801) saying, for example, "[a] new bill may be ingrafted by way of amendment on the words 'Be it enacted[.]'" These arguments also cite examples of complete substitutes in Congress from the mid-to-late 1800s, particularly the Senate's attempted substitute to a House revenue bill in 1872. But no previous research has examined congressional amendment practice during the important post-ratification period of 1789 to 1799 (First through Fifth Congresses), which represents the republic's first decade and which can be the most suggestive of original meaning.*

This article tracks the rise of Congress' complete substitutes—whether to revenue or other legislation—during the first decade and even until 1805. Throughout the entire period under examination, the Senate made no complete substitutes to House revenue bills. The first actual complete substitute to any legislation occurred to a Senate resolution in 1800 when Jefferson was that chamber's presiding officer, and this episode obviously occurred after the first decade. There was thus no trace of any accepted, let alone consistent, practice of complete substitution in the earliest Congresses. Accordingly, the post-ratification history of amendment practice confirms the original meaning of amendment and indicates Jefferson's quotes and the historical legal arguments lack a significant foundation in originalism. Later Senate practice as in 1872 allowing complete substitutes to House revenue bills, which Jefferson surely enabled, disregarded the original meaning of amendment in the Origination Clause. But perhaps—given this article's findings—this original meaning will return to prominence.

KEYWORDS

Original Meaning, Amendment, Origination Clause, Congress, Post-Ratification, Thomas Jefferson

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* Independent Researcher (Master of Public Policy; University of Maryland, Baltimore County). I thank my following reviewers: Marion and Michael Smyth; Andrew T. Hyman, Esq.; and Michael D. Ramsey, Hugh and Hazel Darling Foundation Professor of Law, University of San Diego School of Law.

CONTENTS

I. Introduction

In his landmark *A Manual of Parliamentary Practice: For the Use of the Senate of the United States* (1801), Thomas Jefferson wrote, among many other legislative practices of the time, "[a]mendments may be made so as totally to alter the nature of the proposition[.]" He even continued that "[a] new bill may be ingrafted by way of amendment on the words 'Be it enacted, &c.'"[1]—referring to a procedure now known as "gut-and-amend."[2] As Jefferson was the Senate's Presiding Officer as part of his role as U.S. Vice President from 1797 to 1801,[3] both these quotes could easily be interpreted to validate the practice of complete substitution. This practice occurs when an amendment(s) replaces the substance of all significant parts of a whole legislative proposal—such as a bill or report—with entirely different parts. Jefferson's quotes also suggest complete substitutes may have occurred with some frequency in early Congress.

Surely, Jefferson's manual influenced both his contemporary and later congressmen. For instance, by as early as 1802 the Senate invoked rules from Jefferson's manual about keeping sensitive treaty proceedings secret,[4] and in 1811 a representative referenced the manual during a question of order.[5] In 1812, the House circulated manual copies for general reference along with the House's rules of procedure, and the Senate took a similar action in 1828.[6] By 1837, the House even officially adopted the manual to help govern its proceedings.[7] Accordingly, the manual's apparent claims about the permissibility of complete substitutes most likely influenced the understanding of Jefferson's contemporary and later congressmen regarding the proper scope of amendments.

A. Known Complete Substitutes in U.S. Congress

Hinds' Precedents of the House of Representatives of the United States (1907), which documents the House's early procedural precedents, contends the House permitted complete substitutes throughout much of the 1800s.[8] Hinds' earliest example is from 1826, when Representative Daniel Webster of Massachusetts tried to gut-

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1 Thomas Jefferson, A Manual of Parliamentary Practice: for the Use of the Senate of the United States, Sec. XXXV (Printed by Samuel Harrison Smith, 1801) [hereinafter Jefferson's Manual].

2 Tessa Dysart, *The Origination Clause, the Affordable Care Act, and Indirect Constitutional Violations*, 24(3) Cornell J. Law Public Policy 454 n.14 (2015).

3 Jefferson's Parliamentary Writings: "Parliamentary Pocket-Book" and a Manual of Parliamentary Practice 9 (Wilbur Samuel Howell ed., 1988) [hereinafter Jefferson' s Parliamentary Writings].

4 Annals of Cong., 1802-1803 89 n.*, n.+ (Joseph Gales, ed., vol. 12, 1851).

5 Annals of Cong., 1810-1811 526-27 (Joseph Gales, ed., vol. 22, 1853).

6 Journal of the House of Representatives, 12th Cong., First Sess., 28 February 1812, 211; Journal of the Senate, 20th Cong., Second Sess., 16-17 December 1828, 36, 39.

7 Brian Alexander, *Jefferson's Manual and the Modern Rules of the U.S. Congress* (November 23, 2020)*, available at* https://www.monticello.org/research-education/blog/jeffreson-s-manual/

8 Asher Crosby Hinds, Parliamentary Precedents of the House of Representatives of the United States, § 5753, 5758-5787 (vol. 5, 1907) [hereinafter Hinds' Precedents].

and-amend the "Panama resolution."[9] Hinds offered several examples of complete substitutes in ensuing decades, such as one in 1836 involving the gut-and-amend of a resolution calling for no abolition of slavery in the District of Columbia[10] and another in 1850 involving the swap of a bill establishing boundaries in Texas for another bill providing a territorial government in New Mexico.[11]

More recent publications have described several complete substitutes in Congress after the Civil War. For instance, scholar Michael Evans (2004) documents the Senate's attempt in 1872 to completely replace a House bill reducing taxes on tea and coffee with a bill aiming to abolish the federal income tax and alter the tariff system.[12] Evans also examines two revenue laws passed in the 1980s—the Tax Equity and Fiscal Responsibility Act (TERFA) of 1982[13] and the Tax Reform Act of 1986[14]—that began as the Senate's complete substitutes to House revenue bills. Professor Rebecca Kysar (2014) notes several more recent examples of revenue laws resulting from the Senate's "gut-and-amend" procedures, including the Emergency Economic Stabilization Act (EESA) of 2008, the Patient Protection and Affordable Care Act (PPACA) of 2010, and the American Taxpayer Relief Act (ATRA) of 2012.[15] However, according to this article, only PPACA is a true complete substitute[16] because the "gut-and-amend" procedures for EESA and ATRA actually preserved significant parts of their respective House bills.[17]

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9 *Id.* at § 5753. However, Webster's amendment merely reworded the original resolution. Both versions requested that the U.S. president provide the House background information regarding 1) an invitation for U.S. ministers to attend a meeting at the Congress of Panama and 2) the meeting's goals. *See* Journal of the House of Representatives, 19th Cong., First Sess., 2 February 1826, 215 (Hinds appears to have mistakenly said the "gut-and-amend" was on 31 January 1826).

10 Hinds' Precedents, *supra* note 8, at § 5793.

11 *Id.* at § 5687.

12 Michael W. Evans, *'A Source of Frequent and Obstinate Altercations': The History and Application of the Origination Clause*, 105 Tax Notes 1228-30 (2004) [hereinafter *Evans*]. The House refused voting on the Senate's amendment over concerns the amendment violated the Origination Clause.

13 *Id.* at 1223; 1231-32. As passed, TEFRA contained three sections from the original House bill, such as a section on refunding excise taxes on buses. *See* Thomas L. Jipping, TEFRA *and the Origination Clause: Taking the Oath Seriously,* 35 Buff. L. Rev. 646 n.57 (1986). But it appears a conference committee between the chambers reinserted these shared sections into the bill after the Senate's complete substitute. *See* John L. Hoffer, Jr., *The Origination Clause and Tax Legislation,* B.U. J. Tax L. 20 (1984). Such a retroactive reinsertion would not change the fact that the Senate's original amendment was a complete substitute.

14 *Evans, supra* note 12, at 1221.

15 Rebecca M. Kysar, *The 'Shell Bill' Game: Avoidance and the Origination Clause*, 91 Wash. U. L. Rev. 661 (2014) [hereinafter *Kysar*].

16 Daniel J. Smyth, *The Original Public Meaning of Amendment in the Origination Clause Versus the Patient Protection and Affordable Care Act,* 6(2) Br. J. Am. Leg. Studies 304 (2017) [hereinafter *Smyth*].

17 For instance, the "gut-and-amend" procedure resulting in EESA kept the original House bill's provision that commanded group health insurance plans to impose the same limits on benefits for mental health and substance use treatment as on all other medical and surgical benefits. *Compare* H.R. 1424 – 110th Congress (2007-2008): Paul Wellstone Mental Health and Addiction Equity Act of 2007, § 2, H.R. 1424, 110th Congress, https://www.congress.gov/bill/110th-congress/house-bill/1424/text/ih *with* H.R. 1424 – 110th

B. Jefferson's Quotes and Known Complete Substitutes: Relevance to the Origination Clause

Jefferson's two above quotes and all these just-mentioned examples of Congress' complete substitutes are relevant to discussions of the Constitution's Origination Clause. This clause, ratified as part of the original Constitution in 1788, reads (emphasis added), "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with *Amendments* [on House revenue bills] as on other Bills."[18] As Professor Priscilla Zotti and scholar Nicholas Schmitz (2014) have documented, the Origination Clause's stipulation that only the House may originate revenue bills lodged the important tax power in the chamber closest to the people. The House has proportional representation and direct elections every two years compared to the original Constitution's election of two Senators each by state legislatures every six years.[19] Permitting the Senate to amend revenue bills was primarily intended to prevent the House from "tacking" non-revenue measures to revenue bills that the Senate would have only been able to approve or reject in their entirety.[20]

Historical legal arguments justifying the Senate's practice of complete substitution to House revenue bills—particularly in the case of PPACA—have heavily relied on Jefferson's two quotes and the mentioned examples of complete substitutes since the Civil War.[21] For instance, in the case *Sissel v. U.S. Department of Health & Human Services* (2015) about whether PPACA violated the Origination Clause, the U.S. Court of Appeals cited Jefferson's two quotes when arguing for complete substitution. The Court said, "Congress's longstanding practice has been to permit Senate amendments of exactly the kind at issue here, in which the Senate essentially guts the House bill and replaces the House language with Senate

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Congress (2007-2008): Emergency Economic Stabilization Act of 2008 (amendment in the nature of a substitute), § 512, H.R. 1424, 110th Congress, https://www.congress.gov/bill/110th-congress/house-bill/1424/text/eas. And both the House's original ARTA bill and the Senate's amendment extended parts of the tax relief bills passed in 2001 and 2003 (especially the income tax cuts). *See* What did the American Taxpayer Relief Act of 2012 do?, The Tax Policy Center's Briefing Book, *available at* https://www.taxpolicycenter.org/briefing-book/what-did-american-taxpayer-relief-act-2012-do; H.R.8 - 112th Congress (2011-2012): Job Protection and Recession Prevention Act of 2012, H.R.8, 112th Cong. (2013), https://www.congress.gov/bill/112th-congress/house-bill/8/text/ih; H.R.8 - 112th Congress (2011-2012): American Taxpayer Relief Act of 2012 (amendment in nature of a substitute), H.R.8, 112th Cong. (2013), https://www.congress.gov/bill/112th-congress/house-bill/8/text/eas.

18 U.S. Const. art. I, §7.

19 Priscilla H.M. Zotti & Nicholas M. Schmitz, *The Origination Clause: Meaning, Precedent, and Theory from the 12th to 21st Century*, 3 Br. J. Am. Leg. Studies 90; 131-34 (2014) [hereinafter *Zotti & Schmitz*].

20 *Id.* at 96-97; 131.

21 *See, e.g.,* Defendants' Reply Memorandum in Support of Motion to Dismiss Plaintiffs' Complaint at 25; 30-32, Hotze v. Kathleen Sebelius, U.S. Secretary of Health & Human Servs., S.D. Tex. (2013) (No. 4:13-cv-01318); *Kysar*, *supra* note 15, at 685-88 (arguing for the permissibility of complete substitutes); Sissel v. United States Department of Health & Human Services, 951 F. Supp. 2d 159, 171 (D.D.C. 2013) (citing *Kysar* and essentially endorsing her argument).

language."[22] And Evans—drawing largely on the examples of the Senate's complete substitutes to House revenue bills in 1872 and the 1980s—concluded "the Senate has virtually unlimited power to amend House revenue bills[.]"[23]

The other main evidence some of these historical legal arguments rely on is a quote by Delegate William Grayson in the Virginia Convention to ratify the Constitution on June 14, 1788.[24] Grayson stated a Senate amendment to a House revenue bill "could strike out every word of the bill, except the…introductory word, and…substitute new words [and a new revenue bill] of their own." However, Zotti and Schmitz have noted that James Madison—perhaps the most influential Founding Father—immediately contradicted Grayson. Madison argued that the Origination Clause's requirement that revenue bills must *originate* in the House precludes the Senate from *originating* any revenue bills as amendments.[25] Also, my previous research shows that later in the Virginia Convention on June 24, Grayson even totally contradicted himself. While arguing for some amendments to the new constitution, Grayson said (emphasis added), "[t]he late [Philadelphia] Convention were not [even] empowered totally to alter the present [Articles of] Confederation [i.e., the then-compact between states]. The idea was to *amend*. If they lay before us a thing [i.e., the new constitution] quite different, we are not bound to accept it." [26] At the time, many ratifiers and others—not just Grayson—argued the new constitution amounted to a complete substitute to the Articles when the Philadelphia Convention's mission was only to amend the Articles.[27] Madison's above response to Grayson and Grayson's self-contradiction nullify the importance of Grayson's comment supporting complete substitution.

But of course, as Zotti and Schmitz have noted, the Origination Clause applies only to bills for raising revenue and to Senate amendments on these bills.[28] Each chamber's "Rules of its Proceedings"[29]—not the Origination Clause—governs any amendments to non-revenue bills or to other such legislation as resolutions or reports. Nevertheless, Jefferson's two manual quotes and any examples of complete substitutes—whether to revenue or other legislation—in early Congress may help suggest what the word amendment had meant vis-à-vis the Origination Clause at the time of the Constitution's ratification or how congressional understanding of amendments may have changed after ratification.

C. My Previous Research versus Complete Substitutes: New Research Questions

My previous research examined the original public meaning of amendment, which of course had the same meaning relative to revenue bills as to "other bills," such other

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22 Sissel v. U.S. Dep't of Health & Human Servs., 799 F.3d 1035, 1061-62 (D.C. Cir. 2015) [hereinafter *Sissel v. U.S. Dep't of Health & Human Servs.*].

23 *Evans*, *supra* note 12, at 1232.

24 *See, e.g., Sissel v. U.S. Dep't of Health & Human Servs., supra* note 22*,* at 1062; *Kysar*, *supra* note 15, at 691.

25 *Zotti & Schmitz*, *supra* note 19, at 115.

26 *Smyth*, *supra* note 16, at 347.

27 *See generally id*.

28 *Zotti & Schmitz, supra* note 19, at 111; 114.

29 U.S. Const. art. I, §5.

legislation as resolutions, and even constitutions.[30] The original public meaning of a constitutional word or provision is how a "reasonable speaker of English" during the founding era would have understood that word or provision.[31] I, along with many originalist legal scholars, believe the Constitution should be interpreted according to the original public meaning—unless unrecoverable—of its words and provisions. In analyzing founding-era dictionaries and articles, pamphlets, and other writings from the Constitution's ratification period, my article concluded the original meaning of amendment is a change or alteration to something that must 1) be germane (i.e., relevant) to that something, 2) preserve at least the essence—but not necessarily the same language—of a significant part of the substance of that something (a "significant part" being a distinct portion that served a function within that something), and 3) make that something transform from bad to better.[32] This definition, particularly the second part requiring some significant preservation of the thing being amended, disallows amendments to be complete substitutes.[33]

The original public meaning of amendment appears to conflict with the practice of complete substitution that Jefferson's quotes seemingly validate and that *Hinds' Precedents* and later publications have documented since the mid-to-late 1800s. However, I have found no research detailing any actual complete substitutes—whether to bills, resolutions, or other legislation—in the important post-ratification period of 1789 to 1799 (First through Fifth Congresses), which represents the republic's first decade and which can be the most suggestive of original meaning,[34] or even around publication of Jefferson's manual in 1801. When and how did complete substitutes emerge in Congress, and did actual amendment practice during the important first decade confirm the original public meaning of amendment or Jefferson's quotes?

Answers to these questions may have important implications for debates surrounding the Origination Clause. It is true many originalist scholars give post-

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30 *Smyth*, *supra* note 16, at 307 n.25; 309-23.

31 Randy E. Barnett, *The Gravitational Force of Originalism*, 82 Fordham L. Rev. 415, 417 (2013).

32 *Smyth*, *supra* note 16, at 350-51. This meaning of amendment applies to the Origination Clause and to Article V of the Constitution, which allows amendments to the Constitution. *See Smyth*, *supra* note 16, at 323 n.85.

33 One may think that this definition of a valid amendment is too lenient and that an amendment is invalid when it replaces, say, the intention or majority of an original item. Surely, amendment extensiveness may be understood as a spectrum, with amendments getting closer to a "complete substitute" as they depart from the original. However, in analyzing ratification records, my previous research did not find enough evidence to claim a more stringent definition of an amendment. *See generally id.* at 303-61.

34 In general, this decade represents the time frame of post-ratification evidence most relevant to originalism (and the earlier the evidence—especially from the First Congress held 1789 to 1791—the stronger it is). Few originalists view post-ratification evidence from after this decade as capable of significantly informing the meaning of the original Constitution. *See, e.g.,* Michael D. Ramsey, *Beyond the Text: Justice Scalia's Originalism in Practice*, 92(5) Notre Dame L. Rev. 1961-62 (2017) [hereinafter *Ramsey, Beyond the Text*]; Michael D. Ramsey, *Missouri v. Holland and Historical Textualism*, 73 Mo. L. Rev. 975; 992 (2008) [hereinafter *Ramsey, Missouri v. Holland*]; Michael D. Ramsey, *Textualism and War Powers*, 69(4) U. Chi. L. Rev. 1606-09; 1636-37 (2002); Vasan Kesavan and Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 Geo. L.J. 1164-1176 (2003).

ratification history little importance when determining the original meaning of a constitutional word or provision. A primary reason is even congressmen in the First Congress may have taken actions inspired more by political considerations than by any constitutional fidelity.[35] However, at the least, post-ratification history can serve as secondary or confirmatory evidence of the original meaning of a given word or phrase[36] or can help indicate if there was a "post-ratification shift in meaning."[37] If Jefferson's quotes are correct in apparently suggesting the post-ratification history of amendment practice supports complete substitution, then an explanation of my definition of the original public meaning of amendment in light of such evidence would be appropriate. Conversely, if Jefferson's quotes are wrong or largely unsubstantiated in their apparent suggestion, then there would be strong confirmatory evidence that the original public meaning of amendment disallows complete substitutes. Also, the historical legal arguments for allowing the Senate's complete substitutes to House revenue bills would be unable to show that complete substitution was an accepted, let alone a consistent, practice in early Congress. These arguments would then lack a significant foundation in originalism.

D. Complete Substitution versus Tacking a New Revenue Bill

One should note complete substitution is not the only legal controversy surrounding the Origination Clause. Another important controversy is if Senate amendments may originate a new revenue bill by simply "tacking" it to a House revenue bill.[38] For instance, the Senate could have originated PPACA by tacking it to a House revenue bill instead of completely replacing one. Although this article does not focus on this "tacking" controversy, previous research examining the Origination Clause's original meaning indicates the clause bans such a practice. Zotti and Schmitz showed that the Origination Clause's requirement that (emphasis added) "*All* Bills for raising Revenue shall *originate* in the House of Representatives" meant the Senate has no power whatsoever—even by amendment—to create a revenue bill.[39] The authors found that a revenue bill is "any act which might tax the people,"[40] and scholar Chris Land (2020)—in analyzing British revenue legislation in the revolutionary era and evidence from American state legislatures in the founding era—had the same finding.[41] Andrew T. Hyman, Esq., has even noted that the Origination Clause's stipulation that the Senate may propose amendments to House revenue bills "as on other bills" appears to further disallow Senate origination of a revenue bill through amendments. As the Senate may not amend any non-revenue (i.e., "other") bills by adding a revenue bill (because *all* revenue bills must originate in the House), so the Senate may not amend a House revenue bill by adding a

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35 *Ramsey, Beyond the Text, supra* note 34, at 1957-62.
36 *Ramsey, Missouri v. Holland, supra* note 34, at 975-77.
37 Jake Linford, *Datamining Linguistics and Triangulation*, 2017(6) B.Y.U. L. Rev. 1530-31 (2018).
38 *See, e.g., Zotti & Schmitz, supra* note 19, at 131.
39 *Zotti & Schmitz, supra* note 19, at 103-04; 116-17; 135-39.
40 *Id.* at 102.
41 Chris Land, *The Origination Clause's Missing Piece*, 87(4) Tenn. L. Rev. 959-78 [hereinafter *Land*].

new revenue bill.[42] And, as a possible further impediment to "tacking," Zotti and Schmitz, Robert Natelson (Senior Fellow of the Independence Institute), and my previous research have shown that any Senate amendment to a House revenue bill must be germane to that revenue bill.[43] I have seen no significant originalist evidence that all taxes are germane simply because they are taxes and raise revenue.[44] Thus, it appears dubious to claim the Senate may take a House bill proposing, say, a tax on land and germanely tack, say, a tax on an object(s) unrelated to land, such as a medical device(s).

II. Background Topics: The Rise of Complete Substitutes

Before delving into early congressional records to track the rise of complete substitutes, it is worth examining several background topics. These topics include A) proper context to Jefferson's two manual quotes, B) any occurrences of complete substitutes in British Parliament and American legislative bodies before the Constitution's ratification and the First Congress, C) the general permissibility of extensive amendments in British and early American history, and D) any rules of procedure addressing complete substitutes in the early Congresses.

A. Proper Context to Jefferson's Two Quotes

To best understand and weigh the evidentiary strength of Jefferson's two manual quotes, this article must first place Jefferson's quotes in proper context. In a section titled "Amendments," Jefferson's manual presents the two quotes together as one paragraph that reads, in full, as follows:

> Amendments may be made so as totally to alter the nature of the proposition; and it is a way of getting rid of a proposition, by making it bear a sense different from what was intended by the movers, so that they vote against it themselves. *2 Hats. 79, 4, 83, 84*. A new bill may be ingrafted by way of amendment on the words, 'Be it enacted, &c.' *1 Grey. 190, 192.*

No other part of this "Amendments" section—or the rest of the manual—addresses the permissibility of a complete substitute.

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42 *Kysar*, *supra* note 15, at 696; n.201 (citing Hyman's argument provided as an article reviewer). *See also Zotti & Schmitz, supra* note 19, at 105; 115-16.

43 *Zotti & Schmitz, supra* note 19, at 104-14; Robert G. Natelson, *The Founders' Origination Clause and Implications for the Affordable Care Act*, 38(2) Harvard J. L. & Pub. Pol. 691 (2015) [hereinafter *Natelson*]; *Smyth*, *supra* note 16, at 323.

44 Natelson argued that, according to the Constitution, "all taxes are within the same subject" and may therefore be swapped in and out of revenue bills through amendments. *See Natelson, supra* note 43, at 706. However, one cannot necessarily assume "all taxes are within the same subject" when determining the original meaning of a germane bill amendment. Future research should examine the records of early state legislatures and the Continental Congress for all amendments to tax bills to see if amendments were typically permitted to add a new object or activity of taxation unrelated to the object(s) or activity(ies) of taxation already in a given tax bill.

In any case, Jefferson's two quotes do not necessarily indicate that legislative amendments could completely replace an original item with totally different and non-germane text. As shown above, Jefferson's first quote that "[a]mendments may... totally...alter the nature of the proposition" is actually followed by a semicolon and then this clarification (emphasis added): "[I]t is a way of getting rid of a proposition, by making it *bear a sense different* from what was intended by the movers, so that they vote against it themselves." This clarifying quote—particularly the mention of "bear[ing] a sense different"— suggests amendments may be significant or extensive but not necessarily dramatic and blunts any conclusion that an amendment could be totally unrelated to an original proposition. Also, "totally...alter[ing] the nature of...[a] proposition" could involve simply adding the word "not" to the proposition to give it opposite meaning. Perhaps such an amendment is all Jefferson meant. Regarding Jefferson's second quote that (emphasis added) "*[a] new bill* may be ingrafted by way of amendment on the words 'Be it enacted, &c.,'" it is unclear what he meant by "[a] new bill." My previous research showed a "new bill...by way of amendment"—at least in the case of the Massachusetts legislature of the 1780s—may have just meant a new version of a given bill following extensive amendments, which would have kept original elements.[45] It seems extensive amendments got so complicated that it was easiest to present all bill amendments through a new, clean version of a given bill.

In addition, Jefferson based much of his manual on—and even borrowed both the "totally...alter" and "new bill...ingrafted by way of amendment…" quotes from—his *Parliamentary Pocket-Book* written years earlier.[46] This pocket-book was a compilation of notes on legislative procedure—mostly British parliamentary practice—that Jefferson first drafted as a student at the College of William and Mary (Williamsburg, Virginia) in the early 1760s. Jefferson evidently modified these notes at various times throughout his life, such as in the 1770s while serving in the Virginia General Assembly and in the 1790s after being the U.S. Minister to France.[47] Although historians have not pinpointed the exact date Jefferson completed his pocket-book, Jefferson probably completed it before becoming the Senate's Presiding Officer.[48] Given that Jefferson was Presiding Officer from March 4, 1797, to February 28, 1801, which overlapped by one day with publication of his manual on February 27, 1801,[49] it would be reasonable to think Jefferson's presiding experience largely formed the basis of his two quotes. But this situation does not appear true for either quote.

Furthermore, Jefferson's sources for both manual quotes address the procedures of British Parliament, not U.S. Congress or other American legislative bodies. The "totally...alter" quote cites John Hatsell's *Precedents of the Proceedings in the House of Commons* (1785),[50] which covered proceedings of Parliament's lower house. And the quote that "[a] new bill may be ingrafted by…amendment…" cites a Commons debate from 1669.[51] In fact, the pocket-book version of the "[a] new

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45 *Smyth*, *supra* note 16, at 336-37.
46 Jefferson's Parliamentary Writings, *supra* note 3, at 137-38; 158.
47 *Id.* at 3-10.
48 *Id.* at 10.
49 *Id*. at 9; 26-27.
50 Jefferson's Manual, *supra* note 1, at Sec. XXXV.
51 *Id*.

bill...by way of amendment" quote read, in full, as follows (emphasis added): "[a] new bill [may be] engrafted by way of amendment on the words, 'be it enacted *by the Lords & Commons [of British Parliament]*.'" Thus, it is evident that for the manual-version of this quote Jefferson deleted the pocket-book version's direct mention of the Lords and Commons.[52]

Moreover, as Natelson has indicated, neither of these citations for Jefferson's quotes even provide much background support for Jefferson's claims.[53] The pages in Hatsell's *Precedents* that Jefferson cites for his "totally...alter" quote have such entries as follows (emphasis added): "On…February [24], 1728 [in the Commons], the *sense and meaning of a question, totally altered by amendments*; and on the 12th of March following a question is so much changed that it passes in the negative."[54] Hatsell also mentions that (emphasis added) "[a] mode of avoiding a question, is by altering it by amendments, till it *bears a sense different* from what was intended by the proposers: This…is not quite fair, but has been often done; and the instance relating to the Duke D'Aremberg, of…April [10], 1744, is a very remarkable one."[55] Hatsell provides no actual details of the mentioned episodes, and Jefferson evidently took Hatsell's claims at face value.

And the Commons debate from 1669 that Jefferson cites when claiming "[a] new bill may be ingrafted by way of amendment..." provides even more dubious background support. This debate discussed a controversial bill from the House of Lords "for taking away Privilege, and increasing the numbers of Peers upon tryals." A member of Parliament said, "save this Bill if it have [sic] ten good lines," and another member announced he would "retain the Bill to mend it." Later, a third member remarked—perhaps sarcastically in response to these calls to mend and save ten lines of the bill—that "One line only to be grafted upon in this Bill, viz. 'Be it enacted by the Lords and Commons.'"[56] Despite this reference to gutting-and-amending, no part of the debate passage indicates this member necessarily believed replacement language could not have involved some rewording of a significant part(s) of the original. There is also no indication that the "gut-and-amend" idea was officially motioned, voted on, or even approved. But Jefferson apparently used this episode as enough basis to validate the practice of complete substitution in the Senate.

All this proper context to Jefferson's quotes is insufficient grounds to outright dismiss Jefferson's quotes as evidence for the permissibility of complete substitutes in early Congress. For instance, it would be reasonable to argue Jefferson included these quotes in his manual because he thought they fairly represented actual Senate practice. Nevertheless, this proper context to Jefferson's quotes indicates his quotes are not close to being conclusive evidence for the permissibility of complete substitutes.

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52 Jefferson's Parliamentary Writings, *supra* note 3, at 158.

53 *Natelson, supra* note 43, at 662-63.

54 John Hatsell, Precedents of Proceedings in the House of Commons 79 (Printed by H. Hughs, For J. Dodsley, in Pall-Mall, Vol. II, 2nd ed, 1785).

55 *Id.* at 84.

56 "Debates in 1669: November 27," in *Grey's Debates of the House of Commons: Volume 1*, ed. Anchitell Grey (London, 1769), pp. 189-193. *British History Online* http://www.british-history.ac.uk/greys-debates/vol1/pp178-195 [accessed 22 August 2023].

B. Complete Substitutes Before Ratification and First Congress

What was the precedence of complete substitutes in British Parliament and American legislative bodies before the Constitution's ratification on June 21, 1788, and the First Congress' start on March 4, 1789?[57] According to this article, an actual complete substitute occurs when a legislative body considers and officially votes on the complete substitute for approval or rejection. A complete substitute that is held out of order, withdrawn, or otherwise not even voted on—what I call an "attempted complete substitute"—is not an actual one. British parliamentary practice in the Eighteenth Century is relevant to this discussion because, as Zotti and Schmitz—and more recently Chris Land—have meticulously documented, British practice heavily influenced American legislative practice of this time and in particular the development of the Origination Clause.[58]

My previous research examined British parliamentary practice from 1688 to 1789, the century leading up to the Constitution's ratification, using relevant volumes of Cobbett's *Parliamentary History of England.*[59] The volumes include parliamentary debates, various newspaper accounts of proceedings, and various entries from the journals of the Lords and the Commons. I found no bill amendments that were complete substitutes and several debates revealing a general prohibition on complete substitutes.[60]

I found only one example of a complete substitute to non-bill legislation. This example occurred in the Lords on November 25, 1779, and involved the Lords' response address to a speech by King George III to Parliament.[61] The King's speech called for continued support for the ongoing Revolutionary War in America and encouraged Parliament's involvement in strengthening Britain's kingdom in Ireland. The Earl of Chesterfield presented for debate a lengthy response address to the King. This address echoed the King's speech, promising full support of the war and consideration of ways to strengthen the kingdom in Ireland. Soon thereafter, the Marquis of Rockingham proposed an amendment that completely replaced the response address except for its brief, customary expression of thanks for the Crown's speech. The amendment brazenly asked the King to reflect on the recent

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57 Gary Lawson & Gary Seidman, *When Did the Constitution become Law?*, 77(1) Notre Dame L. Rev. 1, 5, 37 (2001).

58 *Zotti & Schmitz, supra* note 19, at 75-85; Land, *supra* note 41, at 933-82. *See also Natelson*, *supra* note 43, at 646-48.

59 William Cobbett, The Parliamentary History of England (vols. 1-23, 1812-1814) [hereinafter Cobbett].

60 *Smyth*, *supra* note 16, at 324-27.

61 20 Cobbett, *supra* note 59, at 1020-92. The Lords' response address to the Crown's speech occurred annually throughout the Eighteenth Century. At the start of each parliament's session, the Crown gave a speech about the state of national affairs to each house with an expected response. *See* Thomas Erskine May, A Treatise Upon the Law, Privileges, Procedures, and Usage of Parliament 266 (London, 1844) [hereinafter May]; Sheila Lambert, Bills and Acts: Legislative Procedure in Eighteenth-Century England 42 (1971) [hereinafter Lambert]. Response addresses faced a somewhat different process than that of such legislation as bills (*see* May, *supra*, at 266). For instance, although amendments were permitted to response addresses (*see* May, *supra,* at 144), ultimate approval of an address in some form was considered inevitable (*see* Lambert, *supra*, at 39-40; 42).

decay of kingdom affairs and suggested the only way to strengthen the kingdom was to permit "new councils and…counsellors" throughout its lands. A long debate ensued about the proposed language's political merits, but Lord Stormont quicky noted this complete substitute's novelty to British Parliamentary practice as follows (emphasis added):

> *The [Marquis'] Amendment was not a correction of a few words of the Address, which he [Lord Stormont] had ever considered to be the sort of amendment warranted by parliamentary usage*; but the substituting of entire new matter, totally foreign to the address, and equally foreign to the whole business of the day.

No other lord challenged Lord Stormont's objection, but it surprisingly garnered no further commentary. After more debate on the political merits of the Marquis' amendment, it lost by a vote of 82 to 41.[62]

Turning to American legislative bodies, my previous research assessed the existing evidence of complete substitutes from the Continental Congress, state legislatures, and state conventions between 1774 and 1790. This roughly 15-year period included the years between the start of the First Continental Congress and when all original states had ratified the Constitution.[63] My previous research had verified only three known complete substitutes in American legislative bodies, being two in the Virginia legislature in 1780 and one in the North Carolina ratifying convention in 1789.[64] However—upon applying greater scrutiny to these three episodes using the original public meaning of amendment—this article will show that these examples involved only significant or extensive amendments.

The first supposed complete substitute was in the Virginia House of Delegates and occurred on June 6, 1780.[65] The House was considering the following series of related resolutions (emphasis added):

> That*…certain funds ought to be established, for sinking the quota of the continental debt due from this State* in ten years.
>
> That certain funds ought to be established for furnishing to the continent the quota of this State, for the support of the war for the current year.
>
> That a specific tax ought to be laid for the use of the continent in full proportion to the abilities of the people.

After the House changed the word "ten" in the first resolution to "fifteen," a delegate proposed the following replacement language to the first resolution (emphasis added):

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62 20 Cobbett, *supra* note 59, at 1020-25; 1029; 1033; 1037; 1092.

63 *Smyth, supra* note 16, at 333 n.136, 335-337; 341-342.

64 *Id.* at 335-37; 340; 341-42; 350-51.

65 *Natelson, supra* note 43, at 682-83; Journal of the House of Delegates of the Commonwealth of Virginia 36 (Richmond, 1827) [hereinafter VA House Delegates Journal].

> [T]hat this Commonwealth will take upon itself its due *proportion of the…[$180 million of debt] issued by Congress*, and recommended to be speedily called in by taxes or otherwise; and that the *General Assembly will* redeem or call in the same, and also *establish certain funds* for the *redemption of this Commonwealth's due proportion* of the new money to be issued in lieu thereof [.]

However, this amendment to the first resolution, which was quickly rejected, did not amount to a complete substitute. As indicated with the above italics in the original first resolution and its proposed substitute, both these versions contained the same call for Virginia to pay its share of the national debt. Specifically, the original called for "certain funds to be established [by Virginia]" to pay off Virginia's "quota of the continental debt," while the substitute called for establishment of "certain funds" to pay off "this Commonwealth's due proportion" of the continental debt of $180 million. Also, the proposed amendment was no complete substitute because the amendment was to replace only one of a series of related resolutions, not the entire series. A series of related resolutions—much like a series of sections in a bill—are presented together for consideration and should be treated as a whole legislative proposal.

The second supposed complete substitute was on December 19, 1780, and again involved the House of Delegates.[66] The House was considering the following series of related resolutions (emphasis added):

> That the delegates representing this State in Congress, ought to be allowed a certain fixed and genteel support…[of] two pounds six shillings in specie per day for every day that he shall attend…Congress[.]
>
> That the treasurer of this Commonwealth ought to take effectual measurers to lodge a sufficient credit in Philadelphia, for the purpose of furnishing the delegates their pay as aforesaid.
>
> That the said *Meriwether Smith*, is guilty of a *misapplication of the public money*, and that *he ought to be forthwith recalled from Congress to answer for such misapplication*.

After the House approved the first two resolutions, a delegate proposed—and the House approved—a substitute to the third resolution in these words (emphasis added):

> [T]hat *the accounts of Meriwether Smith…appear to be unsatisfactory*, inasmuch as the sum of 8,000/. and upwards remains thereby *unaccounted for*. And the Speaker of this House is desired to write to the said Meriwether Smith…and to *require of him a full and explicit settlement of his accounts with the Commonwealth*, as a delegate of this State in Congress[.]

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66 *Natelson, supra* note 43, at 683; VA House Delegates Journal, *supra* note 65, at 58.

This approved substitute was not a complete substitute for two reasons. First, as indicated with the italics in the original third resolution and its substitute, the substitute kept the original's call to hold Meriwether Smith accountable for—and get his input regarding—an apparent unauthorized use(s) of state funds. The original alleged Smith was guilty of misusing funds and should "answer for such misapplication," and the substitute more diplomatically said that Smith's accounts show some funds "unaccounted for" and that there should be a "full and explicit settlement [by Smith] of his accounts." Second, the approved substitute replaced only one of a series of related resolutions, not the entire series.

The third supposed complete substitute, which occurred in the North Carolina ratifying convention, was surely extensive.[67] On November 21, 1789, the following simple report, which was originally proposed on November 17, was under debate (emphasis added):

> Whereas *the General Convention, which met in Philadelphia in pursuance of a recommendation of Congress, did recommend to…[U.S.] citizens…a Constitution…in the following words*, viz:
> (The Constitution.)
>
> Resolved, *That this Convention*, in [sic] behalf of the freemen, citizens and inhabitants of the State of North Carolina, *do adopt and ratify the said Constitution and form of government*.

Then, a delegate proposed the following substitute, which was subsequently rejected (emphasis added):

> *The Convention…have taken under their consideration the Constitution proposed for the future [U.S.] government*…yet as some of the great… parts of the…proposed Constitution have not undergone the alterations… thought necessary…Therefore,
>
> *Resolved, That previous to the ratification in [sic] behalf and on the part of the State of North Carolina,* the following amendments be proposed… before Congress, that they may be adopted and made part of the said Constitution, viz:
>
> [Five specific amendments, such as this one: "That Congress shall not introduce foreign troops into the United States without the consent of two-thirds of the members present of both Houses."]

At first glance, the proposed substitute may appear to be a complete substitute, as the original report calls for immediate ratification of the Constitution while the substitute essentially calls for specific constitutional amendments. However, both reports shared mention of the fact that the Philadelphia Convention had proposed a new constitution for consideration by states, which served as an introduction for

[67] *Natelson, supra* note 43, at 683; The State Records of North Carolina 41-42; 45-47 (Walker Clark ed., vol. 22, 1907).

the reports' respective calls to action. And, more importantly, both reports called for ratification of the Constitution. The original report obviously calls for immediate ratification, and the substitute calls for ratification "in [sic] behalf and on the part of the State of North Carolina" after incorporation of the proposed amendments.

All considered, during the 15 years (1774 to 1789) leading up to the Constitution's ratification and the First Congress there was a precedence of only one actual complete substitute in British Parliament, which involved a parliamentary address to the King, and zero actual complete substitutes in American legislative bodies. Of course, it is uncertain that no compete substitutes occurred in American legislative bodies during this period. For instance, as Natelson has noted, analysis of paper-only records in state legislative archives could reveal unknown amendments,[68] some of which could have been complete substitutes. Also, even though previous research has not found actual complete substitutes in the Continental Congress,[69] *Hinds' Precedents* suggested some may have occurred. Hinds said the practice of "proposing an entirely different matter" to avoid deciding on another given proposition inspired a rule of proceeding in 1781 against a "new motion…under colour of amendment as a substitute for [another motion]."[70] Unfortunately, Hinds provided no citation for his claim. I searched the Journals of the Continental Congress from 1774 through 1781[71] for "substitute" and found no actual complete substitutes. However, I discovered one attempted complete substitute, which was non-germane, on May 8, 1779.[72] Hinds could have been referring to this attempt or perhaps even an undiscovered actual complete substitute(s).

C. General Permissibility of Extensive Amendments

It bears emphasis that extensive, germane amendments short of complete substitutes are consistent with the original public meaning of amendment. There were a significant number of these amendments in British Parliament and American legislative bodies leading up to the Constitution's ratification.[73] For instance, in British Parliament on June 12, 1737, the Commons saw a bill ultimately pass after having "run a very great risk of being lost; for after all the Amendments had been made, the Bill then appeared to be so very different from what had been sent them by

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68 *Natelson, supra* note 43, at 687.

69 *Id.*

70 Hinds' Precedents, *supra* note 8, at § 5753.

71 Journals of the Continental Congress, 1774–1789 (Worthington C. Ford et al. eds., vols. 1-20, 1904-1912) [hereinafter Journals Cont. Cong.].

72 14 Journals Cont. Cong., *supra* note 71, at 563-66. That day, the Continental Congress was discussing a resolution declaring—in response to apparent British interference—the right of Americans to fish off the North American coasts and banks. Then, a "substitute [amendment] was moved" declaring that Congress should agree to a peace treaty with Great Britain to end the Revolutionary War. A majority of states held this attempt out of order without citing the rule violation. The only applicable rule at the time said (emphasis added), "While a question is before the house, no motion shall be received, unless for an *amendment*, for the previous question, to postpone…the main question, or to commit it." *See* 11 Journals Cont. Cong., *supra* note 71, at 534-35. Thus, the majority may have thought the substitute violated the meaning of amendment.

73 *Smyth*, *supra* note 16, at 326-27; 332.

the Lords[.]"[74] Such extensive amendments in American legislative bodies include a significantly-reworded resolution in the North Carolina legislature in 1777 and "[h]eavily amended" money bills in the Massachusetts legislature in 1784. Not to mention some ratifiers and others argued the U.S. Constitution amounted to an extensive amendment to the Articles of Confederation, the legal compact between states from 1781 to 1789.[75]

D. Rules of Procedure Addressing Complete Substitutes

During early U.S. Congresses, the situation regarding rules of procedure for complete substitutes was somewhat complicated. The Senate never had a rule governing a motion "under color of amendment as a substitute" as in the Continental Congress.[76] Thus, complete substitutes by the Senate—whether germane or non-germane—were always theoretically possible. The Senate's Presiding Officer (including Jefferson from 1797 to 1801) always had exclusive power over deciding any questions of order—including questions over proper amendments—although the officer could "call for the sense of the Senate" if he so chose.[77] Things were different in the House, which continuously had the same rule from the Continental Congress that disallowed a "new motion...under color of amendment as a substitute for [another motion.]"[78] Thus, it appears the House had outright banned complete substitutes. However, since the First Congress, rule enforcement in the House has depended on the will of either the Speaker of the House or the majority. The Speaker always decided any questions of order—including questions over proper amendments—but Speaker decisions have been subject to a full-house appeal if initiated by any two representatives.[79] So even in the House, complete substitutes could have occurred with Speaker or majority support. Natelson even suggested the Continental Congress' rule against substitute amendments may have applied only to non-germane complete substitutes.[80] Thus, there is the additional possibility that the House rule permitted germane substitutes.

E. Deductions from These Background Topics

This proper background to examining Congress' rise of complete substitutes has involved discussions of A) context to Jefferson's two manual quotes, B) the precedence of complete substitutes before the Constitution's ratification and the First Congress, C) the general permissibility of extensive amendments, and D) the situation in early Congresses regarding rules of procedure for complete substitutes. These discussions allow for several important deductions. First, as

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74 10 Cobbett, *supra* note 59, at 318-19.
75 *Smyth*, *supra* note 16, 317-19; 336-37.
76 *Zotti & Schmitz, supra* note 19, at 108.
77 *See, e.g.,* Journal of the Senate, 1st Cong., First Sess., 16 April 1789, 13; Journal of the Senate, 9th Cong., First Sess., 26 March 1806, 66.
78 *Zotti & Schmitz, supra* note 19, at 108.
79 *See, e.g.,* Journal of the House of Representatives, 1st Cong., First Sess., 7 April 1789, 9; Journal of the House of Representatives, 9th Cong., First Sess., 17 December 1805, 200.
80 *Natelson, supra* note 43, at 687-90.

Jefferson's quotes are non-conclusive evidence for complete substitutes in early Congresses, one should not necessarily expect to find complete substitutes in early Congresses. Second, the lack of a significant precedence of complete substitutes in British Parliament and American legislative bodies indicates how novel complete substitutes as an accepted practice may have been to Congress once they emerged. Third, the permissibility of extensive amendments in the original public meaning of amendment gives Congress much leeway in making amendments despite the implicit ban on complete substitutes. Finally, even though the House continuously had a rule of procedure in early Congresses that seems to have banned complete substitutes, there was ample opportunity for complete substitutes to occur in Congress, especially in the Senate.

III. Methodology

I examined congressional amendment practice vis-à-vis complete substitutes between 1789 and 1805, a period spanning from the First Congress (beginning March 4, 1789) through the Eighth Congress (ending March 3, 1805). This period included the important first decade (1789-1799) and the years leading up to and soon after publication of Jefferson's manual in 1801. To examine amendment practice, I first searched for and highlighted every mention of "amend" and words with the root of "amend," such as "amendment" and "amended," in the following main sources of early congressional records:

- Journals of the House[81] and Senate,[82] which contain daily summaries of major proceedings.
- *Annals of Congress*,[83] which detail major debates and proceedings.
- *Journal of the Executive Proceedings of the Senate*,[84] which summarizes proceedings of the Senate's consent to treaties and confirmations of presidential appointments.

In these three main sources (and excluding the *Annals*' lengthy indices), I found a grand total of 29,079 mentions of "amend" and its derivative words.

Then, I searched for and highlighted every mention of the following 25 key words historically associated with "gut-and-amend" procedures to best identify any possible complete substitutes to any legislation:

- All after
- Alter
- Enacting
- Entire

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81 Journal of the House of Representatives, 1st Cong., First Sess., to 8th Cong., Second Sess., March 4, 1789, to March 3, 1805 [hereinafter House Journal].

82 Journal of the Senate, 1st Cong., First Sess., to 8th Cong., Second Sess., March 4, 1789, to March 3, 1805 [hereinafter Senate Journal].

83 Annals of Cong., 1789-1805 (Joseph Gales, ed., vols. 1-14, 1834-1852) [hereinafter Annals].

84 Journal of the Executive Proceedings of the Senate, 1789-1805 (vol. 1), 1st Cong., First Sess., to 8th Cong., Second Sess., March 4, 1789, to March 3, 1805 [hereinafter Senate Executive Journal].

- Except
- "Expung" (for expunge, expunging, etc.)
- In lieu
- Insert
- "Modif" (for modify, modified, etc.)
- New bill
- New resolution
- "Originat" (for originate, originating, etc.)
- Replace
- Residue
- "Revis" (for revise, revision, etc.)
- Strike out
- Strike out all
- Striking out
- Striking out all
- Struck out
- "Substitut" (for substitution, substituted, etc.)
- To the end
- Under color
- Whole bill
- Whole resolution

Finally, I went page by page in these sources analyzing the text surrounding any mention of "amend" and its derivative words or the above 25 keywords. I recorded any instance where a complete substitute may have occurred. Such instances included when congressmen used a "gut-and-amend" procedure (e.g., "strike out all after the enacting clause and insert...") and when it was otherwise evident a whole proposal may be at stake (e.g., a committee to amend a bill proposes a "new bill"). As needed and to verify whether a complete substitute actually occurred, I consulted available legislative texts (or exerts of or references to these texts) found in the journals, *Annals*, Congress.gov,[85] U.S. Statutes at Large,[86] ProQuest (Congressional),[87] and the National Archives Building, Washington, DC.[88]

I was unable to examine the totality of available paper records of early Congresses at the National Archives Building, Washington, DC. The British military burned the Capitol building, including the early congressional records stored there, during the War of 1812.[89] However, surviving records include 1) reports and other records of committees assigned to review or amend proposed bills and 2) original

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85 Legislation: 1799-1801, 1801-1803, 1803-1805. Available from: Congress.gov (Law Library of Congress).

86 1-2 Stat. (1789-1805).

87 ProQuest Digital U.S. Bills and Resolutions. Available from: ProQuest® Congressional.

88 Records of the United States House of Representatives, Record Group 233 (RG 233); National Archives Building, Washington, DC (NAB); Records of the United States Senate, RG 46; NAB.

89 Jessie Kratz, *P.S. You Had Better Remove the Records: Early Federal Archives and the Burning of Washington during the War of 1812*. 46(1) Prologue J. Natl. Arch. 43 (2014).

or engrossed versions of all House and Senate bills.[90] Committee records contain some details not in the journals or *Annals,* and it is possible a proposed bill aiming to amend an existing law sought to completely replace the given law.[91] Future research should examine these archival records for any possible complete substitutes not recorded elsewhere.

It is important to emphasize that my analysis considered an amendment to be a complete substitute if the item being amended was a whole entity and not just a part of a larger whole. Key examples of a whole entity include a bill, stand-alone resolution, series of related resolutions, report, order, and an address to the U.S. president. Key examples of items that are not whole entities and are part of a larger whole include 1) a resolution that is one of a series of two or more related resolutions presented together for consideration, 2) a proposed amendment to the Constitution that is one of a series of two or more proposed amendments presented together for consideration, and 3) an individual amendment as occurs when one tries to amend an amendment to a piece of legislation (unless, of course, the amendment being amended is a complete substitute to a whole entity). Afterall, this article is debating complete substitutes to whole bills—that is, whole entities—not complete substitutes to clauses, sections, or other parts of a bill. It would be erroneous to use an example of a complete substitute to a part of a whole entity as evidence for permitting complete substitutes to whole entities.

IV. My Findings: Rise of Complete Substitutes in U.S. Congress, 1789-1805

My analysis of the journals and *Annals* of Congress between 1789 and 1805 found 32 episodes involving at least one "gut-and-amend" or similar procedure. Of these episodes, 20 (60%) occurred in the Senate and 12 (40%) occurred in the House. A bill was involved in 16 (50%), a resolution or series of related resolutions was involved in 15 (47%), and an order was involved in one (three percent).

This Part first discusses the episodes where I verified complete substitutes were actually—or most likely—involved (the "Yeses"). I also discuss when complete substitutes were attempted—that is, held out of order, withdrawn, or otherwise not voted on. Then, this Part presents a tentative timeline of these actual versus attempted complete substitutes. The timeline shows all these complete substitutes relative to the only actual complete substitute in British Parliament and to such other relevant milestones as the Constitution's ratification date. Finally, this Part addresses the episodes where it turns out a complete substitute clearly—or most likely—did not occur (the "Nos").

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90 *See, e.g.,* United States Senate: First Congress (1789-1791), Sen 1: Records of Legislative Proceedings, Sen 1A, NAB (on file with author).

91 I did examine if any law *passed* between 1789 and 1805 that amended an existing law actually replaced that law. I analyzed the text of the 59 laws enacted in this period with titles containing the words "amend," "alter," "modify," or "revise" in reference to an existing law. None of these 59 laws indicated they were completely replacing an existing law(s). *See* List of the Public Acts of Congress (vol. 1-2, 1789-1805) *Stat.* and corresponding texts of these laws.

A. The "Yeses": Attempted or Actual Complete Substitutes

I found a total of six complete substitutes, including four attempts and two actuals. These six episodes represent a relatively small number of complete substitutes overall considering that, as mentioned earlier, I found over 29,000 mentions of amend or its derivative words in the journals and *Annals*. This Section chronologically discusses each episode.

1. First Attempt

Surprisingly, the first attempt was in the House in the First Congress on May 31, 1790. The House was considering a resolution that "Congress shall meet and hold their next session at --" (with "--" indicating a location to be determined later). A congressman then declared there was "more important business...before the House" and proposed a non-germane complete substitute. This substitute read, "a permanent seat for the [U.S.] Government…ought to be fixed at some convenient place on the banks of the river Delaware, and [--]" (with "--" indicating a location to be determined later). After the Speaker decided the amendment was out of order, an appeal was made to the entire House. With the Speaker casting a tie-breaking vote to make the tally 30 to 29, the House upheld the non-germane substitute as out of order. Although neither the journal nor the *Annals* recorded why the House held the amendment improper, the reason was most likely that this proposition was done "under color of amendment as a substitute."[92] Certainly no House rule at that time explicitly required germaneness.[93] Political considerations of the 29 supporting the substitute had evidently overridden their fidelity to the rule against substitutes and the meaning of amendment.

2. First Two Actuals

No other attempted complete substitute occurred in either chamber until the first actual complete substitute, which was almost a decade later in the Senate on March 6, 1800 (Sixth Congress). The important background to this episode was Presiding Officer Thomas Jefferson, a Republican, was surely considering entering a close race for U.S. president that year against then-President John Adams, a Federalist (Jefferson ended up being nominated in May and ultimately won the election).[94] And Federalists in the Senate had crafted a controversial bill titled the "bill prescribing the mode of deciding disputed elections of President and Vice President of the United States" that many Republican congressmen and others believed was

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92 1 House Journal, *supra* note 81, at 228-29; 2 Annals, *supra* note 83, at 1624.

93 Such a House rule emerged in 1822, when the House changed its rule against motions "under color of amendment as a substitute" to be against only a "[new] proposition on a [different] subject...under color of amendment." See *Zotti & Schmitz, supra* note 19, at 108.

94 Susan Dunn, Jefferson's Second Revolution: The Election Crisis of 1800 and the Triumph of Republicanism 176 (2004) [hereinafter Dunn]; John Ferling, Adams vs. Jefferson: The Tumultuous Election of 1800 126-30; 132; 134; 140; 195-96 (2004) [hereinafter Ferling]; Jon Meacham, Thomas Jefferson: The Art of Power 322 (2012).

intended to ensure Adams' reelection.[95] The bill aimed to create a committee filled with select members of the then-Federalist majority in Congress and a Federalist justice of the Supreme Court to—with no oversight—vet the legality of states' electoral votes and thereby ultimately determine the victors.[96] In articles published on February 19 and 20, the *General Advertiser* of Philadelphia, which supported Jefferson and his political allies, leaked a version of this controversial bill and accused Senate Federalists of conspiratorial behavior, attempting to undermine voter will, and other charges.[97]

Under Senate debate on March 6 was a resolution calling for a congressional investigation into the *General Advertiser*'s controversial articles and into William Duane, the newspaper's editor and Jefferson's political ally. The resolution essentially read as follows:

> That the Committee of Privileges [shall] inquire who is the editor of…the *General Advertiser*… and by what means the editor became possessed of [and published] the copy of [the] bill…which was printed [on February 19]…And generally to inquire the origin of sundry assertions in the same paper, respecting the Senate…and why the same were published; and make report to the Senate. And that the…committee have power to send for [relevant] persons, papers, and records[.][98]

In short, this resolution requested a legislative committee investigate this editor and his source(s), even by summoning persons, papers, and records.

A congressman, clearly in opposition to this resolution, proposed the following substitute amendment:

> [T]he constitution…does not vest in…Congress…any other powers… of privilege than those mentioned [such as punishing its members for disorderly behavior.] [T]herefore, to assume any other privilege would be to diminish the [people's] rights[,] to encroach on the [judiciary's] powers…; to disparage the right of trial by jury; and to establish…that a single branch…can…in their own case, punish for reasons on which the constitution has given them no power to decide.[99]

This proposed amendment criticized—albeit indirectly—the perceived lawlessness of the original resolution's proposed investigation of a newspaper editor, so the amendment was germane to the original resolution. However, the amendment

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95 Dunn, *supra* note 94, at 171. *See also* 10 Annals, *supra* note 83, at 47; Ferling, *supra* note 94, at 135.

96 Dunn, *supra* note 94, at 171.

97 Roy Swanstrom, The United States Senate, 1787-1801: A Dissertation of The First Fourteen Years of the Upper Legislative Body 307 (1962) (Ph.D. dissertation, Seattle Pacific College). *See also* Matthew Schafer, *That Time the Senate Issued an Arrest Warrant for a Reporter* (June 27, 2021), *available at* https://medium.com/lessons-from-history/that-time-the-senate-issued-an-arrest-warrant-for-a-reporter-a58faa4408d [hereinafter Schafer].

98 3 Senate Journal, *supra* note 82, at 37.

99 *Id.* at 43-44.

lacked the essence of any significant part of the original resolution, such as a grant to a legislative committee or other entity to investigate the newspaper editor or his sources. Instead, the amendment essentially communicated that any assumption by Congress of having such an extra-constitutional privilege as the authority to investigate an editor would be an abuse of power that violates people's rights.

After some debate on this obvious complete substitute, the Senate adjourned for the day. Two days later on March 8, the Senate reconsidered, slightly reworded, and ultimately rejected the substitute by a vote of 19 to 8. But, as this substitute was voted on and not held out of order, it qualifies as an *actual* complete substitute. Surprisingly, neither Thomas Jefferson—who in his role as the Senate's Presiding Officer had sole power over holding an action out of order—nor any other senator so much as questioned if the complete substitute was proper.[100] Of course, Jefferson had not been in an impartial position to rule on the substitute's propriety. As Duane, the editor, was Jefferson's political ally and the election bill at the heart of the affair—if passed—could have blocked Jefferson's path to the presidency, Jefferson had an understandable but vested interest in seeing the substitute pass. Immediately after the substitute's rejection, another "gut-and-amend" procedure was used, but this amendment was no complete substitute.[101]

The first actual complete substitute in the House of Representatives was months later on December 22, 1800, representing Congress' second actual complete substitute overall. A representative had proposed the following resolution about controversial government actions in the Mississippi Territory under Governor Winthrop Sargent:

> That the laws passed by the Governor and Judges of the Mississippi Territory…heretofore presented to the House, together with all the documents relative thereto, be transmitted to the [U.S.] President[.][102]

Immediately, another congressman proposed the following substitute amendment:

> [A] committee be appointed to inquire into the official conduct of Winthrop Sargent, Governor of the Mississippi Territory, and to report thereon to this House; and that the said committee have power to send for persons, papers, and records[.][103]

The original resolution and the amendment were germane because they addressed certain actions (i.e., "laws passed" in the original versus "official conduct" in the amendment) by Governor Sargent of the Mississippi Territory. But the original called for all the House's materials on this topic to be transferred to the U.S. president (presumably for possible executive action), while the amendment—in

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100 *Id.* at 44-45.

101 The second "gut-and-amend" procedure offered the following language, which was similar to the original resolution: "[T]he Committee of Privileges [should]…inquire and report whether…the publication of [February 19th]…in the *General Advertiser*…is a seditious libel against the Senate…and, if so, whether the Attorney General should be requested to prosecute the editor[.]." *See id.* at 45.

102 3 House Journal, *supra* note 81, at 744.

103 *Id*.

a totally different approach—would establish a House committee to investigate the Governor's conduct. Neither Speaker Theodore Sedgwick nor another representative objected that the amendment was a substitute. After significant debate on the amendment's exact wording, the House passed the amendment with a vote of 70 to 11.[104]

3. Three More Attempts

After this actual complete substitute in the House, I found no more actual but a few more attempted complete substitutes—all in the Senate. The next attempt was on January 19, 1802 (Seventh Congress), when Aaron Burr of New York was the Senate's Presiding Officer in his role as Jefferson's Vice President. This episode involved a resolution stating that "[T]he act passed last session respecting the Judiciary Establishment of the United States, be repealed." A substitute amendment was proposed requesting a "committee be appointed to inquire if any, and what, alterations are necessary in the Federal Judiciary system." This amendment kept the topic on the judiciary. However, the amendment's suggested course of action of having a committee consider possible alterations to the general judiciary system was completely different than the original resolution's call to outright repeal a specific judiciary law. After all, any committee list of possible alterations to the general judiciary system would not necessarily include a call to repeal the mentioned judiciary law. Burr rejected the proposed amendment as out of order, although the *Annals* do not state why.[105] As discussed earlier, the Senate had no rule banning complete substitutes in early Congresses. The only relevant rule Burr could have invoked was Rule 8, which stated (emphasis added), "While a question is before the Senate, no motion shall be received unless for an *amendment*, for the previous question, or, for postponing the main question, or to commit it…or… adjourn."[106] It is possible that Burr, contrary to Jefferson's at least situational permissiveness of complete substitution, enforced the meaning of amendment. Regardless, after Burr's decision another amendment was proposed but rejected to have the original resolution request the given judiciary law be "revised" and "amended" instead of repealed.[107] Finally, the original resolution passed.[108]

Another attempted complete substitute occurred on January 6, 1803 (Seventh Congress). The Senate was debating a resolution "that a committee be appointed to bring in a bill for giving effect to the laws of the United States within the state of Ohio." Before the Senate adjourned that day, a senator motioned an amendment with this replacement text:

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104 10 Annals, *supra* note 83, at 848-49; 853.

105 11 Annals, *supra* note 83, at 23; 144-45.

106 U.S. 7th Congress, 1801-1803. Senate. Rules for Conducting Business in the Senate (Washington, 1801). MWA copy (on file with author).

107 This proposed amendment was no complete substitute to the original resolution. While a repeal of the judiciary law would have totally changed the state of the law, an amendment would have involved at least a partial change. After all, an amendment requires there be some kind of improvement to the original (i.e., a change from bad to better). *See infra* Part I (discussing the original meaning of amendment). Thus, the proposed amendment preserved—in part—the original resolution's call to change the state of the judiciary law.

108 11 Annals, *supra* note 83, at 145.

> [A] committee be appointed to inquire whether the people of the eastern division of the territory northwest of the river Ohio have formed a constitution and state government agreeably to the constitution and [U.S.] laws…and the ordinance of Congress for the government of the territory of the United States northwest of the river Ohio, and make report thereon.[109]

Both the original resolution and the amendment called for appointing a committee on the topic of the Territory Northwest of the River Ohio, but this similarity establishes only germaneness. The original specifically called for a committee to report a bill for extending U.S. laws to the entire territory, whereas the amendment called for a committee to inquire and report on whether the territory's eastern division has a constitution and government agreeable to federal laws and the Constitution. The amendment did not further stipulate that federal laws could be extended to the entire territory or its eastern portion and thereby was a complete substitute. The next day, this proposed amendment was withdrawn with no reason provided. The Senate then passed another amendment that reworded the original resolution.[110]

The last attempted complete substitute was on February 2, 1805, during the Twenty-Third Session of the Executive Proceedings of the Senate (Eighth Congress). This episode involved a proposed treaty between the United States and the Creek Nation. Under debate was the following resolution, which was originally proposed on January 22: "[T]he Senate do advise and consent to the ratification of the treaty, made in [sic] behalf of the United States with the Creek nation of Indians…on [November 3, 1804.]"[111] A congressman then proposed to delete all the resolution's text for this new language:

> [T]he further consideration of the treaty entered into…on [November 3rd]…be postponed until…December next; and that the [U.S.] President…be requested to enter into further negotiations with the Creek nation of Indians…to effect, if possible, such modification of the terms contemplated by said treaty, as well relative to price, as to the mode of payment, as may be more conformable to…[U.S.] interest[s].

Clearly the substitute was germane to the original, as both versions addressed the proposed treaty with the Creek Nation. However, the original resolution requested immediate consent to the treaty, while the amendment requested 1) the president to restart negotiations with the Creek Nation to improve U.S. benefits and 2) postponement of further treaty consideration until December 1805 (presumably to give the president time for renegotiations). The amendment's proposer may have envisioned eventual consent to the treaty (with the stated changes), but the amendment did not mention eventual consent. This amendment could have ended up being an actual complete substitute, but the Senate decided not to delete the original text and thus held no vote on the new language. The Senate then rejected the original resolution.[112]

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109 3 Senate Journal, *supra* note 82, at 251.
110 *Id.*
111 1 Senate Executive Journal, *supra* note 84, at 481.
112 *Id.* at 482-83.

4. Summary of the "Yeses"

My analysis of congressional records from 1789 to 1805 (First through Eighth Congresses) revealed six complete substitutes, including four attempts and two actuals. All six substitutes involved resolutions and never revenue bills or other legislation. Figure 1, provided below, shows a tentative timeline of these actual versus attempted complete substitutes. The figure also shows the first actual complete substitute in British Parliament and other relevant milestones, such the Constitution's ratification date and Jefferson's tenure as the Senate's Presiding Officer. The House had the first attempted complete substitute in 1790 (First Congress), which was held out of order. Neither chamber had another attempt until almost a decade later with the Senate's first actual complete substitute in March 1800 (Sixth Congress), which was voted on and rejected. Later that year in December, the House followed suit with its own actual complete substitute, which passed. In the ensuing years until 1805 (Eighth Congress), there were three more attempted complete substitutes—all in the Senate—including a germane one in 1802 held out of order.

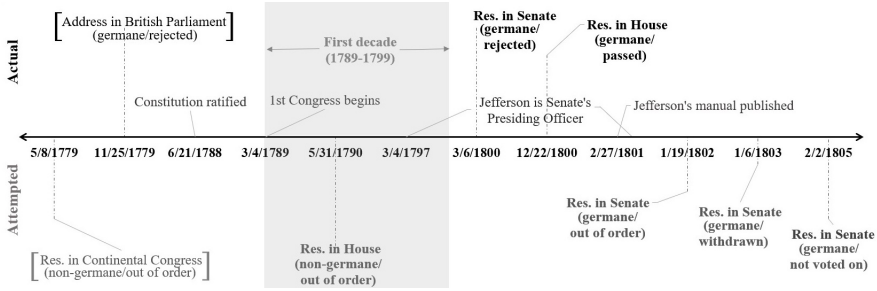

Figure 1: Tentative Timeline of Actual versus Attempted Complete Substitutes in U.S. Congress, 1789-1805

B. The "Nos": Not—in Fact—Complete Substitutes

Twenty-six of the 32 episodes I identified as involving at least one "gut-and-amend" or similar procedure were clearly—or most likely—not complete substitutes. This Section chronologically discusses the 10 of these 26 episodes that are more complicated and require elaboration. For instance, for almost all these 10 episodes, neither the journals nor the *Annals* provided the full text of either the original legislation or its amendment and I had to piece together evidence of what happened. The Appendix chronologically documents the other 16 of these 26 episodes, which are easier cases to prove. For each episode, the Appendix presents a brief textual comparison of the original legislation to its amendment indicating the commonality involved.

1. Ten Episodes Requiring Elaboration

a. First Episode

The first episode occurred in the House early in the First Congress on June 29, 1789. The committee on the "bill to regulate the collection of the duties imposed on

goods, wares, and merchandises imported into the United States" reported "an entire new bill, as an amendment and substitute to the former bill."[113] Neither the journal nor the *Annals* provide the full text of the original bill or the amendment. However, regarding the original bill, the *Annals* documents on June 2, 1789, that it had a section establishing specific ports of entry and delivery for purposes of collecting import duties.[114] And the *Annals* on July 3, 1789, mentions the amendment aimed to establish enumerated ports of entry "at which foreign vessels might enter."[115] Thus, at the least, the original bill and the amendment shared language establishing specific ports of entry to help collect import duties.

b. Second Episode

The second episode involved a House resolution proposed on April 7, 1794 (Third Congress). The resolution requested a halt to commercial intercourse with Great Britain and its economic allies unless Great Britain compensated America for several perceived grievances, such as "loses and damages" imposed by hostile British vessels on U.S. ships. This resolution generated multiple days of debate.[116]

During a debate on April 14, William Smith of South Carolina argued against the resolution's wording. His primary objection was that the resolution's threat to halt commercial intercourse was an unproductive negotiation technique. In a lengthy speech, Smith said he supported asking Great Britain for "reparations, in decent terms, unaccompanied with threats."[117]

More debate on the resolution continued the next day. Smith then "presented his modification of the original [that]…was declared to be a substitute by the Chair, and therefore out of order."[118] Neither the journals nor the *Annals* nor the records of the National Archives have the text or any elaboration on the exact nature of Smith's amendment.[119] However, Smith's stated preference the day before to have the resolution more politely request British reparations indicates Smith's amendment would have most likely done just that and omitted any economic threats. Such an amendment would have preserved—at least in essence—the original resolution's list of perceived grievances and reparation requests.

c. Third Episode

The third episode was on April 13, 1796 (Fourth Congress), and involved a House resolution addressing the prospect of implementing several new treaties. The resolution read as follows:

> Resolved, That provision ought to be made by law for carrying into effect, with good faith, the Treaties lately concluded between the Dey

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113 1 House Journal, *supra* note 81, at 55.
114 1 Annals, *supra* note 83, at 434-35.
115 *Id.* at 643-44.
116 4 Annals, *supra* note 83, at 570-96.
117 *Id.* at 582-86.
118 *Id.* at 595-96.
119 E-mail from National Archives Building, Washington, DC, to Dan Smyth (October 14, 2021) (on record with author).

> and Regency of Algiers, the King of Great Britain, the King of Spain, and certain Indian tribes Northwest of the Ohio.

William Giles of Virginia moved to "strike out all the words after 'Resolve[d],' that the resolution might be filled up with other words."[120] The journals and *Annals* do not provide the exact "other words" comprising the amendment, and the National Archives has no record detailing his amendment.[121] However, right after proposing his amendment, the *Annals* noted Giles (emphasis added) "hoped the Committee would adopt…[his] proposition…to have the resolution *differently worded*."[122] Becoming "differently worded" is far from being a complete substitute with entirely different text, and it seems the amendment simply reworded the original.

In addition, the *Annals* provide several details about Giles' reaction to the original resolution and its other proposed amendments indicating Giles' "other words" amendment was most likely no complete substitute. For one, Giles supported the part of the original resolution addressing the Spanish Treaty, and he strongly felt that each treaty was "proper for a separate resolution."[123] Second, before proposing his "other words" amendment, Giles had opposed a different amendment, in part, for being a "substitute." The different amendment he had opposed read, "[I]t is expedient to pass the laws necessary for carrying the Treaty with Spain into effect."[124] This amendment was even on Giles' preferred topic of the Spanish Treaty and was worded similarly to the original resolution. But this amendment was different enough from the original to be a substitute in Giles' opinion. Third, later on after proposing his "other words" amendment and after the House ultimately made the original resolution mention only the Spanish Treaty, Giles supported preserving the original resolution's language that "provision ought to be made by law for carrying into effect" the Spanish Treaty.[125] Perhaps the same or similar language had comprised Giles' "other words" amendment.

d. Fourth Episode

The fourth episode occurred on January 8, 1798 (Fifth Congress), after the House began discussing the "Bill for the relief of the legal representatives of certain deceased officers and soldiers." This bill read as follows:

> That the representatives of such officers and soldiers of the [U.S.] Army… as died after [March 24, 1783]…, and before [November 3, 1783]...shall be entitled to all the emoluments to which the said officers and soldiers would respectively have been entitled if they had lived to the end of the war between the United States and Great Britain [i.e., the Revolutionary War.]

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120 5 Annals, *supra* note 83, at 940; 948.

121 E-mail from National Archives Building, Washington, DC, to Dan Smyth (October 14, 2021) (on record with author).

122 5 Annals, *supra* note 83, at 948.

123 *Id.* at 940.

124 *Id.* at 942-44.

125 *Id.* at 966.

Thomas Evans of Virginia motioned to "strike out all the bill after the enacting clause...to introduce words which went expressly to declare the period of the termination of the war."[126] Neither the journal nor the *Annals* provide the exact words of Evans' amendment. However, his amendment focused on mentioning the Revolutionary War's correct end date, which was a qualifier for the rest of the bill compensating representatives of the war's veterans. Surely, Evans' amendment would have preserved this main part of the bill compensating the representatives.

e. Fifth Episode

The fifth episode occurred on April 13, 1798 (Fifth Congress), when the House considered a Senate amendment to the House's "bill providing an appropriation for completing the necessary buildings in the city of Washington." The Senate's amendment "struck out all the bill, except the enacting clause, and inserted in its place a provision for a loan of [$]100,000[.]" Neither the journals nor the *Annals* provide the full text of the original House bill or the Senate's amendment. But the House resolution on which the bill was based, which passed on March 13, read as follows:

> [That 200,000] dollars be appropriated for completing the buildings requisite for the [U.S.] Government…at the city of Washington[.][127]

And right after the *Annals* mentioned the Senate's "gut-and-amend" proposition, the *Annals* noted "[t]he original bill, as sent from this House, proposed a grant of [$]200,000," which was consistent with the bill's corresponding resolution. The House passed the Senate's amendment after a congressman remarked "this [loan of $100,000 in the Senate amendment] was all that could be got at this time," and the bill's title remained unchanged.[128] Thus, it is clear the Senate's amendment allotted $100,000—instead of the original bill's $200,000—toward completing government buildings in Washington.

f. Sixth Episode

The sixth episode began on June 1, 1798 (Fifth Congress), in the House with the "bill providing for the assessment and collection of direct taxes." The House submitted the bill to a committee for amendment after deleting the bill's first section, which comprised "the principle of the bill," and requiring "many [other] alterations." Several days later on June 5, the said committee reported its amendment as a "new bill" with a different title, being the "bill providing for the valuation of lands and dwelling houses, and for the enumeration of slaves in the United States." One congressman even said this "new bill" excluded "everything which relates to the collection of the taxes [from the original bill], and...confine[d] it to the assessment only[.]"[129] It appeared at least much of the original bill was gone, and it was unclear if the new bill's assessment language was essentially the same or only germane to the original bill's assessment language.

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126 7 Annals, *supra* note 83, at 810-12.
127 8 Annals, *supra* note 83, at 1266; 1413.
128 *Id.* at 1413.
129 *Id.* at 1866; 1869.

Unfortunately, neither the journals nor *Annals* contain full text of the original bill or the committee's new bill. Nevertheless, a debate about the committee's "new bill" on June 8 revealed the following commonality between the two bills: "[T]he original bill provided that every dwelling house with its appurtenances [i.e., items like fences tied to the land]…above…$200, should be separately enumerated; but in the…[new] bill the provision is extended to all houses above…$100."[130] The original and new bills, therefore, shared at least one assessment provision, being the enumeration of dwelling houses and their appurtenances starting at a certain value for purposes of assessing taxes.

g. Seventh Episode

The next episode occurred a month later in the House on July 6, 1798 (Fifth Congress). The House was discussing the Senate "bill to declare the Treaties between the United States and the Republic of France void and of no effect." This bill had one section reading as follows:

> That the Treaty of Amity and Commerce, and the Treaty of Alliance, between the United States and the French Government...and the Consular Convention between the same parties…are hereby declared, void and of no effect[.][131]

Congressman William Giles of Virginia then suggested "whether a declaration of war might be moved as an amendment to the bill." The *Annals* noted that "[t]o his mind, there seemed…little difference between saying the treaties were at an end, and declaring war." A war declaration may seem like a significant step beyond ending treaties between nations. However, according to the Eighteenth Century understanding of declaring war, such a proposed treaty termination could be tantamount to declaring war and a war declaration could be interpreted as indicating any treaty(ies) (except for wartime provisions) between warring countries was void.[132] Thus, Giles' amendment idea to declare war preserved the essence of the original bill's declaration that the given treaties were void. In any case, Giles never even officially proposed his amendment.[133] Two other amendments using a "gut-and-amend" procedure were later proposed, but neither amendment was a complete substitute.[134]

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130 *Id.* at 1893.

131 *Id.* at 2035-37.

132 Saikrishna Prakash, *Exhuming the Seemingly Moribund Declaration of War*, 77(1) Geo. Wash. L. Rev. 116-17 (2008).

133 8 Annals, *supra* note 83, at 2118-22; 2127.

134 The first amendment declared the treaties void as follows: "[W]hereas the treaties have been in numerous instances violated, they are no longer to be considered as law within the United States[.]" The second amendment had this similar language: "[T]he United States are…freed and exonerated from the stipulations of the treaties…between the United States and France[.]" *See* 8 Annals, *supra* note 83, at 2121-22.

h. Eighth Episode

The eighth episode happened several years later in the Senate in April 1800 (Sixth Congress) with the "bill to amend the act establishing the Judicial Courts of the United States." This bill originated on April 8 from a committee led by Nathaniel Chipman of Vermont. The Senate decided to appoint this committee weeks earlier on March 12 with this purpose (emphasis added):

> [T]o inquire whether any, and what, amendments are necessary in the act to establish the Judicial Courts of the United States [from 1789], *particularly the provision in said [1789] act for summoning jurors to serve in the Courts of the United States*, and to report by bill or otherwise.[135]

Neither the journals nor the *Annals* provided the original text of the original committee bill, but given the committee's above assignment, the original bill most likely amended the then-current process for summoning jurors to serve in U.S. courts.[136]

After the Chipman committee bill's second reading on April 16, the Senate sent the bill to a committee led by Wilson Nicholas of Virginia for possible amendment. On April 28, this Nicholas committee reported the following recommendation, which proposed to gut-and-amend the Chipman committee bill as follows (emphasis added):

> *Strike out the whole of the bill after the word "serve"...and insert* "in the courts of the United States, shall be designated by lot, or otherwise, in each state or district respectively, according to the mode of forming juries, to serve in the highest courts of law therein, now practised [sic]; so far as the same shall render such designation practicable by the courts and marshals of the United States."[137]

Clearly, this amendment text aimed to establish a process for summoning jurors to serve in U.S. courts, which—as discussed above—the original Chipman committee bill most likely had as well.

The next day on April 29, the Senate brought up the Nicholas committee amendment but never voted on it.[138] The Senate made no further amendments to the Chipman committee bill and passed it in its final form, which was the same text as the Nicholas amendment minus a couple commas.[139] This final form thereby

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135 10 Annals, *supra* note 83, at 107.

136 It is important to distinguish this Chipman committee bill from the bill of the same title that Charles Pinkney originated on March 5, 1800, which banned the Chief Justice of the Supreme Court and other federal judges from simultaneously holding other government positions. The Senate considered Pinkney's bill but rejected it on April 3. *See* A bill further to amend the Act entitled an Act to establish the Judicial Courts of the United States; Mar. 6 read 1st; Sen6A-B1, Box 1, Folder 2, Internal Ref: 12E2C 5/9/2; RG 46; NAB. *See also* 10 Annals, *supra* note 83, at 67; 97-102, 150.

137 10 Annals, *supra* note 83, at 161; 168-69.

138 *Id.* at 169-70.

139 *Id.* at 1526. On May 12, the House passed the Senate's version of the bill from April 29 without change, indicating the bill's final version that became law was identical to the Senate bill on April 29. *See id.* at 170; 715.

indicates—without a doubt—that the Nicholas committee amendment was no complete substitute to the Chipman committee bill and attempted only minor grammatical corrections.

i. Ninth Episode

The ninth episode occurred in early 1801 (Sixth Congress) in the Senate and involved the House "bill to erect a mausoleum for George Washington." The original bill's full text is not in the journals or *Annals*, but the *Annals* provides the original bill's first section as follows:

> *That a mausoleum* of American granite and marble, in a pyramidal form, one hundred feet square at the base, and of a proportionate height, *shall be erected*, in testimony of the love and gratitude of…[American] citizens… *to George Washington*."

A debate on this bill further noted the original bill allotted $70,000 toward building the mausoleum.[140]

On January 22, 1801, a Senate committee on this bill proposed—and the full Senate accepted—an amendment that struck out "the whole of the [original] bill" for this replacement text:

> In testimony of the respect and gratitude of…[American] citizens… to George Washington…*there…hereby is…appropriated a sum not exceeding -- thousand dollars*…and to adopt all other measures necessary and proper *for the due execution of this act.*[141]

This new text had several blanks to be determined later (indicated by "--"), and the new text did not explicitly mention the appropriation would create a mausoleum. However, after this amendment passed, the title remained unchanged.[142] Thus, all the amendment's language—given the title—was obviously for the purpose of erecting a mausoleum for Washington. And, considering the original bill's allotment of $70,000 toward the mausoleum compared with the Senate amendment's allotment of "a sum not exceeding -- thousand dollars," this episode surely involved no complete substitute.

j. Tenth Episode

The tenth and final episode requiring elaboration occurred in the Senate on April 7, 1802 (Seventh Congress). Under debate was the "bill to revive and continue in force an act, entitled 'An act to augment the salaries of the officers therein mentioned,'

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140 *Id.* at 799-800; 802.

141 3 Senate Journal, *supra* note 82, at 117.

142 *Id*. In fact, soon thereafter on February 4 the House received all Senate amendments to this bill, including the replacement text from January 22, and the bill title remained the "bill, entitled 'An act to erect a Mausoleum for George Washington.'" *See* 3 House Journal, *supra* note 81, at 785.

passed the second day of March, 1799."[143] The *Annals* does not provide this bill's full text but does say the bill declared the "said act [from 1799 to augment the salaries of officers] be revived" for three years.[144] The 1799 law's first section read as follows:

> That in lieu of the salaries heretofore allowed by law to the [U.S.] officers…herein mentioned, the following compensations be…granted to the said officers…
>
> [The section then allotted various salaries up to $5,000 to 14 U.S. officers, such as the Secretary of State, Treasurer, and Postmaster General.]

The second section then declared the law would be valid for three years.

A senator then motioned that the original bill under debate (declaring this 1799 law's revival) be replaced with new amendment text. However, this amendment simply duplicated all the 1799 law's text, putting blanks ("…") for the salaries of the 14 U.S. officers to be determined later.[145] The amendment thereby restored the 1799 law's actual language and preserved the essence of the original bill to revive the 1799 law.

2. Summary of the "Nos"

These 10 episodes of a "gut-and-amend" or similar procedure involved varying levels of complexity. However, each amendment clearly or most likely preserved at least the essence of one significant part of the original legislation. The Appendix documents the 16 other similar episodes.

V. Conclusions

A. When and How: Rise of Complete Substitutes

According to my analysis of congressional records from 1789 to 1805 (First through Eighth Congresses), the year 1800 marked the rise of complete substitutes—at least to resolutions and not revenue bills or other legislation—in Congress. In March that year, the Senate—with Thomas Jefferson as Presiding Officer—saw an actual complete substitute to a resolution requesting a congressional investigation into the *General Advertiser*'s publications about a controversial election bill and into William Duane, the paper's editor and Jefferson's political ally. And months later in December, the House followed suit with its first actual complete substitute, which was to a resolution about William Sargent's controversial governing of the Mississippi Territory.

Of course, trying to propose complete substitutes as amendments was not novel to U.S. Congress in 1800. As documented, the year 1779 saw one attempted complete substitute to a resolution in the Continental Congress and an actual complete substitute to an address to the King in British Parliament.

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143 3 Senate Journal, *supra* note 82, at 205.

144 11 Annals, *supra* note 83, at 1083-84.

145 *See* An Act to augment the Salaries of the Officers therein mentioned., Chap. 38, 1 Stat. 729 (1799).

But in U.S. Congress before 1800, complete substitutes—whether germane or non-germane—were evidently not accepted as proper amendments. For instance, the House's rule against new motions under color of amendment, adopted during the First Congress, appears to have outright banned any complete substitutes. And from 1789 to 1799, the House had only one attempted complete substitute, which was in 1790 and which was held out of order. Furthermore, the Senate—even though it had no explicit rule against complete substitutes—never had an attempted complete substitute before its first actual complete substitute in 1800.

It evidently took Jefferson, whose *Manual of Parliamentary Practice* seems to have approved of complete substitutes, to permit the rise of complete substitutes in Congress. As thoroughly documented, the first actual complete substitute, which involved the Duane resolution, was during Jefferson's tenure as the Senate's Presiding Officer. In this role, Jefferson had sole power over deciding if a given amendment was in order. But, of course, Jefferson was in no impartial position to determine the permissibility of that complete substitute, which directly bore on the freedom of his ally Duane and Jefferson's own presidential ambitions that year. It is therefore unclear if Jefferson permitted the substitute consistent with a pro-complete-substitute interpretation of his two manual quotes or during an understandable moment of political expediency.

B. Post-Ratification History Confirms Original Public Meaning of Amendment

In any case, Congress' early amendment practice confirms the original public meaning of amendment and not Jefferson's two manual quotes that seemingly approve of complete substitutes. Between 1789 and 1805, the Senate made no complete substitutes to House revenue bills. And Congress' first two actual complete substitutes to any legislation—in these cases resolutions—were in 1800, which was obviously after the important first decade (1789-1799/First-Fifth Congresses). There was thus no trace of any accepted, let alone consistent, practice of complete substitution in the earliest Congresses. This trend of no actual complete substitutes between 1789 and 1800 continued the rejection of complete substitutes in the Continental Congress and evident lack of complete substitutes in American legislative bodies between 1774 and 1790. Similar to how the British Parliament's complete substitute to an address to the King in 1779 was an anomaly to the long British history opposed to complete substitution, Congress' two complete substitutes to resolutions in 1800 were evidently anomalies to American legislative history. All considered, Jefferson's two manual quotes—and any historical legal arguments for permitting the Senate's complete substitutes to House revenue bills—lack any significant support from either the ratification period or the important first decade and thus have no significant foundation in originalism.

C. Return of the Original Public Meaning of Amendment?

Jefferson, as the Senate's Presiding Officer, appears to have unwittingly validated the apparent claim in his own manual that congressional amendments may be complete substitutes. He thereby created a precedent for and surely enabled Congress' later complete substitutes, including the Senate's substitutes to House revenue bills. Of course, this later Senate practice totally disregarded the original public meaning of amendment in the Origination Clause. But perhaps, given this article's findings, this

original meaning will return to prominence. Then, at the most, a Senate amendment to a House revenue bill could—without originating a new revenue bill—replace all parts of the House bill except for the essence of one significant part with new, germane parts.

Appendix: All Other Episodes Involving a "Gut-and-Amend" or Similar Procedure but Not a Complete Substitute

Date & Source	Episode (emphasis added)	Original (emphasis added)	Amendment (emphasis added)	Commonality (between Original and Amendment)
1) May 25, 1790 (1st Congress) 1 Senate Journal, *supra* note 82, at 145-46.	The Senate was considering the House's "bill, entitled an act for finally adjusting and satisfying the claims of Frederick William de Steuben" (see Original). The committee on the bill proposed this amendment: "*In the second line, strike out from the word 'order' inclusive, to the end of the bill, and insert* [*see Amendment.]*"	That, in order to make full and adequate compensation to *Frederick William de Steuben*, as well for the *sacrifices and eminent services*, *made…to the United States during the late war… there be paid* to the said Frederick…seven thousand dollars…and…*an annuity of… [2,000] dollars during life…to be paid in quarterly payments* [.][146]	That, in consideration of *the eminent services of the Baron de Steuben*, *rendered to the United States during the late war*, there be *paid to him an annuity of two thousand dollars…in quarterly payments [.]*	Both provided Frederick William de Steuben a lifetime annuity of $2,000 paid quarterly for his wartime services to the United States.
2) Aug. 7, 1790 (1st Congress) 1 Senate Journal, *supra* note 82, at 208-09.	The Senate began discussing the House's "bill, entitled 'An act making an appropriation for discharging the claim of Sarah Alexander, the widow of the late Major General Lord Stirling, who died in the service of the United States'" (see Original). The committee on the bill reported this amendment: "*Strike out of the section all subsequent to the word 'that,' in the second line, and substitute as follows…[see Amendment.]*"	[No text of the original bill is in the journals or *Annals*. However, the *Annals* contains the following House resolution from August 2, 1790, which was in response to "the *petition of the widow [Sarah Alexander] of the late General Sterling*" and which was the basis of the original House bill:] Resolved, *That* the sum of [$6,972]…being the *half-pay of a Major General* in the late American army, for the term of seven years*, be allowed.* [147]	The Register of the Treasury shall…*grant unto Sarah [Alexander], the widow of the late Major General Earl of Stirling*, who died in the service of the United States, *a certificate, to entitle her to a sum equal to an annuity for seven years half pay of a Major General[.]* [This amendment contained several other allotments for other similarly situated individuals.]	Most likely, both provided Sarah Alexander—as a Major General's widow—the half-pay of a Major General.
3) March 3, 1795 (3rd Congress) 2 Senate Journal, *supra* note 82, at 184.	The Senate was discussing the House "bill, entitled 'An act to authorize the [U.S.] President… to obtain a cession of claim to certain territory'" (see Original). Aaron Burr of New York then proposed *"to amend the bill, to be read as follows…[See Amendment.]*"	[No text of the original bill is in the journals or *Annals*. However, the *Annals* contains the following House resolution from February 26, 1795, which was in response to "the disposition of Indian lands by the Legislature of the State of Georgia" and which was the basis of the original House bill:] Resolved, That the *[U.S.] President…be authorized to obtain a cession of the State of Georgia of their claim to the whole, or any part, of the land* within the present Indian boundaries.[148]	Be it enacted...That the *[U.S.] President…be… authorized…to obtain*, by purchase or donation, a relinquishment and *cession of the whole or any part of the lands claimed by or under the state of Georgia,* and without the ordinary jurisdiction thereof[.]	Most likely, both authorized the U.S president to obtain a cession of the Indian lands claimed by the State of Georgia.

146 2 Annals, *supra* note 83, at 1556-57.
147 2 Annals, *supra* note 83, at 1717-18.
148 4 Annals, *supra* note 83, at 1256-57.

Date & Source	Episode (emphasis added)	Original (emphasis added)	Amendment (emphasis added)	Commonality (between Original and Amendment)
4) June 12, 1795 (10th Session of Executive Proceedings of the Senate in 3rd Congress) 1 Senate Executive Journal, *supra* note 84, at 179.	The Senate was considering a treaty with Great Britain that President George Washington had sent the Senate on June 8. That day, the Senate had approved a resolution "[t]hat the Senators be under an injunction of secrecy on the communications this day received from the [U.S.] President…until the further order of the Senate." On June 12 when the treaty was being discussed, a resolution was proposed to publish the treaty (see Original). But immediately thereafter, a motion was made and approved *"to modify the motion [to publish the treaty] as follows…[see Amendment]."*	[T]hat the said *treaty be published* [i.e., rescind the enjoined secrecy and make the treaty widely and publicly known].	*That so much of the resolution* of [June 8]… *as enjoins secrecy upon the Senators with respect to the communications on that day received from the President, be rescinded.*	Both removed the secrecy of the treaty.
5) Jan. 9, 1798 (5th Congress) 7 Annals (House), *supra* note 83, at 814-17.	The House began discussing a resolution about a land dispute between Indians and the State of Tennessee (see Original). William Clairborne of Tennessee then *"moved to strike out all the words of the resolution after the word 'for,' in second line, and to insert [see Amendment.]"*	Resolved, That *the sum of----dollars be appropriated* for the relief of such [Tennessee] citizens…as have rights to lands within the…State…and have made actual settlements thereupon, and who have been deprived of the possession of the said lands by the operation of the act for regulating the intercourse with the Indian tribes. The *said sum to be subject to the order of the [U.S.] President…to be expended under his direction… in extinguishing the Indian claim to the above described lands, in case he shall deem it expedient to hold a treaty for that purpose*[.]	Resolved*, That the sum of----dollars be appropriated for the extinction of the Indian claim to all or any part of the land within the limits of the State of Tennessee, in case the [U.S.] President…shall think it expedient to hold a treaty for that purpose.*	Both shared key components, such as an appropriation toward the extinction of the Indian claim to land said to be within the limits of the State of Tennessee.
6) March 24, 1800 (6th Congress) 3 Senate Journal, *supra* note 82, at 56.	The Senate was in the middle of an episode, partially discussed earlier, in which the Senate ultimately tried arresting editor William Duane of the *General Advertiser* newspaper for publishing a leaked version of a controversial election bill and for comments critical of Federalists in power.[149] On this date, a Senator introduced a resolution essentially stating that Duane be allowed to be heard by counsel (see Original). Immediately, another Senator motioned *"to strike out all the motion subsequent to the word 'Duane,' and insert [see Amendment.]"*	Resolved, *That William Duane be permitted to be heard by counsel*, he having appeared… and requested that he might be heard by counsel.	Resolved, That *William Duane*, having appeared at the [Senate] bar… and requested to be heard by counsel on the charge against him…*be allowed the assistance of counsel*[.]	Both permitted William Duane to be heard by counsel.

149 Dunn, *supra* note 94, at 171-74; *Schafer*, *supra* note 97.

Date & Source	Episode (emphasis added)	Original (emphasis added)	Amendment (emphasis added)	Commonality (between Original and Amendment)
7) April 24, 1800 (6th Congress) 3 Senate Journal, *supra* note 82, at 80.	The Senate brought up the "bill supplementary to the act to suspend part of an act, entitled 'An act to augment the army of the United States, and for other purposes'" (see Original). The committee on the bill reported this amendment: "*Line 2, after the word 'that,' strike out to the end of the bill, and insert [see Amendment].*"	Be it enacted...*That all further appointment of officers authorized by the act intitled "an act to augment the army of the United Sates and for other purposes," shall be suspended until the further order of Congress*; *unless* in the recess of Congress…war should break out between the United States and the French Republic, or imminent danger of [French] invasion…shall, *in the opinion of the [U.S.] President…be discovered to exist[.]*[150]	Be it enacted...That, *it shall be lawful for the [U.S.] President… to suspend any further military appointments under the act to augment the army of the United States, and for other purposes… according to his discretion*[.]	Both authorized the suspension of military appointments being made under the given act with possible exceptions at the president's discretion.
8) April 25, 1800 (6th Congress) 10 Annals (House), *supra* note 83, at 159; 689; 698-99.	The House discussed a Senate amendment to the House's "bill to divide the Territory of the United States Northwest of the Ohio into two separate governments" (see Original). At the time, there was a large territory in the United States called the "Territory of the United States North-West of the River Ohio." The bill aimed to split up this territory into two governments. The Senate amendment to the bill recommended "*striking out the whole bill, and inserting a new one [see Amendment]*."	Sec. 1. Be it enacted...*That the territory of the United States, north-west of the river Ohio, shall, for purposes of temporary government, be divided into two districts*…and that *part of the said territory which lies to the westward of the said line, shall form one district, to be called the ----territory*, and *that which lies to the eastward of said line, shall form one other district, to be called the ----territory...*[151]	That from and after the fourth day of July next, *all that part of the territory of the United States, north west of the Ohio river… shall, for purposes of temporary government, constitute a separate territory, and be called the Indiana Territory.*[152] [Five other sections further established the two governments, such as a section establishing the seats of the governments of the Indiana Territory and the reshaped Territory of the United States North-West of the Ohio river.]	Both split the "Territory of the United States Northwest of the Ohio River" into two separate territories.

150 Bill supplement augmentation of the army. April 3rd 1800; Sen 6A-B1, Box 1, Folder 2, Internal Ref: 12E2C 5/9/2; RG 46, NAB.

151 H.R. 39 - 6th Congress (1799-1801): A Bill, To divide the Territory of the United States North-West of the Ohio, into two separate Governments, 6th Cong. (1800), https://www.congress.gov/bill/6th-congress/house-bill/45/1800/03/20/text.

152 Message to Congress, April 21, 1800 (Senate Amendment): A Bill, To divide the Territory of the United States North-West of the Ohio, into two separate Governments, 6th Cong. (1800), https://www.congress.gov/bill/6th-congress/century-of-lawmaking-historical-document/73/1800/04/21/text?s=1&r=1.

Date & Source	Episode (emphasis added)	Original (emphasis added)	Amendment (emphasis added)	Commonality (between Original and Amendment)
9) February 6, 1801 (6th Congress) 3 Senate Journal, *supra* note 82, at 121-22; 10 Annals, *supra* note 83, at 896-97; 900.	A Senator read the "bill providing for the more convenient organization of the courts of the United States" (see Original). A senator suddenly motioned to "*strike out the whole of the bill*" after the second line and insert a lengthy new bill (see Amendment).	[Text of the entire bill is not in the journals or *Annals*. However, the *Annals* mentions the following two sections of the bill:] *Sect. 13: The circuit courts shall have cognizance* of all actions, or suits, matters or things, cognizable by the Judicial authority of the United States… where the matter in dispute shall amount to ---- hundred dollars, and where original jurisdiction is not given by the Constitution...to the Supreme Court. Sect. 48: [An annual salary of $2,000 shall be assigned to] each of the *Circuit Judges... to be appointed by virtue of this act*[.]	Passing of this act, *there shall be four circuits [i.e., circuit courts] in the United States*; the first to consist of the district[s] of Maine… New Hampshire…and Rhode Island: the second to consist of the district[s] of Connecticut… New York, and New Jersey; [and so on.]	Both established U.S. circuit courts.
10) Dec. 14, 1801 (7th Congress) 11 Annals (House), *supra* note 83, at 313; 319-24.	The House continued discussing a motion made by Joseph Nicholson of Maryland on December 8. This motion called for an accounting of the oversight by the [Treasury] Secretary of public money spent by Timothy Pickering, a former Secretary of State (see Original). Nicholson decided to "*modify his [own] motion" by proposing a different motion in its place (see Amendment.)* Another representative immediately responded that he was "well pleased with the *substitute[.]"*	Resolved, That the *[Treasury] Secretary*…be directed to lay before this House an *account of all moneys* received by *Timothy Pickering*, Esq., former Secretary of State, *together with Mr. Pickering's account of disbursements, and his vouchers for the same*.	Resolved, That a committee be appointed to *inquire and report, whether moneys drawn from the Treasury [which surely include Timothy Pickering's transactions] have been faithfully applied to the objects for which they were appropriated*…and to report…whether any further arrangements are necessary to … *secure the accountability of persons entrusted with…public money*.	Both requested a legislative accounting of Treasury transactions involving Timothy Pickering.
11) April 5, 1802 (7th Congress) 11 Annals (House), *supra* note 83, at 1133-34; 1139-41.	The House was considering a resolution by Roger Griswold of Connecticut. This resolution called for, given a recent Convention between the United States and France, legislative oversight of the finances involved in repairing the French ship *corvette Berceau* captured by U.S. forces in 1800 (see Original). The following two amendments were proposed in tandem to produce a "gut-and-amend" procedure: 1) Griswold decided to amend his resolution to *add language asking the Navy Secretary for "all…documents related to the sale, purchase, and repairs of the vessel" (see Amendment)* and then 2) Samuel Smith of Maryland proposed to *"strike out all the resolution, excepting that which called for papers."*	Resolved, That the *Secretary* of State *be directed to report* to this House whether the sum of $32,839 54 [sic], laid out in repairing the *corvette Berceau*…was expended… agreeably to the stipulations of the Convention between the United States and France.	Resolved, That the *Secretary* of Navy *be directed to lay before this House* copies of all… documents which relate to the sale, purchase, and repairs of that vessel *[corvette Berceau].*	Both directed a U.S. secretary to provide the House information regarding the repair of the *corvette Berceau* ship as part of legislative oversight of the finances involved.

Date & Source	Episode (emphasis added)	Original (emphasis added)	Amendment (emphasis added)	Commonality (between Original and Amendment)
12) Feb. 23, 1803 (8th Congress) 3 Senate Journal, *supra* note 82, at 266; 270-71; 273-75.	The Senate was considering a series of related resolutions presented together for consideration on February 16, 1803, that addressed growing concerns of a hostile France, which then controlled the Louisiana Territory and Mississippi River (see Original). John Breckinridge of Kentucky then proposed to "*amend the resolutions under consideration, by striking out all that follows the word 'resolved,' and inserting as follows…[see Amendment].*"	Resolved, That the United States have an indisputable right to the free navigation of the river Mississippi, and to a convenient place of deposite for their produce and merchandise in the island of New Orleans… *-That he [the U.S. president] be authorized to call into actual service any number of the militia of the states of South Carolina, Georgia, Ohio, Kentucky, Tennessee, or of the Mississippi territory, which he may think proper, not exceeding fifty thousand, and to employ them, together with the military and naval forces of the Union, for effecting the objects above mentioned. -That the sum of five millions of dollars be appropriated to the carrying into effect the foregoing resolutions* [.]	Resolved, That *the [U.S.] President…is hereby, authorized, whenever he shall judge it expedient, to require of the executives of the several states to take effectual measures to organize, arm, and equip, according to law, and hold in readiness to march, at a moment's warning, 80,000 effective militia, officers included… Resolved, That -- dollars be appropriated for paying and subsisting such part of the troops aforesaid, whose actual service may be wanted[.]*	Both shared several key components, including authorizations for 1) the president to mobilize tens of thousands of militia troops (from various states) and 2) an appropriation to fund this mobilization.
13) Jan. 11, 1804 (8th Congress) 4 House Journal, *supra* note 81, at 527-28.	The House was discussing a committee report on the "memorials of Alexander Moultrie, of the State of South Carolina, in [sic] behalf of himself and others, and of the Virginia Yazoo Company, by William Cowan, their agent." This report involved a complicated land dispute involving multiple parties. A resolution was proposed that would, regarding the report, allow a specific company to be heard by its agent at the Bar of the House (see Original). Another representative motioned to *"amend the same, by striking out all the words from the word 'Resolved,' in the first line, to the end of the motion, and inserting, in lieu thereof, the following words…[*see *Amendment]."*	Resolved, That the *South Carolina Yazoo Company be heard by their agent,* on Monday next, *at the Bar of the House.*	Resolved that this *House will*, on Monday next, *hear all the agents of the different companies [such as South Carolina Yazoo Company]*, claiming lands South of the State of Tennessee, *who may choose to speak at the Bar of this House.*	Both allowed at least one company to speak about the given topic at the Bar of the House.

Date & Source	Episode (emphasis added)	Original (emphasis added)	Amendment (emphasis added)	Commonality (between Original and Amendment)
14) Jan. 3, 1805 (8th Congress) 3 Senate Journal [Trial of Samuel Chase], *supra* note 82, at 514-15.	The Senate was conducting the trial of Samuel Chase, a Supreme Court justice and well-known Federalist. The House had impeached Chase over allegations of violating principles of justice with partisan rulings. Stephen Bradley of Vermont proposed an order compelling Chase to respond to the charges by a specific deadline (see Original). William Giles of Virginia then motioned *"to amend the motion, and to strike out all that follows the word 'Ordered,' and insert [see Amendment.]"*	Ordered, That *Samuel Chase file his answer* with the Secretary of the Senate, *to the several articles of impeachment exhibited against him* by the House of Representatives, *on or before the -- day of --*.	Ordered, That -- *next shall be the day for receiving the answer,* and proceeding on the trial of the *impeachment against Samuel Chase*.	Both gave Samuel Chase a deadline to submit his response to the impeachment charges.
15) Feb. 5, 1805 (8th Congress) 3 Senate Journal, *supra* note 82, at 446; 14 Annals (Senate), *supra* note 83, at 39.	The Senate resumed discussion of the "bill, entitled an act to regulate the clearance of armed merchant vessels" (see Original) and a previously proposed amendment to it. The *Annals* suggest that this previously proposed amendment was the one made by the committee on the bill on January 21, 1805, as no other amendment was proposed to the bill after this one was proposed. In any case, the committee amendment proposed to "*strike out the whole of said bill, after the enacting clause, for the purpose of inserting an amendment [see Amendment]*."	Be it enacted…*That, after due notice of this act at the several custom-houses, no merchant vessel armed*, or provided with the means of being armed at sea, *shall receive a clearance…to leave the port where she may be armed or provided, without bond,* with two sufficient sureties being given by the owner…or by the master or commander, to use of the United States*, in a sum equal to double the value of said vessel*…Provided, That the regulations herein contained shall not be construed to extend to vessels bound to any port or place in the Mediterranean, or beyond the Cape of Good Hope...[153]	Be it enacted...*That after due notice of this act at the several custom houses, no armed merchant vessel,* or vessel prepared for armament, the property of any [U.S.] citizen … or person residing therein, *shall receive a clearance, or be permitted to depart from any port in the United States, to any island in the West Indies, or any port or place in this continent, situated between Surinam and the western boundary of the United States, unless the owner or owners, agent or agents, and the commander of such vessel for the intended voyage, shall give bond in a sum equal to double the value of such vessel*, her arms, tackle, apparel, and furniture…[154]	Both permitted an armed merchant vessel to get clearance to depart a port if a bond at least equal to double the vessel's value is provided by the vessel owner or the master/ commander.

153 14 Annals (Senate), *supra* note 83, at 722-23.

154 Report of the Committee to whom was referred the Bill, entitled "An act to regulate the clearance of armed merchant vessels." January 21, 1805. Sen8A-D1, Box 5, Internal Ref: 12E2C 5/11/2; RG 46, NAB.

Date & Source	Episode (emphasis added)	Original (emphasis added)	Amendment (emphasis added)	Commonality (between Original and Amendment)
16) Feb. 16, 1805 (8th Congress) 3 Senate Journal, *supra* note 82, at 455-56.	The Senate was considering the "bill further providing for the government of the territory of Orleans" (see Original). Back-to-back amendments were proposed to "gut-and-amend" the bill. The first amendment was to "*[s]trike out of the first section of the bill all that follows the enacting clause, and insert [see 'Sec. 1' of Amendment].*" And the second amendment was to "*[s]trike out the residue of said bill, and insert in lieu thereof the following…[see Sect. 2 – Sect. 6 of Amendment].*"	[Sec. 1.] Be it enacted...That the [U.S.] President…is hereby authorized to establish within the Territory of Orleans, a government in all respects similar (except as is herein otherwise provided) to that now exercised in the Mississippi Territory[.] Sec. 2. And be it further enacted…the *Governor of the said Territory shall* cause to be elected twenty-five representatives, for which purpose he shall *lay off the said Territory into convenient election districts, on or before the --day of-- next,* and give due notice thereof throughout the same and first *appoint the most convenient place within each of the said districts, for holding the elections; and shall nominate a proper officer or officers to preside at and conduct the same,* and to return to him the names of the persons who may have been duly elected[.][155]	[Sec. 1.] That, for…the people of Louisiana to enjoy the right of self government, *the [U.S.] President…*is hereby authorized to cause the territory ceded by the Republic of France to the United States, by the treaty concluded at Paris on the 30th of April, 1803 [i.e., what became the territories of Louisiana and Orleans], *to be laid off on or before the -- day of -- into convenient election districts,* having reference to population and location, and not exceeding the number of -- districts; and to *appoint the most convenient* time thereafter, as well as *place, within each of said districts, for holding an election*; *and to appoint in each district a proper person or persons, inhabitants of the same, respectively to preside at and conduct the election which is hereinafter described[.]* [Sect. 2 – Sect. 6 further provided for the government.]	Both established 1) "convenient election districts...for holding an election" by a certain deadline in the Territory of Orleans and 2) the "most convenient place[s]" for elections with "proper officers" to preside over and conduct the elections.

[155] 14 Annals (Senate), *supra* note 83, at 45-46.

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Oh What Tangled Webs We Weave—Unpacking (and Unpicking) the Majority Opinion in *Dobbs, State Health Officer of the Mississippi Department of Health et al. v. Jackson Women's Health Organization et al.*

Ian Loveland*

ABSTRACT

This paper evaluates the majority judgment in the United States Supreme Court in Dobbs v. Jackson Women's Health Organization. It is suggested that much of what is said in the majority opinion ostensibly appears eminently defensible if viewed solely from a narrowly legalistic perspective. But closer analysis suggests that the majority's reasoning has some weaknesses when viewed within that limited paradigm. A further line of inquiry assesses whether adopting such a 'legalistic' approach to the question of abortion rights is in any event an appropriate position for the Court to adopt. The final section of the paper explores two additional contextual issues: the first relates to the personal ethical integrity of some of the majority judges; the second to the adequacy of State political processes as a means to address the abortion rights controversy.

KEYWORDS

Abortion, Dobbs v. Jackson, Roe v. Wade, Stare Decisis, Judicial Lawmaking

CONTENTS

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I. Introduction

A recurring fascination of teaching an historically themed LLB or LLM class on the Constitutional Law of the USA is seeing the appalled look on the faces of very able students when they find themselves accepting that there might be perfectly credible jurisprudential reasons for defending aspects of both the method followed and the conclusion reached by Taney, C.J. in his *Dred Scott*[1] opinion. Insofar as one can—and it is a perfectly cogent proposition that one really cannot—strip the slavery dimension from that judgment, one is left inter alia with two interlinked doctrinal assertions. Both of these are eminently plausible in the context of a constitutional settlement formed in reaction—indeed revolution—against a unitary state polity in which sovereign lawmaking power rested in the hands of a bare majoritarian legislature which sat in almost constant session; within which settlement notions of a substantially decentralized federal government system and the allocation of sovereign legislative authority to a lawmaker which both existed normatively (far) above that ordinary governmental system and which was composed in a way that made it very difficult for that lawmaker ever to act, were given clear textual expression as part of that new nation's fundamental law.

The first is that the only legitimate process through which the text *and meaning* of the constitution can be changed is by the exercise of the sovereign's authority in accordance with Article V of the constitution's text. The second, consequential, proposition is that a court in the exercise of a judicial (legislative) review jurisdiction cannot legitimately lend new meanings to[2] the unaltered constitutional text simply because that text now exists in a changed – even a radically changed – political, economic or cultural context. In combination, these concepts presume there to be an effective congruence between the textual form and practical substance of sovereign lawmaking authority.

For pedagogic purposes, Taney's methodology can be placed in stark contrast to the principles developed by his predecessor as Chief Justice, John Marshall. Those ideas, most famously articulated in *M'Culloch v. Maryland*,[3] accept as entirely legitimate a judicial power to find in the Constitution principles which had no express textual basis[4] and to give new meanings to the constitution's text in response to (judicially perceived) changes in the political, social, economic or moral contexts in which that text is now being construed. Within that paradigm, the *de jure* sovereignty of the Article V lawmaker is compromised by what is *de facto* a judicial assertion of the Court's power to provide an alternative constitutional amendment process.

This basic evaluative dichotomy has been played out repeatedly over different moral questions in varying historical epochs. It is a dichotomy which has become evermore complicated with the passage of time as the ebbs and flows of these respective judicial currents become increasingly entangled with the question of how

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1 109 Howard 393 (1857).

2 A concept which I use to include methods of interpretation which *de facto* (and then for precedential purposes *de jure*) add words into the text.

3 4 Wheaton 316 (1819).

4 "[The Constitution's] nature requires that only its great outlines should be marked, its important objects designated and the *minor ingredients which compose those objects be deduced* from the nature of the objects themselves"; *id.* at 407; (emphasis added).

much weight the Court should attribute to its own rapidly growing body of precedent. Marshall's Court enjoyed the benefit of writing its constitutional jurisprudence on an essentially blank legal page: the precedential landscape facing Taney's Court was at best sparsely populated. That is a luxury which simply has not been available to later Courts. The new deal cases of the 1930s[5] and the desegregation jurisprudence of the 1950s-1960s[6] are both graphic illustrations of the Court suffering, to varying degrees, a crisis of legitimacy occasioned by judgments which either reversed or substantially undermined previously authoritative decisions.

The United States seems to be embracing another such constitutional moment now in relation to what is often (very) loosely termed 'the right' to abortion. The Supreme Court's judgment in *Dobbs*[7] has prompted a tsunami of media comment and speculation both in the United States itself and elsewhere, much of which has presented the judgment as sounding a death knell for abortion provision in the United States by overruling *Roe v. Wade*[8] and also as threatening other 'liberal' Court judgments on contentious social policy issues.[9] The purpose of this article is to examine the majority judgment at several levels of elaboration. The first level is directed towards demonstrating that there is prima facie much to be said – from various 'political' and 'legal' perspectives - in favor of the majority judgment. The second, in essence a rebuttal of the first, addresses intrinsic inadequacies of that prima facie credible majority reasoning. The third is concerned with matters of context, relating both to what we might term the 'constitutional integrity' of the majority Justices per se and to the question of whether the adequacy of State political fora as the means to resolve the abortion question may be substantially compromised in States promoting restrictive abortion regimes by recent legislative initiatives which are intended to make the exercise of voting rights significantly more difficult.

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5 Contrast *Schechter v. United States,* 295 U.S. 495 (1935), *Louisville Bank v. Radford,* 295 U.S. 555 (1935) and *United States v. Butler,* 297 U.S. 1 (1936) with *NLRB v. Jones and Laughlin Steel,* 301 U.S. 22 (1936) and *United States v. Darby,* 312 U.S. 108 (1940) and *Wickard v. Filburn,* 317 U.S. 113 (1942).

6 Notably *Shelley v. Kraemer,* 334 U.S. 1 (1948) effectively reversing *Buchanan v. Warley,* (1917) 245 U.S. 60 (1917) and *Corrigan v. Buckley,* 271 US 323 (1926): *Brown v. Board of Education* 347 U.S. 438 (1954) effectively if not de jure reversing *Plessy v. Ferguson,* 163 U.S. 537 (1896). On the depth and breadth of the legitimation crisis *Brown* created see the coverage in *Another tragic era?* US News and World Report*,* 4 Oct. 1957.

7 All references to and quotations from *Dobb*s are taken from the slip opinion at 19-1392 *Dobbs v. Jackson Women's Health Organization* (06/24/2022) (supremecourt.gov). That opinion starts the headnote (syllabus) and each individual judgment at p1, so citations here are rendered as *Dobbs*, Majority,1; *Dobbs*, Thomas,3 etc

8 410 U.S. 113 (1973).

9 *See, e.g.,* Karin Brulliard, *The Supreme Court Prompts the Question: Who Gets Rights in America?*, Wash. Post, June 25, 2022 at 07.37p.m., EDT, https://www.washingtonpost.com/politics/2022/06/25/abortion-constitutional-rights/; The Editorial Board, *The Ruling Overturning Roe Is an Insult to Women and the Judicial System* N.Y. Times, June 24, 2022, https://www.nytimes.com/2022/06/24/opinion/dobbs-ruling-roe-v-wade.html. In the United Kingdom, the judgment received substantial coverage in The Guardian (Jessica Glenza, Martin Pengelly & Sam Levin, *US Supreme Court Overturns Abortion Rights, Upending Roe v Wade,* 24 June 2022) and The Times (David Charter, *As Roe v. Wade Is Overturned, What Next for Abortion in the US?*, 24 June 2022).

A. The Mississippi legislation

Strictu sensu, the question before the Supreme Court in *Dobbs* was the constitutionality of various provisions of the Mississippi Gestational Age Act, (now found in Title 41 Chapter 41 of the Mississippi Code; hereafter cited as § 41-41-191).[10] That measure was enacted in 2018. At that time, the party political composition of the Mississippi legislature was 74 Republican to 48 Democrat in the House of Representatives and 31 Republican to 18 Democrat in the Senate.[11] The then Governor, Phil Bryant, was also a Republican.

Mississippi's State constitution[12] (it seems as a matter of inference rather than explicit provision) permits most laws (including the 2018 Act) to be enacted by bare bi-cameral majority and the Governor's assent. The State's Constitution does contain a 'Bill of Rights', which can be amended only by a two thirds majority vote in both chambers, but there is nothing in those provisions which has any obvious bearing on abortion regulation. The 2018 bill passed the House with an 80-31 majority, a few Democrats joining the Republican majority.[13] In the Senate, the vote was 35-14.[14]The Act was therefore not quite a purely partisan measure in the cross-party sense.

The text of the bill was essentially a borrowing of a draft measure promoted by the 'Alliance Defending Freedom' an evangelical Christian pressure group which has been hawking its (inter alia) anti-abortion legal wares around several southern States in recent years.[15] The 2018 Act contains a lengthy preamble which hangs its evangelical moral inspiration on a cluster of legal pegs which can be found poking out of the Court's previous abortion jurisprudence.[16] The gist of the preamble is that very few countries permit non-therapeutic abortion, that medical science now permits us to identify the extent to which, even at early stages of pregnancy, a fetus has recognizable features and developed organs, that later term abortions present significant risk to the 'maternal patient's'[17] physiological and psychological health, and that the mechanical process of performing late term abortions generally deploys—the preamble uses distinctly melodramatic phraseology:

> dilation and evacuation procedures which involve the use of surgical instruments to crush and tear the unborn child apart before removing the pieces of the dead child from the womb.

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10 Mississippi Code § 41-41-191 (2018) - Gestational Age Act; legislative findings and purpose; definitions; abortion limited to fifteen weeks' gestation; exceptions; requisite report; reporting forms; professional sanctions; civil penalties; additional enforcement; construction; severability; right to intervene if constitutionality challenged. For a brief review of the Act's history *see* Adel Hussein, *What to Know About the Mississippi Abortion Law Challenging Roe v. Wade,* N.Y. Times 6 May 2022.

11 Three Senate seats were then vacant.

12 Mississippi_Constitution.pdf (ms.gov).

13 2 Feb. 2018; 0320008.pdf (state.ms.us).

14 6 Mar. 2018; 0640039.pdf (state.ms.us).

15 *See* Amy Littlefield, *The Christian Legal Army Behind the Ban on Abortion in Mississippi,* The Nation, 30 Nov. 2021.

16 The preamble takes the unusual textual step of expressly citing judgments (presumably) to buttress the legal defensibility of the assertions it makes.

17 The Act does not use the term 'mother' to describe the pregnant woman.

> The Legislature finds that the intentional commitment of such acts for nontherapeutic or elective reasons is a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession.

The Act's main substantive provision is s.4(a):

> Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not perform, induce, or attempt to perform or induce an abortion unless the physician or the referring physician has first made a determination of the probable gestational age of the unborn human being and documented that gestational age in the maternal patient's chart….

The Act (s.3(f)) defines 'gestational age' as day one of the pregnant person's last period. So a 15 week 'gestational age' can arise at just *11 weeks* after conception for a woman or child who has a regular monthly menstrual cycle. People with irregular cycles might hit the 15 week point even earlier in the pregnancy.

The Act does not per se criminalize post-15 week abortions, either on the part of the pregnant woman nor the medical professional performing the procedure. Indeed, s.4(d) expressly forbids the patient from being identified. The Act does not explain how it is to interact with § 97-3-3 of the Mississippi Code, which purports to make performing an abortion procedure (other than to save the life of the mother or where the pregnancy is the result of rape) a crime punishable with up to 10 years imprisonment.[18] Rather than create a new criminal offence, the Act imposes a civil penalty of up to $500 per violation.[19] The more potent sanction is s.6(a), which provides for automatic suspension of the doctor's license to practice medicine in Mississippi if the doctor breaches any of s.4's substantive or reporting provisions. Both of those sanctions are prima facie limited to breaches undertaken 'knowingly or intentionally' by the doctor concerned. The Act does not explain what is meant by either term. Nor does it make any provision for how that question is to be resolved. Notwithstanding the emphasis in the Act's preamble on the 'barbaric' nature of dilation and evacuation, s.4 does not differentiate between methods used to terminate a pregnancy.

The 2018 Act added to an already expansive web of statutory regulation of abortion provision in Mississippi.[20] In 2017 there were reportedly only three specialized facilities in the State offering the procedure. Pressure groups from both sides of the abortion controversy are in broad agreement that in 2017 approximately 2500 abortions were performed in Mississippi, the overwhelming majority of which were chemically rather than surgically induced terminations; (and so likely to have occurred well short of 15 weeks gestational age).[21]

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18 Miss. Code § 97-3-3 (2018).

19 § 41-41-191 s.4(d)

20 *See, e.g,* 2017 Miss. Code, Title 41, Chapter 41 (setting a 20 week limit on most abortion procures).

21 On the pro-*Roe* side *see* Guttmacher Institute, *State Facts about Abortion: Mississippi,* (June 2022)*;* https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-mississippi. On the anti-*Roe* side *see* Tessa Longbons*,* , *Abortion Reporting: Mississippi* (2019), Charlotte Lozier

Then Governor Bryant had anticipated an immediate legal challenge to the Act's constitutionality: "We are saving more of the unborn than any state in America, and what better thing we could do," Bryant said as he signed the bill. "We'll probably be sued here in about a half hour, and that'll be fine with me. It is worth fighting over".[22] Bryant's prediction was well-founded. The Jackson Women's Health Organization[23] sought an immediate enjoinment of enforcement of the Act before a Federal District Court. This was granted in November 2018[24] and subsequently upheld in the Fifth Circuit Court of Appeals.[25] The case was argued before the Supreme Court on 1 December 2021, and judgment handed down on 24 June 2022. Argument proceeded with the parties' agreement on a much broader basis than simply the defensibility of the Mississippi statute: the primary question placed before the Court was whether *Roe v. Wade* should be overruled.

II. The case for—and against—

After an introductory paragraph acknowledging both the significance of abortion as a moral issue and the 'sharply conflicting views' held on the topic by the American public, Alito, J. began his (5-4 majority)[26] opinion with a withering critique of the substance and methodology of the majority judgment in *Roe* which sustained the conclusion that *Roe* should indeed be reversed overruled and that State abortion regulation in future be subject only to rational basis review:

> Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one. It did not claim that American law or the common law had ever such a right, and its survey of history ranged from the constitutionally irrelevant (e.g., its discussion of abortion in antiquity) to the plainly incorrect (e.g., its assertion that abortion was probably never a crime under the common law). After cataloging a wealth of other information having no bearing on the meaning of the Constitution, the opinion concluded with a numbered set of rules much like those that might be found in a statute enacted by a legislature.[27]

Institute (Aug. 26, 2021) https://lozierinstitute.org/abortion-reporting-mississippi-2019/; Tessa Longbons, , *Abortion Reporting: Mississippi* (2017), Charlotte Lozier Institute (May 16, 2019) https://lozierinstitute.org/abortion-reporting-mississippi-2017/.

22 Jenny Gathright, *Mississippi Governor Signs Nation's Toughest Abortion Ban Into Law* The Two-Way: NPR, (Mar. 19, 2018) https://www.npr.org/sections/thetwo-way/2018/03/19/595045249/mississippi-governor-signs-nations-toughest-abortion-ban-into-law

23 About Us - Jackson Women's Health Organization abortion clinic in MS (jacksonwomenshealth.com). The JWHO was then the only facility offering surgical abortions in Mississippi. It did not receive any State or municipal funding. Its presumptive fee for a surgical abortion was $700-$800; Fee Schedule - Jackson Women's Health Organization (jacksonwomenshealth.com).

24 349 F. Supp. 3d 536 (S.D. Miss. 2019).

25 945 F. 3d 265 (2019).

26 Joined by Thomas, Gorsuch, Kavanaugh & Coney-Barrett, JJ.

27 *Dobbs*, Majority, 1.

As suggested below, there is considerable force to aspects of that critique. We might however begin with a more cautionary note. *Roe* manifestly did not 'create' a right to abortion in any positive sense. What *Roe* did 'create'—although some commentators might suggest 'found' rather than 'create' is the better descriptor—was a quite expansive set of negative constraints on State power to prohibit abortion in circumstances where qualified medical professionals were willing to provide such a service either gratis or at a price the pregnant woman was willing and able to pay. Neither *Roe* nor any subsequent majority judgment has ever suggested that States are under any legal obligation to provide abortion services. This mischaracterization is common usage when *Roe* is being discussed, and there is no obvious basis to assume that it is being deployed in *Dobbs* as a deliberate attempt to mislead. But, as is discussed further below, distinguishing between positive and negative conceptions of the 'right' is not an insignificant matter.

A. A 'Right to Abortion' Has No Roots in the Constitution's Text, in Political History, or in Judicial Authority

It is impossible to disagree with Alito's assertion that the Constitution's text "makes no mention of abortion".[28] Nor is there scope to reject the *Dobbs* majority's claim that the majority in *Roe* were very imprecise indeed about those parts of the text from which it might be inferred that States were subject to constitutional restraints in relation to their regulation of the issue. Was it the Ninth Amendment? The First? The Fourth or the Fifth? The liberty clause of the Fourteenth? Or a mix of some or all of those sources?[29] *Roe* really does not tell us. And that is certainly a failing which undermines the legitimacy of the majority judgment, in that it places the 'right' much more in the realm of being 'created' rather than 'found' by the Court.

Alito is a little (if not much) less scathing in his treatment of *Planned Parenthood of Southeastern Pennsylvania v. Casey,*[30] which *Dobbs* has also overruled. The *Dobbs* majority accepts *Casey* was methodologically less freewheeling than *Roe* in holding that constraints on State power over abortion provision were rooted solely in the liberty clause of the Fourteenth.[31] Alito and his colleagues do not reject per se the principle that Fourteenth Amendment liberty 'rights'—whether as positive individual entitlements or negative constraints on State power —can exist without an express textual basis. Such rights can exist however only if they can be brought within the confines of the Court's now long-established doctrine of 'ordered liberty'.

The formula is generally credited as having first appeared in the Court's 1937 judgment in *Palko v. Connecticut*[32] in the context of a Connecticut statute creating a situation of double jeopardy for certain criminal offences. Cardozo, J.'s somewhat circular test for whether a particular moral value fell within 'ordered liberty' was that it amounted to "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental".[33] *Palko* per se was concerned with the question of whether the Fourteenth might be invoked to incorporate provisions

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28 *Id*.
29 *Id*, 9-10.
30 505 U.S. 833 (1992)
31 *Dobbs*, Majority, 10.
32 302 U.S. 319 (1937).
33 *Id*, 325. The phrase is taken from *Snyder v. Massachusetts* 291 U.S. 97, 105 (1934).

of the Fifth against the States, but subsequent authority has also used the principle to address issues which have no textual root in the Bill of Rights.

In *Dobbs*, Alito rooted the current understanding of the principle in three recent authorities: *Timbs v. Indiana;*[34] *McDonald v. Chicago;*[35] and *Glucksberg v. Washington.*[36] Alito drew primarily on *Timbs*, presumably because the judgment is (a) unanimous; (b) brief; and (c) authored by Ruth Bader Ginsberg.[37]

Unlike *Glucksberg* (and *Roe*), *Timbs* is actually an incorporation case (of the Eighth) rather than a freestanding Fourteenth 'liberty' case. Alito's reasoning for its deployment in *Dobbs* is that the test for accepting that an entitlement with no express textual basis anywhere in the Constitution is a Fourteenth Amendment liberty must be at least as rigorous as the one used to decide if a provision of the Bill of Rights can be incorporated against the States through the Fourteenth Amendment liberty. The *Timbs* test was briefly formulated: did the claimed entitlement have "deep roots in our history and traditions".[38] Those deep roots were clearly evident in *Timb*s:

> …[I]n 1868 upon ratification of the Fourteenth Amendment…the constitutions of 35 of the 37 States—accounting for over 90% of the U. S. population—expressly prohibited excessive fines….. Today, acknowledgment of the right's fundamental nature remains widespread. As Indiana itself reports, all 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality.[39]

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34 *Timbs v. Indiana*, 586 U.S. _ (2019); slip opinion at 17-1091.

35 561 U.S.742 (2010), in which the Court by 5-4 (Alito, Roberts & Thomas, JJ. being among the five) held that the Fourteenth incorporated the Second Amendment right to bear arms.

36 521 U.S. 702 (1997), in which the Court unanimously held there was no liberty right preventing a State from prohibiting assisted suicide.

37 In what one assumes is an attempt (albeit a transparently unconvincing attempt) either to rebut criticism that the majority is itself engaging in a partisan political project, or just to discomfit the makers of such criticism, Alito, J. takes the opportunity early in the judgment to note that immediate critiques of *Roe* by John Hart Ely and Laurence Tribe; (respectively *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973) and Foreword: *Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1 (1973)) indicated that: "even abortion supporters have found it hard to defend *Roe's* reasoning"; (Dobbs, *Majority*, 2). Ely and Tribe as critics of *Roe's* legitimacy are joined at later stages of the judgment by Ruth Bader Ginsburg, Mark Tushnett, Phillip Bobbit and Archibald Cox, all of whom according to the majority were "unsparing in their criticism" of *Roe; (Dobbs,* Majority, 54). The Ginsberg citation (at 3 fn. 4) is to a comment in Speaking in a Judicial Voice, 67 N.Y.U.L. Rev. 1185, 1208 (1992) that "*Roe* . . . halted a political process that was moving in a reform direction and thereby, I believed, prolonged divisiveness and deferred stable settlement of the issue". The other 'liberal' commentators are invoked at 54. The reference to *Timbs* would seem to be another example of this rather clumsy technique.

A cynical observer might wonder if Alito, Gorsuch, Kavanaugh and Thomas joined the opinion in *Timbs* in anticipation of using the judgment in a subsequent abortion case in which the Court would not be unanimous. Alito has a long track record of such opportunism; *see* Charlie Savage, *Decades Ago, Alito Laid Out Methodical Strategy to Eventually Overrule Roe,* N.Y. Times, 25 June 2022.

38 *Timbs*, slip opinion, 2.

39 *Timbs*, slip opinion, 5-6.

The *Dobbs* majority argue in what are overall unassailable terms that a similar conclusion in respect of abortion entitlements is unsustainable. The least convincing element of this historical analysis is its taking issue with the accuracy of many of the historical assertions made by the *Roe* majority, especially *Roe's* majority's assertion that abortion was not recognized as a crime in pre-revolution common law. Alito invokes various seventeenth and eighteenth century English treatises to rebut this conclusion. The critique[40] is prima facie quite plausible, though given that we are here dealing with a pre-democratic era in which it was a perfectly non-contentious common law proposition that a man could not rape his wife because she was legally obliged always to accommodate his sexual advances,[41] one might wonder if the either the pro-choice or pro-life arguments could gain much traction from an 'accurate' reading of that history.

The weight of Alito's historical argument undoubtedly increases as he makes his way towards the near modern era, noting that: "In this country during the 19th century, the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy."[42] The relevant statutes are listed in appendix to the majority judgment. After noting a similar trend within States created after ratification of the Fourteenth (the statutes are listed in another appendix), Alito finished his survey with this observation:

> By the end of the 1950s, according to the *Roe* Court's own count, statutes in all but four States and the District of Columbia prohibited abortion "however and whenever performed, unless done to save or preserve the life of the mother." 410 U. S., at 139….
>
> This overwhelming consensus endured until the day *Roe* was decided. At that time, also by the *Roe* Court's own count, a substantial majority—30 States—still prohibited abortion at all stages except to save the life of the mother. See id., at 118, and n. 2 (listing States).[43]

He then concluded – again quite credibly that:

> The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions…..
>
> Respondents and their amici have no persuasive answer to this historical evidence.[44]

However in what might be regarded as something of a sleight of hand (since the matter was not raised in *Timbs*), Alito also held that in addition to being firmly rooted in longstanding political practice, an ordered liberty entitlement should

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40 The passage is at *Dobbs*, Majority, 16-23.
41 *See* the discussion in *R v R (Rape: Marital Exemption)* [1992] 1 A.C. 599.
42 *Dobbs*, Majority, 23.
43 *Id* at 24.
44 *Id* at 25.

also be rooted in a steady and chronologically extensive stream of pertinent judicial authority. Having set this test, Alito then reasoned that the line of judicial authority which the *Roe* majority had invoked to sustain its conclusion that the Constitution implicitly contained privacy entitlements which could be stretched to include limits on a State's capacity to prohibit abortion. Those cases—clustered around an invocation from *Palko* that "only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty"—included, inter alia, *Meyer v. Nebraska*;[45] *Pierce v. Society of Sisters;*[46] *Skinner v. Oklahoma;*[47] *Griswold v. Connecticut;*[48] and *Loving v. Virginia.*[49]

In dismissing these cases as irrelevant to the abortion issue,[50] Alito might readily be thought to be ignoring the proposition that there is nothing particularly contentious about a Court engaging periodically in an interstitial development of judicial authority which takes modest steps to draw previously unconsidered factual situations within the scope of a more expansive organizing principle. Rather than address this issue, the *Dobbs* majority dismissed all of these authorities as "inapposite" because none of them concerned "the critical moral question posed by abortion"; that critical question evidently being that abortion "destroys potential life".[51]

This notion of the 'uniqueness' of abortion as a moral issue is returned to below, in the context of considering whether overruling *Roe* has implications for other recent Fourteenth Amendment liberty judgments. Here we might simply note that this reasoning takes a perhaps rather simplistic view of the idea of precedent and that Alito casts no doubt on the 'correctness' per se of any of those previous judgments: "They do not support the right to obtain an abortion, and by the same token our conclusion that the Constitution does not confer such a right does not undermine them in any way".[52] But that conclusion sends the *Dobbs* majority sailing into distinctly more choppy legal waters.

This element of the *Dobbs'* majority's critique of *Roe*—that Roe has no credible source either in historical practice or in judicial authority—is summed up by Alito's quotation of Byron White's dissent in *Roe,* where White categorized the majority holding as an exercise of "raw judicial power".[53] Alito evidently accords the phrase considerable substantive and/or stylistic weight: it is quoted verbatim at 3, 36, 44, 53, and 69 of the majority opinion. The label is undoubtedly powerful as a piece of rhetoric, but it is being used rather selectively in *Dobbs*.

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45 262 U.S. 390 (1923); (recognizing/creating a liberty right preventing States outlawing the teaching of German to children).

46 268 U.S. 510 (1925); (liberty right not to be prevented from educating one's children in a private sector school).

47 316 U.S. 535 (1942); (forbidding a State from imposing sterilisation as an element of the punishment for certain criminal offences).

48 381 U.S. 479 (1965); (preventing States from criminalizing the use of contraception by married couples.

49 388 U.S. 1 (1967); (Fourteenth Amendment prevents States from forbidding inter-racial marriage).

50 *Skinner* and *Loving* are perhaps better seen as equal protection cases in any event, and so—subject to the caveat raised in the discussion of *Brown* below—of little direct relevance to liberty issues.

51 *Dobbs*, Majority, 32.

52 *Id*.

53 410 U.S.113, 222 (1973).

Reduced to essentials, the majority opinion seems to be telling us that a claimed 'right' will fall within the Fourteenth's protection of 'ordered liberty' if it is 'recognized' by a substantial super-majority of States for an extensive period of time and if it is supported by a relevant[54] line of judicial authority. This sounds like a perfectly plausible principle. The argument then asserts that *Roe* had neither characteristic, and so is 'egregiously wrong' because it was an exercise in 'raw judicial power'. It also asserts that the inapposite authorities relied on in *Roe* were not 'wrong' per se. So presumably they were not an exercise in 'raw judicial power'.

'Recognition' of a right in this sense must presumably encompass both (positively) protection of a value in State law and (negatively) an absence of State law restriction on that value. It is for example most unlikely that a survey of State law in the 1920s would have shown that many States had for many years expressly identified a parent's right in any positive sense to have her child taught German or any other foreign language. One might very well have found a widespread or near universal absence of prohibition of such an activity. But the Court in *Meyer v. Nebraska*[55] simply asserted, without undertaking any survey of State practice, that:

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Two years later, in *Pierce v. Society of Sisters,*[56] the Court also saw no need to examine State practice before concluding that liberty within the Fourteenth encompassed a parental right to educate their children in private sector schools.

Both judgments were also notably lacking in precedential pedigree. If one examines *Meyer v. Nebraska* one finds it wholly devoid of any supportive judicial authority. In *Pierce*, the only authority invoked in support of the Court's substantive liberty conclusion is *Meyer*.[57]

Skinner and *Griswold* have similar characteristics. None of these cases actually pass muster under Alito's *Dobbs'* methodology. They could all credibly be characterized as exercises in 'raw judicial power'. The inference then arising is that Alito's methodology test is just a legal fig leaf, covering—and not very well—the substantive moral preferences of a bare majority of the Court. We return to this issue below. For the moment we might focus attention on a second presumed inadequacy of *Roe.*

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54 By which Alito seems to mean a series of cases upholding a similar entitlement to the one being claimed in the instant case.

55 262 U.S. 390, 399 (1923).

56 268 U.S. 510 (1925).

57 The other authorities invoked go to questions of standing and ripeness.

B. Roe Was an Exercise in Legislative Rather Than Judicial Lawmaking

There is obvious weight too, at least at first glance, in Alito's characterization of the *Roe* majority's division of pregnancy into three trimesters, during which States were subject to decreasingly severe restraints on their regulatory power, as looking much more like an exercise in legislative than judicial lawmaking.[58] *Roe* promulgated, we are told, "a numbered set of rules much like those that might be found in a statute enacted by a legislature".[59] But that criticism is rather overstated. There is nothing in *Roe* that equates to an expansive code of rules. Rather *Roe* sketches out in broad terms a set of malleable principles which leave the business of filling in the (myriad) details to the realm of State legislation.

Alito is using the 'legislation' label here in a pejoratively evaluative sense rather than simply as a descriptor. The pejorative accusation is in essence that *Roe* foreclosed all scope for State legislative initiatives in respect of abortion regulation. But that is manifestly untrue. States began almost immediately after *Roe* to enact legislation which explored and tested in all sort of ways the room for political maneuver that the judgment left them.[60] That process has continued unabated ever since. *Roe* is a 'perfect' example of what has come to be called a dialogic relationship between a Court exercising a power of legislative judicial review and the legislatures concerned as to the proper boundaries of a claimed constitutional right. That is however a concept that sems to have passed the *Dobbs* majority by.

C. Roe's Ratio Was Undermined by Casey

Alito, J., seems to stand on more solid ground in asserting that *Roe* had not been 'good law'—even in a narrow mechanistic sense—since the Court's 1992 judgment in *Planned Parenthood v. Casey.*[61] Although *Casey* purported to affirm *Roe,* it seemed very clearly to reject the trimester framework and replace it with a simple pre-viability and post-viability dichotomy. *Casey* also 'clarified' the presumed roots of any constraints on State power to restrict abortion as being only the liberty clause of the Fourteenth.

Insofar as one can extract a ratio from the various opinions offered in *Casey*, it would seem to be that States cannot impose 'an undue burden' on women who are seeking an abortion.[62] Writing some thirty years ago, I had suggested that: "[O] n close examination of the judgments [in *Casey*], the argument that *Roe* remains

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58 Setting students the challenge of drafting 'a *Roe* statute' can make for an instructive class. For a brief overview of the *Roe* provisos *see* Ian Loveland, *Affirming* Roe v. Wade? Planned Parenthood v. Casey, Public Law 14, 16 (1993).

59 *Dobbs,* Majority, 2.

60 *See, e.g.,* the many and varied restrictions (often considered compatible with *Roe*) at issue in *Bellotti v. Baird,* 443 U.S. 622 (1979): *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 (1976): *Akron v. Akron Centre for Reproductive Health,* 462 U.S. 416 (1983): *Webster v. Reproductive Health Services,* 492 U.S. 490 (1989).

61 505 U.S. 833 (1992).

62 For critiques of the judgment *see, interalia,* Michael Moses, *Casey and Its Impact on Abortion Regulation*, 31 Fordham Urban L.J. 805 (2004): Neil Devins, *How* Planned Parenthood v. Casey (*Pretty Much) Settled the Abortion Wars*, 118 Yale L.J. 1318 (2009): Loveland*, supra* note 58.

authoritative on the subject of State control of abortion is quite unsustainable".[63] But this sub silentio overruling of *Roe* by *Casey* does not serve to make Casey a 'correct decision' for the *Dobb*s majority. For Alito, *Casey* is as egregiously wrong as *Roe*.

This is in part because of its evident methodological failings. In the twenty years between *Roe* and *Casey*, all States recognized a 'right' to abortion in the *Roe* sense. But this recognition was of course the result of national judicial dicta, not State political choice. Such (short-lived) roots as abortion then had in the national legal landscape could not properly be taken into account for the purposes of identifying a Fourteenth Amendment liberty entitlement. For the *Dobbs* majority, *Casey* is like *Roe* also to be castigated as being an exercise in legislative rather than judicial lawmaking. But this is not because the *Casey* test was – as was *Roe's* – too complicated in its content, but because it is too simplistic. The notion of an 'undue burden' is so vague as to invite constant questioning by State legislatures. But once again, the idea that an ongoing conversation between the Supreme Court and State legislatures might have constitutional merit is not something that Alito is willing to acknowledge.

D. It's Not Just Roe That Was Wrong

Alito takes some pains in *Dobbs* to place that *Roe* in the company of other supposedly indefensible judgments which have subsequently been overruled, and overruled not because of the passage of time and changing circumstance, but because they were manifestly wrong even when they were decided. The two most prominent examples – both of which, if one wishes to adopt simplistic labels – involve 'liberal' overrulings of 'reactionary' decisions - are *Lochner v. New York*[64] and *Plessy v. Ferguson*.[65] Such judgments were, it seems, exercises in "[f]reewheeling judicial policymaking".[66] The identification of these cases as 'egregiously wrong' decisions on the basis of the *Dobbs* methodology is however profoundly unconvincing.

Prior to 1905 few if any States other than New York had imposed maximum working hours on the occupation of a baker, whether as a matter of criminal or civil law. To work as a baker for such hours at such wages as one (or —in economic reality—one's employer) wished would have been common (perhaps universal) practice throughout the United States from 1787 onwards, and was thus—notwithstanding there being no mention of the individual's right to work as a baker in the text of the constitution—an element of 'ordered liberty'. Nor would one be able to find any significant line of judicial authority controverting that conclusion. One might be forgiven for wondering if the *Dobbs* majority would in fact have lined up quite happily with their *Lochner* predecessors.

Alito's invocation of *Brown v. Board of Education*[67] as a 'correct' judgment which overruled the egregiously wrong decision in *Plessy* also seems to be playing rather fast and loose both with judicial history and judicial methodology. This criticism might be pre-emptively rebutted by noting that *Brown* was *strictu sensu*

63 *Id* at 14.
64 198 U.S. 45 (1905).
65 163 U.S. 537 (1896).
66 *Dobbs*, Majority, 14.
67 347 U.S. 4883(1954).

an equal protection rather than liberty case, but since Alito has chosen the case to buttress his own reasoning in *Dobbs*, it seems quite proper to identify *Brown's* shortcomings for that purpose.

There is manifestly no basis in *Brown* to support the contention that *Plessy* was 'wrong', still less egregiously so, *when it was decided in 1896*. Nor, strictu sensu, did *Brown* overrule *Plessy*. *Brown* simply held the separate but equal doctrine inapplicable to public schooling, not to segregated transport facilities. Moreover it did so—following Marshall rather than Taney's methodology—because the Fourteenth Amendment then (in 1954) was situated in a completely different political and cultural context to the one which prevailed in 1896

> In approaching this problem, we cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.[68]

Neither did *Brown* suggest that the meaning of equal protection of the laws in the Fourteenth was to be found in the accumulated practice of many States over many years. Had the Court conducted such a search, it would have found that a great many States (and the District of Columbia)[69] had been for many years-—and were still in 1954-—happy to give legal effect to apartheid legislation which either excluded non-white Americans from public facilities entirely or (in respect of schools) segregated them into often manifestly inferior provision.

Nor could *Brown* be said to rest on any significant line of pertinent judicial authority. None is cited in the judgment: because there was none to cite. To the contrary, the Court had on several occasions shortly before *Brown* expressly applied the separate but equal doctrine in the context of State education provision.[70]

Brown was decided in essence on the basis of the Court's perception, rooted in a modest body of social science 'evidence', that school segregation imposed a sense of inferiority on black students, and that such inferiority should be considered inconsistent with the equal protection clause. There is one might think no better example of "raw judicial power" than Warren, C.J.,'s judgment in *Brown*. Yet *Brown*, according to the *Dobbs* majority, was 'right'; and presumably remains so. It is certainly easy to leap to the accusation that these conclusions are not reconcilable. Methodologically, *Brown* is as far removed from Alito's *Dobbs* template as is *Roe*.

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68 Id, 492-493.

69 As to which see *Brown's* companion case of *Bolling v. Sharp*, 347 U.S. 497 (1954). *Bolling,* which related to school segregation in Washington D.C., was decided on a liberty basis, there being no equal protection proviso in the Fifth. On the implications of *Dobbs* for *Bolling* see Cass Sunstein, The Enigma of *Bolling v Sharp*, Ius & Iustitium (Aug 17, 2022) https://iusetiustitium.com/the-enigma-of-bolling-v-sharpe/.

70 *See, eg*., *Gong Lum v. Rice* ,275 U.S. 278 (1927): *Missouri ex rel. Gaines v. Canada,* 305 U.S. 337 (1938): *Sipuel v. Board of Regents,* 332 U.S. 631 (1948): *Sweatt v. Painter,* 339 U.S. 629 (1950).

E. Abortion Is Unique, So Overruling Roe Does Not Mean Overruling Other 'Liberal' Decisions

A recurrent theme in press coverage of *Dobbs* was that it placed substantial question marks over the continued vitality of other modern and near-modern era Court judgments addressing contentious social policy issues. The most obvious candidate is *Obergefell v. Hodges*,[71] in which a 5-4 majority held that States were required to permit same sex marriages between mentally competent adults. Allusion has also been made to the 2003 judgment in *Lawrence v. Texas*[72] and the 1965 opinion in *Griswold* as candidates for reversal.

Alito took several opportunities in *Dobbs* pre-emptively to refute such assertions, variously at pages 5, 32, 38, 47, 49, 66 and 71. This is where an aspect of the judgment mentioned briefly above perhaps has more traction. According to Alito, abortion is a 'unique' issue because it necessarily 'destroys potential life'. It thus raised moral issues of much greater profundity than were at stake in all these other cases and so there is no basis to think that *Dobbs* affects their continuing vitality.

There is an obvious and profound disconnect in Alito's judgment on this point. For the majority, *Roe* was 'wrong'—and 'egregiously' so—(as presumably also was *Casey*) because of serious flaws in the *Roe* majority's methodology and understanding of the Court's proper constitutional role. Those 'errors' are not tied at all to the substantively 'unique' nature (if such it is) of abortion. They may as readily be found in any judgment which identifies a 'right' which has no textual basis in the Constitution or which has not long been recognized and protected by many State jurisdictions.

Save for the fact that it did not—as *Roe* did—promulgate "a numbered set of rules much like those that might be found in a statute enacted by a legislature", the majority judgment in *Obergefell* has all the methodological flaws that Alito attaches to its *Roe* counterpart. No State had recognized an entitlement to same sex marriage prior to 2000. When *Obergefell* was decided a mere handful of States did so. There was at that time minimal pertinent judicial authority to support such an entitlement. There is no credible basis, if deploying the *Dobbs* methodology, to find that a prohibition on States refusing to recognize same sex marriage is a component of ordered liberty.

Alito was a dissentient in *Obergefell*, on a methodological basis which precisely foreshadows his arguments in *Dobbs*:[73]

> To prevent five unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that "liberty" under the Due Process Clause should be understood to protect only those rights that are "'deeply rooted in this Nation's history and tradition.'" *Washington* v. *Glucksberg*, 521 U.S. 701, 720–721 (1997). And it is beyond dispute

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71 576 U.S. 644 (2015). For comment in this journal *see* Ian Loveland, *Liberty, Equality and the Right to Marry under the Fourteenth Amendment*, Br. J. Am. Leg. Studies 6(2) (2017) 241.

72 539 U.S. 558 (2003); prohibiting State criminalization of consensual private sexual activities between same sex participants.

73 *Obergefell v Hodges,* 576 U.S. 644, (slip opinion, Alito 2) (2015).

> that the right to same-sex marriage is not among those rights. See *United States* v. *Windsor*, 570 U.S. ___, ___ (2013) (Alito, J., dissenting) (slip op., at 7). Indeed:
>
> 'In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. See *Goodridge* v. *Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941…..'.
>
> "What [those arguing in favor of a constitutional right to same sex marriage] seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility." *United States* v. *Windsor*, 570 U. S. ___, ___ (2013) (Alito, J., dissenting) (slip op., at 7–8) (footnote omitted).

Alito does not mention in *Dobbs* that he was a dissentient in *Obergefell.* His dissent there certainly conveys the impression that he considered the majority decision to be—how might one best put it—'egregiously wrong'. If such it was, that decision must surely be overruled if *Dobbs* correctly states the nature of the Court's lawmaking role. It seems at best unlikely that Alito has now decided his own dissent in *Obergefell* was itself 'egregiously wrong', and he should therefore overrule his own opinion. His position on the point in *Dobbs* is certainly not candid. The larger question is whether that position is honest.

Justice Thomas was another of the four dissenters in *Obergefell*, subscribing wholeheartedly to Alito's reasoning. Thomas's concurrence in *Dobbs* certainly has the candor and transparency which Alito seems to lack. For Thomas, *Obergefell* was "demonstrably erroneous"[74] and should be reconsidered. It is very difficult to imagine that Gorsuch, Kavanaugh and Coney-Barrett, the post-*Obergefell* appointees, will not be waving that methodological flag with similar enthusiasm in a challenge to *Obergefell* which will surely be triggered in one of the anti-*Roe* States in the foreseeable future. For good measure, Thomas attaches the same label to *Lawrence* and even to *Griswold*. He raises the possibility that similar substantive protections might be found in the privileges and immunities clause, but given that clause relates to aspects of national citizenship and *Griswold, Lawrence* and *Obergerfell* speak primarily to matters of State competence that possibility seems a remote one.[75]

Griswold would likely survive scrutiny under Alito's methodology if he is correct in his assertion that, as a matter of historical record, Connecticut's prohibition of contraception was "an extreme outlier" in terms of State law in the mid-1960s.[76] Although to be true to the *Dobbs* methodology, one presumably also has to ask if

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74 *Dobbs*, Thomas 3.

75 Roberts, C.J., also dissented in *Obergefell*, on the basis that recognition of same sex marriages was a question that the Constitution left to be resolved by State political processes. Scalia was of course the final dissentient.

76 *Dobbs*, Majority, 35 fn 47.

the Connecticut law had had that outlier status for a protracted period of time. That a super-majority of the States were suddenly seized of the view in 1960 that married couples should be allowed to use condoms and the pill and legislated accordingly would not make such access to contraception a Fourteenth Amendment liberty on the basis of *Dobbs'* methodology. One would have to wait some years—how many Alito does not tell us—for that widespread State practice to harden into a liberty right.

Lawrence v. Texas[77] presents a similarly viable candidate for survival. The majority's reading of political history in *Lawrence* was that same gender sexual activity was not at all criminalized in the United States until the mid-twentieth century. By the late 1970s it was a crime in only nine States, and when *Lawrence* was decided in 2003 three of those nine States had removed such laws from their statute books.[78] Same sex sexual activity would therefore seem to pass muster under the *Dobbs* ordered liberty test; subject to the caveat that the *Dobbs* majority might find a history premised on 'alternative facts' which point to a different conclusion.

There is though a second dimension to the 'abortion is unique' element of Alito's reasoning. In part, the uniqueness is used a stick to beat the *Dobbs* dissentients. As Alito puts it: "The most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States' interest in protecting fetal life".[79] But the *Dobbs* majority is taking a very partial view of abortion's 'uniqueness'.

Abortion is of course a consequence of pregnancy. Pregnancy is also 'unique' in terms of the burdens that are placed on the pregnant person if she is required to complete the pregnancy and give birth. The *Dobbs* majority seems not to recognize this. There is no mention in the majority opinion of the physiological or psychological costs a person might incur if she does not have an abortion. Indeed one might almost be tempted to suggest that:

> The most striking feature of the majority opinion is the absence of any serious discussion of the legitimacy of the interest of a pregnant minor, or the child or woman impregnated by rape, or the pregnant woman who lacks mental competence, in not being required to carry the pregnancy to term.

On its face, the Mississippi statute accords almost no weight to such considerations. Its 'medical emergency' exception is cast in very narrow terms:

> "Medical emergency" means a condition in which, on the basis of the physician's good faith clinical judgment, an abortion is necessary to preserve the life of a pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition arising from the pregnancy itself, or when the continuation of the pregnancy will create a serious risk of substantial and irreversible impairment of a major bodily function.

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77 539 U.S. 558 (2003).
78 *Id.* at 570.
79 *Dobbs*, Majority, 37.

Alito's judgment does not engage with this issue at all. Nor does the majority accord any legitimacy (nor even consideration) to more pervasive concerns about the risks of pregnancy to a pregnant person. In the 2010s, post-partum death rates in the USA during or consequent upon childbirth ran at 17 per 100,000.[80] This is substantially higher than in many other western nations. In Mississippi in the 2013-2016 period,[81] the death rate was notably higher than the national average, at 33 per 100,000 births. More starkly still, the maternal death rate in Mississippi for black women was 52 per 100,000 births. None of these issues are canvassed in the majority opinion. The 'uniqueness' of abortion for Alito *et al*, it seems, exists as a concept very much in the eye of the judicial beholder rather than the child or woman who is actually pregnant.

F. A Fetus Does Not Have 'Rights'—Yet

Mississippi's Act makes repeated use of the term 'unborn human being' to describe a fetus. The Act also asserts that the fetus is a human being from the moment of conception. This is of course a recurrent feature of pro-life discourse in the USA. To this point, the Supreme Court has consistently refused to accept that a fetus is per se the holder of legal rights in the context of abortion regulation. That refusal was bluntly stated in *Roe* and in *Casey* and in subsequent litigation. Thus far, the constitutional basis recognized by the Court for State prohibition and regulation of abortion – whatever that prohibition or regulation might be – is the 'right' of a State's 'people' to give tangible legal expression to their moral distaste for the practice through their respective State's lawmaking procedures.

For the Court to acceptance that a fetus is per se the bearer of legal rights – and is so from the moment of conception – would have profound implications not just for States which wish to have very restrictive abortion laws, but also, perhaps even more significantly, for those States which would prefer to have a very permissive legal regime. Crudely stated – if a fetus is a human being then for a person intentionally either to undergo or provide an abortion is prima facie murder.

From that perspective, arguments about 'abortion rights' will shift from being concerned with what a State may not constitutionally prohibit to what a State may not constitutionally allow. The crucial question which will be raised by anti-abortion activists in pro-abortion States will be in what circumstances and to what extent may a State rebut a presumption that the deliberate killing of a 'human being' amounts to murder? More bluntly put, the question will shift from whether States *can* prohibit abortion to whether they *must* do so. The text of the Fourteenth expressly identifies 'life' as a protected entitlement. That is a much less open term than 'liberty'.

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80 *See* the survey in The Commonwealth Fund, *Maternal Mortality and Maternity Care in the United States Compared to 10 Other Developed Countries*, (Nov.18, 2020) https://www.commonwealthfund.org/publications/issue-briefs/2020/nov/maternal-mortality-maternity-care-us-compared-10-countries.

81 The following figures are taken from the State government's own statistics, so one can certainly assume that they do not exaggerate the reality: Mississippi State Department of Health, Mississippi Maternal Mortality Report 2013-2016, (2019) https://msdh.ms.gov/msdhsite/index.cfm/31,8127,299,pdf/MS_Maternal_Mortality_Report_2019_Final.pdf.

Ostensibly, the majority in *Dobbs* passed up the opportunity to take this step.[82] Alito framed the majority position in this way: "Our decision is not based on any view about when a State should regard pre-natal life as having rights or legally cognizable interests".[83] But that text merits careful consideration. Two words within that phrase that might set alarm bells ringing in pro-choice States: "when" rather than "whether"; and "should" rather than "may". The invitation seems on closer examination a quite obvious one to anti-abortion activists in States where the supposedly conclusive State lawmaking process permits abortion on quite expansive terms.

III. Conclusions

Alito's judgment in *Dobbs* depends for its legitimacy at least in part on its unacknowledged rejection of John Marshall's previously noted suggestion that: "[The Constitution's] nature requires that only its great outlines should be marked, its important objects designated and the *minor ingredients which compose those objects be deduced* from the nature of the objects themselves".[84] *Roe* can sensibly be portrayed as a fine example of a judgment which has 'deduced a minor ingredient' from the Constitution's 'important objectives'. It is therefore not just *Roe* which the *Dobbs* majority are condemning as 'egregiously wrong'. The target is an entire philosophy of legal thought.

A. On the Adequacy of State Political Processes

In one sense, the moral integrity of the majority judgment in *Dobbs* rests on the presumption that if creating extensive—or even modest—entitlements to abortion is a matter about which a State's voters really care, then significant numbers of voters will mobilize politically to support and secure the election of political candidates who will promote and pass laws to that effect; (or if the State's law makes provision for it will pursue that result in a referendum). *De jure*, the United States is no longer in—and has not been for many years—an era when women or non-white or impoverished citizens were formally denied the entitlement to vote in State elections, or when attempts to exercise a formally existing voting right were met with violent or intimidatory tactics of suppression.

Subsequent events lend some force to the integrity of that presumption. The scope of abortion regulation within some States was a fiercely contested issue in the fall 2022 State elections, and there are clear indications that people's voting choices in national elections were significantly influenced by candidates' positions on the question.[85] The rather large elephant in the (Court) room, which was obviously not

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82 Kavanaugh's concurrence expressly states that the Constitution cannot be construed in a fashion which "outlaws" abortion; *Dobbs*, Kavanaugh 3, 5. He does not explain how one could square this assertion with acceptance of the proposition that a fetus is a person for the purposes of bringing abortion with the reach of murder.

83 *Dobbs*, Majority p29.

84 *Supra* note 4.

85 See the regularly updated post by the New York Times, Abortion on the Ballot, https://www.nytimes.com/interactive/2022/11/08/us/elections/results-abortion.html; Veronica

directly in issue in *Dobbs*, is the staggering raft of voter suppression laws which have latterly (and not so latterly) appeared in—and not one assumes as a matter of coincidence—Republican governed States which also favor very restrictive regulation of abortion.[86] Mississippi is one of those States. Legislation enacted there in 2022 significantly increased the self-identification requirements that were required for people to register for and cast votes in State and federal elections.[87]

When *Roe* was decided, and for many years thereafter, the abortion controversy cut significantly across party lines. But it is now an almost perfectly partisan issue, with Democrats lining up in support of *Roe* and *Casey* and Republicans opposing them.[88] The pursuit of partisan political advantage over political questions other than abortion no doubt underlies recent voter restrictions and reapportionment initiative in Republican States. Legal challenges to such measures will surely be forthcoming. But one might wonder if the *Dobbs* majority will decide that the Constitution is as accommodating of States' preferences as to their voting laws as it to their preferences on abortion.

B. On Judicial Integrity

Observers who are by nature invariably and firmly predisposed to see the best rather than the worst of human nature at work in the governmental process, and who restrict their treatment of *Dobbs* to reading the judgment itself, might incline towards giving Alito *et al* the benefit of the doubt and accept that those judges are indeed principled upholders of the finest traditions of judicial constitutional lawmaking. It is however not difficult to offer a rebuttal to such naivety.

For the *Dobbs* majority, it is essential that *Roe* and *Casey* were *egregiously* wrong in order to justify the assertion that overruling them is consistent with accepted notions of stare decisis. If *Roe* and Casey were finely balanced in doctrinal terms then their overruling by a new Court majority would be transparently an indulgence of 'raw judicial power'. But if a decision is considered to be—as *Roe* and Casey apparently were—'egregiously wrong', then the judges who hold that view presumably did not arrive at it, having immediately previously held a contrary or even significantly different view, as a result of arguments presented to them in court in *Dobbs*. If one of the highest profile of all Supreme Court opinions was in those judges' respective opinions 'egregiously wrong', it must have surely been so

Straqualursi, Devan Col & Pual LeBlanc, *Voters Deliver Ringing Endorsement of Abortion Rights on Midterm Ballot Initiatives Across the US*, CNN Nov. 9, 2022; ps://edition.cnn.com/2022/11/09/politics/abortion-rights-2022-midterms/index.html.

86 For an overview of recent initiatives see Brennan Centre for Justice, *Voting Laws Round-Up: May 2022*, https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2022. A similar point might be made about recent reapportionment initiatives (especially for seats in State legislatures) in Republican controlled States. *See, e.g.,* the critique (obviously somewhat partisan) in American Civil Liberties Union, *Block the Vote: How Politicians are Trying to Block Voters from the Ballot Box*, (2021) https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020.

87 [57] H.B. 1510 (Miss.) For an (admittedly partisan) analysis of the Act see American Civil Liberties Union Mississippi, ACLU-MS Statement on HB 1510, https://www.aclu-ms.org/en/press-releases/aclu-ms-statement-hb-1510.

88 Sophia Cal, *The Last Anti-Abortion Democrats*, Axios 27 (May 27, 2022) https://www.axios.com/2022/05/27/abortion-democrats-supreme-court-midterms.

regarded by them for a good many years. Egregious error is not a matter of nuance. It is not a realization which dawns as the product of myriad subtle, interstitial steps on a long and winding road of gradually unfolding judicial enlightenment. It is a bluntly obvious phenomenon, long and firmly held, that there can be *no justification at all* for the conclusion reached.

Consider then the following exchange from Alito's confirmation hearings before the Senate Judiciary Committee in January 2006:

> **Chairman SPECTER**….. Let me come now to the statement you made in 1985, that the Constitution does not provide a basis for a woman's right to an abortion. Do you agree with that statement today, Judge Alito?
>
> **Judge ALITO**. Well, that was a correct statement of what I thought in 1985 from my vantage point in 1985, and that was as a line attorney in the Department of Justice in the Reagan administration. Today if the issue were to come before me … then I would approach the question with an open mind, and I would listen to the arguments that were made.
>
> **Chairman SPECTER**. So you would approach it with an open mind notwithstanding your 1985 statement?
>
> **Judge ALITO**. Absolutely, Senator … .[89]

There is nothing in the *Dobbs* majority opinion to suggest that Alito heard argument with an open mind. He sees no merit at all in any of the propositions advanced in support of retaining *Roe* or *Casey* as good authorities. Perhaps in those 15 years between his confirmation and deciding *Dobbs*, Alito's 'open mind' gave weight to all manner of arguments against his 1985 assertion, and after careful reflection found them all wanting. Perhaps. But what of Gorsuch, Kavanaugh and Coney-Barrett, the three Trump nominees now on the Court, given that Donald Trump had indicated shortly before the 2016 election that he would only nominate Justices who would overrule *Roe*.[90]

Gorsuch's confirmation hearings were held in March 2017.[91] In the course of the hearing, Gorsuch identified Byron White[92] as one of his "'legal heroes"', and lauded Scalia for being a judge who would insist "that the judge's job is to follow

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89 Committee on the Judiciary United States Senate, Confirmation Hearing on the Nomination of Samuel A. Alito Jr. to Be an Associate Justice of the Supreme Court of the United States, 322 (2006) Serial No. J–109–56.

90 Dan Mangan, *Trump: I'll Appoint Supreme Court Justices to Overturn Roe v. Wade Abortion Case*, CNBC, Wed. Oct. 19, 2016 at 10:00 EDT, https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html.

91 Committee on the Judiciary United States Senate, Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States, 322 (2017) Serial No. J–115–6; (hereafter Gorsuch, Hearing).

92 *See supra* note.

the words that are in the law, not replace them with those that are not".[93] Gorsuch refused to answer if he considered *Roe* and *Casey* to have been correctly decided.[94]

Kavanaugh was similarly non-committal, a position typified by the exchange quoted below:

> **Senator FEINSTEIN …** So the question comes, and you have said today—not today, but it has been reported that you have said that Roe is now settled law. The first question I have of you is what do you mean by ''settled law''? I tried to ask earlier do you believe it is correct law? Have your views on whether Roe is settled precedent or could be overturned, and has your views changed since you were in the Bush White House?
>
> **Judge KAVANAUGH.** Senator, I said that it is settled as a precedent of the Supreme Court, entitled the respect under principles of stare decisis. And one of the important things to keep in mind about Roe v. Wade is that it has been reaffirmed many times over the past 45 years, as you know, and most prominently, most importantly, reaffirmed in Planned Parenthood v. Casey in 1992…..[95]

Coney-Barret's position during her (2020) confirmation hearings was more palpably evasive: its lack of candor matched perhaps by a shortfall in believability:

> **Senator Dianne Feinstein:** … (34:40) … Do you agree with Justice Scalia's view that Roe was wrongly decided?
>
> **Amy Coney Barrett**: (35:05) Senator, I completely understand why you are asking the question, but again, I can't pre-commit or say yes, I'm going in with some agenda, because I'm not. I don't have any agenda. I have no agenda to try to overrule Casey. I have an agenda to stick to the rule of law and decide cases as they come.[96]

From 'no agenda' to 'egregious error' in just two years might strike some observers as an implausibly rapid journey for an experienced lawyer, professor and judge *bona fide* to have made.

Some years ago, in a rather well-known collection of pamphlets on the subject of constitutional reform, Alexander Hamilton offered the following rationale for entrusting the judges of a proposed Supreme Court with a power of constitutional rather than just legislative interpretation:

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93 Gorsuch, Hearing, 65.

94 *Id*. at, inter alia, 77, 107, 228

95 Committee on the Judiciary United States Senate, Confirmation Hearing on the Nomination of Hon. Brett M Kavanaugh To Be an Associate Justice of the Supreme Court of the United States, 127 (2018) Serial No. J–115–61.

96 The official Judiciary Committee transcript is not yet available. This exchange is taken from https://www.rev.com/blog/transcripts/amy-coney-barrett-senate-confirmation-hearing-day-2-transcript. The bracketed figures denote the time into the video recording when the comments were made.

> …[T]there can be but few men [sic] in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge … . [97]

How unfortunate it would be if the egregious—to use an in-vogue term—lack of integrity which latterly afflicted the the holder of the Presidency of the United States might also now be presumed to afflict some members of its Supreme Court.

C. What Next for Abortion Rights ?

Dobbs has manifestly not brought the abortion controversy to an end. Nor has it removed the issue from the courts. Nor is there any realistic prospect that it could ever do so. All that *Dobbs* has done is yank the field of legal battle many steps to the political rights.

Dred Scott provides an unhappy point of reference here. Narrowly construed, the majority holding in *Dred Scott* was that Congress had no power to prohibit slavery in the territories. But that conclusion opened the door to more expansive pro-slavery legal arguments; for example that slave owners in slave States had a legal right to take their slaves with them in transit through or for temporary sojourns in free States and that Congress was under an obligation to enact legislation to enforce those rights against the wishes of free States.

Dobbs does not close the door on future abortion litigation. It just points that litigation in new directions. The notion that anti-abortion activists in pro-choice States will now seek to establish that a fetus is at any point post-conception a 'person' for the purposes of seeking to require rather than permit States to prohibit abortion has already been canvassed. But the less draconian implications of that argument ought to be teased out.

The most obvious—and likely quantitatively most significant—next step will be that States legislate to criminalize possession, supply and use of the morning after pill and any other forms of non-surgical abortion procedure. As noted above, 'chemical' early-stage abortions are much the most significant element of abortions in Mississippi, and presumably in every other State as well. States have always been permitted to prohibit the in-State production of 'dangerous' substances, and to close their borders to such material.[98] The morning after pill may prevent conception, but it can also be effective in terminating an already conceived fetus. The drug mifepristone, though often subsumed under the morning after pill label, is in contrast intended only to terminate existing pregnancies.[99] Its effect would no doubt be seen in some pro-life political circles as being to 'kill' a 'human being'. It strains credibility to think that the *Dobbs* majority would not accept that States

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97 James Madison, Alexander Hamilton, & John Jay, The Federalist Papers no.78 471 (Clinton Rossiter, ed. 1961).

98 *See, e.g., Munn v. Illinois,* 94 U.S. 113 (1877); *Mugler v. Kansas,* 123 U.S. 623 (1887); *Powell v. Pennsylvania,* 127 U.S. 678 (1888).

99 Mayo Clinic, Morning After Pill, https://www.mayoclinic.org/tests-procedures/morning-after-pill/about/pac-20394730#:~:text=Plan%20B%20One%2DStep%20contains,emergency%20birth%20control%20(contraception).

would have a rational basis for regarding chemical abortion methods as 'dangerous' substances and prohibiting their presence within State borders.[100]

Any such initiatives would be complicated by the fact that morning after pills are licensed by the Federal Drug Administration (FDA), and so presumptively beyond the reach of State regulation. The FDA itself also responded promptly to *Dobbs* by changing its characterization of the pill to one which expressly disclaimed that it triggered abortion.[101] That symbolism is already being put to a legal test. A direct attack has already been made on the legality of the FDA's licensing regime for mifespirstone. In *Alliance for Hippocratic Medicine v. U.S. Food and Drug Administration, [102]*a Trump appointed federal district judge enjoined continued distribution of the pill. The Supreme Court subsequently lifted the District Court ban[103] pending an appeal before the Fifth Circuit, which was heard in May 2023. A third element to what pro-choice advocates might see as "parade of [post-*Dobbs*] horribles"[104] will be State legislation which seeks to prevent the State's citizens and/or residents from leaving the State in order to have an abortion elsewhere. That situation will in any event arise de facto in many States without the need for legislation, as many pregnant women will be unable to afford the costs of travelling inter-State. On the present state of the law, it would seem very difficult to envisage that such legislation would survive scrutiny even by the current Court insofar as it attempted to control the movement of mentally competent adult women. Kavanaugh's concurrence in *Dobbs* suggest that it is "not especially difficult" to conclude that such legislation would be invalid because of the "constitutional right to inter-state travel".[105] The matter has already come before the Federal District

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100 A bill to that effect has already been promoted in the Texas legislature: Rebecca Noel, *Proposed Texas Bill Could Penalize Use of Emergency Contraceptive*, Houston Public Media, 27 February 2023; https://www.houstonpublicmedia.org/articles/news/health-science/2023/02/27/444704/proposed-state-bill-could-penalize-the-use-of-emergency-contraceptive/.

101 *See* Pam Belluk, *The FDA Now Says It Plainly: Morning After Pills Are Not Abortion Pills*, N.Y. Times, December 22, 2022; https://www.nytimes.com/2022/12/23/health/morning-after-pills-abortion-fda.html.

102 United States District Court, Northern District of Texas, Amarillo Division, 7 April 2023; https://storage.courtlistener.com/recap/gov.uscourts.txnd.370067/gov.uscourts.txnd.370067.137.0_12.pdf.

103 21 April 2023; https://reproductiverights.org/wp-content/uploads/2023/04/Supreme-court-order-stay-FDA-4-21-23.pdf. Thomas and Alito JJ. dissented.

104 The phrase is borrowed from Powell, J.'s description in *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416, 445 (1983) of the way in which Ohio legislation characterised the mechanics of abortion procedures.

105 *Dobbs,* Kavanaugh, 10. Kavanaugh one assumes has in mind here such case as *Crandall v. Nevada,* 6 18 L. Ed. 745 (1867): *Williams v. Fears,* 179 U.S. 270 (1900): *Edwards v. California,* 314 U.S. 160 (1941): *Saenz v. Roe,* 526 U.S. (1999). In *Williams*, Fuller, C.J., stated (at 274): "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty…secured by the Fourteenth Amendment and by other provisions of the Constitution". The obvious "other provision" is the commerce clause. *See generally* Richard Sobel, *The Right to Travel and Privacy: Intersecting Fundamental Freedoms*, 30 J. Marshall J. Info. Tech. & Privacy L. 639 (2014): Andrew Porter, *Comment: Toward a Constitutional Analysis of the Right to Intrastate Travel* 86 Nw U. L.R. 820 (1992). In the specific context of abortion see Seth Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. Rev. 451 (1992).

court in Texas, which has issued an interim order preventing State authorities from stopping abortion providers providing advice and assistance to women seeking to travel out of State to get an abortion.[106]

But the argument in support of such legislation is much easier to make in respect of a minor —a 13 year old raped by her father perhaps, who as a result of the rape has been placed *de jure* within the care of State authorities and who has no responsible adult to assist here in making an inter-State journey; or the 17 year old pregnant through consensual sex who has the individual mental competence to decide she wants to have an abortion but is the child of anti-abortion parents who are not just unwilling to assist her to do so but prepared to take positive steps to prevent it; or even indeed the child of parents who support her wish to have an abortion in another State. Parental consent laws (albeit with the possibility of a judicial by-pass) were approved by the Court in *Casey*. They are now widespread features of the United States abortion landscape.[107] Their use as an indirect means to block inter-State travel for abortion purposes will surely not be long in coming.

Dobbs does not make State laws prohibiting wholly immune from judicial scrutiny. Such laws will still be subject to rational basis review. The prospects of a successful challenge on that ground are slight at best, and even a successful challenge is likely to be of minimal quantitative significance.[108] It is also very difficult to see any circumstances arising in which an equal protection claim under strict scrutiny review could arise. The *Dobbs* majority was bluntly dismissive of any suggestion that abortion laws raised an equal protection issue because only women can be pregnant.[109] It would seem fanciful to expect that any State will enact abortion legislation that on its face draws any distinction between women and girls on the basis of such suspect categories as their race, religious belief or party political affiliation.

There is no prospect at all of resolution being found through the process of formal constitutional amendment. Nor does the Biden administration seem to have taken seriously suggestions aired after *Dobbs* that the composition of the Court should be altered to create a pro-*Roe* or *Casey* majority.[110] Even if a congressional majority might have been found for such measures prior to the November 2022 elections, and it clearly cannot be found now, Roosevelt's ill-fated proposal to pack the Court to save his new deal legislation stands as a powerful precautionary tale against the advisability of even proposing such a remedy.[111]

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106 *See* the statement of claim in *Fund Texas Choice v. Paxton* 1:22-CV-859-RP (W.D. Texas (Aust. Div.)) Feb. 24, 2023) https://www.courthousenews.com/wp-content/uploads/2022/08/fund-texas-choice-complaint-usdc-austin.pdf. The interim order is at https://caselaw.findlaw.com/court/us-dis-crt-w-d-tex-aus-div/2193694.html.

107 Guttmacher Institute, Parental Involvement in Minors' Abortions, (2023) https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions.

108 A prohibition on abortion even when the life of the pregnant mother would be put at significant risk by continuing the pregnancy likely would not survive rational basis review.

109 Dobbs, *Majority*, 10-11.

110 *See* the discussion in Norman Eisen & Sasha Matsuki, *Term Limits—A Way to Tackle the Supreme Court's Crisis of Legitimacy*, Brookings Institute, (2022); https://www.brookings.edu/blog/fixgov/2022/09/26/term-limits-a-way-to-tackle-the-supreme-courts-crisis-of-legitimacy/.

111 *See* Franklin D. Roosevelt, *Fireside Chat on the Reorganisation of the Judiciary,* (March 09, 1937) http://www.pbs.org/wnet/supremecourt/capitalism/sources_document4.html.

For those of my/our students in a Constitutional Law of the USA class who are discomfited by finding things to say in favor of Taney's judgment in *Dred Scott*, *Roe* and *Casey* will likely have triggered similar feelings of unease. Neither judgment has clear legal roots. Neither is firmly located in longstanding and widespread political practice. Neither, it might be said, has a strong claim even to be 'law' at all in terms of methodology. But then, perhaps, someone might suggest that 'we must never forget that it is a Constitution we are expounding', and that the Court's role in expounding that Constitution is not simply to defer on such a contentious moral issue to bare majoritarian legislative processes in the States. For many pregnant people in pro-life States, *Dobbs* will surely prove a horrendously problematic judgment. In the more secluded world of the constitutional law classroom it offers a marvelous vehicle for exploring and evaluating the nature of the Court's constitutional role.

See further David Kyving, *The Road Not Taken* 104 Pol. Science. Q., 463, (1989); Michael Nelson, *The President and the Court: Reinterpreting the Court-packing Episode of 1937*, 103 Pol. Science Q., 267, (1988).

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Administrative Courts: A Defence Against Populism in Mexico

Ana E. Fierro

ABSTRACT

The increase in populism in Latin America is characterised by the dismissal of evidence-based decision-making and the disappearance of expert bodies and committees. The Mexican Government launched a campaign against the regulatory state that centres on the rearrangement of its institutional architecture and the elimination of control mechanisms, such as independent technical agencies.[3] These phenomena again raise the question of the pertinence of deference from courts to the executive branch. Using the Mexican case, we explore the role administrative courts play in preserving checks and balances in populist governments. This article analyses the accountability mechanisms of the Mexican legal system. Following Kitrosser,[4] we understand accountability to be a substantive dimension of the rule of law that is under the jurisdiction of congress and the judicial branch. We suggest that administrative and constitutional courts possess powerful mechanisms for enforcing government accountability, especially when considering that populist governments tend to ignore governance controls. We show that, in the Mexican legal system, nullity trials, state liability trials and constitutional controls not only protect the rule of law but also hold authorities accountable. The court's decisions also frequently order measures for agencies' improvement. We attempt to demonstrate that in a populist environment where evidence and expert knowledge are rejected, judicial deference to the executive branch can be perilous. We identify challenges facing the courts in Mexico and suggest some solutions. Nevertheless, further studies are needed to assess the impact administrative courts have in defending checks and balances in populist governments.

KEYWORDS

accountability, administrative courts, human rights, the rule of law, state liability trials

CONTENTS

3 Martin Lodge, *Accountability and Transparency in Regulation: Critiques, Doctrines and Instruments*, in The Politics of Regulation ch.6 (Jacinta Ordana & David Levi-Faur eds., 2004).

4 Heidi Kitrosser. Reclaiming Accountability: Transparency, Executive Power, and the U.S. Constitution (2015).

Introduction

Over the last two decades, there has been a proliferation of so-called 'illiberal' and even openly populist governments in the Americas. The most problematic case is that of Venezuela; however, similar political trends are also observable in the United States, Ecuador, Brazil, Nicaragua, and Mexico. These governments have reduced the control mechanisms of the constitutional state–such as the division of powers, accountability, and transparency–to mere formal structures. Populist governments often intervene in the work of the courts, illustrating a disregard for institutions that collect information and evaluate government performance, such as transparency committees, auditing agencies and courts. These agencies often face attacks on their autonomy and budgets.[3] Kyle and Mounk's[4] work on 36 populist regimes of the 21st century shows that in countries controlled by populist governments, there is a 23% chance of democratic institutions being infringed upon. Moreover, over 50% of populist leaders have reformed their country's constitutions to weaken the checks and balances on the executive branch. Such actions strip away most of the protections of democracy and, therefore, represent the *de facto* elimination and substitution of a democratic government by a strong leader who often advocates for the mobilisation of the people and demands unconditional support without regard for the checks and balances common to constitutional states. The histories of Latin American countries show that populist leaders have met few challenges when seeking to undermine democratic frameworks.[5]

Populism is also characterised by the dismissal of evidence-based decision-making. Populist governments frequently disband expert bodies and committees intended to strengthen the regulatory capacity of the state and prevent 'capture' by powerful actors. In Mexico, such agencies were created to grant a professional status to certain public policy activities.[6] For example, the Access to Information Agency and the Antitrust Agency have suffered continuous attacks under the current administration. In 2019, the Mexican Government launched a campaign against the regulatory state that sought to restructure the government and eliminate the oversight performed by quasi-independent technical agencies. There have also been attempts to undermine judicial independence. President Lopez Obrador often criticises the work of judges and the Supreme Court of Justice (SCJN).

Other examples of populist actions include the replacement of Seguro Popular, the main state health policy of the last two decades, with The Institute of Health for Welfare a programme has been instituted without carrying out a proper assessment of needs or establishing formal rules. The programme also lacks sufficient funds to fulfil the ambitious task of providing free and unrestricted access to medical care

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3 Mariano Talanquer Sánchez, *México 2019: Política Personalista y Neoliberalismo desde la Izquierda*, 40 Rev. de Ciencia Política 401 (2020).

4 Jordan Kyle & Yascha Mounk. *The Populist Harm to Democracy: An Empirical Assessment,* Tony Blair Institute for global change, (Dec. 26, 2018, 11:36 AM), http://institute.global/insight/renewing-centre/populist-harm-democracy.

5 Gianfranco Pasquino, *Populism and Democracy, in* Twenty-First Century Populism 15 (Daniele Albertazzi & Dunvan McDonnell ed.,2008).

6 Pedro Salazar Ugarte, *El Estado Constitucional Mexicano: Una Constelación de Autonomías: The Mexican Constitutional State: A Constellation of Autonomies,* 20 Int. J. Const. Law 1483 (2022.

and medication for all beneficiaries[7]. In fact, this programme was suspended at the end of 2022. Other populist actions include the enactment of an austerity law that reduced the salaries of high-ranking officials.[8] There has been an increase in populism that focuses on the leader, divides society into good and bad people and promotes nationalism; there has also been an increase in disdain for legal controls over public actions. In populist governments the legitimacy of public actions derives from the populist leaders and not from the law. They consider themselves one of the people, and simultaneously, the people consider their leader to be better than them.[9] For these reasons, they are prepared to overlook the leader's disrespect for the rule of law and the evidence-based opinions of experts.

Take, for example, President Lopez´s new social programmes, such as Jovenes Construyendo el Futuro, which, like most of President Lopez's programmes, are direct transfer programmes. These programmes have created a base of support for the President.[10] However, they have also eliminated the participation of civil society organisations, which acted as intermediaries between the state and citizens. These organisations were useful for evaluating the impact of social policies. Currently, these social policies have very bad results; Mexico has 3.8 million new poor.[11] A similar failure occurred in the handling of the COVID-19 pandemic: The Mexican Government systematically disregarded experts' recommendations and failed to provide government aid and the appropriate equipment to medical staff. This resulted in Mexico recording one of the highest excess death percentages in the world at 43.6%.[12] According to the Kiel Institute for the World Economy, other countries with populist governments also recorded rates of excess mortality twice as high as 2020 levels.[13] Given this scenario, it is necessary to reassess the importance of controls on power and the degree of oversight that courts should have over administrative decisions that disregard the rule of law and science.

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7 Laura Flamand & Carlos Moreno, Desigualdad en la Atención de la Salud en México: (2012).

8 German Petersen, & Fernanda Somuano, *Mexican De-Democratization? Pandemic, Hyper-Presidentialism and Attempts to Rebuild a Dominant Party System*, 41 Rev. Ciencia Política 353 (2021).

9 Pasquino, *supra* note 5, at 15.

10 Encuesta Nacional de Opinión Pública, (Buendía & Márquez), Aprobación Presidencial (June 3, 2021) http://buendiaymarquez.org/wp-content/uploads/2003/21/2102_APROBACION.pdf .

11 Consejo Nacional de Evaluación de Política de desarrollo social. *CONEVAL Presenta las Estimaciones de Pobreza Multidimensional 2018 y 2020*. Comunicado Número 9, 5 de Agosto de 2021, https://www.coneval.org.mx/SalaPrensa/Comunicadosprensa/Documents/2021/COMUNICADO_009_MEDICION_POBREZA_2020.pdf.

12 INEGI, *Características de las Defunciones Registradas en México durante 2020*, Comunicado de prensa, núm. 592/21, Oct. 28, 2021. https://www.inegi.org.mx/contenidos/saladeprensa/boletines/2021/EstSociodemo/DefuncionesRegistradas2020preliminar.pdf.

13 Corona Politics: *The Cost of Mismanaging Pandemics*, https://www.ifw-kiel.de/publications/kiel-working-papers/pre2021/corona-politics-the-cost-of-mismanaging-pandemics-15013/.

Judicial Deference in Populist Governments

Judicial deference refers to courts yielding decision-making powers to government agencies in circumstances of normative or empirical uncertainty. Courts defer to other government agencies out of respect for (1) decisions made by democratically legitimate decision-makers and (2) their institutional competence and expertise.[14] Judicial deference functions to uphold the separation of powers and enhance efficiency by allocating functions to the institutions that are most capable of performing them. Deference also aims to uphold constitutional values such as respect for the majority will and the protection of liberties. Justice Scalia considers deference to be the presumption that, in cases of ambiguity regarding a statute, agencies should have the discretion to interpret laws and regulations. This discretion permits flexibility and allows agencies to apply their expertise in technical and complex matters.[15] In a more general sense, deference is understood as part of a democratic system that respects the rule of law and recognises that those who have achieved leadership, political office or another position of authority deserve respect. They perform activities and duties that can often not be performed by less qualified individuals.[16]

Courts defer decisions to administrative agencies because they consider their expertise and technical knowledge. Thus, deference results from a respect to separation of powers. But when these premises are not true, should courts continue to defer? If populist leaders tend to disregard technical expertise and the rule of law should courts be deferential?

In this context, administrative courts become one of the few mechanisms of accountability that can control a populist government. Therefore, under a populist regime, the courts' accountability mechanisms are vital to preserving respect for the rule of law and democracy. Deference is granted out of respect for the knowledge of expert agencies and the separation of powers. Therefore, if the executive branch disregards these values, then the courts should act to defend them. Even though it is true that many populist leaders have risen to power through democratic processes, their attacks on the rule of law and their disregard for institutions created to safeguard technical decisions justify increasing the control of the courts and reducing the scope of judicial deference.

The following sections seek to show how the administrative courts in Mexico function as accountability mechanisms. That is, the following section highlights their active role, in recent years, in preserving the separation of powers and amending errors in public policy that have resulted in human rights violations. Thus, present-day administrative courts in Mexico are perceived as less deferential.

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14 Carolina Henckels, *Proportionality, and the Separation of Powers in Constitutional Review: Examining the Role of Judicial Deference* 45 Fed. L. Rev. 181 (2017).

15 Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 Duke L. J. 511 (1989)

16 Pasquino, *supra* note 8, at 15.

Accountability and Courts

Since the beginning of the 21st century, accountability has gained prominence as a fundamental concept related to the rule of law and as one of the main checks that preserve democracy. Nevertheless, as Mulgan, Schedler and Bovens have pointed out,[17] the term has been used with various meanings and for multiple objectives. Accountability refers to good governance, transparency, efficiency, and sanctions in the event of corruption.[18] Unfortunately, accountability has also been used as an instrument of rhetoric, making its meaning ambiguous at times.[19] Therefore, it is necessary to establish a clear definition of accountability when analysing its role in a particular legal system. Professor Boven articulates two ways in which the concept of accountability is used. The first is accountability as a quality of responsible people–that is, as an ideal to which public servants should aspire to. Black´s Law Dictionary defines accountability as 'the state of being responsible or answerable'.[20] Accountability defines how public servants should act and involves behaving in a rational, prudent manner. Accountability, in this sense, is used to determine whether a person´s actions, such as those of a public servant, comply with the qualities expected of that position. The second meaning of accountability is as a mechanism. According to this usage, accountability is an institutional arrangement whereby an agency can be held responsible. Here the focus of accountability studies is not on the behaviour of public agents but rather on how these institutional arrangements function.[21] This second meaning is useful for guaranteeing the rule of law by strengthening the capacity to control public agencies and demand certain results.

Following these two definitions, accountability as part of the rule of law should be understood as a mechanism that requires formal procedures that allow for public agencies to be judged and sanctioned. Ackerman[22] states that these mechanisms are proactive controls for disciplining power and provide justification for one authority to analyse another agency´s actions and judge their validity. O´Donnell notes that accountability should be understood as a means of controlling the state's activities through both vertical and horizontal dimensions.[23] In the vertical dimension, state power is controlled through periodic elections; in the horizontal dimension, it is controlled through a system of checks and balances. These bilateral mechanisms are

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17 Richard Mulgan, *Accountability: An Ever-expanding Concept?*, 78 Pub. Admin. 555 (2002); Andreas Schedler. *¿Qué Es la Rendición de Cuentas?*, 3 IFAI. (2010) available at https://infocdmx.org.mx/capacitacion/documentos/JURIDICO08/LECTURAS/MODULO%202/RENDICIONDECUENTAS.pdf ; Mark Bovens, *Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism*, 33 W. Eur. Politics 946 (2010).

18 Bovens, *supra* note 17.

19 Heidi Kitrosser, Reclaiming Accountability: *Transparency, Executive Power, and the U.S. Constitution* (2015*)*.

20 Black's Law Dictionary. Free Online Legal Dictionary 2nd ed*, https://thelawdictionary.org/legal-resources/.*

21 Bovens, *supra* note 17.

22 Más allá del Acceso a la Información: Transparencia, Rendición de Cuentas y Estado de Derecho (John M. Ackeman ed ,2008).

23 Guillermo O'Donnell, *Democracia y Estado de Derecho*, in, Más Allá Del Acceso a La Información: Transparencia, Rendición de Cuentas y Estado de Derecho (John M. Ackerman ed., 2008).

designed to ensure the evaluation of public agencies by an authority. That is, they not only sanction their departure from the law but also improve their performance.[24] Lapsley[25] explains that accountability is an essential component to evaluating the outcomes of all public agencies and their efficiency and for identifying methods for improving outcomes. In this respect, accountability, as Kitrosser [26]points out, is a substantive component of the rule of law and a part of the overall control of power by congress and the judicial branch. Thus, accountability as a dimension of the rule of law can be defined as the legal norms that establish control mechanisms that oblige state agencies to inform and justify their actions to an authority that judges and sanctions its performance. This, in turn, guarantees the protection of human rights and constitutional values while also demanding certain results.[27]

If accountability is a legal process, then the judicial review of agencies' performances can be regarded as an accountability mechanism. This mechanism enables the judiciary to use legal guidelines to analyse the actions of a given authority, determine its compliance with the rule of law, evaluate the outcomes of its activities and provide solutions and institutional countermeasures.[28] The other main accountability mechanism is congress's (Chamber of Deputies) budgetary controls. These controls focus on agencies' performances, outcomes, and efficiency.[29] Both mechanisms place checks on branches of government.

Accountability mechanisms are essential elements of the rule of law. How they work and how frequently they are used are key indicators of the strength of a democratic government and the rule of law itself. When democracy is threatened by populist regimens, accountability mechanisms can be important defences. As Ginsburg and Moustafa[30] explain, courts play a key role in resisting authoritarian governments. As an example, the following sections focus on how judicial procedures operate as accountability mechanisms in the Mexican legal system.

Administrative Courts as Accountability Mechanisms

We defined accountability as a substantive component of the rule of law.[31] As a legal concept, accountability can be understood as the rules that establish control mechanisms that oblige government agencies to report on and justify their actions

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24 Chris Argyris & Donald. A. Schön, *Organizational Learning: A Theory of Action Perspective*, 77/78 *enero-junio* Revista Española de Investigaciones Sociológicas 345 (1997).

25 Irvine Lapsley, *Audit and accountability in the public sector problems and perspectives,* 11 Financial Accountability & Management 107 (1995).

26 Kitrosser, *supra* note 19.

27 Ana Elena Fierro, El sistema normativo de rendición de cuentas y el ciclo del uso de los recursos públicos en el orden jurídico mexicano, (2017) (unpublished doctoral dissertation, Instituto de Investigaciones Jurídicas, UNAM) (on file with author).

28 Jonathan Fox, *"Transparencia y Rendición de Cuentas" in* Más allá del acceso a la información: transparencia, rendición de cuentas y estado de derecho (John M. Ackerman, ed., 2008).

29 Robert D. Behn (ed.), Rethinking Democratic Accountability (2001).

30 Tom Ginsburg & Moustafa Tamir, Administrative Law and the Judicial Control of Agents in Authoritarian Regimes (2008)

31 Kitrosser, *supra* note 19.

to an authority that judges and sanctions its performance. This process is intended to ensure that an agency's actions comply with the Constitution, uphold the protection of human rights and demand certain results. State purpose and human rights are usually part of the Constitution, and therefore, accountability mechanisms are procedures that ensure that government actions comply with the constitutional mandate as the supreme law of the land.[32] Ginsburg and Tamir[33] highlight that the evolution of authoritarian regimes into democratic governments governed by the rule of law has been characterised by a transition from the political control of government action by ideology and hierarchy to the institutionalisation of legal procedures that are governed by law and respect for due process. Accordingly, in democratic regimes, constitutional and administrative courts gain importance as accountability mechanisms. These types of mechanisms have the virtue of empowering citizens by granting them standing in judicial processes that can hold governments responsible. Hence, when populist governments threaten the rule of law, administrative courts play an essential role in its defence. Citizens are an important part of these accountability mechanisms, as they can bring authorities who are performing unsatisfactorily to court. These actions not only protect the plaintiffs' rights but also ensure oversight of agencies' performances. They function as warning alarms that can be triggered by citizens when government actions fail to comply with the law or the Constitution.[34] Involving citizens in these accountability mechanisms means that ad hoc institutions do not have to be relied on for controlling agencies. Moreover, because it is an adversarial procedure, its quality can be assessed based on the complaint and the defendant's response, making it an efficient, democratic option.[35] In this respect, constitutional and administrative courts, as democratic accountability mechanisms, grant citizens control of their governments.[36]

Administrative and constitutional courts are the authorities responsible for ensuring the rule of law. They review the legality of government action through judicial procedures. Courts can review any act of government to determine its compliance with the law, human rights regulations, and the Constitution. It is, therefore, an accountability mechanism that guarantees that authorities abide by the Constitution.[37] Courts serve as the guarantors of proper government performance through what García[38] defines as the "protection of the right to a good

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32 Ana Elena Fierro Ferráez, El Concepto Jurídico de Rendición de Cuentas (2021).

33 Ginsburg & Tamir, *supra* note 30.

34 Mathew McCubbins et al*., Administrative Procedures as Instruments of Political Control* 3 J. Law, Economics & Organizations 243 (2011*).*

35 Tom Ginsburg, *Administrative Law and the Judicial Control of Agents in Authoritarian Regimes, in* Rule by Law: The Politics of Courts in Authoritarian Regimes (Tom Ginsburg & Moustafa Tamir eds., 2008).

36 Dieter Nohlen, *Jurisdicción Constitucional y Consolidación de la Democracia, in* Tribunales constitucionales y consolidación de la democracia (ed. Suprema Corte de Justicia de la Nación,2007).

37 José Ramón Cossío Díaz, Sistemas y modelos de control constitucional en México (2011).

38 Eduardo García Enterría, La transformación de la justicia administrativa de excepción singular a la plenitud de jurisdiccional (2007).

administration". Asimov[39] has identified four types of administrative courts in the world. These courts vary depending on whether they function as independent agencies or separate tribunals in either adversarial or inquisitorial procedures. They also vary according to the scope of the judicial review and their ability to present new evidence. Finally, judicial review can be conducted via either general or specialised courts.

Constitutional courts are intended to analyse the performance of an agency to determine whether its actions comply with the rights and principles established in the Constitution and sanction them accordingly. Constitutional courts are responsible for overseeing the effective protection of human rights by empowering citizens to demand their rights be fully protected.[40] The court reviews all government actions to determine whether they comply with human rights regulations, the rule of law and the separation of powers. Constitutional courts are, therefore, an accountability mechanism that guarantees that exercises of power adhere to the Constitution. There are two main models of constitutional control. The European model features specialised constitutional courts and abstract control, and according to this model, decisions have *erga omnes* effects. In the common law model, in contrast, constitutional control may be exercised by any judge during the process of ordinary judicial procedures, and these decisions only have an *inter parts* effect.[41]

Mexican Administrative Courts as Accountability Mechanisms

Mexico´s administrative courts have an inquisitorial procedure that is open to new evidence. There are two main methods of controlling administrative agencies: nullity trials and state liability trials. Both are designed to ensure that administrative agencies comply with the law. The Constitution regulates these procedures differently for each level of government. At the federal level, the Constitution[42] empowers the legislator to issue laws that create administrative courts that are responsible for both nullity and liability proceedings. Through these lawsuits, individuals can sue agencies whose actions they regard as unlawful. At the state level,[43] local administrative courts are authorised to resolve these types of controversies. The Constitution of Mexico[44] also empowers local legislatures to establish procedures for resolving disputes between citizens and municipal authorities. These procedures enable a judge to act on a claim to sanction the government for its action. Since this accountability procedure takes the form of a trial, people play important roles as plaintiffs. A citizen complaint serves as an alarm indicating that they have been negatively affected by an illegal action. The types of cases taken to these courts

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39 Michael Asimov, *Five Models of Administrative Adjudication*, Presentation at the 2016 University of Cambridge Faculty of Law Public Law Conference 'The Unity of Public Law?' (September 2016).

40 Luigi Ferrajoli, Derecho y Razón: Teoría del Garantismo Penal (2000).

41 José Ramón Cossío Díaz, Sistemas y Modelos de Control Constitucional en México (2011).

42 Constitución Política de los Estados Unidos Mexicanos, art. 73, XXIX, H

43 *Id*. at art. 116, section V and art. 122, section V)

44 *Id*. at art. 115.

commonly pertain to administrative decisions, such as government purchases, permits, licences and fines. Through its decision, a court can declare the validity of the contested action or declare that the contested action departs from the norm. In the latter case, the court can choose to decree it null, partially, or totally. The court can also request redress or payment of damages where appropriate.

The purpose of the nullity trial is, therefore, to verify that the government complies with the law and ensure that any government mistakes are corrected; for this reason, nullity trials also constitute an accountability mechanism.

State liability trials within the administrative courts are the second accountability mechanism. This procedure focuses on repairing the damage caused by public agencies' actions or failures to act at both the federal and local levels. Article 109 of the Constitution states that irregular administrative activity makes the state liable. The SCJN has declared that the Constitution establishes the substantive right of individuals to receive compensation when irregular administrative activity causes damage. The purpose of this right is 'to redress damage, through financial compensation, as well as to ensure, through legislation and the corresponding ordinary channels, a procedural vehicle to secure compliance'.[45] Thus, the Constitution establishes a substantive right to a competent administration that adheres to the rule of law. The SCJN[46] has ruled that this procedure is designed to repair the damage caused to individuals by irregular administrative activity and prevent it from reoccurring. State liability can, therefore, be understood as an accountability mechanism whereby administrative judges determine the validity of agencies' actions, the damage caused and possible modes of redress. Redress can establish a system of incentives to prevent the reoccurrence of certain actions and improve the performance of agencies. It achieves this by promoting the internalisation of the costs caused by irregular actions,[47] which, in turn, makes them effective accountability mechanisms and fosters more effective governance. Plaintiffs play a key role in this procedure by highlighting the irregular performance of agencies. The SCJN has emphasised that the Constitution establishes citizens' substantive right to receive compensation when irregular administrative activities cause them harm. The aim is to provide proper redress and a mechanism for securing compliance.[48] In keeping with the concept of accountability, the SCJN has established that state liability procedures have four main purposes:

(i) compensating damage,
(ii) creating incentives designed to prevent damage and accidents, and
(iii) guaranteeing the proper functioning of government.

State liability trials are, therefore, important accountability mechanisms that establish a direct system of incentives to correct illegal actions. They are a powerful

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45 Semanario Judicial de la Federación y su Gaceta. Tomo XXIX. 167386. 1a. LIV/2009. Primera Sala. Novena Época, Abril de 2009, p.590.

46 Suprema Corte de Justicia de la Nación, [TA]; 10a. Época; T.C.C.; S.J.F. y su Gaceta; Libro XVIII, marzo de 2013, Tomo 3; p. 2077.

47 Sergio López Ayllón & Adriana García García. Perspectivas Comparadas de la Justicia Administrativa (2017).

48 Suprema Corte de Justicia de la Nación. Semanario Judicial de la Federación y su Gaceta. [TA]; 9a. Época; 1a. Sala; S.J.F. y su Gaceta; Tomo XXIX, Abril de 2009; p. 592).

tool for improving government. The Supreme Court has established that state liability procedures guarantee that administrative authorities comply with the law and that public services are delivered in accordance with certain quality standards. This protects citizens' fundamental right to an efficient public administration. Indeed, the right to compensation is guaranteed if these standards are not met.

During the populist government of President López Obrador the military have gained much power; today they are in charge of security and combating organize crime. Unfortunately, in many of the military operations there have been abuses and violations of human's rights. Various civil society organizations have use state liability trials to combat these violations.

The case of *Teresa y Jacinta* is a paradigmatic example of how state liability trials fulfil this function. In this case, two indigenous women were wrongly accused of kidnapping several soldiers and were subsequently imprisoned. They sued the federal prosecutor in a state liability trial where the court not only ordered redress be made but also that a public apology be given,[49] demonstrating the effectiveness of state liability trials as an accountability mechanism. More recently, the plaintiff in the Medina case sought to obtain redress for a human rights violation committed by the military; the plaintiff sought to use a liability trial as an accountability mechanism to prevent torture and unlawful arrest in the future.

Centro Prodh, and Open Society Justice Initiative, filed administrative claims seeking reparations against both the navy and the prosecutor's office. This is the first time the state liability remedy is used in Mexico to obtain reparations for torture and is aimed at providing victims with some sense of justice while ensuring the adoption of guarantees of non-repetition aimed at structural changes to ensure that fundamental legal safeguards are guaranteed in practice to all persons held in custody.[50]

According to Ginsburg and Tamir,[51] in authoritarian regimes, conflicts between citizens and the administration are not resolved through legal channels such as trials but through informal means. This was true of Mexican administrative courts in the 20th century. These courts were not very well known, and their use was limited mainly to federal tax conflicts. Indeed, only 29 states had administrative courts.[52] By the beginning of the 21st century, parties other than the Partido Revolucionario Institucional (PRI; the state party) began seizing power at the state and federal levels. This led to the creation of more administrative courts, and currently, all 32 states have one. In present times, these courts play a greater role in the control of the administration and the preservation of the rule of law.

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49 El Centro de Derechos Humanos Miguel Agustín Pro Juárez A.C. (Centro Prodh), *https://centroprodh.org.mx/2017/02/22/jacinta-alberta-y-teresa-reciben-las-disculpas-de-la-pgr-es-una-victoria-qhasta-que-la-dignidad-se-haga-costumbreq/ (2017*

50 Open Society Justice Initiative, *https://www.justiceinitiative.org/litigation/claudia-medina-v-secretaria-de-marina-and-fiscalia-general-de-la-republica* (2020).

51 Tom Ginsburg & Moustafa Tamir, *supra* note 30.

52 Sergio López Ayllón et al., Diagnóstico del Funcionamiento del Sistema de Impartición de Justicia en Materia Administrativa a Nivel Nacional (2010).

The Amparo Trial as an Accountability Mechanism

In Mexico, the main recourse to constitutional control for citizens is the writ of *amparo*, which is a combination of the two models explained in the previous section. Burgoa[53] and Tena[54] consider the case of Mexico to be unique. It is a specialised procedure undertaken in federal courts, and the decision only affects the parties being tried, except for cases in which there is a declaration of general effects by the SCJN. Within the Mexican legal system, *amparo* trials constitute the primary mechanism for exerting constitutional controls. The democratisation movement of the 21st century resulted in a series of constitutional reforms intended to strengthen the rule of law, including the 2010 Human Rights Reform[55] and the 2011 *Amparo* Reform.[56] The Constitution of Mexico regulates *amparo* trials in Articles 1, 103 and 107. In accordance with Paragraph 3 of Article 1 of the Constitution, all acts of government must promote, respect, protect and guarantee human rights, all of which are ensured by constitutional control procedures. An *amparo* trial enables an individual to challenge any action they consider to be contrary to the Constitution, regardless of what level or branch of government has committed the act. Given the breadth of the *amparo*, it is the most powerful accountability mechanism in the Mexican legal system. Moreover, the June 2011 reform of the *amparo* law expanded its scope of protection to include rights granted via international treaties. Subsequently, with decision 293/2011,[57] the SCJN reinforced this new mandate, stating that both the constitutional norms and human rights contained in international treaties signed by Mexico should be considered part of the Constitution. In addition, the SCJN ruled that all precedents of the Inter-American Court of Human Rights (CoIDH) would become legal precedent within the Mexican legal system. Consequently, all judges must observe both the human rights mandates contained in the Constitution, as well as the treaties and decisions issued by the SCJN and the CoIDH. Thus, the *amparo* is a constitutional and conventional control.

Moreover, the 2010 and 2011 reforms not only broadened the scope of review but also made the requirements for standing in *amparo* more flexible, thereby enhancing public access to *amparo*. Nowadays, it is sufficient to prove that an act or ruling has caused or could cause unlawful damage and that the person appearing in court has a legitimate interest in preventing it; however, it is not necessary to prove the infringement of a subjective right. Citizens can now also present a class action lawsuit. Since the 2011 reform, it has been possible to use *amparo* not only to sue traditional government agencies but also any private entity that provides a public service. Additionally, administrative omissions can be brought to court (Section IV, Article 107 of the Constitution). This flexibility in *amparo* procedures has strengthened the *amparo* as an accountability mechanism that enables people

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53 Ignacio Burgoa Orihuela, Derecho Constitucional Mexicano (2010).

54 Felipe Tena Ramírez. Derecho Constitucional Mexicano (1984).

55 Comisión Nacional de los Derechos Humanos, I*nforme de actividades, del 1 de enero al 31 de diciembre 2012, https://www.cndh.org.mx/sites/default/files/doc/informes/anuales/2012_I.pdf.*

56 Diaro Oficial de la Federación, 06/06/2011, *http://www.dof.gob.mx/nota_detalle.php?codigo=5193266&fecha=06/06/2011.*

57 Suprema Corte de Justicia de la Nación y su gaceta. Novena época, *Tomo XXXIII, JUNIO de 2011, Pleno y salas, México 2011.*

to sound the alarm when an action threatens the Constitution. An *amparo* trial can result in the following outcomes:

- The granting of an *amparo* declaring the unconstitutionality of the authority's action and a determination of how it must be corrected.
- The refusal of an *amparo*, in which case the judge concludes that the action complies with the Constitution or that the defendant has not engaged in an omission.
- The ruling by a judge that it is not appropriate to try the case due to its failure to meet the necessary legal requirements.

Moreover, the decision can be appealed. The Courts of Appeals, or in some cases, the SCJN, may confirm, modify, or revoke a decision. Regarding sanctions, Section XVI of Article 107 of the Constitution establishes measures guaranteeing compliance with the judgement and, therefore, the objective of the accountability procedure. It also stipulates deadlines for the agency to either comply with the resolution or request additional time to reach compliance. It also establishes forms of substitute compliance for cases where it is impossible or extremely burdensome for an agency to comply with a judgement. In such a circumstance, redress is granted through the payment of damages. The *amparo*, as an accountability mechanism, is a strong tool for protecting against populist administrative decisions as well as omissions. There are several paradigmatic cases that demonstrate the effectiveness of *amparo* for deterring populist actions.[58] Such examples include the *Acueducto Independencia* case, where an *amparo* trial was granted to the Indigenous communities of Sinaloa because the government made water infrastructure plans without consulting the community as mandated by the OIT169 agreement (SCJN). Another example is the Papillon 13 case, where the state failed to provide VHI patients with access to adequate hospital facilities for treating their respiratory diseases, which resulted in the worsening of their illness and deaths (SCJN).

Courts and Populism in Mexico

Since 2019, Mexico has faced a series of threats to its democracy. The current administration's actions have threatened freedom of speech, health, and public servants' rights. In many of these cases, courts have played an important role in preventing these violations. They have functioned, as explained in the previous sections, as accountability mechanisms.

The Federal Court of Administrative Justice struck down various decisions by the Morena-led government of Mexico City to restrict access to the city's public spaces in response to the COVID-19 pandemic[59]. They also struck down decisions to impose a new tax on digital services[60], to modify the eligibility requirements for

[58] Ana Elena Fierro Ferráez, *supra* note 32.

[59] Tribunal Federal de Justicia Administrativa *http://sentencias.tfjfa.gob.mx:8080/SICSEJLDOC/faces/content/public/consultasentencia.xhtml.*

[60] Tribunal Federal de Justicia Administrativa, *http://sentencias.tfjfa.gob.mx:8080/SICSEJLDOC/faces/content/public/consultasentencia.xhtml*.

certain public benefits,[61] and to raise the cost of public transportation[62]. In all these cases the court considered that the agency lacked sufficient evidence to justify their actions or that where violations to due process.

Recent cases where an *amparo* was granted due to an omission on the part of the government include the government's action to vaccinate children under 15 years old despite having health conditions that put them at heightened risk. The health minister's decision was not based on evidence, nor did it provide reasons for denying access to vaccines. The court, however, analysed scientific evidence provided by national and international experts and ordered the authority to vaccinate the defendants.[63] Courts frequently defer to medical experts; this case, however, is an example of populist decision-making that disregards experts' opinions. Indeed, in such a scenario, showing deference would result in the violation of children's rights. Another omission that was taken to court was the lack of measures to protect the life and health of incarcerated individuals against the risk posed by COVID-19 due to systemic and endemic problems, including overcrowding, inadequate health services, poor living conditions and unsatisfactory sanitation. States are responsible for taking appropriate, immediate measures to protect the lives and health of incarcerated people. An *amparo* was filed by the Mexican organisation Centro Prodh against the governor of the state of Morelos, the Mexican Ministry of Health and other state authorities. The lawsuit drew from international and Mexican legal standards and argued that the failure of authorities to implement pandemic guidelines and policies violated their obligation to protect inmates of the Morelos state prison system from COVID-19. It used a public health rationale to argue that the state has an obligation to protect its prison population during the pandemic. It was supported by experts in epidemiology, public health, and forensics.[64] In these cases, the courts have played an important role in preserving checks and balances as well as defending basic human rights. Despite receiving criticism from various experts, the agency made this decision without supporting evidence, demonstrating that in populist governments, deference should be exercised carefully.

Populist governments also frequently attack freedom of speech and academia. In Mexico, President Lopez Obrador attempted to suppress criticism by academics and journalists by cutting funds and reducing wages. Courts have managed to halt many of these attempts. In 2021, the Supreme Court determined that the right to defend democracy constitutes a specific concretisation of the right to participate in the public affairs of the state, which also includes the joint exercise of the right to freedom of speech and political electoral rights. In this sense, the state is obliged to guarantee these rights through regulations and appropriate practices that allow citizens real, effective and equal access to different deliberative spaces. Moreover, given the state of vulnerability in which members of certain sectors

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61 Tribunal Federal de Justicia Administrativa, *http://sentencias.tfjfa.gob.mx:8080/SICSEJLDOC/faces/content/public/consultasentencia.xhtml.*

62 Tribunal Federal de Justicia Administrativa *http://sentencias.tfjfa.gob.mx:8080/SICSEJLDOC/faces/content/public/consultasentencia.xhtml.*

63 Semanario Judicial de la Federación, Época: Undécima Época, Registro: 2024193 Instancia: Tribunales Colegiados de Circuito, Tipo de Tesis: Jurisprudencia, Fuente: Semanario Judicial de la Federación, Publicación: viernes 18 de febrero de 2022 10:20 h, Materia(s): (Común) Tesis: I.4o. A. J/1 K (11a.).

64 Open Society Justice Initiative, *https://www.justiceinitiative.org/litigation/centro-prodh-vs-the-governor-of-the-state-of-morelos-et-al.*

or social groups find themselves, the state is also obliged to adopt measures that guarantee the exercise of these rights.[65] In February 2022, a federal judge ruled that the Republican Austerity Act–a law promoted by AMLO that infringed on public servants' labour rights–was unconstitutional. This law reduced their salary and established a 10-year freeze during which senior government officials could not work in the private companies they had previously regulated. The SCJN ruled the 10-year term to be unconstitutional.[66] Additionally, a federal judge granted an injunction to three members of the National System of Researchers (SNI), which carries out research and academic work at private universities, enabling them to receive the grants that the National Council of Science and Technology denied them after a change in SNI regulations. The court's decision established that because the new rules excluded only researchers working in private institutions from receiving grants, they were a discriminatory measure that violated Article 1 of the Constitution. One of the most important infrastructure projects of the current administration is a train in the Yucatan peninsula. This project has raised a lot of controversy over its potential environmental impact. Environmental activists have filed numerous legal amparos against the project in order to stop construction and demand an environmental impact assessment that would consider the potential impacts of the project on the region's sensitive ecosystems. The amparos argue that the project could have negative effects on the climate, water, air, soil, and wildlife in the area. They also argue that the project would affect the livelihoods of local Indigenous communities, who depend on the region's resources for their subsistence. The Mexican government has responded to these amparos by arguing that the project is necessary for economic development and that the environmental impacts will be minimal but without allowing the environmental agency to provide complete environment impact assessments. These amparos are still pending.

These are prime examples of how *amparo* trials are used as an accountability mechanism to ensure what Kitrosser refers to as "the substantive dimension of the rule of law" that is, the effectiveness of human rights. The Courts decisions show that in cases where the administration disregards experts' opinions and checks and balances deference can weaken the rule of law and be a menace to democracy.

Weaknesses and Challenges

Vergara and Mouffe[67] point out that disappointment with democracy comes from the fact that currently, in most countries, a large portion of the population is excluded from public decision-making, with only a minority being able to wield economic power and influence government. People feel that their governments

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[65] Suprema Corte de Justicia de la Nación, CLASIFICACIÓN DE INFORMACIÓN CT-CI/J38-2021, derivado del UT-J/0914/2021, *https://www.scjn.gob.mx/sites/default/files/resoluciones/2021-12/CT-CI-J-38-2021.pdf.*

[66] AI 139/2019 SCJN *https://www.scjn.gob.mx/sites/default/files/proyectos_resolucion_scjn/documento/2022-03/AI%20139-2019.pdf.*

[67] Camila Vergara, *Populism as Plebeian Politics: Inequality, Domination, and Popular Empowerment. Journal of Political Philosophy*, 28(2), 222-246. doi:10.1111/jopp.12203, June 2020., *Chantal Mouffe. La «Fin du Politique » et le Défi du Populisme de Droite* , 20 (2) Revue du MAUSS, 178 (2002).

act independently of their will. This sentiment creates fertile soil for populist governments to grow. Administrative courts are a powerful weapon against these impulses. In constitutional democracies, accountability mechanisms play a fundamental role in controlling power and improving government agencies. This is particularly true for populist regimes where the rule of law and scientific evidence are not embraced as principles for government actions. Accountability mechanisms that can control the exercise of power and the use of public resources are powerful tools that can protect citizens against arbitrary decisions. These mechanisms protect human rights, including the right to a good administration.

To ensure that the administration abides by the rule of law, greater efforts must be made to guarantee access to these courts and make their procedures and decisions comprehensible for everyone. In Mexico, access to justice through administrative courts is far from simple; this process is extremely formal and sometimes lengthy. At the state level, administrative courts are frequently underfunded, and personnel require better training.[68] This is especially true of state liability trials: A recent study demonstrated that even at the federal level, only 398 cases were taken to court between 2005 and 2017.[69] Judicial independence is another challenge that these courts must overcome. The process of appointing judges by the legislative branch, including the selection of candidates by the president or governor, lacks transparency. The SCJN has stated that when appointing administrative judges, a proposal must contain elements related to their performance. Moreover, the candidates must comply with the constitutional principles of efficiency, honesty, proven ethics and professionalism.[70] Nevertheless, these criteria are seldom met. Moreover, populist leaders frequently attack judicial independence by choosing candidates that lack professional experience; they even sometimes fail to make appointments altogether. For example, President Lopez Obrador has yet to nominate candidates for the federal administrative courts specialising in the corruption case. In this context,[71] guaranteeing transparent nomination procedures with adequate candidates is even more important. In Mexico, judicial independence, in general, must be reinforced. At the state level, the influence of the incumbent governor over the appointment of judges, as well as the governor's control over the courts' budgets, undermines the efficacy of administrative courts as an accountability mechanism. In this area, the recent involvement of civil society and its push for open appointment procedures where decisions must be deliberated has helped.

Amparo trials are the main mechanism under Mexican law for protecting human rights and holding government institutions and agencies responsible. The 2010 and 2011 constitutional reforms strengthened the rule of law and sought to guarantee an efficient means of enforcement. Nevertheless, access to justice is still an issue in *amparo* cases. The number of formalities involved still causes over 60% of cases to be dismissed. Only 9.6% are granted an *amparo*, and only 16% of appeals reverse the judge's decision. This high rate of dismissal is generally

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68 Sergio López Ayllón et al., *supra* note 52.

69 Magda Zulema Morsi Gutiérrez, Fundamento de una Teoría sobre Responsabilidad del Estado y Su Remediación, (2007) (unpublished doctoral dissertation) (on file with author).

70 Suprema Corte de Justicia de la Nación, *Amparo en Revisión* (753/2015).

71 Senado de la República. Comunicación Social. 22 de marzo 2021. *http://comunicacion.senado.gob.mx/index.php/informacion/boletines/50570-aprueba-comision-desaparecer-salas-especializadas-en-materia-de-responsabilidades-administrativas.html.*

due to case overload.[72] Experts such as Magaloni argue that this situation means that *amparo* trials are only available to rich people who can afford a sophisticated lawyer who is able to overcome these formal barriers.[73] This lack of access is part of the marginalisation that Vergara and Mouffe highlighted; therefore, efforts must be made to make *amparo* accessible to everyone.

Another weakness of *amparo* trials as an accountability mechanism is their limited ability to guarantee full redress for human rights violations. Since its creation, the writ of *amparo* has been regarded as an effective means of protecting human rights, and it was even used as a model at the American Convention of Human Rights.[74] The SCJN has upheld the right to a solution and even the obligation to oversee the changes required to prevent future violations, particularly regarding health-related matters.[75] Nevertheless, authors such as Quintana have pointed out that *amparo* has often fallen short of fully redressing violations. Moreover, the SCJN declared that in most cases, *amparo* remedies are limited to financial compensation.[76] Limiting redress to financial compensation reduces opportunities for improving government actions. Moreover, democratic exercises such as the recognition of wrongdoing by ordering public apologies are denied. Ideally, the SCJN will reconsider this decision since the lower courts have continually held that *amparo* is an important tool for countering arbitrary government actions. For example, following the disappearance of 43 students in Ayotzinapa, the Court of Appeals decided, given the gross errors of the prosecution in the investigation, to establish a truth commission that would be overseen by the national ombudsman and would include the participation of the victims.[77] This type of commission is frequently considered a form of reparations and a mechanism for ensuring that an event does not reoccur.

The public´s lack of awareness regarding the existence of administrative trials and their purpose, as well as excessively formal procedures, have resulted in their underuse.[78] Regarding state liability trials, their scope should be broadened to include not only administrative agencies' actions but also judicial errors. Moreover, although *amparo* benefits from higher public awareness, it is far from being

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72 José María Soberanes Díez, *El Amparo Está Diseñado para que los Ciudadanos Pierdan*. 06/06/2018. *E* pub https://www.eluniversal.com.mx/articulo/jose-maria-soberanes-diez/nacion/el-amparo-esta-disenado-para-que-los-ciudadanos-pierdan/?utm_source=web&utm_medium=social_buttons&utm_campaign=social_sharing&utm_content=copy_link .

73 Ana Laura Magaloni Kerpel, Diálogos por la Justicia Cotidiana: Diagnósticos conjuntos y soluciones (2017).

74 Karla Quintana. *La Obligación de Reparar Violaciones de Derechos Humanos: El Papel del Amparo Mexicano*. 06/25/2018, de SCJN, ¿Cómo Ha Entendido la Suprema Corte de Justicia de la Nación los Derechos en la Historia y Hoy en Día? Estudios del Desarrollo interpretativo de los Derechos.

75 Suprema Corte de Justicia de la Nación, Amparo en Revisión 152/2013. *http://www.internet2.scjn.gob.mx/contra2as/PDF/CT-2018-091.PDF.*

76 Gaceta del Semanario Judicial de la Federación. *Medidas de Reparación Integral por Regla General,* 2014342. 1a. LIII/2017 (10a.). Primera Sala. Décima Época Libro 42, mayo de 2017, pág. 469).

77 Ximena Medellín Urquiaga. *Caso Iguala, Los Claroscuros de una Polémica Sentencia de Amparo. 06/25/2018, de Derecho en Acción*. CIDE website: *http://derechoenaccion.cide.edu/author/ximena-medellin-urquiaga.*

78 Sergio López Ayllón & Adriana García García, *supra* note 46.

universally accessible. Efforts must be made to ensure that all citizens have access to these accountability mechanisms.

If disenchantment with democracy stems, in part, from a lack of public control over public decisions, then accountability mechanisms such as administrative courts are powerful tools for securing faith in democracy. As the analysis above shows, administrative courts provide citizens with effective means of controlling their government as well as a defence against human rights violations. Therefore, it is important to preserve the independence and autonomy of these courts. In addition, these procedures must be accessible to everyone to guarantee their efficacy against populist attacks on democracy.

Final Thoughts

The recent increase in populist regimes in America highlights the necessity of considering what level of deference courts should grant to the executive branch. This study aimed to analyse the Mexican case to highlight some of the risks of granting judicial deference within populist governments. In the past 20 years, Mexico has undergone a process of democratisation whereby political control of power has lessened, and transparency and accountability mechanisms have become more common. During the first decade of the 21st century, administrative and constitutional courts became relevant actors for protecting the rule of law, and they regularly held the government responsible regarding significant matters, such as human rights violations and limits to executive power. Since 2018, President Lopez Obrador has sought to undermine these democratic controls. Administrative courts have been important in resisting these attempts. The result has been less judicial deference within government. Administrative courts have played an important role in preventing the return to a government that concentrates all power in a charismatic leader. They can hold the government accountable for its actions and control it. When confronted with a populist government that ignores evidence and disregards the law, deference should be exercised carefully.

This essay provided a series of examples of how administrative courts in Mexico have curtailed government attempts to eliminate checks and balances and undermine democratic controls. These decisions have resulted in less judicial deference regarding government policies. Nevertheless, further research is necessary to prove if, under a populist regimen, administrative courts, in fact, begin to show less deference towards the government. It is also necessary to consider how effective they are in deterring attacks on the rule of law and the separation of powers, both of which are important safeguards of democracy. In Mexico, the 2018 elections resulted in a concentration of power by President Lopez Obrador. His party, Morena, has *de facto* control of the legislature; therefore, traditional checks and balances have been placed in jeopardy. In this scenario, administrative courts have played an important role as an accountability mechanism. They have undermined the government's attacks on free speech, health, and labour rights. In this sense, administrative courts have safeguarded democracy against populist attacks.

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State-created Dangers: An Endangered Doctrine?

Thomas Halper*

ABSTRACT

State-created danger, weakly tethered to notions of negative and positive rights, emerged from a few words in a decision that denied its application. From this unpromising start, it has weathered an unpromising life marred by inconsistencies and dubious assumptions that leave the concept bordering on incoherence.

KEYWORDS

state-created danger, negative rights, positive rights.

CONTENTS

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The notion of rights is central to the doctrine of state-created danger, which proceeds from the loose assumption that if the state is responsible for putting us in peril, it can be said to have deprived us of liberty without due process of law. In the key case that triggered interest in the concept, the majority and chief dissenting opinions referenced rights a dozen times in fewer than twenty pages.[1]

Rights: Negative and Positive

"Rights." How often that word is the first blow struck in arguments, and the last blow. And how odd that an America, so boastful of its can-do practicality, should be so besotted by this abstract idea. Apparently, it was always so. From the beginning, America has been a society bewitched by the language of rights. In 1638, the General Assembly of Maryland declared that all free persons "Shall have and enjoy all such rights, liberties, immunities, privileges and free customs within the province as any natural born subject of England;"[2] in 1641, the Massachusetts colony legislated no fewer than seventeen "rights, liberties, and privileges;"[3] and in 1677, West New Jersey issued a charter prominently featuring rights.[4] Today, too, at an early age, Americans become acolytes of Jefferson, and take it as "self-evident. . . that [we] are endowed by [our] creator with certain unalienable rights, that among these rights are life, liberty, and the pursuit of happiness."[5] So comfortable are we with the language of rights that we rarely think it worth our time to inquire as to what a right is. It is enough that we understand that a right is something we are entitled to, like freedom of speech or cheap gasoline. The vocabulary of rights, taken for granted by everyone, legitimizes the nature and format of social conflict and its outcomes. Indeed, as one scholar observed, "No thread runs through the tangle of American politics more clearly than rights."[6]

What, then, are rights? First, "every right," Austin observed, "rests on a relative duty;"[7] that is, a right is simply a duty perceived from the beneficiary's perspective. Second, a right in the sense that we are using it reflects an *in rem* claim against the whole community, rather than an *in personam* claim that one person may raise against another. Third, the enjoyment of a right is usually seen as creating or reinforcing a duty to meet one's obligations, for rights almost always generate regulations that prescribe the nature and circumstances of their exercise. Fourth, the exercise of rights is not obligatory, but only permissive; my right to speak does not imply a duty to speak nor does my right to health care imply a duty to see a doctor. Finally, legal rights, are "creatures of legal institutions"[8] and are tied to texts

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1 DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).
2 I Archives of Maryland 41 (William Hand Brown, ed. 1883).
3 Collections of the Massachusetts Historical 216-19 (3d ser. n.d.).
4 Fundamental Laws and Constitutions of New Jersey, 1664-1964, at 83-9 (Julian Boyd ed., 1964).
5 Declaration of Independence (1776).
6 Michael P. Zuckert, The Natural Rights Republic: Studies in the Foundation of the American Political Tradition 10 (1996).
7 John Austin, The Province of Jurisprudence Determined 285 (H.L.A. Hart ed. 1832/1954).
8 L.W. Sumner, The Moral Foundations of Rights 13 (1987).

issued by government, and differ from moral rights which "grow spontaneously from the warp and woof of a society."[9] We often assume that we are entitled to what we want, that somehow desires or needs imply rights, but this is clearly not so.[10] Yet the core remains: rights and duties are two sides of the same coin.[11] If a have a right to worship, the state has a duty to let me worship. If I have a right to decent housing, the state has a duty to provide me decent housing. A right, then, is not a mere statement of aspiration. To be meaningful, it must be supported by a tangible commitment to the duty it entails.

Negative and Positive Liberty

Plainly the rights to worship and to decent housing are quite different types of rights. In a famous essay, Isaiah Berlin spoke of negative and positive liberty, and his argument may easily be applied to rights. By negative liberty, Berlin meant the absence of restraints from other people.[12] (Restraints imposed upon us by biology or physics – I cannot fly like a bird or swim like a fish – do not qualify as limits upon my liberty.) A purist might insist that negative liberty implies the kind of state of nature conjured by seventeenth century philosophers, but nearly everyone would agree that liberty presupposes at least a minimal state; the alternative, as Hobbes warned, is a condition of "no arts; no letters, no society; and what is worst of all, continual fear and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short."[13] In this telling, negative liberty presupposes no particular or desirable ends or means, leaving these to be determined by the actors.

A frequent criticism is that a focus on negative liberty ignores the unequal distribution of resources that leaves many people unable to make much use of

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9 Loren E. Lomasky, Persons, Rights, and the Moral Community 104 (1987).

10 Thomas Halper, Positive Rights in a Republic of Talk: A Survey and a Critique 27-32, 49-89 (2003).

11 Arguably, a duty may exist without a corresponding right. For example, most lawyers would agree that I have a duty not to abuse animals but that this does not imply that animals enjoy rights. On the other hand, some would insist that animals have rights. Gary L. Francione, Animal Rights: The Abolitionist Approach (2015); Steven M. Wise, Rattling the Cage: Toward Legal Rights for Animals (2000).

12 Berlin's formulations evolved. In his original version in Two Concepts of Liberty, he defined negative liberty in these words. "I am normally said to be free to the degree to which no human being interferes with my activity." Isaiah Berlin, Two Concepts of Liberty 7 (1958). A difficulty here is that if I am manipulated into having few wants or desires, I may be free to pursue them and yet not enjoy much freedom. Thus, in a later edition, Berlin defined negative liberty as "the absence of obstacles to positive choices and activities" resulting from "alterable human practices," in other words, no barriers to what we may do and not merely what we choose to do. Isaiah Berlin, Four Essays on Liberty 122 (1969). This version, however, seems to conflate liberty with opportunity. William A. Parent, *Some Recent Work on the Concept of Liberty*, 38 Am. Phil. Q.149 (1974).

13 Thomas Hobbes, The Leviathan 65 (1651/1947). Nussbaum contends, "Fundamental rights are only words unless and until they are made real by government action." Martha Nussbaum, Creating Capabilities 65 (2011). While government action is required to establish order and security necessary for the exercise of liberty, however, it may be the *refusal* of government to act (say, its refusal to suppress speech) that generates liberty.

their liberty.[14] Thus. Marx, to take the best known example, disdained "the narrow horizon of bourgeois right"[15] with its "pompous catalogue" of laws and customs.[16] Berlin himself conceded that negative liberty had been "used to support politically and socially destructive policies, which armed the strong, the brutal, and the unscrupulous against the humane and the weak, the able and the ruthless against the less gifted and less fortunate."[17] Negative liberty has also been criticized for ignoring the purposes of freedom and its limitations;[18] for example, Taylor maintained that we value freedom in proportion to the purposes it serves, recognizing that our own base fears and desires may induce us to seek the wrong goals and leave us unfree: "if a man is profoundly mistaken about his purposes and about what he wants to repudiate . . . he is incapable of freedom in the meaningful sense of the word."[19] Thus, if I am free to use my resources to improve my life (as with education) or destroy it (as with narcotics), the term "freedom" as I use it is defective. Taylor, however, would seem to conflate the normative and the descriptive, assuming that liberty implies some kind of good result.

The gist of these critiques is that negative rights may be necessary, but they are surely not sufficient.

Where negative liberty requires the state to leave us alone, positive liberty compels it to help us. Typically, the point is to make real the presence of those factors that facilitate the utilization of negative liberty. As Berlin put it, "if a man is too poor or too ignorant or too feeble to make use of his legal rights, the liberty that these rights confer upon him is nothing to him."[20] Thus, my freedom to speak would mean little if I lacked an education. Without the necessary resources, negative liberty's rights are rights only *in abstracto*, like a child's imagined right to a fancy dessert. In place of the individualistic freedom contemplated by advocates of negative liberty, positive liberty has a communitarian dimension. Thus, Green, for whom liberty is "a power which each man exercises through the help or security given him by his fellow man, and which in turn he helps to secure for them."[21] We are not born ready to make use of negative liberty, but must be made ready by the multitudinous agents of civilization, including the state, which together provide us the means to do so. Moreover, positive liberty also has an individualistic component, for it is claimed that without this help from the state, we will be unable to fulfill our potential. As many have insufficient resources, their claim on the resources of others appears obvious.

However, positive liberty is also problematical. If we empower the state to do things for us, we also empower it to do things to us. It may dismiss our goals as the

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14 *E.g.*, Dwight Waldo, The Administrative State 68 (2d ed. 1984); Herman Finer, Road to Reaction 221 (1946). Eva Sorensen, *Democratic Theory and Network Governance*, 24 Admin. Th. & Praxis 693, 712 (2002)

15 2 Karl Marx, Selected Works 566 (n.d.).

16 1 Karl Marx, Capital 195 (Ernest Unterman ed. 1867/1906).

17 Berlin 1969, *supra* note 12, at xlv.

18 Charles Taylor, *What's Wrong with Negative Liberty? in* The Idea of Freedom: Essays in Honor of Isiah Berlin 175, 181, 191 (Alan Ryan ed. 1979).

19 *Id.* at 193. Berlin acknowledged that "some doors are much more important than others' and that the "goods to which they lead are far more central to an individual's or society's life." Isaiah Berlin, Concepts and Categories 191 (1979).

20 Berlin 1969, *supra* note 12, at lxiii.

21 Thomas H. Green, 3 Works 371 (3d ed. 1891).

products of false consciousness, for example, and use its power to try to remake our personality, forcing us to be free.[22] In Berlin's words, "all paternalist governments, however benevolent, cautious, disinterested, and rational, have tended, in the end, to treat the majority of men as minors or as being too often incurably foolish or irresponsible."[23]

At the very least, an emphasis on positive liberty may foster a culture of entitlement, which inculcates complacency at the expense of innovation and risk taking. And because positive liberty tends to be very expensive (where negative liberty essentially involves only the creation and maintenance of law and order), it costs us heavily in resources which could otherwise enhance our negative liberty. To the extent that I am taxed to provide you with positive liberty, I may have less money to spend in ways that I believe will enhance my experience of living.[24] For positive liberty rights are not inherently self limiting. One consequence of a greater utilization of positive liberty is a higher profile for courts, for as there is no consensus as to the practical meaning of, say, the right to decent health care, its contours will be challenged in the courts to determine if they meet implicit constitutional standards as to scope and content.[25] The effect of this will be to involve judges, unrepresentative and deficient in expertise and accountability, deeply in the policy making process.[26]

Relatedly, positive liberty presumes that consumption is the preeminent issue concerning social justice, often focusing on the unfair and destructive consequences of inequality. Scarcity is a curse to be ameliorated by official generosity; society should "profess human decency as a constitutional value."[27] Those favoring negative liberty, however, tend to stress the priority of production, which must logically and temporally precede consumption. Scarcity, from this perspective, is a blessing that generates competition that produces innovation and progress – and, in any event, is a basic fact of life that cannot be wished away. The Constitution very largely proceeds from the latter presumption: its task is not to define and guarantee the fruits of a decent society, but rather to institute processes for the society to make

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22 Yinghong Cheng, Creating the "New Man": From Enlightenment Ideals to Socialist Realities (2009).

23 Berlin 1969, *supra* note 12, at lxiii.

24 However, one study of sixty-eight countries found no robust correlation between constitutional positive rights and government size or spending, except for social security. Avi Ben-Bassat & Morni Dahan, *Social Rights in the Constitution in Practice*, 36 J. Comp. Eco. 103 (2008). A more recent study looked at 196 countries and found no significant relationship between constitutional positive rights and expenditures on education or health. Adam S. Chilton & Mila Versteeg, *Rights without Resources: The Impact of Constitutional Social Rights on Social Spending*, 60 J. Law & Eco. 713 (2017).

25 Joao Biehl *et al*., *Judicialisation of the Right to Health in Brazil*, 171 Lancet 2182 (2009); Katharine G. Young & Julieta Lemaitre, *The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and Sout*h *Africa*, 26 Harv. Hum. Res. J. 179 (2013). On the other hand, the Irish constitution denies courts a role in determining "principles of social policy." Constitution of Ireland (Bunreacht Na Héireann)(1937), art. 45.

26 However, if courts decline the challenge and defer to the lawmakers or the bureaucracy, they may in effect instruct the interested public that the Constitution lacks practical value.

27 Erwin Chemerinsky, *Making the Case for a Constitutional Right to Minimum Entitlements*, 44 Mercer L. Rev. 525, 526 (1993).

(and unmake) these judgments for itself, restrained by the principle of significant democratic accountability. As Judge Posner expressed it, "the Constitution is a charter of negative rather than positive liberties."[28] Apart from a relatively few exceptions, for example, indigent persons accused of crimes must be provided with lawyers,[29] it quite ignores positive liberty. Indeed, the point of the famous principles of separation of powers and checks and balances was to protect negative liberty, not to facilitate positive liberty. To the extent that legislation and amending the Constitution were deliberately made difficult and cumbersome, it might be said that the Constitution set an obstacle course before those seeking to establish a system of positive liberty. Literally, too, the Constitution does not recognize such classic positive liberty rights as to housing, employment, health care, and so on, though it does not bar government from providing these benefits.[30]

The relation of positive and negative liberty is also contested. Some view positive liberty rights as a precondition for negative liberty rights, in that they enable us to make good use of negative rights. Others see negative liberty rights as a precondition to positive liberty rights, in that they enable interested parties to influence government to adopt these rights. While Berlin thought both kinds of liberty "liable to perversion,"[31] he found positive liberty far more likely to be abused,[32] though he did not contend that negative liberty was "sufficient in any absolute sense."[33]

Whatever the wisdom of Berlin's or the Framers' position, it must be admitted that for some time many observers have found the Constitution's commitment to negative liberty outmoded and inadequate. In its focus on liberty, they contend, it entirely ignores the claims of equity and diversity.[34]

State-Created Dangers: The Early Years

In the law, one venue dominated by the negative/positive liberty dispute is the doctrine of state-created dangers. The doctrine was created by circuit courts in response to the Supreme Court's widely discussed ruling in *DeShaney v. Winnebago Department of Social Services* (1989). The circuits are not in complete agreement as to the doctrine's meaning, but in general, it seems to come down to this: If a person in government custody is foreseeably harmed by a government actor whose deliberately indifferent conduct shocks the conscience or by a private actor with a special relationship with the state, the state has created a danger that violates the individual's substantive due process right to liberty.

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28 Jackson v. Joliet, 715 F.2d 1200, 1293 (7th Cir. 1989) (Posner, J.).

29 Gideon v. Wainwright, 372 U.S. 335 (1963).

30 David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. Chi. L. Rev. 864, 886-87 (1986).

31 Berlin 1969, *supra* note 12, at xlvi.

32 *Id.* at xlvii.

33 *Id.* at lx.

34 *E.g.*, Christina S. Ho, *Introduction: Normalizing an American Right to Health*, Rutgers Law Sch. Res. Paper (SSRN 4406493)(Mar. 31, 2023); Charles Black, *Further Reflections on the Constitutional Justice of Livelihood*, 86 Colum. L. Rev. 1103 (1986); Frank I. Michelman, *Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969).

Among the antecedents to *DeShaney* are a pair of cases that deserve mention. In *White v. Rochford* (1979), a Seventh Circuit case, the police arrested a man for drag racing, ignoring his plea to take the three young children with him to a safe adult's house. Instead, the police left the children in the cold and on the roadside. Crossing eight lanes of traffic, they found a telephone and had their mother call the police to get them, but the police refused. Eventually a neighbor came for the children, but one of them, an asthmatic, was hospitalized for a week as a result of inhaling the cars' fumes and a second suffered mental pain and anguish. The children and their parents brought suit under 42 U.S.C. sec.1983, which provides a cause of action against states for depriving persons of their constitutional rights, specifically, the due process right to liberty. Section 1983 is designed to promote accountability, provide compensation, and deter future abuses.

The court held the officer's misconduct "so clearly deserving of universal reprobation"[35] that it violated the due process right to be free from "undue excursions on personal security."[36] The police refusal was "unjustified and arbitrary," the children had been "endangered by the performance of official duty," and the result "shock[s] the conscience."[37] That this reflected "not . . . an intent to injure the children as much as a neglect of their safety" was immaterial.[38] The court expressly rejected the contention that the adult with the children and not the police "caused the children to be stranded,"[39] observing that this argument could always be used to absolve the police from any charges of abuse. The case was allowed to proceed to trial. Here was a harbinger of the doctrine of state-created danger.

Three years later, in *Bowers v. DeVito*, the Seventh Circuit considered a case involving Thomas Manda, a man judged to be a schizophrenic, who was convicted of aggravated battery and released within a year, whereupon he murdered a woman and was found not guilty by reason of insanity, whereupon he was released again, and again within a year murdered a woman, this time Marguerite Anne Bowers. Her estate sued under section 1983 those responsible for Manda's final release for depriving her of her life without due process.

In deciding for the defense, the court observed, "there is no constitutional right to be protected by the state against being murdered by criminals or madmen. . . . The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services."[40] Thus, the defendants "did not place [the murdered woman] in a position of danger; they simply failed adequately to protect her, as a member of the public, from a dangerous man."[41] In *dicta*, however, the judge, a prominent figure with well known libertarian sensibilities observed, "If the state puts a man in a position of danger and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit."[42] With

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35 592 F. 2d 381, 386 (7th Cir. 1979).
36 *Id.*
37 *Id.* at 383.
38 *Id.* at 385.
39 *Id.* at 386.
40 Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).
41 *Id.* at 618.
42 *Id.* (Posner, J.).

White and *Bowers,* the contending approaches were by the early 1980s already established.

DeShaney is the leading state-created danger case. Joshua DeShaney, born in 1979, was consigned to the custody of his father following his parents' divorce in 1980. In 1982, the police notified the local Department of Social Services that Joshua was being abused by his father, who denied the charge; the department did not pursue the matter. In 1983, Joshua was admitted to the hospital, and the doctor who saw him told the department that he suspected abuse. The department then secured an order leaving Joshua in the temporary custody of the hospital, and convened a child protection team that unanimously concluded that he had been abused. The county attorney, however, decided that abuse could not be proved, and sent him back to his father, who agreed to certain conditions designed to protect the boy. Throughout the following year, Joshua was again and again brought to the hospital, which in November, 1983 told the department that it suspected abuse. A caseworker visited the home monthly, noted that Joshua had suffered repeated head injuries and that his father was ignoring the agreement, and finally was told that Joshua was too sick to see the caseworker. In March, 1984, Joshua was beaten so badly by his father that he fell into a coma and was left severely mentally disabled with the capacity of an eighteen month old child.

By the age of four, Joshua had been to emergency rooms three times, had been the subject of multiple warnings to the Department of Social Services by police, neighbors, and doctors who had treated him, and had experienced almost twenty caseworker visits – despite this, the department left him completely vulnerable and unprotected, allowing his father to effectively destroy his life. Joshua and his mother brought suit, complaining under section 1983 that the department had violated the Fourteenth Amendment's due process clause and had deprived him of his liberty without due process when, after it had relinquished custody, it had failed to protect him from his father's violence.

Chief Justice Rehnquist acknowledged that "The facts of this case are undeniably tragic,"[43] detailing them in two full pages.[44] But the determination of the case did not turn on the horror of the abuse, he concluded, but rather on the settled meaning of the Fourteenth Amendment's due process clause as a guarantor of negative liberty.

As Rehnquist saw it, "nothing in the language of the due process clause requires the state to protect the life, liberty, and property of its citizens against invasions by private actors. The clause is phrased as a limitation on the state's power to act, not as a "guarantee of certain minimal levels of safety and security."[45] History, he believed, bolsters this reading; "Its purpose was to protect the people from the state, not to ensure that the state protected them from each other."[46] Here, Rehnquist cited three precedents in support of this principle: *Harris v. McRae* (holding no state obligation to fund abortions),[47] *Lindsey v. Normet* (no obligation to provide adequate housing),[48] and *Youngberg v. Romeo* (no obligation to provide optimum

43 DeShaney*, supra* note 1, at 191.
44 *Id.* at 192-93.
45 *Id.* at 195.
46 *Id.* at 196.
47 448 U.S. 297, 317-18 (1980).
48 405 U.S. 56, 74 (1972).

care for mental patients).[49] The state "played no part" in creating the dangers "nor did it do anything to render [Joshua] any more vulnerable to them."[50]

The Department of Social Services' refusal to take Joshua into state custody, the plaintiffs had maintained, "was an abuse of governmental power that so 'shocks the conscience' . . . as to constitute a substantive due process violation."[51] But Rehnquist turned this aside with the observation that Joshua had not been in the state's custody when the final beating occurred.[52] it was not clear whether he rejected the applicability of the concept or merely that the facts here did not pass the test.[53]

Whether the department was aware of the danger – a social worker admitted that "I just knew the phone would ring some day and Joshua would be dead"[54] – was apparently immaterial. There is no positive right to be protected.

The DeShaneys also argued that an "affirmative obligation . . . may arise out of certain 'special relationships' created or assumed by the state."[55] Rehnquist granted that earlier cases had recognized obligations imposed by special relationships: *Estelle v. Gamble* (cruel and unusual punishment),[56] *Robinson v. California* (medical care for prisoners),[57] *Youngberg v. Romeo* (involuntarily committed mental patients).[58] However, these cases concerned persons taken into custody and held against their will. In these cases, the state is obligated to protect the individual because "it has imposed on his freedom to act on his own behalf."[59] But that rule "simply has no applicability in the present case."[60] Joshua's problem was his father, "who was in no sense a state actor," and "when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all. The state might have "acquired a duty under state tort law [but] the due process clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation."[61] Naturally, a state "may create such a system, if they do not have it already."[62]

Justice Brennan, dissenting, thought that the question was not whether there existed a "right to basic governmental services."[63] The question, instead, was

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49 *Id.* at 196. 457 U.S. 307, 317 (1982). Harris and Lindsey concern competent adults, who, unlike Joshua, may be assumed to be able to look out for themselves. Romeo, on the other hand, was as seriously disabled mentally as Joshua.

50 DeShaney, *supra* note 1, at 190.

51 *Id*., at 197.

52 *Id.* at 198.

53 *Id.* at 197.

54 *Id.* at 208-9.

55 *Id.*

56 429 U.S 97 (1976).

57 370 U.S. 660 (1962).

58 Youngberg v. Romeo, 457 U.S. 307, 317 (1982).

59 DeShaney, *supra* note 1, at 200.

60 *Id.* at 201. The opinion did not resolve the question as to whether foster care qualified as a special relationship.

61 *Id.* at 201-02. Arguably, the state had performed an imperfect rescue. There may be no general duty to rescue, but if a rescue is undertaken (as it was here by the state's temporarily placing Joshua in the custody of a hospital) and carried out so negligently that it put the victim in peril, the rescuer may be liable for the result.

62 *Id.* at 203.

63 *Id.*

whether the state met its responsibilities in this particular case. With the department, the sheriff, and the police, the state "invites – indeed, directs – citizens and other governmental entities to depend on local departments of social services . . . to protect children from abuse."[64] The law signaled that the state had assumed this responsibility, relieving others of their obligation, and so if the department fails to act, "no one will step in to fill the gap."[65] Thus, "a state's actions – such as the monopolization of a particular path of relief – may impose upon the state certain positive duties;"[66] "inaction can be every bit as abusive of power as action . . . oppression can result when a state undertakes a vital duty and then ignores it."[67] But it was not, as Rehnquist claimed, that the state "did nothing,"[68] for actually the state took a series of actions. Rather, what it did do did not meet its responsibilities.[69]

Justice Blackmun, also dissenting, charged the majority with a "sterile formalism" that conflicts "with dictates of fundamental justice and . . . compassion,"[70] comparing Rehnquist's opinion with pre-Civil War rulings in fugitive slave cases.[71] "Poor Joshua!" he declared.[72] Was he criticizing the morality of the majority or, instead, declaring that law and morality were inseparable? Was he complaining that the Court was deciding with its head, not its heart? Or was his point that empathy was required to truly grasp the facts of the case? It was impossible to say.[73]

State-Created Danger: After DeShaney

In a pair of sentences, *DeShaney* gave birth to the concept of state-created danger, with the "special relationship" exception. By arguing that the exception did not apply here, it implied that it would apply elsewhere. By any measure, this is a thin reed from which to hang an important doctrine. If Congress does not "hide elephants in mouseholes,"[74] neither does the Supreme Court. The irony is, of course, that an opinion fundamentally hostile to the doctrine of state-created danger provided the basis for its development. Large oaks from tiny acorns grow.

Only three years after the decision, *DeShaney* was revisited in *Collins v. Harker Heights* (1992),[75] which involved a city sanitation worker, Larry Collins,

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64 *Id.* at 208.
65 *Id.* at 210.
66 *Id.* at 207.
67 *Id.* at 212.
68 *Id.* at 203.
69 *Id.* at 210. Thus, it would be irrelevant that the law generally imposes no liability for government inaction. Currie, *supra* note 30.
70 DeShaney, *supra* note 1, at 212, 213.
71 *Id.* at 212.
72 *Id.* at 213.
73 Blackmun's clerk had prodded him to vote to deny *certiorari*, and Blackmun was the last of the four necessary Justices to vote to accept the case and even then would have limited the application to child abuse cases. He also objected to some of Brennan's dissent as too far reaching and persuaded him to remove the offending passages. Notwithstanding all this, Blackmun's was the most personally emotional opinion filed in the case. Linda Greenhouse, Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey 228-32 (2005).
74 Whitman v. Am. Trucking Ass'ns., 531 U.S. 457, 468 (2001).
75 503 U.S. 115.

who died from a workplace injury while performing a dangerous task, entering a manhole to unstop a sewer line. The city, in violation of state law, had not trained him to perform the work or provided him with safety equipment and warnings. A prior incident had given the city notice of the problem, which it did not resolve. His widow claimed that by "failing to provide a reasonably safe work environment,"[76] the city had shocked the conscience, depriving her husband of life without due process in violation of section 1983.

Justice Stevens, speaking for a unanimous Supreme Court, observed that under due process and *DeShaney*, the state had no constitutional duty to provide a safe working environment,[77] for Ms. Collins "cannot maintain. . . that the city deprived Collins of his liberty when it made, and he voluntarily accepted, an offer of employment."[78] "The city breached its 'duty of care' leaving it open to a tortious suit," but "conduct by a government actor will rise to the level of a substantive due process violation only if the act can be characterized as arbitrary or conscience shocking in a constitutional sense."[79] However, the city's failure to train and warn Collins about the risks could not be characterized in this fashion.[80] Employment did not entail a special relationship.[81] Training and warning are expensive; it is up to the city to allocate its scarce resources; these allocative decisions "must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of government for the entire country."[82] In contrast to *DeShaney, Collins* saw Stevens adding a pair of considerations. One was judicial self restraint; courts should defer to legislative policy decisions. The other was conscience-shocking, which remained mired in subjectivity. The revisions, in sum, did not produce much clarity.

Thus, it is not surprising that *Collins* failed to bring order to the circuits. Some rulings reflected sympathy with the state-created danger doctrine. For instance, in *Davis v. Brady* (1998), the police found a drunk driver, took his car keys, and left him on the road at night, where he was struck by a car, sustaining serious injuries. He then complained that the police were responsible for a state-created danger. As their action led to his injury, the Sixth Circuit agreed.[83] Two years later, in *Munger v. Glasgow Police Department* (2000), the Ninth Circuit considered a similar case of a man the police had evicted from a bar after a fight and instructed not to enter his truck because he was drunk. They left him by the side of the road, underdressed for the bitter cold, and he died from hypothermia. As their action also led to his death, the court characterized it as a state-created danger.[84] Both cases referred to a required special relationship,[85] but neither case mentioned conscience-shocking.

Armijo v. Wagon Mound Public Schools (1998) was a Tenth Circuit case involving a sixteen year old student with psychological and emotional problems,

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76 *Id.* at 126.
77 *Id.*
78 *Id.* at 128.
79 *Id.* at 126.
80 *Id.* at 128.
81 *Id.* at 119.
82 *Id.* at 129.
83 143 F.3d 1021, 1025 (6th Cir. 1998).
84 227 F.3d 1082, 1089-90 (9th Cir. 2000).
85 Davis v. Brady, 143 F.3d 1021, 1024 (6th Cir. 1998); Munger v. Glasgow Police Department, 227 F.3d 1082, 1089 (9th Cir. 2000).

who was reprimanded by his school principal for harassing an elementary school student and suspended for threatening the teacher who reported the harassment. He was sent home from school without parental notification,[86] though the school was aware that the student had threatened to shoot himself and had access to a gun. Later that day, he committed suicide using the gun.

The court held that a reasonable jury could conclude that the school increased the risk of self harm, and permitted the case to proceed to trial.[87] It emphasized the presence of a special relationship,[88] and explained that shocking the conscience must "truly [be] conscience shocking."[89] The court seemed reluctant to get deeply involved in school administration and operations.[90]

S.S. ex rel. Jervis v. McMullen (2000) was more similar to *DeShaney*. S.S at age two had had human feces smeared on her face by her father, and had been sexually abused by an unknown person, There were also other substantiated incidents of child abuse, including sodomy from a convicted pedophile friend of her father. State social workers were made aware of this abuse, and while she was in state custody had her released to live with her father. S.S. and her guardian ad litem brought suit against the social workers, alleging that they violated her right under section 1983 "to be reasonably safe from harm."[91] At the time of the suit, S.S. was institutionalized at a psychiatric facility.

The Eighth Circuit distinguished the case from *DeShaney* because here the social workers had created the danger by "affirmatively" placing her into "the path of the molester,[92] though social workers in the earlier case had also sent the child to his abusive father. The court also found no special relationship because custody had ended.[93] As to deliberate indifference, the court agreed that the social workers had plenty of time to know that returning S.S. to her father entailed "a substantial risk of serious harm,"[94] though they were undecided whether official conduct shocked the conscience.[95] It characterized her asserted right not to be injured by the state as "essentially a 'negative liberty,'" while agreeing that the social workers had an affirmative duty to maintain custody, and remanded the case to the district court where the suit could proceed.

Irish v. Fowler (2020) was a First Circuit case that arose after a man, Anthony Lord, murdered the boyfriend of Brittany Irish, shot her mother, and kidnapped and raped her. The police had been informed that Lord was a registered sex offender who threatened to "cut her from ear to ear,"[96] and that if he knew she had spoken with them, he could become extremely violent. Despite this, the police left a voicemail for Lord that alerted him to the fact that Brittany had filed a complaint

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86 The American School Counselors Association's Ethical Standards requires counselors to report risk assessments to parents when they see a need to act on behalf of the child. ASCA Ethical Standards, A9a (2022).

87 159 F.3d 1253, 1265 (10th Cir. 1998).

88 *Id.* at 1261-62.

89 *Id.* at 1262. It also wrote that it entailed a "high level of outrageousness." *Id.*

90 *Id.* at 1262.

91 186 F.3d 1066, 1067 (1999).

92 *Id.* at 1074.

93 *Id.* at 1070, 1071.

94 *Id.* at 1075-76.

95 *Id.* at 1075.

96 979 F. 3d 65, 68 (1st Cir. 2000).

for an earlier kidnapping and rape, and this apparently provoked the violent attacks. The police never bothered to check Lord's record to learn of his violent history or to speak to him in person. Also, Lord had told Brittany's brother that "someone's gonna die tonight,"[97] and the brother immediately told the police, but they sent no one to protect the family. When Brittany again asked the police to come and protect her, the police again decided not to come and instead set off on several inexplicable and failed searches for Lord. In the middle of the night, Brittany's mother called the police and asked if the family could stay the night at the police parking lot. The police told her that "would be a dangerous mistake," and that there were "officers in the vicinity,"[98] which was not true. The attacks occurred shortly thereafter. Brittany brought suit, claiming that in violation of section 1983 the police created and aggravated the danger and did nothing to protect them.

Citing cases decided by circuits that recognized the state-created danger doctrine, the court identified the core element: "A government official must actually have created or escalated the anger to the plaintiff and the plaintiff cannot have 'voluntarily assume[d] those risks."[99] The danger must be targeted at specific individuals, the official's conduct must cause the injury, and the conduct must shock the conscience (that is, officials must have had the opportunity to make unhurried judgments).[100] A robust (if not unanimous) consensus among the circuits has established the doctrine,[101] and a reasonable jury could find that "defendants violated plaintiffs' substantive due process rights."[102] The court remanded the case to the district court, with appellants bearing court costs.

Murguia v. Langdon (2022)[103] was equally disturbing. Heather Langdon, experiencing a mental health crisis, took twin infants she had with Jose Murguia from their home. Murguia sought help from the sheriff's department, the police department, and the Child Welfare Services. None took action, except for the police, who arranged for Langdon and the twins to stay at a motel. That night, she drowned the twins and was later found not guilty by reason of insanity. Murguia sued under section 1983.

The Ninth Circuit held that Murguia could proceed with his suit under the state-created danger doctrine because the police and the social worker had both increased the risk of physical harm to the twins by denying the most obvious solution to their safety, returning them to his custody. He had informed them of Langdon's history of child abuse and her current mental state, and they acted with deliberate indifference. Instead of the high bar of demonstrating official abuse, it was sufficient to show merely negligence and mistake.

Most cases, however, were not friendly to the state-created danger doctrine. *Piechowicz v. United States* (1989) concerned a witness, David Piechowicz, whose testimony was central in the prosecution of a narcotics and firearms case. The witness was threatened by the girlfriend of the defendant, who was known by the prosecution and the Drug Enforcement Administration to be willing to kill to

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97 *Id.* at 69.
98 *Id.* at 71.
99 *Id.* at 74, citing Valez-Diaz v. Vega-Inzarry, 421 R.3d 71, 81 (1st Cir. 2005).
100 Irish v. Fowler, 979 F. 3d 65, 75 (1st Cir. 2000).
101 *Id.* at 77.
102 *Id.* at 80.
103 61 F.4th 1096 (5th Cir. 2023).

further his ends, but they did nothing to protect him. A hired killer murdered the witness, and his widow brought a wrongful death action against the prosecutor and the DEA, claiming that they breached their duty to protect him.

The Fourth Circuit found that Congress had granted the government discretion in determining "whether and how" to protect witnesses, and so the decision to decline protecting the witness, "freighted with policy overtones,"[104] was a protected policy decision. There was also no special relationship because the witness was never taken into custody. "Fifth Amendment substantive due process protects the liberty interests only of persons affirmatively restrained by the United States from acting on their own behalf."[105] The government did not create the danger; it was the work of the assassin and the man who hired him. That the government placed the witness in the vulnerable position was irrelevant. Thus, the witness' duty to testify did not create a government's duty to protect him. The court did not discuss conscience shocking or special relationships.

Farmer v. Brennan (1994) saw the Court explicate a key term, "deliberate indifference." Dee Farmer, a transgender person identifying as female, was serving a twenty year sentence for credit card fraud. Placed in the general population of a prison, she was beaten and raped by another prisoner. Farmer sued, alleging that her Eighth Amendment protection against cruel and unusual punishment had been violated.

Speaking for a unanimous Supreme Court with three concurrences, Justice Souter focused on deliberate indifference. Earlier cases, he observed, indicated that the term "entails something more than mere negligence [and] something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result."[106] Courts have "routinely equated deliberate indifference with recklessness," he went on, but "recklessness is not self-defining,"[107] and so the problem remained. Addressing it, he ruled that under the Eighth Amendment "deliberate indifference" requires that "the official knows of and disregards an excessive risk to inmate health or safety."[108] This would not apply in cases involving the criminal law, where courts could take account of what officials should have known; however, Souter thought it similar to the actual malice test used in libel cases.[109] Without "knowledge of a risk [officials] cannot be said to have inflicted punishment."[110] Accordingly, the Court remanded the case. Souter mentioned neither conscience-shocking nor special relationships.

The relevant portion of the Eighth Amendment, "nor cruel and unusual punishments inflicted," is unclear in its target. Does it principally limit officials or protect prisoners? Souter assumed the former, hence, his stress on the state of mind of officials. In his concurrence, Justice Blackmun favored the latter, hence, his emphasis on the experience of the prisoner.[111] Justice Thomas, on the other hand, in

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104 885 F.2d 1207, at 1213 (4th Cir. 1989).
105 *Id.* at 1215.
106 511 U.S. 825, 835 (1994).
107 *Id.* at 836.
108 *Id.* at 837. Officials "may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." *Id.* at 844.
109 *Id.* at 839.
110 *Id.* at 844.
111 *Id.* at 854-57.

his concurrence, insisted that punishment comes from judges or juries, not prison officials.[112]

Pinder v. Johnson (1995), a Fourth Circuit case, concerned the police. After her abusive former boyfriend broke into her house and attacked her and her children and threatened to murder them all, Carol Pinder went to the police, and explained that the boyfriend had just been released from prison, where he had served time for attempting to set her house on fire. A police officer promised Pinder that the boyfriend would be held overnight, and based on this assurance, she went to work and left her children at home. The police, however, only charged him with misdemeanors, so the judge released him. He then returned to Pinder's home, burning it down and killing her three children. Subsequently, he was convicted of the three murders.

Pinder claimed that the officer's promise had created a special relationship between them, and so the state had violated its duty to protect her children under section 1983. The court, however, relying on *DeShaney*, emphasized that the state had never taken her into custody or restrained her freedom. "Promises do not create a special relationship – custody does."[113] Though persons may rely upon an official promise, in the end, the court implied, it may be worthless. With no special relationship, she "was due no affirmative constitutional duty of protection from the state."[114] At this point, the court turned to a slippery slope policy concern. "A general obligation of the state to protect private citizens, whether broadly or narrowly conceived . . . would engender a variety of perverse incentives."[115] Conscience-shocking was not discussed, except to deny that it applied.[116]

*Sacramento County v. Lewis (*1998) involved a high speed chase by the police of a motorcycle that ended when the motorcycle tipped over, sending its two passengers flying, one of them struck and killed by the skidding police car that could not stop in time. The parents of the dead passenger, Philip Lewis, sued Sacramento County, alleging that he had been deprived of his right to life under section 1983.

Justice Souter, speaking for a unanimous Supreme Court that included five concurrences, wrote that the plaintiffs would have to establish conscience-shocking behavior on the part of the county, as challenges to executive power under substantive due process must meet a tougher standard than would apply to legislation.[117] Conscience-shocking meant "deliberate indifference," which may vary with the context[118] but "implies [that] actual deliberation is practical."[119] The chase, however, meant that there was no opportunity for the police to deliberate, and thus their conduct "does not shock the conscience."[120] Special relationships were not mentioned.

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112 *Id.* at 859.
113 Pinder v. Johnson, 54 F.3d 1169, 1175 (4th Cir. 1995).
114 *Id.*
115 *Id.* at 1178. Perhaps the court assumed that a narrowly conceived duty would create fewer perverse incentives, though it might create some beneficial incentives, as well. The court did not consider this latter possibility.
116 *Id.* at 1179.
117 523 U.S. 833, 846-48 (1998).
118 *Id.* at 850-51.
119 *Id.* at 851.
120 *Id.* at 855.

Hernandez v. Texas Department of Protective and Regulatory Services (2004) arose under the Fifth Circuit and concerned a seven week old baby, Eric, who was brought to a hospital with a bone fracture that authorities regarded as suspicious. Accordingly, they took the baby into their sole custody without a court order and placed him with a state licensed foster family. The family had a history of multiple negative reports, including for physical abuse, but its record did not deter the state from making the assignment. After two weeks, the baby was found dead from asphyxiation. The parents sued the foster family and the state agency for deliberate indifference in placing the infant with a family with a negative history and failure to properly train the foster parents, among other shortcomings.

The court concluded that the social worker, who had made multiple visits to the foster home, and the department may both have been negligent in sending the baby to the foster parents. But this did not constitute deliberate indifference, which the court said meant that "a state actor must consciously disregard a known and excessive risk to the victim's health and safety."[121] Was there a known obvious risk of severe physical abuse? This standard of proof goes beyond negligence or even gross negligence, and "shocks the conscience,"[122] but was not met here. Nor was there a relevant special relationship.[123] The extraordinary vulnerability of the baby was hardly touched on by the court.

Castle Rock v. Gonzales (2005) arose out of very nasty divorce proceedings that led Jessica Gonzales to obtain a temporary restraining order against her husband that instructed him not to "molest or disturb the peace" of Mrs. Gonzales or their three daughters and to remain at least 100 yards away from their home. In capital letters the now permanent restraining order commanded the police to "USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING ORDER." A few weeks later, Mrs. Gonzales found the girls missing, suspected that her husband had taken them in violation of the order, and called the police. They told her there was nothing they could do. Later, she spoke with her husband, who confirmed that he had the girls at an amusement park. Again, she called the police and asked them to follow up, and again they refused. Subsequently, she called twice more; the second time, she was told an officer would be sent to see her, but none arrived. Finally, she went to the police station and filled out an incident report, but the officer ignored it and went to dinner. A few hours later, her husband came to the police station and shot a gun at the police, who returned fire and killed him. In his pickup truck were the bodies of his three daughters. Mrs. Gonzales sued under section 1983, maintaining that Castle Rock had denied her without due process the property interest in the enforcement of the order.

Justice Scalia, writing for the Court, thought the issue was "whether an individual who has obtained a state-law restraining order has a constitutionally protected property interest in having the police enforce that order when they have probable cause to believe it has been violated."[124] A property interest, he explained, involves "more than an abstract need or desire," but instead a "legitimate claim of entitlement"[125] based on state law, not the Constitution. Though the text of the

[121] 380 F.3d 872, 880 (5th Cir. 2004).
[122] *Id.*
[123] *Id.*
[124] 545 U.S. 748, 750 (2005).
[125] *Id*., at 756.

restraining order appears to have eliminated police discretion, Scalia claimed that a "well established tradition of police discretion"[126] meant that it was not truly mandatory. Private persons do not have a judicially cognizable right to arrest or prosecution. The state did not create the danger; the husband did.

Mrs. Gonzales is entitled to ask the police to enforce the order, but they are under no obligation to do so. She is not even entitled to a good faith consideration as to the probable cause underlying her plea. She may petition the court for a contempt order, but this would not have saved her daughters. On the other hand, is it practical to require police to make good faith considerations every time they are presented with citizen complaints? Would this unreasonably intrude into their best judgment as to how to manage and allocate their resources? At oral argument, Justice Ginsberg asked whether police discretion entailed doing nothing and whether such discretion must be based on an effort as to fact finding.[127] The attorney for Castle Rock dismissed the questions as irrelevant, since he believed "there is no property interest that would invoke the procedural protections of the Fourteenth Amendment."[128]

Renowned as a textualist, Scalia dismisses the clear import of the order's words in favor of a generalized appeal to history. Additionally, he justifies the lack of response in terms of "insufficient resources," "sheer physical impossibility," and ignorance as to where the husband was, all unrelated to the facts of the case.[129]

Cutlip v. Toledo (2012), involved a police encounter with Rocky Cutlip, a man in the grip of a paranoid psychological crisis, who was holding a shotgun pointed at his own head. The police called negotiators, who after an hour's conversation concluded that an effort to disarm him would trigger a suicide but that if they did nothing "he was ultimately going to hurt himself if we don't act immediately."[130] The police detonated a flash-bang device, intending to distract him and shoot him with bean-bag rounds without seriously wounding him, so they could seize the gun. However, immediately after the flash-bang, Cutlip shot and killed himself. His mother sued the city under section 1983, maintaining that it failed to properly train and supervise its police to deal with this kind of situation.

The Sixth Circuit noted that this was not a custodial situation, where the individual could not look out for himself; "he could have put the shotgun down . . . at any time, as the police ,. . . were imploring him to do. . . [H]is actions were purely voluntary."[131] Thus, he violated his own rights, and so "the responsibility for his actions remains with him."[132] Nor did the police create the danger, as the episode arose before they came on the scene. Nor did an affirmative act by the police increase the likelihood of suicide nor did they act with callous indifference, for they tried "to reduce the risk of harm to Rocky."[133] The court conceded that it was impossible to say whether he deliberately squeezed the trigger or did so involuntarily as a result of being startled, but either way, it would not affect their

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126 *Id*., at 760.
127 Oral Argument, at 8.
128 *Id.*
129 Castle Rock, `note 124, at 760.
130 488 Fed. Appx. 107, 110 (2012).
131 *Id.* at 113.
132 *Id.*
133 *Id.* at 118.

decision. Nor did the police shock the conscience.[134] The court ordered a summary judgment favoring the city.

McKenzie v. Talladega Board of Education (2017) was a district court case involving a severely disabled fourteen year old, C.M., with the mental capacity of a preschooler, who could walk only short distances. She was injured during an elementary school bus evacuation drill, leaving her right hand impaired. There was no evacuation plan in place, and the personnel involved had no evacuation training. The girl's parents claimed that the board had violated her Fourteenth Amendment equal protection rights under section 1983 by discriminating against her and her due process rights under section 1983 with their "deliberate indifference" to her "well-being and safety." By forcing her to participate in the drill, they had created a "dangerous situation."[135]

The court found no assertion to support equal protection claims, and observed that "[o]nly in certain limited circumstances does the Constitution impose affirmative duties of care on the states,"[136] and here the state had not assumed a custodial relationship[137] nor was its conduct conscience shocking (that is, arbitrary)[138] nor had there been an intent to injure her.

Riser v. Jefferson County Board of Education (2020) concerned a high school student, Adreanne Riser, on the autism spectrum with attention deficit hyperactivity disorder. The student was harassed by other students during lunch, and a teacher present took no serious action to stop the behavior, even when they told him that they intended to assault Riser after school, which they did. She sued the school board, maintaining, *inter alia*, that it violated section 1983 and deprived her of liberty under the due process clause, as well as violating Title II of the Americans with Disabilities Act, which protected her against discrimination on account of disabilities.[139]

The Alabama district court dismissed the action, asserting that "public schools do not have a special custodial relationship with their students, as public schools do not place the same restraints on students' liberty as do prisons and mental health institutions."[140] Nor did the conduct "rise to the conscience-shocking level, conduct most likely must be 'intended to injure' in some way justifiable by any government interest,"[141] as the teacher did not intend to injure the student. Nor was there ADA discrimination, for it found no deliberate indifference.[142] Had the court focused on the effect rather than the intent of the teacher's conduct, perhaps the result might have been different.

Callahan v. North Carolina Department of Public Safety (2021) involved a female corrections officer, Meggan Lee Callahan, who was brutally beaten to death by a convicted murderer serving a life sentence. The prisoner had informed

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134 *Id.* at 115.
135 242 F. Supp. 3d 1244, 1255 (N.D. Ala. 2017).
136 *Id.*
137 *Id.* at 1256.
138 *Id.*
139 42 U.S. 12132 (1990).
140 2020 U.S. Dist. LEXIS 219036 12 (N.D. Ala. Nov. 23, 2020), *citing* Doe *ex rel*. Magee v. Covington Cty. Sch. Bd*. ex rel*. Keys, 675 F 3d 858 (5th Cir. 2012).
141 *Id.* at 12-3.
142 *Id.* at 7.

officials that he had homicidal fantasies and required mental health treatment, but they ignored his warnings, assigned only three officers instead of the standard four officers to her shift, and the other two officers were not fully trained. Callahan's father sued the prison officials for violating his daughter's due process rights under section 1983 by placing her in a highly dangerous situation and denying her adequate protection.

The Fourth Circuit reminded the father that it "cannot be that the state 'commits an affirmative act' or 'creates a danger' every time it does anything that makes injury at the hands of a third party more likely. If so, the state would be liable for every crime committed by the prisoners released."[143] The state's staffing and training actions "may reflect a failure to adequately respond to the danger,"[144] but the danger came from the murderer and was not created by the state. Conscience and special relationships were each mentioned in a footnote.

Wade v. McDade (2023) was an Eleventh Circuit case involving an epileptic prisoner, David Henegar, who did not receive his prescribed seizure medicine for a period of four days at the facility as a result of a breakdown in communications involving nurses, corrections officers, and the pharmacy. As a result, Henegar suffered two seizures that he claimed caused permanent brain damage that affected him after he left the prison. His sister sued under section 1983, alleging that the prison employees were deliberately indifferent to his medical needs. Instead of the usual reliance on due process, she claimed a violation of his Eighth Amendment right against cruel and unusual punishment.

The court ruled that the sister would have to show that the prison officials' conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known. This, in turn, required a showing of deliberate indifference, where she needed to prove that "the defendant (1) actually knew about a risk of serious harm; (2) disregarded that risk; and (3) acted with more than gross negligence."[145] Deliberate indifference was not established because the officials did not fail to give the medicine intentionally or for no reason at all.[146] The nurses may have acted with gross negligence, but no more than that, as they had checked to see if more medicine had been ordered. By ensuring that even gross negligence was insufficient, the court made deliberate indifference an exceedingly high bar to clear. The court did not expressly consider state-created danger; if the officials were not responsible for Henegar's epilepsy, they were responsible for not providing him with his medicine, and it is these two elements that constituted the danger. The court did not discuss conscience-shocking or special relationships.

A Question of Morality?

Recall the tale of the Good Samaritan.[147] Jesus tells of a man who encounters robbers, who beat him and leave him naked and half dead. A priest and a member of the local elite come upon the man but keep walking. A Samaritan, overcome by

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143 18 F.4th 142, at 147, *quoting* Pinder v. Johnson, 54 F.3d 1169, 1175 (4th Cir. 1995).
144 *Id.* at 148.
145 USCA 11 Case 21-14275 19 (2023).
146 *Id.* at 24.
147 Luke 10:25-37.

compassion, treats the wounds with oil and wine, bandages the man, takes him on his pack animal to an inn, leaves money with the innkeeper to care for him after he leaves, and promises to return and repay any uncovered expenses. "Go, thou and do likewise," Jesus says, "if you seek eternal life."

Consider what the reader does not know. We know nothing about the victim, except that he is an adult male. Was he an innocent victim? Or was this punishment for a life of infamy? Did he provoke the robbers in some way? Had he known them and earlier done them harm? Had he tried to rob them? The Samaritan also knew none of this. Yet he helped him anyway.

Consider also Leviticus 19:16: "neither shall thou stand idly by the blood of thy neighbor."

Are we, then, unconditionally our brother's keeper? A number of countries – Canada, Denmark, France, Germany, Greece, Israel, the Netherlands, Norway, Poland, Russia, Serbia, and Tunisia – generally follow the principle that so long as the aid does not endanger the individual, he or she is obligated to try and provide it.

In the United States, following the English common law, the answer is normally that there is no obligation. In fact, in one well known case a unanimous state supreme court held that not only was an eight year boy not entitled to be rescued when his hand was caught in a factory's machine, but "if the defendant's machinery was injured by the plaintiff's act in putting his hand in the gearing he is liable to them for the damages in an action of trespass and to nominal damages for the wrongful entry."[148]

With the tale of the Good Samaritan fresh in our minds, we ask: Where is the sympathy for the victim? Why do courts make it so difficult to hold states accountable? There is an unmistakable Dickensian quality in the judges' narratives of the horrors followed by their assertions that, sadly, unfortunately, regretfully there is really nothing they can do. They would like to help, but the canons of judicial reasoning make it impossible. To be sure, this is not the invariable result. Sometimes, courts find state-created dangers. But these decisions only serve to highlight the many cases when they do not, perhaps implying that the courts could find the dangers if they wanted to. As a Harvard Law School dean observed over a century ago, "It is left to one's conscience whether he shall be the Good Samaritan or not."[149]

What is troubling about this is that judges unlike politicians are widely perceived as having responsibilities as moral actors. In the words of a distinguished legal philosopher, "The judge in deciding cases is not merely laying down a system of minimum restraints designed to keep the bad man in check, but is in fact helping to create a body of common morality which will define the good man."[150] The law, after all, is expressive as well as instrumental, and has an educative moral function, which it could perform by lending its prestige and coercive power to protect the vulnerable.[151] We are taught that we are our brother's keeper and that the model of the Good Samaritan is worth emulating, but in these cases the judges convey a very different message. The state evinced no intent to protect Joshua DeShaney or

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148 Buch v. Armory Mfg. Co., 69 N.H. 257, 262 (1898).

149 James Barr Ames, *Law and Morals*, 22 Harv. L. Rev. 97, 112 (1908).

150 Lon Fuller, The Law in Quest of Itself 137 (1940).

151 Antony M. Honore, *Law, Morals and Rescue*, *in* The Good Samaritan 239-40 (James M. Ratcliffe ed. 1966).

Marguerite Anne Bowers or Dee Farmer or Carol Pinder or Mrs. Gonzales' three daughters or C.M. or Eric Hernandez or David Piechowicz or Adreanne Riser or Meggan Lee Callahan or David Henegar. The effect of its failure to protect was often horrific and permanent.

We are also aware that the state is ordinarily much better able to carry the financial burden of caring than individuals, suggesting arguments analogous to those justifying strict liability rules. This would support jettisoning the web of detailed and often inconsistent and confusing standards in favor of a more generous, rather mechanical determination. Too, holding the state to account might have deterrent effects, preventing or at least minimizing future harms by ensuring state interventions.

Finally, it seems unassailable common sense that if conduct is clearly immoral – that is, if there is a very broad consensus to this effect -- and the state has the means to deter or reduce it, the state should act. Who would oppose combatting immoral conduct? Morality, after all, undergirds much of the law. Stealing is immoral, so we have the crime of robbery. Bearing false witness is immoral, so we have the crime of perjury. Moral rhetoric suffuses the law. Duty. Right. Obligation. Law could hardly exist without a moral basis. Morals could hardly exist without the law that provides sufficient order for us to think and act morally.

However, the common sense of connecting law and morality is a bit like the common sense that tells us that the Earth is flat and the great void above us is blue. For one thing, such an approach is at war with human agency, for it would deny us as moral creatures the opportunity to make these moral decisions ourselves. Ethics requires choices and cannot survive coercion; the point of the tale of the Good Samaritan was that we should *choose* to act with compassion. Were an immensely powerful state to act, it would obviate the reason for us to act. Does a moralistic state strengthen morality or weaken it?

A second and related difficulty is that if we empower the state to aggressively combat morality, we are calling into bring an extraordinarily intrusive and powerful institution comprised of persons no less self interested than the rest of us. The cost to liberty and privacy may vastly exceed any gains from good behavior.[152] And if morals evolve, how to ensure that the state's role evolves with them, for it may have acquired a vested interest in following the old familiar path? A third problem arises from the fact that we can only very imperfectly know the needs, desires, and fears of other people, so that what we conjure as their interests might not be their perceived interests at all. It is obvious that the state's failure to protect was devastating to Joshua's interests, but not all interventions will be so clearcut. We react emotionally – in Hume's words, "morality is better felt than judged of"[153] – but empathy, though powerful, is a very imperfect guide.

And yet . . . and yet . . . can nothing be done? The stories are so outrageous and painful and avoidable that these abstract debating points serve only to underscore the coldness and lack of empathy that so promptly raised the moral concerns in the first place.

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[152] *Cf.*, United States v. Alvarez, 567 U.S. 709 (2012).

[153] David Hume, A Treatise on Human Nature 470 (1739/1978).

A Special Relationship?

Implicitly, Rehnquist in *DeShaney* may have seen a rough analogy with the asserted legal duty to rescue those in trouble. The general rule that there is no duty to rescue is qualified by several exceptions, among them a "special relationship" (e.g., spouses, parent-child, employer-employee, common carrier-passenger) that creates an affirmative duty to act. There is also a well established principle in tort law that a special relationship can generate a similar duty;[154] courts have counted as special relationships innkeeper-guest,[155] school-pupil,[156] university-fraternity,[157] mortuary-survivors,[158] common carrier-passenger,[159] stockbroker-investor,[160] corporate officer-shareholder,[161] tavern owner-patron,[162] camp proprietor-camper,[163] state agency-foster child,[164] union-employer[165] – why not social services department-child, the DeShaneys asked? The camp proprietor, for example, is under no duty to protect all children in society, but parents sending their child to his camp rightly believe that he has a duty to protect *their* child. Indeed, that is the basis of their relinquishing control over him in return for expecting and demanding that the proprietor exercise reasonable care to safeguard the child from foreseeable harm, like drowning in the local lake.[166]

Rehnquist in *DeShaney* gave the notion of special relationship a specific definition, custodianship, perhaps because custodianship is a paradigmatic example of a relationship denying liberty, and so its activating the due process clause would be obvious and without controversy. As Rehnquist put it, "The rationale for this principle is simple enough: when the state by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic needs – e.g., food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action.:"[167]

Yet his statement begs the key practical question: why does the rationale specify the *affirmative* exercise of power? If the state is able to achieve the same end through different means, why would this not qualify? Why insist on formal

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154 Restatement (Second) of Torts secs. 315-20 (1977). "[T]here is no duty to control the conduct of a third person . . . unless a special relation exists between the actor and the other which gives rise to the other a right of protection." Sec. 315.

155 Garzilli v. Howard Johnson Motor Lodges, 419 F. Supp. 1210 (E.D.N.Y. 1976).

156 Stoneking v. Bradford Area Sch. Distr., 882 E. 2d 770 (3d Cir. 1988).

157 Furek v. Univ. of Del., C.A. No. 82C-SE-30 (Del. Sup. Ct. 1986).

158 Draper Mortuary v. Superior Court, 135 Cal. App. 3d 533 (1982).

159 Carroll v. Staten Island R.R., 58 N.Y. 126 (1874).

160 Ros v. Bolton, 904 F.2d 819 (2d Cir. 1990).

161 Cauble v. White, 360 F. Supp. 1021 (E.D. La. 1973).

162 Allen v. Babrab, 438 So. 2d 356 (Fl. 1982).

163 Wallace v. Der Ohanian, 199 Cal. App 2d 141 (1962).

164 Meador v. Cabinet for Hum. Resources, 902 F.2d 474 (6th Cir. 1990), *cert. denied* 111 S. Ct. 182 (1990).

165 Miles v. Melrose, 882 F.2d 976 (5th Cir. 1989).

166 This follows Kant's distinction between narrow duties that impose constraints on conduct from wide duties that oblige persons to act in certain ways.

167 DeShaney, *supra* note 1. Oddly, Rehnquist, known as a conservative Republican with libertarian leanings, here seems to endorse positive rights in five broad policy areas.

custody, when the state's responsibility to vulnerable persons may be clear in other contexts? Indeed, in *DeShaney* the legislature expressly instructed the department "to prevent . . . developmental disability [and] to provide effective aid and services to all persons in need of that aid and those services . . . and to coordinate and integrate a social welfare program."[168] It was the *failure* of the state to take custody of Joshua that sealed his fate. Similarly, did Child Protective Services protect Eric Hernandez? Did the public schools with their mandatory enrollment, meet their obligations to severely disabled C.M. (*McKenzie*) and autistic Adreanne (*Riser*)? ln short, the law on its face would seem intent on establishing special relationships precisely with persons like these, individuals in potentially serious peril with no means of defending themselves.[169] From this perspective the courts, denying these relationships, seem intent on defeating the legislation they interpret. The problem is magnified when, as with the cases treated here, thirteen discussed special relationships, six did not, and among the discussants, two relegated it to footnotes. Of the omissions, three involved the Supreme Court.

State Action

Textually, the Fourteenth Amendment's due process clause applies only in the event of state action; it is *states* that are instructed not to deprive persons of liberty without due process of law. This requirement stems, first, from the Enlightenment's belief, enshrined in the Declaration of Independence, that each of us has the right to life, liberty, and the pursuit of happiness, which is thought to be incompatible with the belief that we are entitled to have others coerced for our benefit;[170] and second, from the understanding that the state, with its monopoly on the legitimate use of force, is the most potent potential threat to liberty. But unlike 1868, when the Fourteenth Amendment was adopted, today the reach of the state is so vast that state action can be located almost everywhere. But as the concept retains meaning only if there exists its antithesis, courts have refined the search, asking not merely whether the state acted but whether the nature and extent of the action meets their standards. These venerable principles began to be questioned in the 1970s, but Rehnquist "sought to put an end to this incipient constitutional restructuring."[171]

As Rehnquist parses state action, the key factor would seem to be proximity. If the state is the proximate cause of the harm, there is state action. If the state's role is indirect – for example, sending the Hernandez baby to a foster family who harms the baby – there is no state action. The causal chain is thus bisected, with the direct validated and the indirect ignored. Indirect causation might be tortious, Rehnquist admits, but it can raise no constitutional issues.

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168 Sec. 46.001.

169 Rehnquist cited a case decided a few years earlier, when the Court held that "An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." DeShaney, *supra* note 1, at 200; *Estelle v. Gamble,* 429 U.S 97, 103 (1976). Thus, four year old Joshua was entitled to less protection than an adult incarcerated felon. That the felon was held in custody apparently negated Joshua's being far more vulnerable and dependent upon the state.

170 Matthew Pritchard, *Reviving* DeShaney: *State-Created Dangers and Due Process First Principles*, 74 Rutgers L. Rev. 161, at 167-68 (2021).

171 *Id.* at 169.

It is all reminiscent of Justice Sutherland's notorious opinion in *Carter v. Carter Coal*, where in holding that Congress could regulate only activities that had a direct effect on interstate commerce, he defined "direct" as the "absence of an efficient intervening activity or condition."[172] The magnitude of the effect was irrelevant. Sutherland chose "direct" from a collection of adjectives that had featured in earlier cases, like "close" and "substantial," none of which appeared in the Constitution or had even been well defined or applied consistently by earlier courts. The effect of Sutherland's focus was to render Congress practically impotent to address the Great Depression, contributing to the Court-packing battle of the following year that rocked the institution to its very foundation. Sutherland was in no sense compelled by logic, text, or precedent to make this argument, though he plainly believed he was acting on principle.[173] Much the same might be said about Rehnquist.

Rehnquist's nearly all-or-nothing approach also calls to mind a pair of competing common law tort rules: contributory negligence, which prevents parties from recovering from the negligence of others if they also were negligent in bringing about the harm; and comparative negligence, in which each side's negligence is weighted in assessing damages. Most states have viewed contributory negligence as too harsh and have adopted some form of comparative negligence. But Rehnquist would seem in *DeShaney* to prefer a modified version of the contributory negligence model. Unless the state is direct and dominant, its role can be ignored.

Yet in addressing state-created danger, not all courts have insisted on Rehnquist's proximity test. In *Davis* and *Munger*, for instance, courts found the requisite state action, though it might easily be maintained that the men caused their own injuries by getting drunk. Had they been sober, there would have been no interaction with the police and no injuries. Similarly, Armijo's suicide resulted from his own psychological and emotional problems, and in *Irish* the murder and rape were perpetrated by a man crazed with hate and revenge; in neither case did the police create the danger. Earlier in *White* that preceded *DeShaney,* the court explicitly denied the indirect formulation. The inconsistency in the application of proximity, rigid here and flexible there, adds confusion to an already confusing set of precedents. All the cases featured a mix of public and private action to the extent that absent either, the harm would have been avoided. Would it make more sense for courts to focus on proximity or, instead, to propose a "but for" rationale: courts should find state action when they can conclude that, *but for* the state action, there likely would have been no harm?

In addition to proximity, Rehnquist also maintained, as a defender of *DeShaney* put it, that state action presupposed" the exercise of *coercive governmental power* [that] has constrained a person's actions in such a way that has caused her illegitimate harm."[174] Must state action, however, be coercive? Rehnquist's answer might seem to be a corollary of the truism that the state retains a monopoly on the

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172 298 U.S. 238, 307-8 (1936).

173 Sutherland's attitude of let justice be done though the heavens may fall perfectly illustrates Weber's ethics of conviction. Max Weber, *Politics as a Vocation*, *in* From Max Weber 120 (H.H. Gerth & C. Wright Mills eds. 1946). "The absolute ethic just does not ask for 'consequences.' That is the decisive point."

174 Pritchard, *supra* note 161, at 164-65.

legitimate use of physical force.[175] Thus, the explanation for focusing entirely on coercion is that "If the state has not used force or the threat of force against you, the state cannot have deprived you of your liberty in any coherent sense."[176] If you submit to the coercion, you have surrendered a portion of your liberty; if you refuse to submit, you risk surrendering a portion of your liberty.

But coercion is not the only tool – or, perhaps, even the most important tool – available to the state, which may limit liberty, for instance, by incentivizing or disincentivizing certain behavior or through education and propaganda. It is a commonplace that authoritarian states – even the most brutal, like Hitler's Germany and Stalin's Soviet Union -- rely not only on force but on these softer methods, with which they induce people to relinquish some of their liberty. Think Goebbels, for example, harnessing movies, radio, newspapers, really all the available means of mass communications in service of the Nazi state. It is, thus, a cramped view of state limits on liberty that focuses solely on coercion. When Rehnquist refers to abridging liberty as a requirement triggering a state-created danger, he is actually referring to specific techniques (namely, force), not the abridgement of liberty *per se*.

Yet how to speak of liberty in the context of an infant (*Hernandez*), for example, or a four year old (*DeShaney*) or a man in the grip of a psychotic episode (*Cutlip*)? These persons, incapable of exercising liberty at the time, might conceivably be capable at some point in the future, had they not been victimized, but that is entirely speculative. In fact, these cases suggest that a liberty requirement might not always make sense. Yet as state-created danger is tethered to due process, a reliance on liberty is unavoidable, indeed, the only concept available.[177]

In a bizarre, ironic twist, courts have sometimes used a state action rationale to justify denying state-created danger claims. Depicting the state action as representing a policy decision, the courts in *Collins, Piechowicz, McKenzie*, and *Riser* announced that they would defer to politically accountable lawmakers. As this never amounted to more than a brief tipping of the hat to judicial self restraint, this approach has limited utility. What rules would guide the invocation? The courts were silent.

Conceptual Clarity

One problem bedeviling the courts is that a pair of the key concepts they selected have serious clarity problems. Consider the notion of conscience-shocking. Historically, one careful student of the concept observed, "conscience is at the heart of [English] equity [and] today [it] is being used with increasing frequency."[178] For the most part, courts there inquire not into the subjective consciences of the parties before them, but rather the somewhat more objective question as to whether their

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[175] *Id.* at 194. Cf., Max Weber, Political Writings 310 (ed. Peter Lassman & Ronald Speirs 1919/1994).

[176] Pritchard, *supra* note 170, at 195.

[177] The Court might instead rely on life in *Hernandez, Pinder*, and *Callahan,* where individuals died.

[178] Richard Hedlund, Conscience and Unconscionability in English Equity 36 (Ph.D. diss., Univ. of York, Feb. 2016); Alistair Hudson, Equity and Trusts 38-39 (6th ed. 2009).

consciences *ought* to have been affected.[179] Equity developed to ease some of the severe injustice of the common law, but judges have generally been chary of letting conscience become an easy work-around.

An early American chancery case, *Mackie v. Cairns* (1825), concerning a debtor who tried to reserve a sizable portion of his trust to frustrate his creditors, applied the English concept, leading the judge to declare, "It offends the moral sense; it shocks the conscience and produces an exclamation!"[180] Justice Story, in his *Commentaries on Equity Jurisprudence,* acknowledged conscience shocking as an "expressive phrase," akin to "an exclamation."[181]

In the context of criminal law, the term was used in *United States v. Kuwabara*, a case involving draft evasion indictments of Nisei draft resisters during World War II. "It is shocking to the conscience," the judge wrote, "that an American citizen [can] be confined [in internment camps] on the ground of disloyalty, and then, while so under duress and restraint, be compelled to serve in the armed forces, or be prosecuted for not yielding to such compulsion."[182] Denying Kuwabara the normal benefits of citizenship while insisting on his performing perhaps its most dangerous duty plainly affronted the judge on an emotional level. However, his brief opinion contained no guidance as to the meaning and application of the concept.

The case Rehnquist relied on was the famous *Rochin v. California* (1952),[183] where Justice Frankfurter addressed the state's pumping the stomach of a suspect, so that he vomited morphine capsules that were used in his prosecution. Frankfurter found the practice "shocking the conscience," and thereby depriving the suspect of due process under the Fourteenth Amendment.[184] By this, Frankfurter meant offending "those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."[185]

Was conscience-shocking vague? Frankfurter acknowledged the problem; the term may imply an "absence of formal exactitude,"[186] a "want of fixity in meaning,"[187] "vague contours,"[188] or "indefinite and vague . . . standards of

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179 Jones v. Morgan [2001] EWCA Civ 995, [35].

180 1 Lock. Rev. Cas. 190, 195 (N.Y. 1825).

181 Joseph Story, Commentaries on Equity Jurisprudence as Administered in England and America 277 (6th ed. 1853).

182 56 F. Supp. 716, 719 (N.D. Cal. 1944). The World War II internment of well over 100,000 persons of Japanese descent, mostly citizens and none even charged with crimes, did not shock the conscience of President Roosevelt or a majority of the Supreme Court. Korematsu v. United States, 323 U.S. 214 (1944).

183 DeShaney, *supra* note 1, at 197, *citing* Rochin v. California, 342 U.S. 165. On this opinion*, see* Thomas Halper*, Felix Frankfurter and the Law*, 7 Br. J. Am. Leg. St. 115, 130-33 (2018).

184 Rochin, *supra* note 183, at 172. Justice Black, concurring, rejected the term for its "accordion-like qualities." *Id.* at 176. Justice Douglas, also concurring, thought Frankfurter made the decision "turn not on the Constitution, but on the idiosyncrasies of the judges who sit here." *Id.* at 179.

185 *Id.,* at 169 (1952). In Medieval England, conscience referred to impersonal principles based on canon law and not subjective belief. Dennis R. Klinck, Conscience, Equity and the Court of Chancery in Early Modern England 31-32 (2010).

186 Rochin, *supra* note 183, at 169.

187 *Id.*

188 *Id.* at 170.

justice."[189] But he dismissed the problem like a pesky house fly: "[It] does not leave us without adequate guides [or] make due process of law a matter of judicial caprice."[190] Perhaps, Frankfurter had assumed that, as the old aphorism goes, the voice of conscience is the voice of God.[191] Or as in Isaiah, "Whether you turn to the right or to the left, your ears will hear a voice behind you, saying, 'This is the way; walk in it.'"[192] Or as Jiminy Cricket put it to Pinocchio, "Always let your conscience be your guide." However, even a court that applied the standard conceded that it warranted an "amorphous and imprecise inquiry."[193]

The problem is that it is obvious that God (for Frankfurter, speaking English) says different things to different people, becoming an unreliable guide. To Frankfurter, He said, "This is shocking!" but to the police who ordered the stomach pumped and the jury who found Rochin guilty, He said, "OK, no problem." When two years later Frankfurter clarified conscience-shocking to mean offends "a sense of justice,"[194] he inadvertently conceded a vagueness that rendered the term all but unusable. Indeed, the very notion of conscience entails a substantial element of the subjective. For the conscience is not activated except when threatened, different people will perceive threats differently, and the threatener is unlikely to notice the conscience at all. Thus, from the start there will be a disagreement as to conscience-shocking. Was the conscience shocked by the state's conduct, when Joshua was beaten, when Eric Hernandez died, when Adreanne Riser was assaulted? The courts thought not. Of the cases discussed here, conscience shocking was mentioned in twelve and omitted in six. Among the mentions, one did not reach the question, one relegated it to a footnote, and two others denied its applicability; among the omissions, one involved the Supreme Court. Conscience-shocking in practice often becomes merely a barrier to official accountability, as if the purpose of due process was to deter challenges to asserted abuse.

Another problem, equally serious, is that Frankfurter made no real effort to root conscience-shocking to the Constitution or to statutes. Textual analysis, legislative history, original understanding, traditional practice – none of the standard judicial interpretive apparatus was brought to bear to squeeze the meaning from due process. As Justice Scalia described "th' ol' 'shock-the-conscience test" with his celebrated gift for understatement, it is "the ne plus ultra, the Napoleon Brandy, the Mahatma Gandhi, the Cellophane of subjectivity."[195]

It is not surprising, then, that the next few years saw majorities refuse to impose the test, distinguishing the cases before them from *Rochin*. In *Irvine v. California* (1954), the Court failed to apply it in a case where, without a warrant, police entered a private home, planted microphones in various rooms, and bored a hole in the roof

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189 *Id.* at 172.

190 *Id.* at 169, 172.

191 "God alone is Lord of the conscience." Westminster Confession, xx. Ii; "Conscience is God's vice-regent, the God dwelling within us." Benjamin Whichcote, Moral and Religious Aphorisms 1058 (Samuel Salter ed. 1753/2010).

192 Isaiah 30:21.

193 Fagan v. City of Vineland, 22 F.3d 1296, 1308 (1994).

194 Irvine v. California, 347 U.S. 128, 146 (1954). Justice Clark ridiculed the approach by declaring that what it meant in practice was simply that "five Justices [are] sufficiently revolted." *Id.* at 138.

195 Sacramento County v. Lewis, 523 U.S. 833, 861 (1998).

to transmit the conversations. In *Breithaupt v. Abram* (1957), the Court declined to apply it, when a blood alcohol test was administered to an unconscious drunk driver, who had killed three persons in an accident. Notwithstanding all this, courts have summoned conscience-shocking to a return judicial engagement, as if it were an elderly actor known for misbehaving who promises to mend his ways.

The second concept with clarity problems is deliberate indifference, first used in *Estelle*.[196] An ambiguity is built into "deliberate," as it could mean either intentional or after a period of reflection. In *Farmer*, Justice Souter sought to have it encompass both meanings, but in *Sacramento County* the same Justice opted for after a period of reflection; in *Irish*, the First Circuit also opted for both meanings. In *Collins, Cutlip, Riser*, *Hernandez* and *Wade,* the court thought it meant intentional. In *McKenzie*, a federal district court in Alabama made no effort to define it. And in *Callahan, Piechowicz*, and *Pinder*, the courts failed to mention it. Perhaps it is time for courts to spell out exactly what this ambiguous term means.

The Level of Analysis

What seems most striking in reviewing these cases is the courts' willful blindness to the facts before them, for their journey to their conclusions was often traversed at such a high level of abstraction that the events far below in the realm of reality, hidden behind billowing clouds of verbiage, were no longer visible. In *Bowers*, the court announced that there was "no constitutional right to be protected by the state against being murdered by criminals and madmen." In *DeShaney*, the Court declared that the state is not required to "protect the life, liberty, and property of its citizens against private actors." In *Callahan*, the Court warned that it "cannot be that the state 'commits an affirmative act' or 'creates a danger' every time it does anything that makes injury at the hands of a third party more likely." The bloodless descriptions suggest that the harms resulted from unpredictable, random encounters between private persons, perhaps evoking an unprovoked attack on a parishioner after a Sunday church service. The state, in this scenario, resembles an innocent passerby under no obligation to intervene, its refusal (as in *Pinder*[197]) defended with the observation that it would be impractical to intervene in routine matters.

This is unpersuasive for several reasons. First, it is a *non sequitur*. Intervening in extreme cases does not imply, logically or practically, interventions in everyday, mundane matters. This is the slippery slope on an iceberg. Courts routinely are in the business of line drawing, and it beggars belief that they could not develop workable distinctions in this area. The risks to vulnerable persons in these cases is so obvious and so horrific that they clearly stand above the risks of normal life. And the role of the state, far from being peripheral or nonexistent in facilitating the harms, was an ineradicable element in the events.

Second, the highly abstract reasoning ignores the democratic value of accountability. If courts are unwilling to enforce statutory obligations, like that of the social service department to Joshua, who will? To rely on an aroused electorate to motivate the agency seems entirely unrealistic, as there is no reason to suppose

[196] Estelle v. Gamble, 429 U.S 97, 104 (1976). The Court contrasted it to "accident" or "inadvertence."

[197] *Supra* note 113, at 1175.

that apathetic voters with short memories would vote on that basis or even be aware of the incident. The courts' current practice, therefore, not only rewards officials' indifference and complacency: it incentivizes them in their situation to ignore future warnings and do nothing. Would a more sympathetic approach bring about more litigation? Maybe so. The transaction costs in time, money, and emotions will discourage some of this. The mere prospect of waiting on a queue is sufficient to discourage many people from pursuing things.[198] But clearly there would be more litigation. Why, however, count this a bad thing?[199]

Third, there seems to be something self-defeating about employing certain kinds of highly abstract reasoning, for it may simplify and eliminate the literal details that make the problem interesting and, on occasion, dismiss the possibility that anyone could say something interesting about it. Instead of stimulating inquiry, it is apt to imply that it is really not worth the effort. So it is with the courts' blanket bromides, which seem designed to end the conversation with a declaration of a platitude.

What is omitted in this approach? The courts identified the "critical questions" as: "what is the pertinent danger and did the state create it?"[200] The state returned Joshua to his father, sent Eric Hernandez to the foster home, and placed Callahan near a murderous lunatic. Yet the state, the courts tell us, did not create the danger. This ignores that the creation was a collaborative process, and that the state plainly created the opportunity for harm, in a word, for danger. The courts, for the most part, have counted this as irrelevant.

Some Conclusions

The evolution from idea to doctrine confers power and influence,[201] but does not guarantee coherence. The Supreme Court, after *DeShaney,* has mostly left state-created danger for the circuits, and they have been unable to reach a consensus. This would be a perfectly natural development, if the doctrine were only recently articulated, for it always takes time with a new doctrine for the details to be filled in and the inconsistencies wiped off. But *DeShaney* is over three decades old, and the problems that have bedeviled it from the outset remain, like uninvited guests taking advantage of a timid host. It seems that courts cannot only agree on what to say. They also cannot always agree on what to talk about. The state-created danger doctrine, in consequence, remains contested even as to its fundamentals.

How to account for this sorry performance? Perhaps it reflects a tension that resists eradication. For the doctrine of state-created danger lies at the intersection

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198 Queues also deflect attention away from the merits of a dispute, set claimants against claimants, and ration benefits on the basis of persistence. *See* Katharine G. Young, *Rights and Queues: On Distributive Contests in the Modern State*, 55 Colum. J. of Transnat'l L. 65 (2016).

199 At the same time, however, accountability may undermine government effectiveness. To the extent that courts oversee policies with an eye on state-created dangers, they may contribute to policymaking becoming more cumbersome and irrational as they raise transaction costs.

200 Callahan*, supra* note 143, at 148.

201 Allison Orr Larsen, *Becoming a Doctrine*, 76 Fla. L. Rev. (forthcoming 2024).

of the individualistic and communitarian approaches to life. On one side are those who remind us that ours is an atomistic, Hobbesian world. Look out for yourself, for everyone else will do the same, and this ceaseless striving will produce a better world, more prosperous, more innovative, more free. We need the state, but its officials are fallible and with their own agendas, so it is not our friend. Only the blindly naïve could fail to see this.

Or we are all children of God, responsible for each other, in short, our brothers' keepers. But as we can do little by ourselves, we must harness the immense power of the state to help us and to protect us from dangers we cannot successfully confront on our own. Only the blindly naïve could fail to see this.

Such radically divergent perspectives cannot be easily reconciled. And in fact when we read the cases, it is their incompatibility that asserts and reasserts itself, like a stubborn speaker interrupting our train of thought. Is this a place for the old cliché that law is a good servant but a bad master?

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